

Alaska Workers' Compensation Appeals Commission

Teresa Gauthier, d/b/a St. Mary's
Assisted Living Home,
Appellant,

vs.

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

Final Decision and Order

Decision No. 052 August 24, 2007

AWCAC Appeal No. 07-024

AWCB Decision No. 07-0059

AWCB Case No. 700001902

Motion to allow a late filed appeal from Alaska Workers' Compensation Board Decision No. 07-0059, issued March 21, 2007, by the southcentral panel at Anchorage, Janel Wright, Designated Chair, Patricia A. Vollendorf, Member for Labor, Linda Hutchings, Member for Industry.

Appearances: Joseph R. D. Loescher, Smith Alling Lane, P.C., for appellant Teresa Gauthier. Talis J. Colberg, Attorney General, and Larry McKinstry, Assistant Attorney General, for the State of Alaska, Division of Workers' Compensation.¹

Commissioners: Philip Ulmer, John Giuchici, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Teresa Gauthier asks the commission to accept her late filed appeal of a decision assessing penalties against an employer for failure to provide workers' compensation insurance for employees. Based on our reasoning in *Berean v. Coleman Brothers*

¹ The appellant named the Alaska Workers' Compensation Board as the appellee. The proper party appellee is the Director of the Division of Workers' Compensation, who brought the enforcement petition on behalf of the State of Alaska against Gauthier, or the State of Alaska Division of Workers' Compensation. AS 23.30.080(f). The board's decision on the petition is appealed to the commission under AS 23.30.127, but the board is not a party to the appeal.

Timber Cutting, Inc.,² the commission denies the motion and dismisses Gauthier's appeal.

Factual background.

Teresa Gauthier, d/b/a St. Mary's Assisted Living Home was the subject of a Petition for Finding of Failure to Insure and Assessment of Civil Penalty filed by the Director of the Division of Workers' Compensation. The board held a hearing on the petition on February 22, 2007. Gauthier represented herself in the hearing; Investigator Richard Degenhardt represented the petitioner. The board determined that Gauthier had failed to secure insurance to pay workers' compensation benefits for her employees from December 26, 2005 through September 20, 2006. She was assessed a civil penalty of \$16,650 for failure to secure workers' compensation insurance, and ordered to make payment within seven days of service of the board's order.³ The board's decision was filed (issued) on March 21, 2007.

The appeal to the commission.

Gauthier, who is represented on appeal by an attorney, filed an appeal of the board's decision No. 07-0059 on May 23, 2007. Gauthier filed her appeal 63 days after the board issued its decision.

Gauthier failed to file a motion to accept a late filed appeal with the appeal. A commission docket notice sent May 24, 2007, called this omission to the appellant's attention. On June 6, 2007, the appellant filed a motion to accept a late filed appeal. The motion was served on the Juneau office of the Attorney General by mail, posted by private postal meter. Therefore, opposition to the motion would be due seven days after service,⁴ which was effective on receipt of the motion.⁵

² AWCAC Dec. No. 051 (August 2, 2007).

³ *In re Teresa Gauthier*, AWCB Dec. 07-0059, 14 (March 21, 2007).

⁴ 8 AAC 57.210(d).

Within seven days after service of a motion, a party opposing a motion must file and serve a memorandum in opposition.

⁵ 8 AAC 57.040(f).

The Attorney General, through Assistant Attorney General McKinstry, filed an opposition to the appellant's motion on behalf of the State on June 19, 2007. The State filed its opposition one day late. A motion to allow the late filed opposition was filed on the same day. The assistant attorney general provided an affidavit supporting his request, stating that the appellant's motion was received in Juneau on June 10, 2007; that he completed the opposition on Friday, June 15, 2007, that his office assistant mailed the opposition to the commission instead of delivering or faxing it on Monday June 18, 2007; and that it was immediately faxed to the commission on being made aware the next day that it had not been filed. Gauthier filed an opposition to the State's motion on June 28, 2007, urging the commission to reject the State's opposition, unless it allowed appellant's late filed appeal, because to do otherwise would be to condone a "double-standard."

Discussion.

1. The appellant had notice of the decision assessing a civil penalty against her.

The appellant urges us to permit her appeal to be filed late because AS 23.30.127 (a)⁶ is unconstitutional. She argues the provision of 30 days to appeal to the commission "within 30 days after the compensation order is filed with the office of

If papers are served by first class United States mail, the date of mailing as shown by the postmark or other proof from the United States Postal Service, is the date of service. A postmark date from a privately owned and controlled postage meter is not sufficient to prove the date of mailing, and papers postmarked in this manner are considered served on the date of receipt by the party.

⁶ AS 23.30.127 provides in part:

(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.

the board under AS 23.30.110" is unconstitutional because filing the order with the board is insufficient to give notice to the parties of the board's decision. The appellant's argument is without merit. AS 23.30.127(a) permits an appeal within 30 days after the order is filed as provided under AS 23.30.110. In AS 23.30.110(e) the manner of filing the order is described:

The order rejecting the claim or making the award, referred to in this chapter as a compensation order, shall be filed in the office of the board, and a copy of it shall be sent by registered mail to the claimant and to the employer at the last known address of each.

In short, the act of filing the compensation order in the office of the board is completed by service of the order on the claimant and the employer at their addresses of record. While the appeals commission does not have the expertise to rule on a matter of constitutional law, it is able to interpret the workers' compensation statutes. We believe the reference to AS 23.30.110 in AS 23.30.127(a) incorporates the condition that the board mails the decision to the appellant when the board decision is filed in the office of the board. Indeed, in the case of the board's decision, we note that the clerk certified that it was mailed to the appellant on March 21, 2007, and the appellant's exhibit 1, page three, indicates it was delivered to the appellant at her address of record the next day.

