

Alaska Workers' Compensation Appeals Commission

Thomas A. Olekszyk,
Appellant,

vs.

Smyth Moving Service, Inc., and Alaska
Ins. Guaranty Assoc.,
Appellees.

Final Decision

Decision No. 079 May 28, 2008

AWCAC Appeal No. 08-004

AWCB Decision No. 07-0373

AWCB Case No. 199905284

Motion to accept a late-filed appeal from Alaska Workers' Compensation Board Decision No. 07-0373, issued at Anchorage, December 21, 2007, by southcentral panel members Darryl Jacquot, Chairman, Mark Crutchfield, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: Thomas A. Olekszyk, pro se appellant. Richard Wagg, Russell, Wagg, Gabbert & Budzinski, for appellees Smyth Moving Service, Inc., and Alaska Insurance Guaranty Association.

Commission proceedings: Evidentiary hearing on appellant's motion to accept late-filed appeal April 24, 2008. Record open to receive additional evidence through April 30, 2008. Certification requested by the commission from Alaska Workers' Compensation Board May 5, 2008; reply to request for certification received May 8, 2008.

Commissioners: David W. Richards, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Thomas Olekszyk filed his appeal of the board's decision on February 12, 2008, twenty-one days after the statutory appeal period ended. With his appeal, he filed a motion to accept his late-filed appeal. Olekszyk asserts the commission should accept his late-filed appeal because (1) he was "legally blind" and unable to read the decision until the middle of January, (2) he is disabled due to his back injury, so he was unable to drive to town for his mail and, as a result, did not receive it in time to appeal, and

(3) the decision was not issued properly, so the time for appeal did not run; therefore, his appeal cannot be considered untimely. The appellees, Smyth Moving Inc. and Alaska Insurance Guaranty Association, do not agree that the decision was not properly issued. If Olekszyk was prevented by physical disability from filing his appeal, the appellees concede the commission may extend the deadline to file an appeal. However, the appellees argue, Olekszyk did not prove he was unable to file an appeal on time; therefore, his appeal must be dismissed as untimely.

The commission must decide if Olekszyk presented credible evidence of good cause to allow his late-filed appeal, excusing him from compliance with the statute allowing an appeal to be filed within 30 days of the date the board's decision is issued.

When considering Olekszyk's motion, the commission must make findings of fact based on evidence that a reasonable mind could accept as sufficient to support the finding. The commission determines the credibility of evidence, including testimony, in this proceeding. There is no statutory presumption that an appeal is filed on time, so the appellant must produce sufficient evidence to persuade the commission by a preponderance of the evidence that he should be excused from compliance with the statute.

1. The board's decision was final unless an appeal was filed, or reconsideration requested, by January 22, 2008.

In order to decide if Olekszyk presented sufficient evidence of good cause to accept a late-filed appeal, the date when the statutory appeal period expired must be established. The Alaska Workers' Compensation Board denied Olekszyk's claim for medical benefits in its Decision No. 07-0373, issued and filed on December 21, 2007. The board's decision contained the following paragraph:

This compensation order is a final decision. It becomes effective when filed in the office of the Board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the Board and all other parties to the proceedings before the Board. If a request for reconsideration of this final decision is timely

filed with the Board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

The Alaska State Legislature designed the workers' compensation appeal process to balance finality and the chance to appeal. AS 23.30.125(a) states that "A compensation order becomes effective when filed with the office of the board as provided in AS 23.30.110 , and, unless proceedings to reconsider, suspend, or set aside the order are instituted as provided in this chapter, the order becomes final on the 31st day after it is filed." AS 23.30.127 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." The statutes are designed to work together, so that appeals must be filed before the thirty-first day after the board's decision is filed, that is, before the board's decision "becomes final."¹

Olekszyk did not file a petition for reconsideration by the board. Therefore, the time to file an appeal began to run the day after the decision was filed in the board's office: December 21, 2007. The thirtieth day after December 21, 2007 was Sunday, January 20, 2008. The next day, January 21, 2008, was a legal state holiday. If the last day of the appeal period falls on Saturday, Sunday or a legal holiday, the appeal period runs until the next day that is not a Saturday, Sunday or a legal holiday.² Thus, the last day to file an appeal of the December 21, 2007, board decision was Tuesday, January 22, 2008.

¹ *Berean v. Coleman Bros. Logging Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 051, 3 (Aug. 2, 2007) ("Finality of decisions is a weighty consideration in the workers' compensation system where the legislature has reflected its desire to create a quick and efficient system to resolve claims."). The commission also discussed the importance of finality to both employers and employees, *id.* at 4, and noted that finality is also an "important consideration" in arbitration of labor disputes. *Id.* at 4 n. 10.

² 8 AAC 57.060(a)(2).

Olekszyk did not start “proceedings to reconsider, suspend, or set aside the order” before the thirty-first day after December 21, 2007. As a result, the board’s decision and order is final.

2. The appellant must produce evidence to the commission that he was prevented from filing an appeal by January 22, 2008.

