

Case: *Tom Wolford vs. David R. Hanson*, Alaska Workers' Comp. App. Comm'n Dec. No. 030 (February 2, 2007)

Facts: Hanson argued Wolford employed him at the time Hanson was injured cutting timber; Wolford asserted he had referred Hanson to a contract job but had not hired him. Wolford appealed the board's decision finding that he was an employer, arguing that he was denied due process. The hearing was conducted in his absence after he tried to change the hearing date because he was out of state.

First, Wolford asked the Juneau office to reschedule a prehearing conference because he was getting an attorney, but this conference went ahead as scheduled, conducted by the Anchorage office. The hearing was set for January 11, 2006. Wolford then contacted the Anchorage office, asking for the hearing to be rescheduled because he would be out of town. The Anchorage office then set another prehearing conference for December 21, 2005. Before the prehearing, Wolford faxed a request asking that prehearing be rescheduled for February 2006. The record contains no written response or note of a telephone call to Wolford. But the pre-hearing conference was held on December 21, 2005, as scheduled. Wolford did not attend; the hearing officer noted "Since Mr. Wolford did not attend the PH, the hearing will remain on the calendar for January 17, 2006. If Mr. Wolford would like to have the date of the hearing changed, he must file a Petition with the board requesting the hearing date be changed." On January 5, 2006, the same day the notice of hearing was sent, the Anchorage division office received a petition form signed by Wolford. The petition reiterated Wolford's position that he was not the employer, and contained the following statement:

I request a new pre-hearing date in latter February. I requested a later one than one in November. I told her my schedule to be out of state. The letter sat on [Juneau prehearing officer's] desk. I requested one with Kristy Donovan. I told her my schedule to be out of state. They issued one after I left Alaska. I will be back in Alaska in latter January. Please issue a pre-hearing in latter February 2006. Dec. No. 030 at 6.

The board met in Juneau on January 17, 2006, to hear Hanson's claim. The chair stated at the beginning of the hearing that Wolford was not there, and that the prehearing officer had not heard from him despite mailing the hearing notice and the prehearing conference notes. The board concluded Wolford had actual notice of the hearing and did not petition to have it changed and so the board proceeded without him.

Applicable law:

In determining what a party's right to due process entails in the board hearing context, we look to assure that the board was an impartial tribunal, that no findings were made except on due notice to all parties and opportunity to be heard, that the procedure at the hearing was consistent with fairness, and that the hearing was conducted in such a way that there is an opportunity for this commission to ascertain whether the applicable rules of law and procedure were observed. Dec. No. 30

at 9 (citing *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971)). In doing so, we enforce the legislature's direction that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered." Dec. No. 30 at 9 (citing AS 23.30.001(4)).

Determining whether administrative proceedings satisfy due process involves a balancing analysis. The private interest affected, the risk of erroneous deprivation of that interest under the procedures followed and whether different procedures would reduce that risk, and the government interest are considered together in assessing due process claims. Dec. No. 030, 12-13 (citing *Noden v. Commercial Fisheries Entry Comm'n*, 680 P.2d 493, 499 (Alaska 1984)).

8 AAC 45.074 on seeking continuances and cancellations of hearings.

8 AAC 45.070(f) provides that

If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority, (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition; (2) dismiss the case without prejudice; or (3) adjourn, postpone or continue the hearing.

Issue: Did the board err in going forward with the hearing without Wolford's presence?

Holding/analysis: Commission cautioned that the *Richard* duty (*Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963)) to inform and advise pro se litigants applies to self-represented defendants as well as self-represented claimants. Commission concluded that the record in its current state did not reflect that the obligation to inform and instruct was delivered impartially to both litigants as no notes indicated Wolford was given necessary forms when Hanson was offered them, Wolford may not have been served with all of Hanson's documents and there was no record of calls or written responses to Wolford's letters.

On the balancing analysis, the commission determined the private interest was more than just monetary because an uninsured employer could be subject to criminal penalties and the risk to the parties of erroneous deprivation was high where credibility was key to determining whether Wolford employed Hanson and Wolford was denied the opportunity to testify in person. Lastly, no government interest was at stake because the violation occurred as a result of a failure of communication between division offices, rather than because of the design of the government procedures and regulations. The commission concluded that "Wolford attempted to reschedule the date of his hearing so that he could attend. As a result of a series of communication errors in the pre-hearing process, leading to a mistaken finding by the hearing officer, Wolford was effectively

denied the opportunity due process requires -- to face the people who will decide the case against him." Dec. No. 030 at 13-14. The commission vacated the board's decision and remanded to the board for rehearing.

Note: *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska Sept. 7, 2007) stated that administrative agencies, such as the commission, do not have jurisdiction to decide issues of constitutional law. The Alaska Supreme Court concluded that the commission was properly created as a quasi-judicial agency with powers limited to deciding workers' compensation appeals.