

Alaska Workers' Compensation Appeals Commission

Bradford T. Wilson,
Appellant,

vs.

Eastside Carpet Co. and AIG Claim
Services,
Appellees.

Memorandum Decision and Order

Decision No. 098 February 2, 2009

AWCAC Appeal No. 08-013

AWCB Decision No. 08-0043

AWCB Case No. 200709372

Motion to Certify Appeal to the Supreme Court from Alaska Workers' Compensation Board Decision No. 08-0043, issued at Anchorage, Alaska, on March 5, 2008, by southcentral panel members Janel Wright, Chair, Patricia Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: William J. Soule, Esq., for appellant, Bradford T. Wilson.¹ Colby Smith, Griffin and Smith, for appellees Eastside Carpet Co. and AIG Claim Services.

Commission proceedings: Appeal filed April 3, 2008. Appellant's request for extension of time to file opening brief granted June 19, 2008. Motion for Order Certifying Appeal to the Alaska Supreme Court filed June 10, 2008. Order denying appellant's motion to certify appeal to the Supreme Court issued July 16, 2008.²

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

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

By: Kristin Knudsen, Chair.

Appellant filed a motion on June 10, 2008, asking that the commission issue an order certifying this appeal to the Alaska Supreme Court without action by the

¹ Mr. Soule withdrew from representation of Mr. Wilson on Sept. 15, 2008.

² This Memorandum Decision is published on Feb. 2, 2009, but the substance of the decision was issued as an Order on Motion to Certify Appeal to the Supreme Court on July 16, 2008. This Memorandum Decision makes only minor changes in format for publication.

commission because his appeal is based on a challenge to the constitutionality of AS 23.30.220(a)(4) as applied to him. Appellant argues that the commission does not have jurisdiction to rule on the constitutionality of a statute, that it cannot decide his appeal and that it would be more efficient and less costly if he were not required to brief an appeal twice. Appellees did not file a timely response to the motion.

1. Introduction.

The factual summary is drawn from the board's decision. Appellant filed a claim for a compensation rate adjustment based on the disparity between his \$30 per hour wage, received when he was injured, and his "earnings at the time of injury" on which his compensation rate was based. Prior to his employment with the employer-appellee, appellant was self-employed. He argued that the compensation rate calculated under AS 23.30.220(a)(4) did not accurately predict his loss of earnings during his disability. Appellant further argued to the board that AS 23.30.220 was tainted with corruption and was unfair. He asserted that a prior statute, based on the "13 week rule," would have provided him a fair compensation rate.

The board concluded that the adjuster had properly applied AS 23.30.220(a)(4), using the annual earnings of appellant's business as the basis for the calculation. The board's decision did not address whether self-employment profits are a proper basis for determining an employee's wages under AS 23.30.220(a)(4), instead of requiring application of AS 23.30.220(a)(5) in light of 8 Alaska Admin. Code 45.220(b). Appellant had not challenged the calculation of his self-employment earnings, and the board's decision contains no discussion of the evidentiary basis of the calculation.

The appellant raised these points on appeal:

- A. The board's decision and AS 23.30.220, as applied to the appellant, violate the equal protection clause of the Alaska Constitution because
 1. The statute treats similarly situated workers differently and results in substantially different compensation rates for similarly situated workers;
 2. The statute fails to accurately predict an injured workers' loss of earning capacity;

3. No alternative is found in the statute to accurately predict lost earnings and, consequently, results in an irrational award of compensation;
 4. The resulting compensation rate is unconstitutional even applying the subsection of 220 that most closely fits the injured worker's earning fact pattern; and,
- B. The board's decision and the statute create bad public policy in contravention of the Act as interpreted by the Alaska Supreme Court.

Underlying appellant's appeal are two crucial assumptions. First, he assumes that substantial evidence supports a finding that AS 23.30.220(b)(4) most closely fits his earning fact pattern and, second, he assumes that the board correctly applied AS 23.30.220 to the facts established.³ These are not constitutional challenges but rather they are questions of law. The proper application of the Alaska Workers' Compensation Act, and questions of law concerning the workers' compensation statutes, are where the commission "shall exercise its independent judgment,"⁴ subject to the Supreme Court's review.

2. Discussion.

a. The commission may not "certify" a constitutional question to the Supreme Court.

Appellant asks the commission to "certify" his appeal, including the policy issue, to the Supreme Court on the basis that the commission cannot decide a constitutional question. Thus, appellant would avoid arguing an appeal to the commission that appellant implies is futile, because the commission cannot rule on his constitutional challenges. Appellant also would avoid the possibilities that (1) the commission, in reviewing the case, discovers board error in the board's application of the statute he challenges, (2) commission correction of board error weakens, if not rules out, his

³ The board did not consider whether AS 23.30.220(a)(5) should be used to calculate the employee's earnings in order to establish a compensation rate instead of applying AS 23.30.220(a)(4) to two years of business profits as if his profits were wages earned by an employee. *See also* 8 Alaska Admin. Code 45.220(b).

