

Alaska Workers' Compensation Appeals Commission

Izaz E. Khan,
Appellant,

vs.

Adams & Associates, and Insurance
Company of the State of Pennsylvania,
Appellees.

Final Decision and
Order Dismissing Appeal
Decision No. 057 September 27, 2007
AWCAC Appeal No. 06-018
AWCB Decision No. 06-0203
AWCB Case No. 200503126

Motion for Order Dismissing Appeal from Alaska Workers' Compensation Board Decision No. 06-0203 issued July 21, 2006, by the southcentral panel at Anchorage, Janel Wright, Chair, Stephen T. Hagedorn, Member for Industry, and Raymond Scott Bridges, Member for Labor.

Appearances: Izaz E. Khan, appellant, pro se. Timothy McKeever, Holmes Weddle & Barcott, for appellees Adams & Associates and Insurance Company of the State of Pennsylvania.

Commissioners: Philip Ulmer, John Giuchici, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Izaz Khan appealed the board's dismissal of his July 25, 2005, claim for workers' compensation on July 21, 2006.¹ The substance of his appeal was that the board

¹ *Izaz E. Khan v. Adams & Assoc., (Khan II)*, Alaska Workers' Comp. Bd. Dec. No. 06-0203 (July 21, 2006). The board held two hearings, at which Khan appeared and testified, before dismissing his claim. The first hearing resulted in a continuance of the hearing on his claim to allow a medical examination to take place after Khan had "forgotten" to appear for the first scheduled examination. The board ordered Khan to attend the rescheduled examination. *Izaz E. Khan v. Adams & Assoc., (Khan I)*, Alaska Workers' Comp. Bd. Dec. No. 05-0349 (December 28, 2005). The second hearing was held on the employer's petition to dismiss his claim after Khan

should have excused his second failure to appear, or to alert the employer that he would be unable to appear, for a medical examination that the board ordered him to attend because he was in prison and it was impossible for him to comply. In his appeal, he asserted the board's findings regarding his ability to make a telephone call were baseless. He also appealed the board's decision on the grounds that it was the result of discrimination against him because of his national origin. The issue before us now is whether to dismiss Khan's appeal for lack of prosecution. Based on Khan's persistent lack of compliance with briefing deadlines and his failure to demonstrate a good faith effort to comply over several months of extensions, we dismiss his appeal for lack of prosecution.

Proceedings in the appeal.

Khan filed his notice of appeal on July 24, 2006. Khan's briefing schedule was delayed by proceedings related to Khan's request that the board transcript and filing fee be waived. His request was supported by an incomplete financial statement affidavit; he was given time to correct it. He was given a hearing on his request, and a second hearing on his request for reconsideration. On January 10, 2007, the commission chair issued instructions to file briefs, directing Khan to file a brief by February 9, 2007.

Khan repeatedly requested extensions of time based on his lack of an attorney and because English is not his first language. Khan was granted several extensions of time. On May 9, 2007, we extended the time to file his opening brief to June 25, 2007, and warned him that no more extensions would be granted and that his appeal could be dismissed if he did not comply. In our July 30, 2007 Notice of Default and Impending Dismissal and Order to Correct Default, we discussed Khan's repeated requests for extensions of time and failure to comply with our order to file his brief. The commission declared Khan in default of a commission order and told Khan that the commission would grant no further extensions of time to prepare his brief. The commission clearly notified Khan that his appeal would be dismissed if he did not

failed to appear for the medical examination as ordered. *Khan II*, Dec. No. 06-0203 at 1.

comply with our order to file his opening brief in the commission office by 5:00 p.m. Monday, August 13, 2007.

Khan supplied no change of address after delivery of our May 9, 2007 Order on Motion to Extend Time extending his time. The July 30, 2007, Notice of Default and Order to Correct Default was sent to Khan's address of record by certified mail. A receipt signed by Donn Baker was returned to the commission. The commission also provided a copy to Khan's attorney in another matter so that she could give him a copy. A correction sheet sent to Khan's address of record by certified mail was signed for by Donn Baker on the returned receipt. The commission did not receive a response from Khan by August 13, 2007.

On August 20, 2007, the appellees requested entry of an order of dismissal because Khan had failed to comply with the commission's July 30 Order. Khan, who had not responded to the commission's July 30, 2007, Notice of Default and Order, sent a letter to the commission, which we received August 30, 2007. The letter did not indicate that it was copied to appellee's counsel. The letter said:

I am requesting the commission to put a hold on my brief until I find some one to write my brief or I get an attorney. Until then like I have mention before:

1. English is not my first language. It is my second language. I have not qualification. I was a laborer for Adam Associate. Stop telling me to write.
2. On 4-19-07 my injury got worse. I cannot put to much stress on my neck, any reading, wrighting, or working on computer or driving. None of it. My neck start to heart.

