

# Alaska Workers' Compensation Appeals Commission

Patricia and Mark Lawson  
d/b/a JB Services,  
Appellants,

vs.

State of Alaska, Workers'  
Compensation Division,  
Appellee.

## Final Decision and Order

Decision No. 110      May 29, 2009

AWCAC Appeal No. 09-009

AWCB Decision No. 09-0015

AWCB Case No. 700002197

Motion to accept late-filed appeal from Alaska Workers' Compensation Board Decision No. 09-0015, issued at Anchorage, Alaska on January 22, 2009, by southcentral panel members, Janel Wright, Chair, Patricia A. Vollendorf, Member for Labor, Robert C. Weel, Member for Industry.

Appearances: Mark Lawson, *pro se*, on behalf of appellants Patricia and Mark Lawson d/b/a/ JB Services. Wayne Anthony Ross, Attorney General, and Erin Pohland, Assistant Attorney General, for appellee State of Alaska, Workers' Compensation Division.

Commission proceedings: Appeal filed March 10, 2009, with Motion to Accept Late Filed Appeal. Hearing on Motion to Accept Late Filed Appeal held April 2, 2009. Notice of Commission Record and Reopening of Hearing to Receive Affidavit and Record Evidence issued May 5, 2009. Affidavit of Michael P. Monagle and Affidavit of Mark Lutz filed May 12, 2009. Affidavit of Mark Lawson filed May 13, 2009.

Commissioners: Philip Ulmer, Jim Robison, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

This appeal arises from a decision by the board assessing a penalty against an employer for failure to carry workers' compensation insurance. The State of Alaska, Workers' Compensation Division (State) filed a petition asking the board to (1) find that Mark and Patricia Lawson d/b/a JB Services was an employer, (2) find it was uninsured

for workers' compensation liability, (3) assess a penalty under AS 23.30.080(f), and (4) issue a stop order under AS 23.30.080(d). The board held a hearing on May 7, 2008, on the State's petition, but left the record open to receive additional evidence until January 6, 2009. On January 22, 2009, the board issued a decision finding JB Services, Inc., and its predecessor sole proprietorship JB Services, was an employer<sup>1</sup> that failed to insure for workers' compensation liability and assessed a civil penalty of \$91,000 against them.<sup>2</sup> The decision was mailed by certified mail to the Lawsons on January 22, 2009. The Lawsons filed an appeal of the board's decision in the commission on March 10, 2009, with a motion to accept the late-filed appeal. The State opposes the motion.

The appellants' motion to accept a late-filed appeal was heard by the commission on April 2, 2009. The appellants presented testimony by JB Services' principals, Mark Lawson and Patricia Lawson, in support of the motion. The appellants argue that they did not receive the decision until February 17, 2009. They argue that they had so much to deal with in their personal lives, including a flood on January 16, 2009, Patricia Lawson's aunt's illness and their son's arrest, that they could not file an appeal within 30 days of the board's decision. They argue that they filed an appeal within 30 days of the date they received the decision and that this is sufficient compliance to allow the commission to excuse the delay.

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<sup>1</sup> *In re Patricia and Mark Lawson*, Alaska Workers' Comp. Bd. Dec. No. 09-0015, 7 (Jan. 22, 2009).

<sup>2</sup> *Id.* at 14. The penalty was not assessed against Mark and Patricia Lawson as individuals, although the board ordered that they were individually liable for claims by employees in the uninsured period. *Id.* at 13. The board assessed the maximum allowable fine in light of the employer's repeated history of noncompliance with the requirement to insure for workers' compensation liability and familiarity with the need for compensation insurance. *Id.* at 11; *see In re J. B. Servs.*, Alaska Workers' Comp. Bd. Dec. No. 05-0111 (Apr. 20, 2005); *In re J. B. Servs.*, Alaska Workers' Comp. Bd. Dec. No. 04-0147 (June 24, 2004); *Jared O. Flodin v. J B Servs.*, Alaska Workers' Comp. Bd. Dec. No. 04-0065 (Mar. 17, 2004); *Jared O. Flodin v. J B Servs.*, Alaska Workers' Comp. Bd. Dec. No. 04-0047 (Feb. 27, 2004); *Jared O. Flodin v. J B Servs.*, Alaska Workers' Comp. Bd. Dec. No. 04-0026 (Jan. 30, 2004); *In re J. B. Servs.*, Alaska Workers' Comp. Bd. Dec. No. 03-0301 (Dec. 18, 2003).

The State argues that the delay receiving the decision should not excuse appellants' delay filing an appeal because appellants' conduct caused the delay in receipt. The State argues that the appellants' appeal period had not run when they received the decision and they have not shown good cause why the appeal could not have been filed on time.

This appeal requires the commission to address the impact of the Supreme Court's recent decisions in *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193 (Alaska 2008), *Shea v. State, Dep't of Admin.*, 204 P.3d 1023, (Alaska 2009), and *Bohlmann v. Alaska Constr. & Engineering, Inc.*, 205 P.3d 316, (Alaska 2009) on AS 23.30.127(a).<sup>3</sup> The commission concludes that if appellants were required to demonstrate substantial compliance with the statute, as required by *Kim*, they failed to do so. If appellants were required to demonstrate actual compliance in respect to the substance essential to every reasonable objective of the statute,<sup>4</sup> they failed to do so. If appellants were

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<sup>3</sup> AS 23.30.127 provides in pertinent part:

**Appeals to the commission.** (a) 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 director may intervene in an appeal. If a party in interest is not represented by counsel and the compensation order concerns an unsettled question of law, the director may file an appeal to obtain a ruling on the question by the commission.

(b) An appeal is initiated by filing with the office of the commission

(1) a signed notice of appeal specifying the compensation order appealed from;

(2) a statement of the grounds upon which the appeal is taken; and

(3) other material the commission may by regulation require.

<sup>4</sup> *Jones v. Short*, 696 P.2d 665, 668 n.10 (Alaska 1985) (cited in N. Singer, 3 *Sutherland Statutory Construction* § 57.26 n.4 (6<sup>th</sup> ed., 2001)).

required to demonstrate good cause for their delay, they failed to do so. The commission therefore denies the motion and dismisses the appeal.

*1. Evidence presented to the commission.*

Mark Lawson presented the testimony of his wife, Patricia Lawson, and himself in support of his motion to accept the late-filed appeal. Patricia Lawson testified she usually did not pick up the mail from the couple's community mail box every day. She collected it once a week when no business activities were going on and put it in a pile. She testified that she did not pay attention to the mail at all in January and February. She did not check the mail in the pile. She testified she never saw the decision or a "yellow slip" (the notice of attempt to deliver) from the local post office. She testified she pays the bills once a month. She testified that she is unfamiliar with legal proceedings and she does not know about any civil litigation involving her business. She testified she did not see the faxed decision and she did not know what went on after Mark received it because she was not at home. She testified she still has not read the decision.

Patricia Lawson testified that their back yard was flooded, a shed destroyed, and a tree fell over as a result of flooding on January 16 or 17, 2009, following a storm. She testified that the street was flooded, including the area around the community mail box, for a day or two. She testified her son was arrested for driving on a suspended license on January 30, 2009. She testified she was busy with taking care of her sick aunt while her husband was busy with "drainage issues."