Olekszyk bears the burden of persuading us by credible evidence that we should excuse him from compliance with the Legislature’s design. The commission has previously held that

[t]he filing deadline for appeal to the commission is set by statute, not commission rule. We have no express grant of authority to excuse non-compliance with the statute. We believe the exercise of any implied equitable authority should be limited to cases where the appellant was prevented by filing on time under circumstances recognized by the courts as allowing administrative agencies to exercise equitable powers in like cases.³

Therefore, Olekszyk must present credible evidence that he was prevented from filing on time and that the circumstances he demonstrates are such that courts have permitted administrative agencies to exercise equitable powers to excuse an appellant.

a. The appellant’s evidence that blindness prevented him from filing an appeal.

In support of his request, Olekszyk testified telephonically before the commission in the hearing on his motion.⁴ He testified that he had cataracts in both eyes, which made him legally blind. He testified his left eye was operated on in November 2007 and the right eye was operated on December 17, 2007. He saw the physician the next day, December 18, 2007. He testified that he had “substantial improvement” in his eyesight after both surgeries, but his eyes continued to “heal.” He testified he needs glasses to read and he was unable to see to read until he got glasses around

³ *Berean, Alaska Workers’ Comp. App. Comm’n Dec. No. 051 at 5. See also Crawford & Co. v. Baker-Withrow, 73 P.3d 1227, 1229 (Alaska 2003) (holding board’s regulation 8 AAC 45.195 gave board no authority to waive a statutory requirement).*

⁴ Olekszyk was unable to appear in person owing to an accident that blocked the Glenn Highway, which was his only road access to the hearing location.

January 20, 2008. He could see to drive before then. Olekszyk testified he lived alone, but he admitted that he had friends to assist him. He admitted that he had a copy of the board's decision before New Year's Day, and that he had a chance to review it by then. He had a friend read parts of it. He testified that he had been assisted by Barbara Williams, who is known by the commission and the workers' compensation community as an advocate for unrepresented injured workers.

The commission permitted Olekszyk to submit documentary evidence of the date in January he came to Anchorage to see a physician for follow-up after his surgery. Olekszyk did not submit a copy of a billing statement or chart note for a January visit; but he filed a copy of a letter from David Swanson, M.D. that stated:

Thomas Olekszyk returned to clinic for reexamination in October 2007. He was found to be legally blind in both eyes with best corrected visions of 20/800 right eye and 20/400 left eye. Subsequently, he underwent cataract surgery in both eyes. The right eye was operated on 10/16/07 and the left eye on 12/18/07. When last examined on 2/18/08, his visual acuity improved to 20/40 in each eye.

Olekszyk participated in the hearing of his claim on October 30, 2007. His financial statement affidavit was signed on February 12, 2008.

b. The appellant's evidence that he could not file an appeal because he was unable to drive to Anchorage to collect his mail.

Olekszyk also testified he was unable to drive to collect his mail from his Anchorage post office because of his disabling back pain. He explained he did not get his mail in Palmer, despite having lived there five years, because his mail was received in a post box there, instead of a mail box by the road. He uses a neighbor's rural box now. He testified he had to depend on other people to collect his mail. On the other hand, he testified he had no limitations on his drivers' license except a requirement for side mirrors. It was back pain that limited his driving ability. He testified he drove to Anchorage in January. He testified he had people drive him too. He testified that he goes to the utility offices to pay his bills when he gets his disability checks. He did not

testify that he was unable to get his mail before January 22, 2008. He admitted having received the decision by New Year's Day.

c. Appellant's evidence that the woman member who signed the decision was not present at the hearing.

Olekszyk testified that he was told that the woman board member at the board hearing on his claim was someone named "Sherene" or something similar. He did not identify his informant. He asserts that Linda Hutchings, whose name is listed as the board member in the decision, was not present at the hearing. He also claims that, even if she was the board member, Linda Hutchings did not sign the decision because her signature is a bracketed "S". He conceded that an attached copy of the final page of the decision contains her signature.

With notice to the parties, the commission requested the board certify who was present on the hearing panel. The hearing officer certified that Linda Hutchings attended the hearing on Olekszyk's claim as a member of the board panel.

3. Findings of fact.

The commission finds that the period that appellant's appeal of Dec. No. 07-0373 could have been filed expired at 5:00 p.m. January 22, 2008. The commission finds that the appellant did not file an appeal until February 12, 2008, twenty-one days later. The commission finds that Olekszyk is a poor historian for even recent events and that his testimony is inconsistent. The commission finds his testimony neither credible nor persuasive.

