

Alaska Workers' Compensation Appeals Commission

Abdul K. Adepoju,
Appellant,

vs.

Fred Meyers Stores, Inc.,
Appellees.

Memorandum Decision and Order

Decision No. 010 May 11, 2006

AWCAC Appeal No. 06-006

AWCB No. 200014082

Superior Ct No. 4FA 05-01979 Civ.

Memorandum decision and order on appeal transferred to the Workers' Compensation Appeals Commission from the Superior Court for the Fourth Judicial District by Winston Burbank, Superior Court Judge, on appeal from Alaska Workers' Compensation Board Decision No. 05-0177, Fred G. Brown, Chairman, John Giuchici, Member for Labor, Chris Johansen, Member for Management.

Appearances: Abdul K. Adepoju, self-represented appellant; Paul Hoffman, for appellee Fred Meyers Stores, Inc.

Before: Jim Robison and Marc Stemp, Appeals Commissioners, Kristin Knudsen, Chair

By: Kristin Knudsen, Chair.

Abdul K. Adepoju, the appellant, filed his appeal of the Board's decision denying his claim for compensation and medical benefits in the Superior Court on July 28, 2005, before November 7, 2005, the effective date of the statute creating this commission. The Superior Court entered an order transferring the appeal to the appeals commission, without timely objection by the appellant. The appellant objected to the appeals commission hearing his appeal, and the commission chair requested the parties to supply briefs on the issue of the commission's jurisdiction to hear the appeal.

The legislature has constitutional authority to define the jurisdiction of the courts and of quasi-judicial administrative agencies. The commission will not exercise

jurisdiction where the legislature has reserved jurisdiction to the courts. We disagree with appellee's argument that the legislature, in saving pending appeals to the superior court when it created the commission, granted the Superior Court discretion to transfer pending appeals to the commission.

This appeal was transferred by order of the Superior Court on the motion of the appellee. Adepoju did not voluntarily appeal to this commission, and dismissal of the appeal would leave the parties in a jurisdictional vacuum. We announce our intent to decline jurisdiction, suspend consideration of the appeal for sixty days and direct Adepoju to ask the superior court to vacate the order transferring the appeal.

Factual history.

We summarize the factual history recited by the Alaska Workers' Compensation Board.¹ We do not engage in fact finding, and for purposes of this decision, we do not examine the record to determine if the Board's findings are supported by substantial evidence. This summary is intended only to provide historical context.

Abdul Adepoju suffered a serious neck injury in the course of his employment by Veco, Inc., in oil spill clean up during 1989. That injury resulted in fusion of three vertebrae in his neck, the fifth and sixth vertebrae and the sixth and seventh vertebrae. In 1993, he settled his claim against Veco in a way that "strictly limited his future medical care."

Adepoju claimed that he injured his neck again in 2000 while working for Fred Meyer Stores, as a result of a defective slicing machine. He claimed that the machine would occasionally get stuck and slow down, so that it was hard to push the machine. He estimated that machine's automatic slicing function was inoperable approximately three months out of the nine months from October 1999, possibly more.

On June 19, 2000, he went to the Tanana Valley Clinic for treatment of pain on the right side of his neck, in the right trapezius, body weakness and inability to walk and grip. He was diagnosed with cervical myelopathy and he was transferred to

¹ *Adepoju v. Fred Meyer Stores, Inc.*, AWCB Decision No. 05-0177 (July 5, 2005).

Providence Hospital in Anchorage by air ambulance the next day. There Timothy Cohen, MD, performed anterior and posterior decompressive surgery and fused the neck vertebrae from the third cervical vertebra to the sixth. Adepoju was discharged from Providence Hospital in August 2000.

The board's decision does not relate whether compensation and medical benefits were paid and later controverted, or whether the injury was controverted from the first time it was reported.

Procedural history.

The Alaska Worker's Compensation Board heard Adepoju's claim for compensation and medical benefits on June 1 and 2, 2005. Adepoju was represented by counsel in the board proceeding. Videotapes of Adepoju walking with a "Canadian cane" over uneven ground and snow were included in the evidence. The board denied Adepoju's claim, noting that "[b]ased on the employee's consistent and incredible embellishments concerning the nature of his condition, we find any medical opinions as to causation, relying on observations or and statements by the employee must be discounted. AS 23.30.122."²

Adepoju filed a notice of appeal to the Superior Court on August 5, 2005. At the time, he was still represented by counsel. The board, a party under Appellate Rule 602(h), filed a notice of non-participation on September 16, 2005. On October 18, 2005, Adepoju's attorney filed a "notice of non-participation" that stated he did not represent Adepoju in the case. On December 13, 2005, the Court notified Adepoju that his brief was due in 30 days. On that same day, the appellee Fred Meyer Stores moved to transfer the appeal to the appeals commission.³ Adepoju did not respond to the motion, and on January 4, the court ordered the appeal transferred to the commission and that "all further proceedings in this appeal shall be conducted by and at the

² *Adepoju v. Fred Meyer Stores, Inc.*, AWCB Decision No. 05-0177, n.5 p.7 (July 5, 2005).

³ The commission was not informed of the Fred Meyer Stores motion.

Appeals Commission.” The Clerk of the Superior Court then sent the appeal file to the commission.