Mark Lawson testified that he was completely occupied with organizing his neighbors and "calling Sen. Dyson" and other officials regarding the flooding, so he did not pay attention to his mail. He testified that it had been so long since the board hearing, he was not looking for a decision from the board. He also testified that his son was arrested in January, and that this event also occupied his energies calling officials. He testified that these activities were a "good full time job" until the prosecutor dismissed the charges. He conceded that the charges against his son were dropped on February 5, 2009, but he testified he is still trying to get his truck back. He also

testified that he has a pending lawsuit regarding a piece of equipment and that he recently gave a deposition in the lawsuit.<sup>5</sup>

Mark Lawson testified he found the postal notice in the pile of mail at home but that when he took the postal notice to the post office, the letter had already been returned to the board. He testified he found the postal notice two days before he took it to the post office. He said he actually received the decision by fax after calling the State's investigator, Mark Lutz, evidently because the postal notice had the board's address on it. He testified he received the faxed decision on Tuesday, February 17, 2009.

Mark Lawson testified that after receiving the decision, he called the director of the Workers' Compensation Division, Ms. Heikes, who told him to file his appeal as soon as possible. He testified he also called Mr. Lutz. He testified he called the commission's clerk (Ms. Beard) who advised him he would need to file a request to accept a late-filed appeal with his appeal. He testified he called "fifty lawyers" to see if any would represent him. He testified he could not have filed the appeal in less than a week. Mark Lawson testified it took him about a week and he wrote ten drafts of his appeal. He also testified he spent most of two or three days preparing the appeal document, staying up late to do so.

The State presented a copy of a certified mail receipt showing the decision was mailed on January 22, 2009, to the appellants at their home address in "Eagle River, AK 99577."<sup>6</sup> The State also submitted a copy of a "Track & Confirm" screen showing that the receipted mail was "delivered at 9:08 AM on February 18, 2009 in ANCHORAGE AK

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<sup>5</sup> Mark Lawson's statements about the deposition illustrate how confusing his testimony was. He said the deposition occurred on a Monday, and gave the date of the deposition as the 22nd of January or February. Feb. 23, 2009, was a Monday. Jan. 22, 2009, was a Thursday. At another point, he said that he was in a deposition in a lawsuit that "lasted over eight hours" on "the day of this thing here" (presumably the board's decision, issued Jan. 22, 2009).

<sup>6</sup> Opp'n to Mot. to Accept Late-Filed Appeal, Ex. 1.

99510.”<sup>7</sup> The appellee also relies on the clerk’s certification on the board’s decision showing the date of filing as January 22, 2009.<sup>8</sup>

After reviewing the recording of testimony offered by Mark Lawson, the commission determined that there were points on which his testimony appeared to vary from the commission’s record and staff recollection of the date Mr. Lawson first contacted the commission. Accordingly, the parties were given notice of the content of the commission record and staff recollection that Mr. Lawson contacted the commission on February 27, 2009, and Mr. Lawson’s testimony that he contacted the appeals commission as early as February 17, 2009.<sup>9</sup> The record was reopened until May 12, 2009, and the parties were invited to submit affidavits or records in response to the commission staff recollection and electronic telephone record that Mr. Lawson first contacted the appeals commission on February 27, 2009, or to respond, clarify, or add to Mr. Lawson’s testimony.<sup>10</sup>

Mr. Lawson filed an affidavit on May 13, 2009, one day after the commission notified him the record would close. The affidavit was notarized by an attorney, Meredith Ahearn, on May 12, 2009, and mailed to the commission the same day. In his affidavit, Mark Lawson states it is correct he first spoke to the commission on February 27, 2009.<sup>11</sup> He states that on February 17, 2009, he contacted Mr. Monagle in the Juneau office of the Workers’ Compensation Division.<sup>12</sup> He states,

I discussed the case with Mr. Monagle. Mr. Monagle advised me that there was a time limit for filing an appeal. I advised him I wanted to get an attorney. He faxed me a list of attorneys who handled workers compensation matter. I contacted a minimum

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<sup>7</sup> Opp’n to Mot. to Accept Late-Filed Appeal, Ex. 2.

<sup>8</sup> *Id.*, Ex. 3 at 16.

<sup>9</sup> Notice of Comm’n Record & Hr’g Reopening (May 5, 2009).

<sup>10</sup> *Id.* at 4.

<sup>11</sup> Aff. of Mark Lawson, ¶ 3.

<sup>12</sup> *Id.*, ¶ 6.

of twenty of these attorneys, none of which handled a business owner's failure to insure.<sup>13</sup>

Mr. Lawson stated he called Ms. Heikes on February 27, 2009. Ms. Heikes told him that he should file his appeal as soon as possible because it was past the deadline to file an appeal.<sup>14</sup> Ms. Heikes forwarded him to the commission clerk, Ms. Beard.

The State filed an affidavit of Michael P. Monagle on May 12, 2009. Mr. Monagle's affidavit states Mark Lawson telephoned him between February 13 and February 20, 2009.<sup>15</sup> According to Mr. Monagle, Mr. Lawson gave

his opinion that the penalty assessed in the Board's decision was excessive and extreme. He wanted the Division to reduce the amount of the penalty and take administrative action against the panel members. I informed him that his only course of action was to appeal the Board's decision to the Workers' Compensation Appeals Commission.<sup>16</sup>

Mr. Monagle recalled Mr. Lawson because he entered the call in his phone log and Mr. Lawson "was extremely agitated, and ranted in length against state government."<sup>17</sup> According to Mr. Monagle, he "repeatedly advised Mr. Lawson to file his appeal . . . before the appeal period expired."<sup>18</sup> He repeatedly told Mr. Lawson that the Division would not intercede on his behalf, and "he [Mr. Lawson] would have to file the appeal before the 30-day appeal period expired, which as I recall, would transpire within a week of our phone call."<sup>19</sup>

## *2. Discussion.*

When the commission hears a motion to accept a late-filed appeal, the commission treats the motion as concerning dismissal of an appeal for failure to prosecute the appeal, because the first duty of an appellant is to file an appeal within

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<sup>13</sup> Aff. of Mark Lawson, ¶ 6.

<sup>14</sup> *Id.*, ¶ 7.

<sup>15</sup> Aff. of Michael P. Monagle, ¶ 2.

<sup>16</sup> *Id.*, ¶ 3.

<sup>17</sup> *Id.*, ¶ 5.

<sup>18</sup> *Id.*, ¶ 4.

<sup>19</sup> *Id.*, ¶ 6.

thirty days of the day the board issues its decision. The commission will receive evidence and testimony in support of such motions.<sup>20</sup> Thus, a motion to accept a late-filed appeal is one of the few occasions when the commission takes evidence and makes findings of fact. The burden is on the person seeking acceptance of a late-filed appeal to persuade the commission he or she has good cause for the delay.