Olekszyk's excuses for his delay, chiefly that he had cataract surgery and needed glasses to read the board's decision before he could appeal it, even if believed, are not sufficient to establish that he was *prevented* by a lack of glasses from filing an appeal. Olekszyk claims he could not file an appeal because (1) his bad eyesight and back pain prevented him from driving to Anchorage to *pick up his mail and the board decision in time* to appeal; (2) his bad eyesight prevented him from *reading his decision* so that he did not know how to appeal. Olekszyk's claim that he was legally blind may have been true in early October 2007; however, his cataracts in one eye were removed in October (not November as he testified) and in the other eye in December, before the board's

decision was issued. He admits he had substantial improvement in his sight and could see well enough to drive without glasses. He also admitted he had friends drive him. While he claims he needs glasses to read, it is common knowledge that many people do. He admits he had the decision in hand by New Year's Day. He admits he had friends to read it to him. His testimony does not establish that he was prevented by his substantially improved eyesight from filing an appeal on time with Ms. Williams's assistance, assistance from friends, or assistance from the commission staff. Poor eyesight is an obstacle, but not an insurmountable one; it would not impair Olekszyk's ability to decide to file an appeal and contact the commission by January 22, 2008.

By emphasizing in his testimony the day his physician told him he was no longer "legally blind," Olekszyk tried to suggest that he was unable to see well enough to file an appeal until his physician told him he was no longer legally blind. He testified this occurred around January 20, 2008. Dr. Swanson's letter states that Olekszyk was last seen on February 18, 2008; the letter mentions no appointment in January. Olekszyk filed his appeal in person on February 12, 2008, six days before his last appointment with Dr. Swanson. The commission finds that Olekszyk's poor eyesight did not prevent him from filing an appeal by January 22, 2008, just as it did not prevent him from filing an appeal *before* he was seen by Dr. Swanson. The commission finds difficulty driving due to back pain did not prevent him from driving to Anchorage in January or receiving his mail by New Year's Day; it did not prevent him from coming to Anchorage in February; and it would not have prevented him from filing an appeal by facsimile, e-mail or mail from Palmer.

Olekszyk, based on an unnamed person's statement to him, asserts that Linda Hutchings, a board member who signed the decision, was not present at the hearing. The Workers' Compensation Board filed a certification by the hearing officer present at the hearing that Linda Hutchings was present, that her voice was recorded on the recording, that her signature was attached to the decision, and that the hearing officer recalled her participation. The commission finds that Olekszyk's testimony on this point is wholly unreliable, and his assertion borders on frivolous. The commission finds,

based on the certification of the hearing officer, that the panel member Linda Hutchings participated in the hearing and signed the decision.

4. Conclusions of law.

Olekszyk failed to present credible evidence that he was prevented from filing an appeal on time. The circumstances he testified to, even if believed, do not constitute good cause to set aside the legislative design for adjudication of workers' compensation appeals. The appellant failed to show good cause to require this agency to exercise equitable powers to excuse an appellant from compliance with AS 23.30.127, even if, as here, the delay was less than 30 days and the opposing party was not prejudiced. The commission concludes that it may not excuse the appellant from the statutory deadline for an appeal in this case and disregard the finality of the board's decision.

The commission concludes that Olekszyk's objections to the validity of the decision have no merit.⁵

⁵ Olekszyk argues that his need for payment of his medical expenses is so great that the commission ought to allow his late appeal. The commission does not have authority to permit untimely appeals based on need. The commission may, and does, permit indigent appellants to proceed at commission expense; but workers' compensation is not a public entitlement awarded according to need. The commission may not overturn a board decision merely because the appellant is indigent.

Olekszyk also asserts that the commission ought to allow his appeal to be filed late because his case is so strong and the board is clearly wrong. Review of the board's decision reveals that the board based its denial of the appellant's claim [that treatment for complications of his uncontrolled diabetes were causally related to his 1999 low back injury] on a weighing of the medical evidence. The board assigned greater weight to the opinions of internal medicine specialists than to that of the employee's attending physician, a chiropractor. The board's assessment of the weight of medical opinion evidence is conclusive. AS 23.30.122. The commission must support the board's findings of fact if there is substantial evidence to support them in light of the whole record. The board's decision reveals no clear, major errors of law on its face that indicate denial of the opportunity to file a late appeal may work a serious injustice.

5. *Order.*

The motion to accept a late-filed appeal is DENIED. The Alaska Workers' Compensation Appeals Commission appeal no. 08-004, filed February 12, 2008, by Thomas A. Olekszyk, is DISMISSED.

Date: 28 May 2008

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission denied the motion to accept a late appeal from the board's decision on Mr. Olekszyk's claim. The appeals commission's decision ends all administrative proceedings. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision is distributed, look at the Certificate of Distribution box below.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

You may wish to consider consulting with legal counsel before filing an appeal.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier.

If you wish to appeal this decision to the Alaska Supreme Court, you should contact the Alaska Appellate Courts **immediately**:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission's Decision No. 079, the final decision in the appeal of *Olekszyk v. Smyth Moving Service*, Appeal No. 08-004, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 28th day of May, 2008.

Signed

L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No. 08-004 was mailed on 5/28/08 to T. Olekszyk (certified) and R. Wagg at their addresses of record and faxed to Wagg, Director WCD, & AWCB Appeals Clerk.

Signed 5/28/08
J. Ramsey, Deputy Clerk Date