⁴ AS 23.30.128(b).

constitutional challenge or (3) the commission requires board remand for further findings of fact. In effect, appellant asks the commission to request an advisory opinion on his behalf.

The appellant asserts “administrative agencies do not have jurisdiction to decide a constitutional question.”⁵ This principle does not grant the commission authority to ask the Supreme Court to decide a constitutional question before it reviews a board decision. Alaska Rule of Appellate Procedure Rule 407(a) addresses certification of questions of state law to the Supreme Court and allows the Supreme Court to accept certification requests from federal courts.⁶ Black’s Law Dictionary defines “certification” as a “procedure by which a federal appellate court asks . . . the highest state court to review a question of law arising in a case pending before the appellate court and on which it needs guidance.”⁷ The commission is a quasi-judicial agency within the state executive branch.⁸ Nothing in the Rules of Appellate Procedure, the Alaska Constitution, or the workers’ compensation statutes permit the commission to seek an advisory opinion from the Alaska Supreme Court in a pending appeal.

b. A commission appeal provides an opportunity for correction of board error through the second tier of the appellant’s administrative remedy.

The questions presented in this appeal are subject to the doctrine of administrative exhaustion.⁹ The purpose of this doctrine “is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, *and to correct its own errors so as to moot judicial*

⁵ *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

⁶ Alaska R. App. Pro. 407(a). (“The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court, a United States bankruptcy court or United States bankruptcy appellate panel . . .”).

⁷ *Black’s Law Dictionary* 1322 (8th ed. 2004).

⁸ *Alaska Pub. Interest Research Group*, 167 P.3d at 37.

⁹ *Standard Alaska Prod. Co. v. State Dep’t. of Revenue*, 773 P.2d 201, 205 (Alaska 1989).

controversies."¹⁰ The commission is part of an administrative system. With special expertise and experience in the area of workers' compensation, it applies a second tier of independent judgment to correct board errors of law arising from application of the Alaska Workers' Compensation Act.¹¹ The commission does not go outside the boundaries of its special expertise and competence if it examines crucial assumptions underlying the board's decision and appellant's challenges.

A person may file an original declaratory judgment action in superior court to declare a workers' compensation statute unconstitutional. A declaratory judgment action allows the superior court, "upon the filing of an appropriate pleading, [to] declare the rights and legal relations of an interested party seeking [a] declaration, whether or not further relief is or could be sought."¹² However, a party "cannot avoid statutorily or judicially imposed exhaustion requirements merely by framing a grievance as a 'declaratory judgment' action."¹³ The superior court has discretion to hear the action and will only hear an "actual controversy" properly before the court.¹⁴ The court may dismiss an action if the plaintiff "improperly bypassed available administrative remedies."¹⁵

The Alaska Supreme Court has held that "requiring exhaustion is particularly appropriate where a complainant raises both constitutional and non-constitutional issues."¹⁶ Other courts have found this especially true in cases of "as applied"

¹⁰ *Id.* at 206 (citing *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 122 (Alaska 1988)) (emphasis added).

¹¹ AS 23.30.008(a), AS 23.30.128(b).

¹² *Standard Alaska Prod. Co.*, 773 P.2d at 206 (citing AS 22.10.220(g)).

¹³ 773 P.2d at 205.

¹⁴ *Id.* at 206.

¹⁵ *Id.*

¹⁶ *Id.* at 207 (citing *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 122 (Alaska 1988)).

constitutional challenges.¹⁷ When a claim *only* involves constitutional issues the exhaustion doctrine may not apply.¹⁸ That is not the case here. Appellant *framed* his challenges as raising only constitutional issues, but appellant's points on appeal, examined in light of the board's decision, raise legal issues that must be addressed before the constitutional questions may be resolved.

Appellant presupposes the commission has no option but to affirm the board's decision, thus rendering his appeal futile. Even cases raising constitutional issues require fair, careful and thoughtful review to determine if the board has substantial evidence to support its findings, made all required findings of fact, and correctly applied the challenged statute; this is especially true in "as applied" challenges. Commission review ensures that, in the case presented to the Supreme Court, the constitutional challenge is both unavoidable and well-grounded in fact; instead of an unnecessary challenge based on hypothetical or unsupported facts.

c. Issues of workers' compensation policy are within the commission's expertise and competence.