Gauthier's motion states that she denies receiving the board's decision.⁷ On page one of her motion, she states she will file an affidavit "this week" setting out her testimony. She has not filed such an affidavit. We find that there is no evidence that Gauthier, d/b/a St. Mary's Assisted Living Home, failed to receive a copy of the board's decision at her address of record in the board proceedings. There is evidence (the clerk's certification) that the decision was duly mailed to the parties at their addresses of record as required by AS 23.30.110(e). The Alaska Supreme Court has long held this

⁷ Appellant's Mot. to Allow Late Filed Appeal 1:19.

is sufficient to provide notice as a matter of law.⁸ We conclude that Gauthier had notice of the decision.

2. The appellant did not present evidence of good cause to excuse the late filed appeal.

In a recent decision, we addressed the commission's authority to extend the time allowed for appeal to the commission.⁹ We noted that AS 23.30.127(a) requires appeals to be filed with the commission within 30 days, and that the legislature did not expressly provide for delays to be excused.¹⁰ We pointed out that a statute may not be extended by an administrative agency's power to relax its regulations.¹¹ We said:

We believe the exercise of any implied equitable authority should be limited to cases where the appellant was prevented by filing on time under circumstances recognized by the courts as allowing administrative agencies to exercise equitable powers in like cases.¹²

The board's decision assessing penalties against Gauthier was filed March 21, 2007. Gauthier's appeal should have been filed in the commission office by 5:00 p.m. on Friday, April 20, 2007, which is 30 days after March 21, 2007.

Gauthier has not presented any *evidence* that would support exercise of implied equitable authority in her favor. She promised to deliver an affidavit in support of her claims in her motion, but did not do so in the two months that have followed the filing of her motion. She does not assert that she was *prevented* from filing an appeal,¹³ let

⁸ *Aleutian Homes v. Fischer*, 418 P.2d 769, 772 (Alaska 1966).

⁹ *Berean v. Coleman Brothers Timber Cutting, Inc.*, AWCAC Dec. No. 051 (August 2, 2007).

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6, citing *Crawford & Co. v. Baker-Withrow*, 73 P.3d 1227, 1229 (Alaska 2003) (holding board's regulation 8 AAC 45.195 gave board no authority to waive a statutory requirement).

¹² *Berean*, AWCAC Dec. No. 051 at 5.

¹³ Careful reading of the appellant's Motion to Allow Late Filed Appeal reveals that although she purportedly denies receiving the decision, Gauthier does not

alone such circumstances that the court has approved as allowing an administrative agency to extend a statutory appeal period. The commission accepts filing by mail, facsimile and electronically by e-mail, so that a person need not be present in Anchorage to file an appeal. We conclude that there is no evidence in our record that Gauthier was prevented from filing her appeal by April 20, 2007. Therefore, we find Gauthier has not presented evidence of good cause to allow a late filed appeal. We conclude Gauthier's failure to file her appeal within 30 days may not be excused.

3. The commission relaxes the time period set by regulation to allow the State's opposition to be filed one day late.

Unlike a statutory deadline, time periods established by commission regulation, including the time for response to a motion, may be relaxed by the commission to prevent injustice, and to facilitate the business of the commission or advance the prompt, fair, and just disposition of appeals.¹⁴ We find that the one day delay in filing the opposition to Gauthier's late motion to allow her to file an appeal 33 days late is so minimal that Gauthier was not prejudiced; that service of the opposition was made on time to Gauthier; that the delay was inadvertent; and, that it was quickly corrected. We therefore exercise our discretion under 8 AAC 57.270(a) to permit the State's opposition to be filed one day late.

Conclusion and Order.

We find that the appellant presented no evidence on which the commission may excuse non-compliance with the statute requiring an appeal to be filed within 30 days after the board's decision. We find the appellant filed her appeal more than 30 days after the board's decision was issued. We find the appellant failed to present evidence of good cause sufficient to excuse the late filing of her appeal. We therefore DENY her motion to allow her late filed appeal.

state when she had actual notice of it. The fax copy of the decision attached to Appellant's Notice of Appeal contains a facsimile imprint date of April 16, 2007 from "ANCH DLWD W/C Fraud." From this imprint, we may infer that she had actual notice by April 16, 2007; her appeal was filed more than 30 days from that date.

¹⁴ 8 AAC 57.270(a).

Having denied the appellant's motion to allow a late filed appeal, we ORDER that AWCAC Appeal No. 07-024, *Teresa Gauthier d/b/a St. Mary's Assisted Living Home v. State*, is DISMISSED pursuant to 8 AAC 57.250(c) for failure to comply with AS 23.30.127(a).

Date: 24 August 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Not available for signature when issued.

John Giuchici, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission's decision ends all administrative proceedings in the appeal of Teresa Gauthier, d/b/a St. Mary's Assisted Living Home, to the commission. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Alaska Supreme Court review are instituted. Look at the Certification by the commission's clerk on the last page to find the date of filing in the office of the commission.

Effective November 7, 2005, proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision in the commission 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.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f). The date of mailing is found in the certificate of distribution on the last page.

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

Clerk of the Appellate Courts
303 K Street

Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of this Final Decision and Order dismissing appeal in the matter of *Teresa Gauthier, d/b/a St. Mary's Assisted Living Home vs. State of Alaska, Workers' Compensation Division*; AWCAC Appeal No. 07-024; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 24 day of August, 2007.

Signed

R. M. Bauman, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision and order dismissing appeal in AWCAC Appeal No. 07-024 was mailed on 8/24/07 to: J. Loescher, L. McKinstry, and faxed to the Director WCD, AWCB Appeals Clerk, J. Loescher, & L. McKinstry on the same day.

Signed August 24, 2007

L. Beard, Deputy Clerk Date