

Alaska Workers' Compensation Appeals Commission

Wolf Dental Services, Inc., and
Fireman's Fund Insurance Co.,
Appellants,

vs.

Randall Wolf, CNA/Northern Adjusters,
Principal Life Insurance Co. and Health
Care Recoveries,
Appellees.

Final Decision and Order

Decision No. 031 February 2, 2007

AWCAC Appeal No. 06-038
AWCB Decision No. 06-0319
AWCB Case No. 199927043

Motion for Stay Pending Appeal from Alaska Workers' Compensation Board Decision No. 06-0319, issued December 4, 2006 by the southcentral panel at Anchorage, Rosemary Foster, Chair, David Kester, Member for Management, R. Scott Bridges, Member for Labor.

Appearances: Trena Heikes, Law Office of Trena L. Heikes, for appellants Wolf Dental Services, Inc., and Fireman's Fund Insurance Co.; Randall Weddle, Holmes, Weddle & Barcott, for appellee CNA/Northern Adjusters, Principal Life Ins. Co., and Health Care Recoveries; Charles W. Coe, Esq., for appellee Randall Wolf.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen.

The appellants, Fireman's Fund Insurance Co. and Wolf Dental Services, Inc., filed a timely appeal to the commission and requested a stay of payment of benefits ordered by the board to Randall Wolf. In the hearing on the motion for stay, the chair of the commission raised the issue of whether the commission had jurisdiction of an appeal from the board's decision. The chair requested the parties to file briefs on the issue of jurisdiction by December 22, 2006. After reviewing the motion and briefs presented, the superior court's order, and the cases the commission found instructive, the commission determines that jurisdiction over this appeal rests with the superior

court, as the superior court's remand implicitly reserved jurisdiction over an appeal of the board's decision on remand.¹

We briefly review the facts presented in this appeal. Dr. Wolf is a periodontal surgeon who practiced as a sole proprietor until he sold his practice in February 2000.² He purchased workers' compensation insurance through CNA until February 28, 1999; on March 1, 1999, he placed his workers' compensation insurance with Fireman's Fund.

In 1996, Dr. Wolf was involved in a motor vehicle accident in which his neck was injured. He was treated for a neck strain, given a soft collar, and performed physical therapy. He returned to his practice, at that time insured by CNA, but experienced progressive neck pain. In 1998 he began treatment with Larry Levine, M.D., a physiatrist. An MRI in October 1998 showed spurring and protrusion of cervical discs, and narrowing of the neural foramina. In addition to physical therapy, Dr. Levine recommended an ergonomic study to assist Dr. Wolf in developing better support and positioning in his work. Dr. Wolf found he began having problems in other areas as he tried to incorporate the ergonomic recommendations.

In March 1999, after Fireman's Fund became the workers' compensation insurer, Dr. Wolf experienced a sharp increase in shoulder pain. He saw Dr. Levine complaining of severe pain in his right shoulder and inability to use his right arm. When Dr. Levine saw Dr. Wolf on March 29, 1999 he noted profound weakness in the right shoulder. A cervical spine MRI on April 9, 1999, revealed a right herniated disc at the C4-5 level,

¹ This decision was initially a Decision and Order on Motion for Stay Pending Appeal on December 28, 2006. The order resulted in termination of the appeal and addresses questions of law concerning the commission's jurisdiction. The Superior Court assumed jurisdiction of the appeal, Order Re Continuation of Appeal after Remand, *Wolf Dental Serv., Inc., v. Randall C. Wolf*, Super. Ct. Case No. 3 AN 03-13735 Civil, (Alaska Super. Ct., January 13, 2007), M. Christen, J. The commission's decision and order now being final, the order is published today as a final decision and order. No changes in the text of the decision were made except to add this footnote and conform to technical standards for publication.

² The board noted Dr. Wolf incorporated as Wolf Dental Services, Inc., in 2000. *Randall C. Wolf v. Wolf Dental Services, Inc.*, AWCB Dec. No. 03-0380, 2 (November 26, 2003) (hereafter *Wolf I*).

with neural foramina narrowing at the C5-6 and C6-7 levels. Dr. Levine found shoulder atrophy and right arm weakness, loss of signal or irritability on electrodiagnostic testing and referred Dr. Wolf to Timothy Cohen, M.D., for surgery. Dr. Cohen performed a cervical fusion at the C4-6 vertebrae on April 12, 1999. However, by June 3, 1999, Dr. Cohen had stated Dr. Wolf would not be able to return to work as a periodontal surgeon. The same day, Dr. Wolf filed a notice of injury.