The commission now considers Khan's request to suspend his appeal and the appellees' motion for an order dismissing the appeal.

Discussion.

The commission is authorized by statute to accept evidence on motions to dismiss appeals for failure to prosecute the appeal.² We find in this case that there is sufficient evidence to decide this matter based on the actions and writings of Khan in the course of his appeal and the orders of the commission.

² AS 23.30.128(c) (4).

The commission has accommodated Khan in his efforts to appeal the board's decision dismissing his claim.³ Instructions, statutes, regulations and forms were provided to him at no cost. Fees were waived. He was allowed several time extensions, exceeding a total of 180 days of extensions. A copy of the record on appeal was made for him at no cost. Nonetheless, he has not made progress on his opening brief, and, as his letter shows, he is not willing to write the brief himself. Beginning at the point he filed his appeal, Khan has had more than a year to find someone to help him write his brief. We find Khan has failed to show diligent efforts to do so. Instead, Khan continues to argue that the commission should excuse him from pursuing his appeal until he has an attorney. In other words, he claims a legal excuse, (rather than good cause and substantial need), as the basis for relief from the obligation to file a brief.

A party has a right to be represented by an attorney in workers' compensation claims and appeals, but this does not mean that a party may defer proceedings indefinitely until the party secures an attorney. Workers' compensation benefits are not a fundamental constitutional right, but a "merely economic interest."⁴ Khan does not risk the loss of his liberty or other fundamental constitutional rights in this appeal of the board's dismissal of his claim. The commission is not required to provide him with an attorney or to excuse him from proceeding in his appeal until he has one. If Khan cannot persuade an attorney to undertake his appeal, he must proceed without one as required by the commission's regulations, unless good cause, and a showing of diligence and substantial need, support a request for extension of time.⁵ We find Khan

³ The board dismissed Khan's workers' compensation claim, thus cutting off all rights in his claim. *Khan II*, Alaska Workers' Comp. Bd. Dec. No. 06-0203 at 16. The importance of the appeal's potential impact on the pro se litigant's rights in a workers' compensation claim is something we consider when allowing extensions of time for pro se litigants.

⁴ *Williams v. State, Dep't of Revenue*, 895 P.2d 99, 104 (Alaska 1995); citing *Gilmore v. Alaska Workers' Comp. Bd.*, 882 P.2d 922, 927 (Alaska 1994).

⁵ 8 AAC 57.140. We will suspend proceedings when the orderly progress of appeals requires us to do so, as when the parties have negotiated a dispositive

has not shown the commission that he is more likely to get an attorney if his appeal is suspended than he was when he filed his appeal on July 24, 2006. We find that he has not demonstrated good cause to relieve him for a further time from the requirement that he file his brief.

We are not convinced that Khan cannot argue his appeal without an attorney. Khan's appeal is not complex. He has sufficient writing skill to make his argument. Khan's understanding of English is demonstrated by the subtle shifts in position he has made in response to the commission's orders. As an example, we note that Khan responded to our last order stating no more extensions of time would be granted by now requesting instead to "put a hold on my brief." We find he has not demonstrated substantial need for further extensions or suspension.

English is a second language for many Alaskans.⁶ We also recognize that writing is difficult for many people, even those persons whose first or only language is English. For litigants who have not graduated from high school or otherwise acquired basic literacy skills, the commission understands that writing a brief may be very difficult.⁷

settlement but must obtain board approval of it or the commission cedes jurisdiction to the board for action on a petition for reconsideration. However, in such cases, suspension of commission proceedings promotes the orderly progress of the appeal toward final resolution; it does not cast the appeal into limbo.

⁶ We note that the most recent census data (2000) shows that among 401,332 Alaska residents aged 18-64, 7004 persons stated they *spoke* English "not well" or "not at all." See, Workforce Info: 2000 Census – Alaska Summary File 3: Age by Language Spoken by Ability to Speak English, available online at web page http://146.63.75.45/census2000/Census_lv2.asp, published by the State of Alaska, Department of Labor and Workforce Development, Research and Analysis, Census & Geographic Information Network (accessed September 12, 2007).

