

Alaska Workers' Compensation Appeals Commission

Mario Velderrain,
Appellant,

vs.

State of Alaska, Division of Workers'
Compensation,
Appellee.

Memorandum Decision and Order

Decision No. 065 November 29, 2007

AWCAC Appeal No. 07-032

AWCB Decision No. 07-0196

AWCB Case No. 700001708

Order on Motion to Accept Late-Filed Appeal for Alaska Workers' Compensation Board Decision No. 07-0196, issued July 11, 2006, by the northern panel at Fairbanks, William Walters, Designated Chair, Jeffrey P. Pruss, Member for Industry.

Appearances: Zane D. Wilson, Cook, Schuman & Groseclose, limited appearance for appellant Mario Velderrain. Talis J. Colberg, Attorney General, and Larry A. McKinstry, Assistant Attorney General, for the appellee, State of Alaska, Division of Workers' Compensation.

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

*This decision has been edited to conform to standards for publication.*¹

By: Kristin Knudsen Chair.

The State of Alaska, Division of Workers' Compensation (hereafter DWC) petitioned the board for penalties against Mario Velderrain, owner and operator of Hot Tamale, a restaurant in Fairbanks. After a hearing on June 21, 2007, the board assessed a penalty against Velderrain for failure to insure his employees and for failure to comply with a prior stop work order in a decision issued by the board on July 11,

¹ This decision was issued November 29, 2007, as an "Order on Motion to Accept Late-Filed Appeal" with notice that the substance of the order would be published as a memorandum decision with changes to conform to publication format. With the exception of deletion of the last footnote, giving notice of future publication, and insertion of this footnote, there are no changes in the substance of the decision.

2007.² This appeal was filed on August 27, 2007, 47 days after the decision.³ Velderrain filed a “Motion to Late File Appeal” with his notice of appeal.

We heard this motion to accept the late-filed appeal on October 25, 2007. The appellant, Mario Velderrain, appeared and testified by telephone with his attorney, Zane Wilson.⁴ The commission also took testimony by Mark Lutz, a workers’ compensation fraud investigator. The commission, seeing that there were gaps in the evidence, and that Velderrain referred to letters not available to the commission, asked the parties to submit affidavits and documents, including the board’s order approving the payment plan.⁵ The commission requested a brief memorandum on the finality of the board’s order, if the board had not issued an order approving the payment plan. The record closed on October 31, 2007.

1. Arguments to the commission.

Velderrain asks the commission to accept his late-filed appeal because he attempted in good faith to obtain an extension of time to file his appeal at the direction of his second attorney, Nelson Traverso. He claims he visited the workers’

² *In re Mario Velderrain d/b/a Hot Tamale*, Alaska Workers’ Comp. Bd. Dec. No. 07-0196 (July 11, 2007). *See also In re Velderrain*, Alaska Workers’ Comp. Bd. Dec. No. 06-0197 (July 19, 2006).

³ Velderrain claims the date he mailed his notice of appeal, August 22, 2007, is the date of filing under “Fairbanks Rules,” described by his attorney as the custom of the appellate courts to accept filings in Anchorage as timely if mailed in Fairbanks by the due date. The commission does not recognize this custom, 8 AAC 57.040(e). Its regulations provide that papers may be filed in the commission by facsimile and electronically, 8 AAC 47.050, so that communities outside Anchorage may comply with due dates. The commission likely would be more receptive to such an excuse if it were based on a lengthy power or server outage in the sending office on the due date.

⁴ Mr. Wilson entered a limited appearance for the hearing on the motion. The commission commends Mr. Wilson for his full disclosure of involvement and his adherence to Alaska Bar Assoc. Ethics Op. 93-1 regarding limited representation and preparation of pleadings for pro se litigants.