*3. Findings of fact and conclusions of law.*

*a. The commission finds the time to file an appeal ended at 5:00 p.m. Monday, February 23, 2009.*

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(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."<sup>21</sup> The Lawsons do not contest that, as a matter of law, the 30-day appeal period began on the first day after the decision was filed with the office of the board.

The Lawsons do not dispute that the board's decision was filed with the office of the board on the day it was issued, January 22, 2009, and mailed to them that day. Thirty days after January 22, 2009, is February 21, 2009, which is a Saturday. Because the thirtieth day fell on a Saturday, the time to file an appeal did not expire until the

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<sup>20</sup> AS 23.30.128(c) permits the commission to hold hearings and receive evidence on applications for dismissal of appeals for failure to prosecute the appeal. The commission's hearing notice instructed the parties that the "appellant may present evidence on why the appeal was filed late."

<sup>21</sup> AS 23.30.110(e) refers to compensation orders "rejecting the claim or making the award" but AS 23.30.080(g) refers to "civil penalty order[s] issued under (d), (e), or (g) of this section." The statutes do not establish a different hearing procedure for board penalty orders. AS 23.30.125(b) grants the commission power to review "a decision or order" of the board, without qualification. Therefore, the commission considers that "compensation order" as used in AS 23.30.127(a) includes board penalty orders for failure to carry workers' compensation insurance.

close of business on the next day that was not a "Saturday, Sunday, or legal holiday."<sup>22</sup> The following Monday, February 23, 2009, was not a legal holiday, therefore, the commission finds that the statutory 30-day appeal period expired at the close of business on February 23, 2009.

The commission finds that Mark Lawson filed an appeal on behalf of Mark and Patricia Lawson d/b/a/ JB Services on March 10, 2009.<sup>23</sup> The Lawsons do not contend that they contacted the commission in writing indicating a desire to appeal the board's decision with the commission before close of business on February 23, 2009, and the commission finds no record of written or e-mail contact from the Lawsons before the appeal period expired.

*b. The commission finds the Lawsons were not prevented from filing an appeal on time.*

The Lawsons do not dispute that the board's decision was mailed to them on January 22, 2009, by certified mail. They do not argue that the board's method of providing notice of the decision was not reasonably calculated to reach them or that the board failed to comply with due process. The Lawsons ask the commission to accept their late-filed appeal because they did not get *actual* notice of the decision until Tuesday, February 17, 2009, when a copy was faxed to them. This gave them six days to file an appeal, which they assert was too little time to appeal. They assert they did not get notice earlier because they were too busy to check their mail and collect the envelope from the post office before it was returned. They also assert they were delayed by the difficulty of filing an appeal and trying to find a lawyer.

*i. Mailing the decision to the Lawsons.*

The Lawsons do not argue that the board failed to use a method of notifying them of the decision that was reasonably calculated to reach them in time to appeal. The certified mail receipt indicates the letter was mailed on January 22, 2009,<sup>24</sup> and the

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<sup>22</sup> 8 AAC 57.060(a)(2).

<sup>23</sup> Notice of Appeal.

<sup>24</sup> Opp'n to Mot. to Accept Late-Filed Appeal, Ex. 1.

Lawsons do not challenge this. The Lawsons do not deny that the envelope was correctly addressed.

The Lawsons did not present evidence that the mail was undeliverable for some reason outside their control. Mark Lawson's testimony about a neighborhood flood did not establish that mail was not delivered, because the flood occurred six days *before* January 22, 2009. Since the Lawsons concede that their community mailbox was not blocked for more than a day or two, the neighborhood flooding did not prevent them from picking up mail and finding a postal notice. Patricia Lawson testified she did not see a postal notice, but she also testified she did not look for one. Therefore, her testimony does not establish that a postal notice of a certified letter did not arrive.

The commission finds the "track & confirm" print out relied on by the State to show delivery proves that the letter was returned to "ANCHORAGE, AK 99510" on February 18, 2009. It corroborates Mark Lawson's testimony that by the time he took the postal notice to his Eagle River post office, the envelope containing the decision was, if not returned to the board's post office box, at least on its way back to Anchorage. However, this does not tend to prove that the post office did not *deliver* a postal notice announcing the certified letter was available. Mark Lawson testified that he found the postal notice inside the pile of mail at home at least two days before taking it to the post office. Mr. Lawson called Mr. Lutz *because* he had a postal notice and was unable to retrieve the letter; therefore, Mr. Lawson had the postal notice in hand at least two days before Tuesday, February 17, 2009.

The commission finds that the letter was mailed on January 22, 2009, and delivered in accordance with U.S. Postal Service rules for certified mail. Mail is not returned to the sender until repeated notice of the certified mail piece is provided to the addressee. In this case, the Lawsons' failure to promptly collect the envelope resulted in the return of the envelope to the sender. However, the commission finds that the board provided sufficient and timely notice of the board's decision by mailing the decision to them at their address of record.

*ii. Not receiving the mailed decision.*

The Lawsons argued that they did not have sufficient notice of their right to appeal because they did not receive the decision until February 17, 2009. They concede that they may have received the postal notice of the certified letter, but they offered various reasons why they did not see it.

Patricia Lawson testified she did not see any postal notices. She also testified she usually ignored her mail for days at a time, and that at the relevant time she was too occupied with her aunt's condition to bother reading the mail. She testified that she pays household and business bills, but she usually paid bills only once a month. In response to a question under cross-examination whether she looked at the mail to find bills, she responded she paid bills "on-line." She testified the postal carriers did not deliver mail to their house and she would not have been home to receive it anyway. However, Patricia Lawson's testimony that she did not usually collect mail every day from the community mail box, and that she ignored the mail at home during the appeal period, does not establish that she was *unable* to collect a postal notice or that one was not delivered. It establishes only that she chose not to examine her mail in the relevant time period.

Mark Lawson offered several excuses for his failure to look at his mail. Lawson testified he was not plowing at this time because there was no snow, so he was not expecting payment from his municipal contract. He testified he was not expecting anything from the board because it had been so long since the hearing. He testified he was dealing with his son's arrest and seizure of his truck. Mark Lawson painted the picture of a man too concerned with organizing his neighbors and lobbying officials to pay attention to his mail. Mark Lawson presented testimony by Patricia that *she* was too occupied with her aunt's needs to collect and read the mail every day, but she did not testify that her husband Mark was unable to collect it or review it for the entire period from January 22, 2009, to February 17, 2009.

The commission finds Mark Lawson's testimony that he was too busy to read his mail for three weeks is exaggerated and not credible. For example, he testified he was "on the phone all day" about the flooding. While the commission might believe this

were true for a day or two, it does not believe this was true for the *entire* period. He admitted as much by saying that after his son was arrested he was “on the phone” to various officials about that – but he conceded on cross-examination that the charges were dismissed by February 5, 2009, well before the end of the appeal period. Finally, if, as Patricia Lawson testified, *she* was not reviewing the mail because she was caring for her aunt, Mark Lawson knew he had a good reason to review the mail himself. Therefore, the commission finds that the Lawsons did not fail to receive the decision, but that they *failed to collect the decision from the post office* after postal notice had been delivered.