Our summary of the prior proceedings is also limited. In 2003, the board issued a decision finding Dr. Wolf entitled to workers compensation benefits and finding Fireman's Fund "liable for all benefits due to the employee after March 1, 1999, under the last injurious exposure rule."³ An appeal was taken to the superior court by Fireman's Fund. The superior court's decision concluded that the board had substantial evidence to support a finding that the employment after the 1996 injury was a substantial factor in "worsening or aggravating the condition."⁴ The court remanded the case to the board to "separately address whether Dr. Wolf's employment while Fireman's Fund was the insurance carrier was a substantial factor in worsening or aggravating his condition."⁵ No party appealed or filed a petition for review of the superior court's 2005 decision to the supreme court. An order of stay was issued by the court on cash deposit, and, according to appellant's counsel's statement in hearing before this commission, that deposit remains in place.

The board issued an interlocutory decision on whether it would take new evidence on the question of the issue of last injurious exposure on March 29, 2006.⁶ Asserting it had "considerable discretion in addressing the remand issue," it chose to

³ *Wolf I* at 35.

⁴ *Wolf Dental Services, Inc. v. Randall C. Wolf, DDS*, Super. Ct. Case No. 3AN 03-13735, 30 (Alaska Super. Ct. Nov. 25, 2005).

⁵ *Id.*

⁶ *Randall C. Wolf v. Wolf Dental Services, Inc.*, AWCB Dec. No. 06-0068 (March 29, 2006) (*Wolf II*).

reopen the record to take evidence from Dr. Wolf and Dr. Levine.⁷ The board's final decision finding Fireman's Fund liable under the last injurious exposure rule was issued December 4, 2006.⁸ That decision (*Wolf III*) is the subject of Fireman's Fund appeal to this commission, claiming error in the board's application of the last injurious exposure rule. Fireman's Fund's appeal also claims the board erred in its first decision on remand (*Wolf I*) by opening the record.

We begin our analysis with the general rule that a superior court decision remanding a matter to an administrative agency is not a final, appealable order.⁹ The superior court's order in this case does not contain an explicit retention of jurisdiction. However, since the court had sole and exclusive jurisdiction over the issues raised on appeal once an appeal was taken,¹⁰ it necessarily retains jurisdiction over that portion of the appeal it did not remand. Unless the court remands for a strictly "ministerial" act,¹¹ the superior court's decision is not final. The court implicitly retains jurisdiction to examine the results of the board proceedings on remand and to enter a final appealable order.¹²

⁷ *Id.* at. 5.

⁸ *Randall C. Wolf v. Wolf Dental Services, Inc.*, AWCB Dec. No. 06-0319, 41 (Dec. 4, 2006) (*Wolf III*).

⁹ *Gunter v. Kathy-O Estates*, 87 P.3d 65, 71 n.21 (Alaska 2004); *Tlingit Haida Regional Elec. Authority v. State*, 15 P.3d 754, 761 (Alaska 2001); *Stalnaker v. Williams*, 960 P.2d 590, 592 (Alaska 1998). Another view is illustrated in *Continental Telephone Co. v. Colton*, 348 N.W.2d 623, 625 (Iowa 1984) (District court's order remanding workers' compensation proceeding to commissioner is a final appealable order unless court indicates remand is limited and jurisdiction is being retained.)

¹⁰ *Fischback & Moore of Alaska, Inc., v. Lynn*, 407 P.2d 174, 176 n. 4 (Alaska 1965), *overruled in other part by City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 (Alaska 1979).

¹¹ *Municipality of Anchorage, Police and Fire Retirement Bd. v. Coffey*, 893 P.2d 722, 725 n. 6 (Alaska 1995).

¹² *See, Dep't of Trans. v. Grawe*, 447 N.E.2d 467, 470, 113 Ill. App. 3d 336, 341 (Ill. App. Ct. 1983). This process also avoids piecemeal appeals and promotes

It is undisputed that Judge Christen did not enter a final judgment. We believe that the superior court implicitly retained jurisdiction of the appeal because the court's decision did not make a final disposition of the parties' rights in the first appeal. Judge Christen's remand order was not ministerial as its directive required the board to exercise the board's statutory power to make findings of fact and assess credibility.¹³ It would make no sense that the superior court would not have retained jurisdiction when it had yet to enter a final order in an appeal originally filed by the party who is now seeking to appeal the board's decision on remand.