⁵ “Order to File Documents on Motion to Accept Late-Filed Appeal,” Alaska Workers’ Comp. App. Comm’n, October 25, 2007.

compensation office on an unspecified Friday, to speak with Ms. Stuller.⁶ He was told by an unidentified person to wait until Monday to speak to Ms. Stuller since she was not in at the time of his visit. When he returned on the following Monday, it was too late to file an appeal. It took him further time to find a third attorney, Mr. Wilson, who assisted him in filing this late appeal. He argues that there is good cause to extend the deadline because of the impact of the fine on his business, his lack of English skills, and his good faith effort to file an appeal. Unlike *Berean*, who was informed but simply did not do what he was supposed to do, Velderrain claims he made good faith efforts to find someone who would help him to file an appeal, and, given his limited English, he further claims he needed assistance. Finally the potential for injustice was high because the fine would put him out of business.

Velderrain also argues that the board's decision was not final because a payment schedule was not approved. He suggests that, because he appeals the fine as disproportionately severe, the payment plan is a required part of the appealed board decision because it affects the severity of the fine and its impact on his business.

DWC argues that Velderrain understood the deadline but did not file on time, and there is no evidence that he attempted (albeit mistakenly) to file his appeal at the division office. Velderrain waited until the last possible day to file his appeal before coming to the state office building to seek an extension. He waited two weeks after the board's order to find his first attorney, when he was facing a fine of about \$255,000. DWC argues there is an equal potential for injustice to injured employees who benefit

⁶ Velderrain spoke of going to see "Mrs. Sandy." Sandra Stuller is a workers' compensation fraud investigator, in the fraud investigation section of the Division of Workers' Compensation. Testimony by Mark Lutz and the affidavit of the acting chief of adjudications established that her office is parallel to the Wage and Hour Office; it is not located within the Division of Workers' Compensation, where the hearing officers and the general public information counter are located. To avoid confusion with the appellee, the Division office that provides adjudication and public information services is hereafter referred to the AWCB office.

from the Workers' Compensation Benefits Guaranty Fund⁷ if Velderrain's late appeal is allowed. DWC argues the appeal should be dismissed as untimely in line with the decision in *Berean v. Coleman Bros. Timber Cutting, Inc.*⁸ DWC explained it did not file a timely objection to the motion to accept the late-filed appeal because it believed our docket notice was an order accepting the appeal. DWC argues that the decision is final, as it adjudicates all of the rights of the parties, and that the decision text informs Velderrain that it is final.

Responding to the explanation for lack of opposition, Velderrain's attorney pointed out that DWC was in the position of saying it made a mistake when it misunderstood the Docket Notice, which only highlights that the system has to take into account human error that may occur when interpreting legal documents. Velderrain made a good faith effort to comply with the appeal procedures based on his interpretation and understanding, to find someone who could advise him, and, in the interests of justice should be allowed latitude for late filing his appeal.

2. Evidence presented to the commission.

The decision by the board was titled as a final decision and order, and at the end of the decision, clearly states the decision is final unless a party appeals to the commission within 30 days. The decision was issued and filed in the board office on Wednesday, July 11, 2007. It was mailed to Velderrain on the same day. It provided in the order:

1. The employer shall pay a civil penalty of \$14,610.00 under AS 23.30.080(f) for the period in which he was uninsured, to the Alaska Department of Labor, Workers' Compensation Division, Workers' Compensation Benefits Guaranty Fund.
2. The employer shall pay a civil penalty, under AS 23.30.080(d), in the amount of \$255,000.00.

⁷ AS 23.30.082. The fund receives the civil penalty payments made by employers under AS 23.30.080.

⁸ Alaska Workers' Comp. App. Comm'n Dec. No. 051 (August 8, 2007).

3. Under AS 23.30.135, we direct Investigator Sandra Stuller to arrange a proposed payment schedule for the civil penalties assessed under AS 23.30.080(d)&(f), to submit for our consideration within 30 days of this decision. We suspend the payment deadline under AS 23.30.080(d)&(f), and retain jurisdiction over this issue under AS 23.30.130.⁹

At the end of the decision, it notified the parties that “proceedings to appeal must be instituted in the Alaska Workers’ Compensation Appeals Commission within 30 days of the filing of this decision.”

