

Case: *Mark C. Berean vs. Coleman Brothers Timber Cutting, Inc. and Liberty Northwest Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 051 (August 2, 2007)

Facts: The board dismissed the employee's claim after he repeatedly refused to comply with discovery. The board's decision was issued on April 17, 2007, and informed the employee that it was a final decision and he had 30 days to appeal. Thus, he needed to appeal by May 17, 2007. However, he filed an appeal on June 11, 2007. He also "asked the commission to allow him to file his appeal 25 days late because: 'I Mark C. Berean was treated as garbage, intimidated [and] overwhelmed.'" Dec. No. 051 at 2. At hearing, the employee admitted he talked to the commission and received help regarding filing the appeal, and conceded that he understood the appeal needed to be filed within 30 days of the board's decision. He asserted that he had limited writing abilities but acknowledged that most of the forms to file an appeal were short and easy to understand.

Applicable law: AS 23.30.127(a) provides that "A party in interest may appeal a compensation order issued by the board to the commission within 30 days after the compensation order is filed with the office of the board under AS 23.30.110."

Noey v. Bledsoe, 978 P.2d 1264, 1270 (Alaska 1999) (a *pro se* party who makes good faith effort to comply should not be held to strict procedural safeguards).

In *Tonoian v. Pinkerton Security*, Alaska Workers' Comp. App. Comm'n Dec. No. 029, 11 (January 30, 2007). The commission recognized that the following, if proven, could constitute a legal excuse for a filing a late request for hearing under AS 23.30.110(c) -- lack of mental capacity or incompetence; lack of notice of the time-bar to a *pro se* litigant, and equitable estoppel against a governmental agency by *pro se* litigant. See also *Morgan v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 035 (February 28, 2007) (finding no legal excuse for late-filed requests under .110(c)).

8 AAC 57.270 allowing commission to alter time periods that differ from the time periods established otherwise by regulation where "(1) strict adherence to time periods . . . would work injustice; and (2) the change would assist in facilitating the business of the commission or advance the prompt, fair, and just disposition of appeals."

Issues: Does the commission have authority to excuse non-compliance with the deadline? Did good cause exist for excusing the delay in filing?

Holding/analysis: Commission concludes it has no express grant of authority to excuse non-compliance but it might exercise implied equitable authority in cases where the appellant could not file on time under circumstances recognized by the courts in like cases (citing *Tonoian*, Dec. No. 029 and *Morgan*, Dec. No. 035).

Commission found employee did not have good cause to file late and he did not make a good faith effort to comply with the rules. The employee did not articulate any reason why he filed his appeal late, instead arguing the board decision was so unjust, the commission should hear the appeal even though it was late. He was repeatedly advised not to delay. "Neither Berean nor a family member was either sick or incapacitated or

required medical assistance during the appeal period or thereafter. Berean was not on active military duty nor was he otherwise unavoidably drawn away from home. . . . Berean was not afflicted by a serious mental disorder.” Dec. No. 051 at 5-6.

Even assuming commission’s regulatory authority to alter deadlines set by regulation (rather than by statute) applied, employee did not satisfy 8 AAC 57.270’s requirements.

Concurrence: Although commission does not have explicit statutory authority, the commission chair believes it does have implied authority to excuse late-filed appeals because AS 23.30.127(f) gives the commission the power to “make other rules and orders to facilitate the business of the commission and advance the prompt, fair, and just disposition of appeals” and AS 23.30.128(c) gives the commission the authority to hold hearings and take evidence on motions to dismiss appeals for failure to prosecute. “In my view, taken together, the legislative grants of authority to make other orders for the ‘just disposition’ of appeals and to ‘receive evidence’ on motions to dismiss for failure to prosecute an appeal necessarily imply that the commission has authority, when the just disposition of an appeal requires it, to extend the deadline for filing an appeal to the commission if evidence supports the extension.” Dec. No. 051 at 8.

The chair would apply the following factors on whether there is good cause for a late filing: “the demonstration of diligence by the appellant (such as timely, but mistaken, attempts to file an appeal), the willfulness and extent of the delay, the importance of the right to review, and the possibility of injustice if we do not permit an appeal.” *Id.* at 9.

Applied to this case, the employee failed to show good cause.