*iii. Inability to obtain an attorney.*

To explain the delay from February 17 to February 23, Mark Lawson argues he could not have filed an appeal in that time because he could not find a lawyer. Mr. Lawson’s argument that he needed an attorney rests on his lack of knowledge of how to file an appeal.

Lawson first testified he called “fifty lawyers” to represent him after reading the decision, he amended this to “a minimum of twenty lawyers” and “other attorneys” in his affidavit.<sup>25</sup> He testified that

the first five days, . . . I spent trying to find an attorney that would represent me. It wasn’t until after it had already expired – the 30 days – when I’m finding I can’t find anybody who is willing to go in and represent me in this, that I actually realized I’ve got to do this myself.

That point was, he testified, when he “got a call from the last attorney while [he] was plowing for the city.” He said, “I remember that day that I got so ticked off I just told my wife that there is no way.” He testified he realized no attorney was going to represent him “probably just two or three days prior to my filing it.”

Although the Lawsons did not argue this precise point, corporations must be represented by an attorney “in all cases” unless an exception is made by law.<sup>26</sup> Before

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<sup>25</sup> Aff. of Mark Lawson, ¶ 6.

<sup>26</sup> AS 22.20.040(a)(2) provides that a corporation “shall appear by an attorney in all cases unless an exception to the corporation’s appearance by an attorney

the board, corporations do not need an attorney because a party, including a corporation, may be represented by “any person authorized in writing.” AS 23.30.110(d). The Alaska Workers’ Compensation Act includes no such explicit authorization in commission proceedings, so the commission has held that only attorneys may represent parties in appeals to the commission, although litigants may be assisted by non-attorneys.<sup>27</sup> Therefore, JB Services, Inc., the corporation, may not be represented by “any person authorized in writing” and must obtain an attorney to represent it in an appeal.

However, Lawson’s appeal is based on his assertion that the corporation does not exist.<sup>28</sup> He also challenges the order as against himself and Patricia, so he may file an appeal.<sup>29</sup> Also, because parties are not required to have an attorney in board proceedings, an officer of a corporation who appeared before the board may file a notice of appeal to the commission. The commission would then instruct the corporation to obtain representation by an attorney before proceeding further. Failure to obtain an attorney if ordered to do so may result in dismissal of the appeal.<sup>30</sup>

No attorney was required to file the Lawsons’ appeal, and the commission finds Mark Lawson did not believe one was necessary because he believes JB Services was not a corporation. Therefore, lack of an attorney did not prevent the Lawsons from filing an appeal on time.

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has been explicitly made by law.” *See Roberts v. State, Dept. of Revenue*, 162 P.3d 1214 (Alaska 2007).

<sup>27</sup> *Augustyniak v. Carr Gottstein Foods*, Alaska Workers’ Comp. App. Comm’n Dec. No. 064 (Nov. 20, 2007).

<sup>28</sup> Statement of Grounds for Appeal at 3, ¶ 5.

<sup>29</sup> *Id.* at 5, asserting that “we have since 1992 operated as JB Services (Partnership) and continue to do so. . . . Currently we operate as JB Services (Partnership) under Mark, Patricia, & Jeremy Lawson.” However, the board decision describes the employer as “JB Services, Inc., including the sole proprietorship formerly known as JB Services.” Bd. Dec. No. 09-0015 at 7. Since the board’s order defines the employer as a “sole proprietorship” and not a partnership, it is not clear the extent to which the board’s penalty order may be enforced against the partnership.

<sup>30</sup> 8 Alaska Admin. Code 57.250.

*iv. Complexity of the appeal notice.*

Mark Lawson argues that he could not have filed an appeal within the six days after receiving the decision because it took too long to prepare a notice of appeal. He said “there was no way” he “would have been able to get anything together within that period of time going with what I had to go through to get it filed.” His testimony on how long it took him to write his appeal varied. For example, he said:

From the time it took me to fill it out from the day that I actually felt that OK I’m going to have to do this myself to the day I actually sat down and went through nights and days drawing this thing up and then bringing it down here and filing it.

He also testified it took him about a week to write his appeal and that he wrote ten drafts, that he wrote in two or three days, or two full days, staying up late. In his affidavit, he says he “drew up several drafts based on the instructions.”<sup>31</sup> The commission finds Mark Lawson’s testimony regarding how much time he took to write his appeal is exaggerated, inconsistent, and not credible.

The commission’s requirements for filing an appeal are not onerous or complex. Simple forms are provided to assist unrepresented litigants and commission staff may help them complete the forms. To file a appeal requires two one-page forms, a copy of the decision that is appealed, and a \$50 filing fee.<sup>32</sup> If there are deficiencies, the commission notifies the appellant of the deficiency, instructs the appellant, and provides time to remedy the deficiency. The commission finds that the process of filing an appeal is not so complex that it prevented Lawson from filing an appeal on time.

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<sup>31</sup> Aff. of Mark Lawson, ¶ 8.

<sup>32</sup> The commission Notice of Appeal form combines a Notice of Appeal, Statement of Grounds for Appeal, list of parties taking the appeal, and certificate of service. *See* appellants’ Notice of Appeal. In addition, the appellant must file a one page form designating the hearing recording for transcription, a copy of the decision appealed, and a filing fee. 8 Alaska Admin. Code 57.070(a). An appellant unable to pay the filing fee must also file a financial statement affidavit and request for fee waiver. 8 Alaska Admin. Code 57.090.

*v. Misdirection or misinformation from the commission or the board.*

In response to a question on cross examination asking if he recalled speaking to the director of the Workers' Compensation Division and her advice to file an appeal as soon as possible, Mr. Lawson testified he had called the director on February 17, 2009, and that he called Ms. Beard, the appeals commission clerk, that same day:

Mark Lawson: And that same day I spoke with Ms. Beard, through [the Director], she was the one that gave me the name of the people down here in the Anchorage office. I spoke with Ms. Beard at that time.

Erin Pohland: So, you recall that on or around February seventeenth, Ms. Heikes advised you to file your appeal if you were going to do so, ASAP.

Mark Lawson: ASAP, that's correct.

Mark Lawson corrected his testimony in his affidavit to state he first contacted the commission on February 27, 2009.<sup>33</sup> The commission finds that Mark Lawson did not contact the commission until after the appeal period expired. Therefore, information that he could request the commission to accept a late-filed appeal was not material to failure to file on time.<sup>34</sup>

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<sup>33</sup> Aff. of Mark Lawson, ¶ 3.

<sup>34</sup> Mark Lawson also testified regarding when he spoke with the commission clerk:

Had I not known about a – maybe I abused – I am sorry if I did. The fact that I was told I could file a late filing when I spoke with Ms. Beard across the way here. Maybe I put that in my brain, I don't know. Maybe I should have spent the whole five days doing that. I did not have the ability to do that with everything that was going on.

By referring to "the whole five days," Mark Lawson appeared to testify that he spoke to Ms. Beard *before* the appeal period ran and her statement that he could file a motion to accept late-filed appeal caused him to delay past the deadline. The commission's telephone record showed that Mr. Lawson (JB Services) did not telephone the commission until Feb. 27, 2009. The clerk told him he could file a request to accept a late-filed appeal *because* the appeal period had run. The "whole five days" cannot refer to the time from Feb. 27, 2009, through Mar. 10, 2009, which is 12 days.