Velderrain testified that he wanted to appeal. He was not trying to delay or avoid an appeal. After seeking the services of an attorney for about two weeks, he got an appointment with Mr. Logan, who is an attorney in Fairbanks. He thought Mr. Logan agreed to represent him, and he paid him a retainer. Mr. Logan explained the decision to him. Mr. Logan called him after a week, and told him he would not take the case. His secretary referred him to another attorney. He went to see Mr. Traverso, who told him two or three days later he could not help him. Mr. Traverso told him he “had not too much time,” that he should go to the Department of Labor “right away” and see if he could get an extension so Velderrain could file his appeal.

Velderrain testified that these events occurred on a Friday. He did not know the date, but he thought it was the last day he could file an appeal. The last day to file an appeal, according to the instructions on the board’s order, would have been August 10, 2007, which was a Friday. He went to the office to talk with Ms. Stuller, where he had met with her previously about paying his fine. No office staff was standing at the counter. He testified that a gentleman with white hair told him she was not there that day and he would have to come back Monday to get an appointment with her. Velderrain told the gentleman that he wanted an extension. He did not recall if he said an extension for an appeal to the commission. He testified he did not think he went to the office where the hearing officers were. He would recognize the hearing officers. He did not leave any paperwork with anyone. He returned to Mr. Traverso’s office.

⁹ *In re Mario Velderrain*, Alaska Workers’ Comp. Bd. Dec. No. 07-0196 at 10.

When he came back on the following Monday, Velderrain testified, he was told he was too late to file an appeal. He asked for an appointment with Ms. Stuller. He tried to find another lawyer. He was referred to Mr. Wilson, who helped him prepare a notice of appeal, which he signed and mailed to the commission the same day, on August 22, 2007.

Mark Lutz testified that Sandra Stuller's office has been located adjacent to the Wage and Hour investigator's office since about January 2007. He testified that if Velderrain had gone to see Ms. Stuller, he would not have gone to the workers' compensation division office (AWCB office).

Nelson Traverso's affidavit states that he spoke with Velderrain about the penalty order on a Friday afternoon, and that he told him to go immediately to the workers' compensation office and ask the office to agree to an extension of time to file an appeal. The goal was to submit a stipulation to the commission for an extension to file an appeal. Velderrain returned to Traverso's office the same day and told his paralegal assistant that he had been unable to speak with Ms. Stuller and was told to come back on the following Monday. Mr. Traverso's affidavit does not state *which* Friday he spoke with Velderrain.

Sandra Stuller states in her affidavit that, after the board's decision was issued, she met several times with Velderrain about a payment plan. She states Velderrain told her once that he did not agree with the decision. She told him that if he wanted to appeal, he would need to fill out the appeal packet and directed him to the AWCB office next door to get a packet. She recalled telling him he had 30 days from the date of the decision to appeal. At no time did she ever discuss an extension with him. Ms. Stuller states that she was in the office and working on Friday, August 10, 2007. She was on leave the *following* Friday, August 17, 2007, through Tuesday, August 21, 2007.

Ms. Stuller recalled discussing the payment plan on several occasions and reaching verbal agreement. She believes she presented him with a written stipulation regarding the payment plan in the last week of August. She says Velderrain took it, saying he needed more time to review it, and did not return. He did not tell her he had filed an appeal. On September 26, 2007, she informed the board she had been

unable to secure Velderrain's agreement to a payment plan. Ms. Stuller also attached a copy of the payment schedule stipulation she states she prepared. She also said Velderrain verbally agreed with this schedule. The stipulation requires board approval and is dated for signature by Velderrain in September.

William Walters, acting chief of adjudications, testified by affidavit that all but one member of the office staff would recognize Velderrain, but that "no one recalled having a conversation with him concerning the filing of an appeal of the Board's decision, prior to August 13, 2007." He did not state whether or not anyone in the office had a conversation with Velderrain on or after August 13, 2007. He stated that Velderrain would have been referred to the commission if the AWCB office had been contacted about filing a late appeal. He stated he believed the "white haired gentleman" Velderrain described was Mr. Harold Sam Conklin, supervisor of the Wage and Hour section in Fairbanks. He believes Mr. Conklin would have referred anyone asking about a workers' compensation matter to the workers' compensation division office (AWCB office).