The legislature made the commission the "exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter . . . except for an appeal to the Supreme Court."¹⁹ The legislature established the commission as an administrative agency within the Department of Labor and Workforce Development, uniquely suited to consider questions of fundamental workers' compensation policy and the board's interpretation of Department of Labor regulations.²⁰ When an administrative agency's expertise, or questions of fundamental policy are involved, the Supreme Court reviews the agency's interpretation of its

¹⁷ See *Verkouteren v. Supervisor of Assessments*, 380 A.2d 642 (Md. Ct. Spec. App. 1977) and *Harrington v. Spokane County*, 114 P.3d 1233 (Wash. 2005).

¹⁸ *Id.*

¹⁹ AS 23.30.008(a).

²⁰ The board's regulations are adopted by the Department of Labor and Workforce Development, AS 23.30.005(h), (i), but become effective only after approval by the board. AS 23.30.005(l). The commission's regulations are adopted by the commission. AS 23.30.008(c).

regulations under the "reasonable basis" standard.²¹ Even under the independent judgment standard applicable to statutory interpretation, the Court may give "some weight to what the agency has done, especially where the agency interpretation is longstanding."²²

The commission's explanation of fundamental policy underlying the Legislature's enactment of AS 23.30.220, and the Department's regulations, may be given "some weight" when the Supreme Court decides if, as appellant asserts, the "board's decision and the statute create bad public policy in contravention of the Act." Appellant's challenge to the fundamental policy underlying the statute and the board's decision requires the commission to set out what that policy is, and determine if "the board's decision . . . creates bad public policy in contravention of the Act." Thus, the Supreme Court's review may be affected by the commission's approach to the appellant's appeal.

3. Conclusion and Order.

When an appeal from a decision below is brought to the commission, the commission's decision may eliminate the need for judicial review of the constitutionality of AS 23.30.220(a)(4) as applied. If constitutional issues are still present following the commission's decision, judicial review is available through appeal to the Supreme Court; but the commission may not request an advisory opinion from the Supreme Court on a party's behalf. Appellant's points on appeal contain an issue within the commission's special competence. The commission may not encourage avoidance of the statutory process, particularly when, as here, commission review may result in correction of board error without deciding a constitutional issue.

²¹ *Balough v. Fairbanks North Star Bor.*, 995 P.2d 245, 254 (Alaska 2000).

²² *Usibelli Coal Mine, Inc. v. State Dep't of Natural Res.*, 921 P.2d 1134, 1142-43 (Alaska 1996).

For these reasons, the commission DENIES appellant's motion to certify the appeal to the Supreme Court without review by the commission. It is ORDERED that appellant shall file his brief by 5:00 pm Monday, July 21, 2008.²³

Date: July 16, 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 not a final decision on the merits of this appeal. It is a final decision and order denying the appellant's motion to certify his appeal to the Supreme Court. The effect of this decision is that the commission will not (1) ask the Supreme Court to advise the commission on his constitutional challenges to the board's order, or (2) transfer the appeal to the Supreme Court with no review of the appeal by the commission. The commission's order requires the appellant to file his appeal brief by July 21, 2008. This decision is not a final decision on the merits of Bradford Wilson's appeal or claim.

Proceedings to appeal a commission decision 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. Because this is not a final commission decision on an appeal of a final board order, the Supreme Court may not accept an appeal.

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 the Appellate Rules, you should file your petition for review or hearing within 10 days after the date this decision is distributed to you. You may wish to consider consulting with legal counsel before filing a petition for review or hearing, or an appeal.

²³ The commission originally issued this decision on July 16, 2008, as an Order, with notice that it would be published as a memorandum decision in the future, with changes in format. The substance of the order is unchanged.

If you wish to appeal (or petition for review or hearing) 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 AS 23.30.128(f) and 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. If the commission does not respond to the motion for reconsideration by an order granting reconsideration within 60 days of the date of this decision, the motion for reconsideration is considered denied.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Alaska Workers' Compensation Appeals Commission Decision No. 098, first issued as Order on Motion to Certify Appeal to the Supreme Court in AWCAC Appeal No. 08-013, *Bradford T. Wilson v. Eastside Carpet Co. and AIG Claim Services*, signed, issued, and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on the 16th of July, 2008, and, that this Decision No. 098 is filed in the office of the Commission in Anchorage, Alaska, this 2nd day of February, 2009.

Signed

L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on 7/16/08 a copy of the Order on Motion to Certify Appeal to the Supreme Court in AWCAC Appeal No. 08-013 was mailed to: W. Soule and C. Smith at their addresses of record and faxed to: W. Soule, C. Smith, AWCB Appeals Clerk, AWCB Anc. (Wright) & the Director WCD. I further certify that on 2/2/09 a copy of the Memorandum Decision No. 098 in AWCAC Appeal No. 08-013 was mailed to: B. Wilson (certified) and C. Smith, at their addresses of record and faxed to: C. Smith, AWCB Appeals Clerk, AWCB Anc. (Wright) & the Director WCD.

Signed

L. A. Beard, Appeals Commission Clerk