The board notice regarding appeal procedures clearly states an appeal must be instituted “within 30 days of the filing of this decision.”<sup>35</sup> The Lawsons do not argue that a reasonable person reading the board’s decision would be confused or believe the 30-day appeal period began when the appellant actually received notice of the decision – that is, when the envelope containing it was opened and the decision read. However, at one point in the hearing, Lawson suggested he was late because he thought he had 30 days from *receipt* of the decision to file an appeal.

Mark Lawson did not testify that he was told he had 30 days from receipt by a division or commission employee. Mr. Lawson said Mr. Lutz told him he had 30 days to appeal the decision and he (Mr. Lawson) did not read the part of the decision that tells when the appeal period runs until after the appeal period expired. In his affidavit, he stated he telephoned Mark Lutz on February 17, 2009, and Mark Lutz told him “that the Decision and Order was issued on January 22, 2009, and was unsure if the 30-day deadline for appeal was from the date the order was sent or was received.”<sup>36</sup>

Mr. Lutz’s affidavit confirms that Mark Lawson called him on February 17, 2009:

On February 17, 2009 I received a telephone call from Mark Lawson during which he expressed concerns that, having been out of town for some time, he had not been able to pick up a piece of certified mail that he believed was a Decision and Order issued by the Alaska Workers’ Compensation Board.<sup>37</sup>

Mr. Lutz agrees that he faxed a copy of the decision to Mr. Lawson. However, Mr. Lutz states, “I also told Mr. Lawson that the last page of the Decision and Order explained the processes available to him if he wanted to appeal the Board’s order.”<sup>38</sup>

Mark Lawson admits that on February 17, 2009, Mr. Monagle told him “there was a time limit for filing an appeal.”<sup>39</sup> Mr. Monagle’s affidavit states, “I repeatedly advised

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<sup>35</sup> Bd. Dec. No. 09-0015 at 15.

<sup>36</sup> Aff. of Mark Lawson, ¶ 4. The sentence is not altogether clear, as either Mr. Lawson or Mr. Lutz could be the subject of the phrase “was unsure if the 30-day deadline for appeal was from the date the order was sent or was received.”

<sup>37</sup> Aff. of Mark Lutz, ¶ 2.

<sup>38</sup> *Id.*, ¶ 3.

Mr. Lawson to file his appeal to the Workers' Compensation Appeals Commission before the appeal period expired."<sup>40</sup> He states again, "I repeatedly reminded him that the Division could not intercede on his behalf, and that he would have to file the appeal before the 30 day appeal period expired, which as I recall, would transpire within a week of our phone call."<sup>41</sup>

Michael P. Monagle's repeated warnings to file an appeal before the appeal period expired went unheeded. Mark Lawson is not unfamiliar with legal proceedings as a businessman. His appeal is based on a theory of board error regarding the structure of his business and meaning of "employee." He may have thought it would not be difficult to be excused if he filed an appeal within 30 days of receiving the decision. Mark Lawson's testimony that he believed he had 30 days from the day he *received* the decision to file an appeal is self-serving and the commission finds it is not credible.

The Lawsons did not present evidence that they were out of state, unavoidably absent from their home, seriously ill, or otherwise unable to file an appeal on time due to circumstances outside their control.<sup>42</sup> The commission finds that part of the time for

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<sup>39</sup> Aff. of Mark Lawson, ¶ 6.

<sup>40</sup> Aff. of Michael P. Monagle, ¶ 4.

<sup>41</sup> *Id.* at ¶ 5.

<sup>42</sup> In *Berean v. Coleman Bros. Timber Cutting, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 051 (Aug. 2, 2007), the commission listed several events that may present good cause for delay in filing an appeal: grave sickness or incapacity requiring medical assistance during the appeal period in appellant or family member, active military duty, unavoidable absence from home, or serious mental disorder. *Id.* at 5-6. While Patricia Lawson's need to care for her aunt could be a reason for her personally to file late, it does not excuse both parties, each of whom can act for the business that is the object of the board's order. In *Olekszyk v. Smyth Moving Service, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 071 (May 28, 2008), the commission rejected the late appeal of a man who argued that back pain prevented him from driving to his mail box to collect his mail, thus delaying receipt of the decision, although he conceded he received the decision prior to the expiration of the appeal date. But, in *Hearon v. Westaff USA, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009), the commission accepted a late-filed appeal, where the appellant was prevented by a severe storm from filing the appeal on the day he

appeal was consumed by other affairs, but these events did not prevent them from sending an e-mail or fax or mailing a letter to the commission saying they wanted to appeal the decision. The commission finds that the Lawsons were not prevented from filing a timely appeal by events outside their control.

*c. Whether the appeal period is directory or mandatory, substantial compliance is required.*

In *Kim v. Alyeska Seafoods, Inc.*,<sup>43</sup> the Supreme Court reversed the commission's decision affirming a board decision dismissing Kim's claim. The board dismissed the claim because Kim's attorney failed to file an affidavit of readiness for hearing within two years, based upon AS 23.30.110(c), which provides:

If the employer controverts a claim on a board-prescribed notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

The commission had held that the board's regulation requiring an affidavit of readiness to request a hearing<sup>44</sup> was a reasonable interpretation of the requirement to request a hearing, but the Court ruled this was error "[b]ecause a statutory dismissal results from failing to *request* a hearing, rather from failing to *schedule* one."<sup>45</sup> The Court held that a "party must strictly comply with a procedural statute only if its provisions are mandatory; if they are directory, then 'substantial compliance is acceptable absent significant prejudice to the other party.'"<sup>46</sup> The Court said:

A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create "guidelines for the orderly conduct of public business"; and (3)

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believed it was due, and mailed it priority mail as soon as possible so that it arrived at the commission only one working day late.

<sup>43</sup> 197 P.3d 193 (Alaska 2008).

<sup>44</sup> 8 AAC 45.070(b)(1).

<sup>45</sup> *Kim*, 197 P.3d at 196 (emphasis in original).

<sup>46</sup> *Id.*, (quoting *S. Anchorage Concerned Coal., Inc. v. Mun. of Anchorage Bd. of Adjustment*, 172 P.3d 768, 772 (Alaska 2007), citing *In re Wiederholt*, 24 P.3d 1219, 1233 (Alaska 2001)).

“serious, practical consequences would result if it were considered mandatory.”<sup>47</sup>

The Court held that the last sentence of AS 23.30.110(c), providing that if a request for hearing is not filed within two years “the claim is denied,” was affirmative, because it “gives an affirmative directive, rather than a prohibition, simply stating that a claim is denied if the employee does not request a hearing within two years.”<sup>48</sup> By contrast, the Court noted, AS 09.10.010 states, “A person may not commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued . . . .”<sup>49</sup> Applying this test to the commission’s 30-day appeal period produces somewhat mixed results.