3. Discussion.

The commission considers a motion to allow a late-filed appeal as requiring the appellant to show cause why an appeal should not be dismissed for failure to prosecute his appeal by filing the appeal on time.¹⁰ We discussed in *Berean* our approach to motions to accept a late-filed appeal, and our concern for the legislative directive that requires parties to file an appeal within 30 days of the compensation order. However, as noted in the hearing on this motion, the board's order retains jurisdiction to approve the penalty payment schedule, thus raising a question as to the finality of the order in light of the appeal that the fine was so "onerous and out of proportion to the offense" as to violate due process. Our careful study of the decretal language of the board's order leads us to the conclusion that *Berean* does not apply to this case, because the

¹⁰ The commission may accept evidence and make findings of fact when deciding whether to dismiss an appeal for failure to prosecute. AS 23.30.128(c).

board's order was not final until either (1) no penalty payment plan was submitted within 30 days, or (2) a penalty payment plan was submitted and approved.

In *Hope Community Resources v. Rodriguez*, we addressed when a board decision is final.¹¹ We said that the test for determining finality of an administrative order is similar to that for determining the finality of a trial court judgment – it is “essentially a practical one.”¹² We quoted the Alaska Supreme Court’s statement on judgments generally:

The basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case, . . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment Further the reviewing court should look to the substance and effect, rather than form, of the rendering court’s judgment, and focus primarily on the operational or ‘decretal’ language therein.¹³

We discussed the Supreme Court’s decision in *Ostman v. State, Commercial Fisheries Entry Comm’n*,¹⁴ applying a Washington holding that a letter is a final decision if it both denies a right and fixes the legal relationship as the consummation of the administrative process.¹⁵

In Ostman’s case, the Supreme Court focused on whether the decision was a “final rejection of his permit application,”¹⁶ but also considered the practical effect of the decision, which was to

¹¹ Alaska Workers’ Comp. App. Comm’n Dec. No. 041, 6-7 (May 16, 2007).

¹² *Ostman v. State, Commercial Fisheries Entry Comm’n*, 678 P.2d 1323, 1327 (Alaska 1984), quoting *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980); quoting *City and Bor. of Juneau v. Thibodeau*, 595 P.2d 626, 628 (Alaska 1979).

¹³ *Ostman*, 678 P.2d at 1327, quoting *Greater Anchorage Area Bor. v. City of Anchorage*, 504 P.2d 1027, 1030-31 (Alaska 1972). The “decretal” language refers to the text of the “decree.” The decree is the board’s order.

¹⁴ 678 P.2d 1323, 1327 (Alaska 1984).

¹⁵ *Hope Community Resources v. Rodriguez*, Dec. No. 041 at 6.

¹⁶ 678 P.2d at 1327.

reject Ostman's claims for more points.¹⁷ No further opportunities were available for Ostman to seek additional point awards because the evidence submission period had expired; therefore, since further administrative review would be futile, the decision was a final appealable order.¹⁸

We held that an appeal

under AS 23.30.127 to the commission should be from a board decision that is final as to the appellant's rights, and leaves no further dispute on a pending claim or petition for the board to resolve. We agree that, as the dissent noted in *Municipality v. Anderson*,¹⁹ it is sometimes "difficult to predict when there will be a final appealable judgment in . . . workers' compensation proceedings."²⁰ The possibility of filing successive or overlapping claims for, or petitions related to, different benefits flowing from the same injury complicates the determination of when a compensation order "fixes" a legal relationship. However, when there are no pending proceedings before the board, an appeal should not wait upon the possibility that a party will file another claim or petition in the future.²¹

We agree that as to DWC's right to a penalty and appellant's liability for a penalty, the board's decision on DWC's petition is clearly final. It fixes the legal status of the appellant as an employer without insurance. However, when we examine the appellant's rights and legal relationships, we are not convinced that the board's order was fully and immediately final for purposes of appeal.