This case presents a specific risk of conflict with the jurisdiction of the superior court. One dispute presented to the board was the scope of the board's authority on remand, that is, whether the board ought to allow additional evidence to be presented by CNA to the board on remand.¹⁴ That issue is again presented in this appeal. An effort by this commission to interpret the scope of the court's order of remand would necessarily conflict with the court's exclusive jurisdiction to determine whether the board misinterpreted the court's order of remand.¹⁵

We believe the legislature intended that the superior court's jurisdiction over pending matters be saved to the superior court upon the effective date of the bill creating this commission, for some of the same reasons that we stated in *Adepoju v. Fred Meyer Stores, Inc.*¹⁶ As we said in *Adepoju*,

Section 80, ch. 10 FSSLA 2005 saved jurisdiction over pending appeals to the superior court. When the legislature enacted the amendments creating this commission, the legislature also provided that "litigation... and other proceedings pending under a law amended or repealed by this Act or in connection with

judicial economy. *Horsley v. North Dakota Workers' Comp. Bureau*, 623 N.W.2d 377, 381 (N.D. 2001).

¹³ AS 23.30.122.

¹⁴ *Wolf II* at 1.

¹⁵ *See, Robles v. Providence Hospital*, 988 P.2d 592, 597 (Alaska 1999).

¹⁶ AWCAC Dec. No. 010 (May 11, 2006).

functions transferred by this Act continue in effect and may be continued and completed....” We interpret this phrase to mean that the legislature intended that appeals pending in the superior court on the effective date of the legislative repeal “may continue and be completed” notwithstanding the effect of section 41 of the same bill.¹⁷

We view this case as one “saved” to the superior court as a pending appeal.

The exclusion of appeal to the superior court found in AS 23.30.129 is not determinative in this case. There are two means of returning to the superior court: either to file a new appeal from the board’s most recent order and consolidate it with the earlier appeal, or to move the superior court, in the first appeal, for proceedings to resume in that appeal.¹⁸ We do not believe that the effective date clause of the 2005 legislation cut off the superior court’s retained jurisdiction in remanded cases. Since there is a means to reach the underlying appeal in the superior court without filing a new appeal, and because this commission, if it decided the merits of the appeal, would necessarily infringe on the exercise of the superior court’s jurisdiction, we must decline to act on this appeal unless the court’s will is otherwise. In order that the parties’ rights may be preserved in the event that the commission misunderstands the law, the commission will stay the effective date of dismissal of the appeal for thirty days, during which time the parties may seek review by the Alaska Supreme Court.

The commission concludes it does not have jurisdiction over the appeal of Alaska Workers’ Compensation Board Dec. 06-0319. It is ORDERED that the appeal to the commission is DISMISSED effective January 29, 2007, or upon notice that proceedings in *Wolf Dental Services, Inc. v. Randall C. Wolf, DDS*, Super. Ct. Case No. 3AN 03-13735, have resumed in the Superior Court if notice is received sooner.¹⁹ All other

¹⁷ AWCAC Dec. No. 010 at 3.

¹⁸ See, *Wade Oilfield Services v. Providence Washington*, 759 P.2d 1302, 1305 (Alaska 1988) citing *Jeffries v. Glacier State Telephone*, 604 P.2d 4, 6-7 (Alaska 1979).

¹⁹ The substance of this final decision and order will be published after editing to conform to technical standards for publication.

proceedings before the commission in this appeal are STAYED pending dismissal of this appeal.

Date: 28 Dec 2006

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final decision on the merits of this appeal, but it is a final dispositive decision because the commission concludes it does not have jurisdiction over the appeal. It becomes effective when filed in the office of the Commission unless proceedings to reconsider it or seek Supreme Court review are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision 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. AS 23.30.129.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

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. AS 23.30.128(f).

If you wish to appeal or petition for review 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 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 Commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision and Order on Motion for Stay Pending Appeal in the matter of *Wolf Dental Services, Inc., and Fireman's Fund Insurance Co., v. Randall Wolf, CNA/Northern Adjusters, Principal Life Insurance Co. and Health Care Recoveries*; AWCAC Appeal No. 06-038, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 28th day of December, 2006.

Signed

C. J. Paramore, Appeals Commission Clerk

DISTRIBUTION: I certify that a copy of this Final Decision and Order No. 031 was mailed on 2/2/07 to Heikes, Weddle, & Coe at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, Coe, Heikes & Weddle.

Signed

C. J. Paramore, Appeals Commission Clerk