Examined alone, the wording of AS 23.30.127(a) is affirmative, providing that a party “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,” instead of providing “may [not] appeal a compensation order . . . [unless] initiated within 30 days after the compensation order is issued.” However, the language of AS 23.30.127(a) is designed to work with AS 23.30.125(a), which states that “A compensation order becomes effective when filed with the office of the board . . . 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.” The negative limitation (“unless proceedings . . . are instituted”) is not applied to the grant of right to appeal – it is applied to the statute establishing the day a board decision becomes final.<sup>50</sup> Together, the statutes require appeals to be filed before the thirty-first day after the board’s decision is filed. The mandatory consequence of failure to institute proceedings is that the board’s decision becomes final.

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<sup>47</sup> *Kim*, 197 P.3d at 197 (quoting *S. Anchorage Concerned Coal.*, 172 P.3d at 772 (citing *In re Wiederholt*, 24 P.3d at 1233)).

<sup>48</sup> *Kim*, 197 P.3d at 197.

<sup>49</sup> *Id.* at 197 n.15.

<sup>50</sup> Generally, “when an affirmative direction is followed by a negative or limiting provision, it becomes mandatory.” Norman B. Singer, 3 *Sutherland Statutory Construction* § 57:9 (6<sup>th</sup> ed. 2001) (citations omitted).

AS 23.30.127(a) is intended primarily to grant procedural benefits to individuals, but it also promotes the orderly conduct of public business. The orderly conduct of public business requires points of finality. In *Berean v. Coleman Bros. Timber Cutting, Inc.*, the commission said, “Finality of [board] 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.”<sup>51</sup> Thus, to the extent AS 23.30.127(a) promotes the orderly conduct of public business it is “directory,” but, generally, when “a statute specifies acts to be done by parties to entitle them to maintain an action or *to perfect an appeal*, it is generally mandatory.”<sup>52</sup>

Finally, there are few serious, practical consequences to the operation of the workers’ compensation system if AS 23.30.127(a) is mandatory, but the consequences to the individual of failure to file an appeal on time are serious. Failure to comply with the 30-day appeal period may be fatal to the appeal.

However, the difference to the individual between a mandatory or directory statute of this type may be less than first apparent. In *Jones v. Short*,<sup>53</sup> the Supreme Court held that a mandatory bar against a contract action by an unregistered contractor<sup>54</sup> could be abrogated by “substantial compliance” with the statute.<sup>55</sup> “Substantial compliance,” the court noted, “involves conduct which falls short of strict

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<sup>51</sup> App. Comm’n Dec. No. 051 at 3.

<sup>52</sup> Norman B. Singer, 3 *Sutherland Statutory Construction* § 57:23 (6<sup>th</sup> ed. 2001) (citations omitted, emphasis added).

<sup>53</sup> 696 P.2d 665 (Alaska 1985).

<sup>54</sup> AS 08.18.151 provided then that

A person acting in the capacity of a contractor may not bring an action in a court of this state for the collection of compensation for the performance of work or for breach of a contract for which registration is required under this chapter without alleging and proving that the contractor was a registered contractor at the time of contracting for the performance of the work.

<sup>55</sup> 696 P.2d at 668.

compliance with the statutory registration requirements, but which affords the public the same protection that strict compliance would offer.”<sup>56</sup>

In *Kim v. Alyeska Seafood, Inc.*, the court held that “determination that a statute is directory instead permits substantial compliance with statutory requirements, rather than strict compliance.”<sup>57</sup> Substantial compliance, the Court explained in *Kim*, does not mean that a party “can simply ignore the statutory deadline and fail to file anything.”<sup>58</sup> Thus, the distinction between a directory and mandatory statute, from the point of view of the appellant, may be little because even strict compliance is subject to some reasonableness in enforcement.<sup>59</sup> At a *minimum*, substantial compliance with AS 23.30.127(a) is required, and an appellant may not simply ignore the statutory deadline and fail to file anything. In the absence of prejudice to the opposing party, the commission holds that substantial compliance with AS 23.30.127(a) is sufficient to preserve an appeal.<sup>60</sup>

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<sup>56</sup> 696 P.2d at 667 n.10

<sup>57</sup> 197 P.3d at 198.

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., *Chalovich v. State, Dep’t of Nat. Res.*, 104 P.3d 125 (Alaska 2004) (holding mining statute requiring fee payment or performance of annual labor by Sept. 1, 2004, requires strict compliance, but Dep’t unreasonably failed to treat as timely a payment postmarked by the regulatory deadline); *Herter v. State*, 715 P.2d 274, 275-76 (Alaska App. 1986) (holding substantial compliance, rather than strict compliance, is prerequisite to admission of breath test results against defendant); *State v. Jeffery*, 170 P.3d 226, 234 (Alaska 2007) (holding strict compliance with judicial retention election filing deadlines was required, affirming division of election’s omission of judges from ballot due to late-filed declarations of intent to stand for retention, but describing instances when late filings were excused due to statutory ambiguity; dissent, *id.* at 242-48, arguing that judicial council’s timely filing of retention evaluation with division constituted acceptable substantial compliance).

<sup>60</sup> The commission has permitted substantial compliance with the statute. When the commission receives timely but incomplete appeal documents, it notifies appellants of deficiencies and provides instruction and time to file complete or amended documents. See *Augustyniak v. Carrs Safeway*, Alaska Workers’ Comp. App. Comm’n Dec. No. 064 (2007). See also *Gauthier v. State, Div. of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 052 (2007) (noting commission docket notice calling omission to appellant’s attention); *Rockstad v. Chugach Eareckson*, Alaska

*d. Mark and Patricia Lawson failed to substantially comply with the 30-day time limit to file an appeal.*

The commission found above that Mark and Patricia Lawson failed to file any writing indicating a desire to appeal in the commission before close of business on Monday February 23, 2009, and Mark and Patricia Lawson do not deny it. The Lawsons did not contact the commission until February 27, 2009, when Mark Lawson telephoned the commission. When he came in to collect forms, he did not stay to complete the simple notice of appeal form at that time. The Lawsons did not file an appeal until March 10, 2009, or 15 days late.

The Lawsons concentrated on explaining why, although they were at home, they did not pick up their mail or review it after picking it up. Those explanations concern events that ended before February 17, 2009, when they concede they knew the board's decision was adverse to them. They did not present testimony that *specifically* addressed why no appeal notice, or anything else indicating a desire to appeal, was filed at the commission by Monday, February 23, 2009. All the excuses offered for not collecting their mail do not explain why, once they knew of the decision, they did not file a timely appeal or make an effort to comply with AS 23.30.127(a).