Although the board determined the total penalty, the board suspended the penalty payment and retained jurisdiction to approve a payment schedule for the fine. This is not a strictly ministerial act because it requires the exercise of board discretion, including a weighing of evidence regarding the ability of the appellant to make the

¹⁷ 678 P.2d at 1328.

¹⁸ *Id.*

¹⁹ 37 P.3d 420 (Alaska 2001) (Justice Matthews, with Chief Justice Fabe joining in the dissent).

²⁰ *Id.* at 423.

²¹ *Hope Community Resources v. Rodriguez*, Dec. No. 041 at 7.

payments.²² The payment schedule necessarily impacts the appellant's rights, both as to his specific rights under the schedule and whether the penalty, as scheduled to be paid, was unreasonably onerous. Thus, the appellant might have appealed the board's order within 30 days, and sought a stay of the board's approval of the penalty payment schedule, or joined a later appeal of the approval of the penalty payment schedule to the first appeal. We agree that this is the preferred process. However, because the appellant challenges the penalty as "onerous and out of proportion to the offense," the appellant also might have waited to appeal until the board had exercised its discretion and approved the payment schedule.

The problem in this case is that Velderrain, after agreeing verbally to a payment schedule, abandoned negotiation of a payment schedule and did not comply with the board's order. The board retained jurisdiction to approve a payment schedule and directed DWC to file it for approval within 30 days. Ms. Stuller's and Velderrain's testimonies are consistent that they met about the payment schedule before he filed an appeal. Ms. Stuller testified that they reached a verbal agreement on a schedule, and she gave him a written plan "in the last week of August," which is consistent with her other statements regarding when she was on leave.²³ It does not appear that DWC presented the board with a payment plan within the period established by the board's order. It is possible DWC had not then abandoned the effort to comply with the board's order by continuing to negotiate for a stipulation, but Velderrain, by filing his appeal and not acting further to execute the plan, did abandon his efforts to comply. We find

²² The board's decision refers to a negotiated payment plan, but its order requires Ms. Stuller to submit a payment plan without regard to whether Velderrain agrees to it.

²³ Ms. Stuller's affidavit indicates that she met with Velderrain after the board's order to set up a payment plan, that Velderrain told her he did not agree with the order, and that she told him to get an appeal packet from the board office next door. She did not then tell Velderrain he was too late to appeal, so it appears that she met with him before August 10, 2007. She describes only one more meeting, to give him the plan (presumably the plan text), *after* she returned from leave. By then, the 30 days provided by the board order had expired.

that the board's order became final on August 10, 2007, when the parties neither complied with the order to file the plan nor requested an extension of time from the board. If no payment plan was submitted within 30 days, there was nothing further for the board to do.²⁴

We find that Velderrain filed his appeal on August 27, 2007, when the documents were received in the commission's office, within 30 days of August 10, 2007. We conclude that the appeal is therefore timely, and the motion to accept a late-filed appeal is therefore moot.

4. Order.

We DENY the motion to accept a late-filed appeal since the motion is moot. In denying this motion we conclude the appeal was filed on time. We direct the commission chair to issue a Notice instructing the parties to file their briefs.

Date: Nov. 29, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Philip Ulmer, Appeals Commissioner

Signed

Jim Robison, Appeals Commissioner

Signed

Kristin Knudsen, Chair

Certification of Distribution

I certify that on 11/29/07 a copy of this Order on Motion to Accept Late-Filed Appeal was mailed to Velderrain (certified), Wilson & McKinstry; and faxed to McKinstry, Wilson, WCD and AWCB Appeals Clerk.

Signed 11/29/07
L. Beard, Deputy Commission Clerk Date

²⁴ The board's suspension was not limited in time. The board also retained jurisdiction to modify the penalty under AS 23.30.130. The year-long modification period in AS 23.30.130(a) begins to run from the last payment of listed compensation benefits or "before one year after rejection of a claim." The board rejected no claim, and ordered no benefits paid. The question is not before us, and we do not decide, whether AS 23.30.130 grants the board authority to modify an AS 23.30.080 penalty.