⁷ 2000 census data shows that out of 195,696 men over the age of 25 residing in Alaska, 22,991 did not have a high school diploma or the equivalent. For the 183,880 Alaska women residents in the same age range, 21,291 did not have a high school diploma or the equivalent. See, Workforce Info: 2000 Census - Alaska Summary File 3 Sex by Educational Attainment for the Population 25 Years and Over, available online at web page: http://146.63.75.45/census2000/Census_lv2.asp, published by the State of Alaska Department of Labor and Workforce Development, Research and Analysis, Census & Geographic Information Network (accessed September 12, 2007).

For that reason, we hold pro se litigants to a less demanding standard in preparing their appeal briefs than those represented by counsel. We do not reject briefs from pro se litigants that fail to cite legal authority or lack formal parts. We recognize that pro se litigants may not know the name of a legal theory that underlies their arguments. We read the briefs of pro se litigants generously. So long as the commission is able to discern the pro se litigant's basic arguments on appeal, and the opposing party is able to discern and respond to them, the commission considers the brief adequate. We have been impressed, as members of the board and as members of the commission, by the sophistication and coherence of arguments advanced by some pro se litigants. We do not regard an argument as less weighty merely because it was prepared by a person not learned in law or proficient in English grammar and spelling.

The commission may exercise its discretion to require oral argument on an appeal involving a pro se litigant, even if oral argument is not requested by the parties, in order to further question the parties, draw out the nuances of their arguments and guide the pro se litigant in presenting an argument. To assist pro se litigants, the commission provides instruction guides, copies of regulations and statutes, access to the appeal record and copies on request. However, we cannot excuse a pro se appellant from the core task of an appeal, which is to explain to the commission in writing why the appellant believes the board's decision was wrong and what the appellant thinks the commission should do in response to the appeal. To do so forces the commission to act as the appellant's advocate and detracts from the impartiality of the commission.

We find that the legislative mandate that workers' compensation "ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers" is impeded when an appellant delays bringing his appeal to hearing before the commission, and certainly is not fulfilled if an appeal is suspended indefinitely. It is not quick because the appeal is drawn out over months and even years. It is not efficient because the resolution may not be reached until all evidence is stale or is destroyed and case files remain open and unresolved. It is not fair because the appellees may see no resolution of the appeal for

years, despite their readiness to defend the appeal, knowledge of the case may be lost, and because one party is given time that the other is not. It is not fair in a larger sense because like cases are not treated alike; the pro se litigant who makes an effort to comply with the act and commission's orders has less time to prepare an argument than the person who, like Khan, fails to make an effort to comply. Thus, non-compliance is rewarded, which is not just. Finally, it is not fair because it excuses the appellant from the duty he undertook when he filed his appeal, which was to prosecute the appeal in an orderly and timely fashion. We therefore decline to permit Khan's appeal to be suspended indefinitely.

The commission finds that Khan has not complied with the commission's orders to file a brief on appeal, despite extensions of time exceeding 180 days. The commission finds there is no reasonable prospect that Khan will file his appeal brief in the immediate future. The commission finds that Khan failed to prosecute his appeal in a timely fashion. The commission DENIES Khan's request to suspend his appeal indefinitely.

The commission DISMISSES the appeal filed by Izaz E. Khan, AWCAC Appeal No. 06-018, for want of prosecution pursuant to 8 AAC 57.250 and AS 23.30.128(c).

Date: 27 Sept. 2007 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

John Giuchici, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final administrative agency decision and order. This decision dismisses the appeal to the commission, so it ends all administrative proceedings in Izaz Khan's workers' compensation claim. It becomes effective when filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are

instituted. The date of filing is found in the clerk's Certification below. Effective November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the filing of this 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. See AS 23.30.129.

If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal 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. See AS 23.30.128(f).

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

You 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. The commission will accept fax filing of a motion for reconsideration.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 057, a Final Decision and Order Dismissing Appeal in the matter of *Izaz E. Khan vs. Adams & Associates and Insurance Company of the State of Pennsylvania*, Appeal No. 06-018, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 27th day of September, 2007.

Signed

L. Beard, Deputy Appeals Commission Clerk

Certificate of Distribution

I certify that on 9/27/07 a copy of this Alaska Workers' Comp. Appeals Comm'n Decision No. 057 was mailed to: I. Khan (certified, return receipt) & T. McKeever at the addresses of record and faxed to: T. McKeever, AWCB Appeals Clerk and Director, WCD. I also mailed a copy to the address (Anchorage Correctional Facility East) provided by Khan on the envelope enclosing his last communication to the commission.

Signed

L. Beard, Deputy Appeals Commission Clerk