Substantial compliance is less than strict compliance, but it does not mean that a deadline may be ignored. In *State v. Jeffery*, the dissent argued that a Judicial Council evaluation (the culmination of a process begun in January with the judges' notice to the Council that they would stand for retention) transmitted to the Election Division on July 15, constituted substantial compliance with the requirement that judges declare candidacy for retention to the Division by August 1. The Division had, the dissent agreed,

authority to require something else from the judge by way of a declaration. Here, by promulgating its own declaration of candidacy form for judges seeking retention, the Division chose to require a specific form of declaration that differs from the declaration embedded in the judicial evaluation reports filed by the Council. As the court correctly observes in today's opinion,

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Workers' Comp. App. Comm'n Dec. No. 100 (2009) (noting grant of motion to accept late-filed motion for extraordinary review).

because “the statutes are silent with regard to what substance a filing must have to be considered a judge’s ‘declaration of candidacy,’” the Division has authority to adopt its own declaration form and to require judges seeking retention to comply with it — just as the Council has authority to decide what a judge should be required to submit in order to declare candidacy to the Council for purposes of initiating its retention evaluation process. But as the court also acknowledges, the Division has broad discretion to accept declarations that are timely filed but fail to conform exactly to the Division’s declaration form.<sup>61</sup>

The dissent then reasoned that the judges had, through the Council’s evaluation, submitted a timely, but non-conforming declaration that substantially complied with the statute because the content of the Council evaluations gave the same notice as the judges’ personal declarations. The majority, however, held that the Division’s interpretation of the statute (requiring a personal declaration from the judge and filing fee by August 1) was reasonable and entitled to deference.<sup>62</sup> In other words, the majority did not consider the Council evaluations to satisfy the requirement for a personal declaration.<sup>63</sup> The majority also rejected the judges’ argument that they “substantially complied with the August 1 deadline . . . when they filed their declaration of candidacy forms with the division in mid-August.”<sup>64</sup> Timelines in elections statutes must be strictly complied with by candidates,<sup>65</sup> so that in the absence of statutory ambiguity, “a candidate’s oversight” does not justify departure from the strict

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<sup>61</sup> 170 P.3d at 243 (citations omitted).

<sup>62</sup> *Id.* at 232-33. Although the commission used similar reasoning in its decision in *Kim v. Alyeska Seafoods, Inc.*, App. Comm’n Dec. No. 042 at 11-14, deferring to the board’s interpretation of the statute in its regulations, on appeal the Supreme Court held the commission erred because the statute required only filing a request for hearing, not scheduling a hearing as the board’s regulation provided. *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d at 196.

<sup>63</sup> 170 P.3d at 233.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 234.

compliance standard.<sup>66</sup> But, the dissent did not suggest that the late personal declarations substantially complied with the statutory requirement – it asserted that the timely but technically insufficient Council filing was substantial compliance:

at bottom, the same general principle applies here that governs other election-filing requirements: when a required filing is timely, proper in all substantive respects, and deficient only in technical or formal ways that do not impair the requirement's basic purposes and goals, the absence of strict compliance should not bar a candidate from appearing on the ballot.<sup>67</sup>

Substantial compliance does not then mean late compliance, it means, as the dissent in *State v. Jeffery* noted, "*actual* compliance in respect to the substance essential to every reasonable objective of the statute."<sup>68</sup> Where a statute provides a deadline, it is a reasonable objective of the statute that the deadline be met. *Kim* does not hold otherwise, as the Supreme Court specifically stated that filing a *timely* request for hearing with a request for additional time to file the affidavit of readiness "tolls the time-bar until the Board decides whether to give the claimant more time to pursue the claim."<sup>69</sup>

In this case, the Lawsons ignored their mail for weeks and, after they knew the board's decision was adverse to them, they failed to file anything in the commission, or even to contact the commission, before the deadline to appeal the board's decision.

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<sup>66</sup> 170 P.3d at 234.

<sup>67</sup> *Id.* at 247 (citing at n.40 *Grimm v. Wagoner*, 77 P.3d 423, 430 (Alaska 2003) and *Ruiz v. Sylva*, 102 Cal. App. 4th 199, 125 Cal. Rptr. 2d 351, 361 (2002) ("[s]ubstantial compliance . . . means *actual* compliance in respect to the substance essential to every reasonable objective of the statute" (emphasis in original) (citation omitted)) and comparing *Williams v. Clark County Dist. Attorney*, 118 Nev. 473, 50 P.3d 536, 540-41 (2002) (timely petition challenging residency of candidate ruled valid despite lack of supporting affidavit attesting to petitioner's personal knowledge because later-filed affidavit ensured that every reasonable objective of the statute was met and therefore established substantial compliance).

<sup>68</sup> 170 P.3d at 247 n.40.

<sup>69</sup> 197 P.3d at 198. Kim's request for hearing, without an affidavit, was filed two days *before* expiration of the time period. The Court held that on the facts this was substantial compliance.

Unlike Kim's attorney, the Lawsons did not "toll" the running of the statutory deadline by filing a timely, but technically deficient, document, or asking for more time to submit their appeal paperwork. The commission concludes that the Lawsons' late appeal does not substantially comply with the requirement of AS 23.30.127(a) that an appeal be filed within 30 days.

*e. The Lawsons failed to present good cause to excuse their late filing of the appeal.*

In a number of decisions, the commission has held that it will *excuse* late filing of an appeal when good cause is presented for the delay.<sup>70</sup> In those cases, the commission looked to whether the appellant presented evidence of circumstances that justify equitable relief: if the delay was due to a circumstance outside the appellant's control, or the appellant was prevented from filing on time, if the appellant made a good faith attempt to file on time, and the prejudice to the opposing party.

In *Shea v. State, Dep't of Admin.*, 204 P.3d 1023, (Alaska 2009), the Supreme Court held the superior court abused its discretion by failing to excuse a six day delay in filing an administrative appeal when the appellant's attorney (1) attempted to file the appeal on Wednesday, June 20 (the last day of the appeal period), but the clerk erroneously directed the appellant to file at the workers' compensation board; (2) attempted to file again on Thursday, June 21, but was refused by the clerk owing to a caption issue and lack of a cost bond; and (3) was unable to file on Monday, June 25, because he was stranded in Valdez until after the court closed. He finally filed the appeal on Tuesday, June 26.

Appellate Rule 502(b) permits the appellate court to validate an act done after the expiration of the time period provided in the appellate rules "on motion of a party, showing good cause." The Supreme Court held that Shea's attorney demonstrated good cause, given the brevity of the delay, the "prima facie showing of good faith

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<sup>70</sup> *Hearon v. Westaff USA, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009) (appeal filed one working day late was excused because Chinook storm prevented appellant from leaving home to file appeal); *Berean*, App. Comm'n Dec. No. 051 at 5.

attempts to file in a timely manner, and the absence of prejudice.” No such provision exists in AS 23.30.127(a). The commission’s regulation on extensions of time, 8 Alaska Admin. Code 57.140, does not authorize the commission to extend deadlines established by statute.<sup>71</sup> Because the commission lacks explicit statutory authority to waive the deadline established by the legislature, the commission has held that “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.”<sup>72</sup>

The Supreme Court’s recent decision in *Bohlmann v. Alaska Constr. & Engineering, Inc.*<sup>73</sup> does not require otherwise. In *Bohlmann*, the Supreme Court held that the board and commission erred in concluding that Bohlmann’s affidavit of readiness was late because, in view of misinformation stated by the employer in a prehearing conference, the division’s workers’ compensation officer, the board’s designee, “should have told Bohlmann in more than general terms how he might still preserve the claim, or at least specifically how Bohlmann could determine whether AC&E was correct in contending that the claim was already barred.”<sup>74</sup> Because the board found Bohlmann had shown he was capable of filing claims and petitions without counsel, the Court presumed that “Bohlmann would have filed a timely affidavit of readiness had the board or staff satisfied its duty to him.”<sup>75</sup> Therefore, the appropriate remedy was to deem the request for hearing timely. In other words, if Bohlmann had

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<sup>71</sup> See *Crawford & Co. v. Baker-Withrow*, 73 P.3d 1227, 1229 (Alaska 2003) (holding board’s regulation 8 Alaska Admin. Code 45.195 gave board no authority to waive a statutory requirement).

<sup>72</sup> *Berean*, App. Comm’n Dec. No. 051 at 5.

<sup>73</sup> 205 P.3d 316 (Alaska 2009).

<sup>74</sup> *Id.* at 320. The Court held that the “board designee or the board” should have corrected the error; thus, the Court appears to have considered that as the board’s designee, the workers’ compensation officer, a technical employee without legal training, is held to the same duty as the board. It is not clear the Court intended to hold every division employee to the same the same duty as the board.

<sup>75</sup> *Id.* at 321.

not been prevented by the employer's misinformation, and the officer's failure to correct the misinformation, Bohlmann would have filed on time.

*Bohlmann* illustrates another mechanism by which a person may demonstrate that he or she was prevented from filing an appeal on time. However, the Lawsons did not establish through credible evidence that they were misled by commission staff or other official instructions *as to the due date of the appeal*. Mark Lawson testified:

From the day I received it, I was on the phone with just about everybody that I could get ahold of. I called, I even spoke with Ms. Beard [the appeals commission clerk]. She at that point advised me that I should apply for a late filing due – it was only I think about four or five days from the day I received it from Mr. Lutz to the day I was supposed to have an appeal filed. I didn't know how to file an appeal, I didn't know what [it] was, I've got a \$90,000 fine sitting over my head. Do I want to handle it myself? No. So I attempted at that point to contact attorneys through a list, contacting the WC board, going into the WC office right behind us here, to try to talk with them to explain to them some of the things that I think they don't understand in all of this. I spent a great deal of time doing this. Then to have Ms. Beard who was very nice across the way here help me get the documentation as far as what I needed filed, I think I did it as fast as I possibly could.

Although he testified he spent a great deal of time contacting the workers' compensation offices, his affidavit describes only three telephone calls on February 17 to the Workers' Compensation Division, but no calls to the commission. He did not call the division or the commission again until ten days later – after the appeal period expired.

*f. The Lawsons failed to demonstrate a good faith effort to file an appeal on time.*

Asked if he read the portion of the board's decision that advised him of his right to appeal, Lawson testified:

Not until, I, after I was told by Ms. Beard about the 30 days and I said is it 30 days – I was still under the impression then that it would be 30 days from the day we receive it, if I am on vacation for 3 weeks out of the four week period and I get something the day I get back that was filed on me three weeks before, how am I suppose to – it is not that I avoided getting it – it's that I don't

get it until right at the time that something is supposed to be filed. Number one I didn't know how, I didn't know what, I had no idea but I worked my best to try and get that information to get this filed.

Mark Lawson does not argue that if he had read the appeal notice he would have continued to believe he had 30 days from receipt of the decision to appeal. Patricia Lawson and Mark Lawson, knowing the decision resulted in a \$91,000 fine, admit they did not read the appeal procedures portion of the decision after receiving it – Patricia Lawson testified she *still* has not read the decision. If the appellants did not even *read* the decision's description of appeal procedures, they cannot claim that they made *good faith efforts* to file an appeal on time.

The commission finds that Mark Lawson made at least two telephone calls to the division. He was angry about the decision and highly agitated. However, he did not take Mr. Monagle's repeated advice to file an appeal before the period expired. He did not contact the appeal commission until four days after the appeal period expired. He did not take Ms. Heikes' advice to file his appeal as soon as possible. Instead, he delayed filing the appeal another 11 days. The commission finds that Mark and Patricia Lawson did not make a good faith effort to file a timely appeal.

#### *4. Conclusion.*

The Lawsons were not prevented from filing an appeal by natural disaster, grave illness, or absence from the state. They were not misdirected to the wrong forum by the division or given the wrong date to file an appeal by commission staff. Lawson's testimony that he sought an attorney but none would represent him may be true, but failure to secure attorney representation does not excuse the delay in filing an appeal because his preference for an attorney, or the need for an attorney to represent a corporation, did not prevent him from filing a timely notice of appeal. The commission found Lawson's testimony that the notice of appeal was too difficult to complete in six days was not credible.

The right to request acceptance of a late appeal does not guarantee the appeal will be accepted late. The commission finds that the Lawsons did not demonstrate that they were delayed in filing this appeal by circumstances outside their control, such as

absence from the state, grave illness, flood, fire, or unforeseen inability to leave their home the day the appeal was due owing to severe weather conditions.

The State concedes it suffered no prejudice by the late filing of the appeal. However, the absence of prejudice to the opposing party is not the only showing needed to excuse a late-filed appeal. A good faith effort to comply with the deadline, the existence of good cause – something outside appellant’s control that prevented the appellant from filing on time – and the brevity of the period of delay once prevention ceases, must be shown as well.<sup>76</sup> The commission concludes that because the Lawsons failed to demonstrate good cause to excuse their delay filing the appeal, and a good faith effort to file on time, their appeal must be dismissed.

### ORDER

The appellants’ motion to accept a late-filed appeal is DENIED and the appeal is DISMISSED.

Date: May 29, 2009

ALASKA WORKERS’ COMPENSATION APPEALS COMMISSION



*Signed*

\_\_\_\_\_  
Philip Ulmer, Appeals Commissioner

*Signed*

\_\_\_\_\_  
Jim Robison, Appeals Commissioner

*Signed*

\_\_\_\_\_  
Kristin Knudsen, Chair

### APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission denied Mark and Patricia Lawson’s motion to accept their late appeal from the board’s decision assessing a penalty against JB Services, Inc., and the sole proprietorship JB Services, and imposing liability for workers’ compensation claims on Mark and Patricia Lawson. The appeals commission’s decision ends all administrative proceedings. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to

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<sup>76</sup> See *Hearon*, App. Comm’n Dec. No. 107 at 7-8.

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 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.

You may request reconsideration by the commission. Your request for 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 certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission's Decision No. 110, the final decision in the appeal of *Mark and Patricia Lawson, d/b/a JB Services, vs. State of Alaska, Workers' Compensation Division*, Appeal No. 09-009, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 29th day of May, 2009.

#### CERTIFICATE OF DISTRIBUTION

I certify that on 5-29-09 a copy of this Final Decision in AWCAC Appeal No. 09-009 was mailed to M. & P. Lawson and E. Pohland at their addresses of record and faxed to Lawsons, Pohland, Director WCD, & AWCB Appeals Clerk.

Signed \_\_\_\_\_ 5-29-09  
B. Ward, Deputy Clerk Date

Signed \_\_\_\_\_  
L. Beard, Appeals Commission Clerk