The commission issued a docket notice on February 22, 2006, assigning appeals commissioners to the appeal and setting a briefing schedule. The commission received the appellant’s February 28 objection to the commissioner assignment on March 3. The reason for the appellant’s objection was “I have asked Judge Burbank to get my files back and to hear my case”. The Superior Court subsequently denied his request to that Court to “stop transferring of appeal to appeals commission.”⁴

Although the appellant’s objection was not directed at the appeals commissioners for reasons of conflict, as required by AS 23.30.007(*l*), the commission considered that the appellant’s objection was a challenge to the authority or jurisdiction of the commission to hear his appeal. The commission suspended the briefing schedule issued 22 February 2006, and asked the parties to brief the issue.

The legislature prescribes court jurisdiction over administrative appeals.

The Constitution of Alaska provides at Art. IV, Sec. 1, that the “jurisdiction of courts shall be prescribed by law.” As the power to enact laws is given to the legislature,⁵ the legislature has the power to prescribe the jurisdiction of the courts. The legislature prescribed the jurisdiction of the Superior Court over appeals from board decisions in AS 23.30.125,⁶ AS 44.62.560, and in AS 22.10.020(d).⁷

⁴ Order, February 28, 2006.

⁵ Constitution of Alaska, Art. II, Sec. 1.

⁶ Repealed and reenacted § 40 ch 10 FSSLA 2005. Prior to November 7, 2005, AS 23.30.125 provided that a “compensation order may be suspended or set aside . . . through injunction proceedings in the superior court brought by a party in interest against the board,” AS 23.30.125(c), and that “proceedings for suspending, setting aside, or enforcing a compensation order . . . may not be instituted except as provided in this section and AS 23.30.170.” AS 23.30.125(e). The Administrative Procedure Act, AS 44.62.010-44.62.560-570, provided specific grounds for judicial review of all administrative decisions and the scope of that review, applicable to the decisions of the board, AS 44.62.330(12). Upon adoption of the Appellate Rules in 1973, the *procedure* for appeal to the superior court outline in AS 23.30.125(c) was

The process by which administrative agency appeals are reviewed by the Superior Court is given form in the Alaska Rules of Appellate Procedure. It was pursuant to those rules that Adepoju filed his appeal to the Superior Court in August 2005. Section 41, ch. 10, FSSLA 2005 enacted AS 23.30.129, effective November 7, 2005, provided that appeals from board decisions would be decided by a three member panel of this commission, and that final decisions of the commission are appealed to the Alaska Supreme Court consistent with AS 22.05.010(b). By this enactment, the legislature withdrew the jurisdiction of the superior court over workers' compensation administrative appeals taken after November 7, 2005.

Section 80, ch. 10 FSSLA 2005 saved jurisdiction over pending appeals to the superior court.

When the legislature enacted the amendments creating this commission, the legislature also provided that "litigation . . . and other proceedings pending under a law amended or repealed by this Act or in connection with functions transferred by this Act continue in effect and may be continued and completed" ⁸ We interpret this phrase to mean that the legislature intended that appeals pending in the superior court on the effective date of the legislative repeal "may continue and be completed" notwithstanding the effect of section 41 of the same bill. ⁹

superseded, as the Rules of Appellate Procedure "supersede all other procedural methods specified in Alaska statutes for appeal from administrative agencies to the courts of Alaska." Alaska R. App. P. 607, formerly R. App. P. 45(i). *State, Dep't of Highways v. Burgess Constr. Co.*, 575 P.2d 792 (Alaska 1978).

⁷ AS 22.10.020(d) grants the superior court jurisdiction "in all matters appealed to it from . . . [an] administrative agency *when appeal is provided by law* . . ." (emphasis added). It has no jurisdiction when appeal to it is not provided by law.

⁸ § 80(a), ch. 10 FSSLA 2005.

⁹ *See also* AS 01.10.100(a), the general savings statute, providing that:

The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred or right

The appellee argues that the word “may” grants discretion to the court to transfer Adepoju’s appeal to the commission.¹⁰ We disagree. The subject of the sentence containing the word “may” is the litigation, not the Superior Court; the *proceedings* (including Adepoju’s appeal) *continue* and *may be continued* into the future and *completed*. The purpose of the savings clause is to allow appeals that are “*pending* under a law amended or repealed” to be completed without creating a jurisdictional vacuum between the loss of superior court jurisdiction¹¹ and the creation

accruing or accrued under that law, unless the repealing or amending act so provides expressly.

However, “where there are express savings clauses in repealing statutes which are later in time, constituting the express will of the Legislature, such have been taken as an indication of legislative intent to save nothing else from the repeal, and the general saving statute in force in the state does not apply.” *Territory of Alaska v. American Can Company*, 137 F.Supp. 181, 183 (D.C. Alaska 1956), reversed on other grounds, *Territory of Alaska v. American Can Company*, 358 U.S. 224, 226-27 (1959). Therefore, we confine our attention to the savings clause adopted by the legislature in section 80(a).

¹⁰ Appellee made the same argument, among others, to the Superior Court, but we note that the motion was not opposed by Adepoju, a self-represented litigant, or the board, which had entered a notice of non-participation.

¹¹ A jurisdictional vacuum is created when jurisdiction over a particular form of action is withdrawn by the legislature without provision for continuing pending cases. The federal courts hold when a statute changes jurisdictional rules, that change is effective immediately and applies even to pending cases, unless they are expressly reserved by the statute changing jurisdiction, and that changes in jurisdiction fall outside the scope of the federal savings statute parallel to AS 01.10.100(a). *Bruner v. United States*, 343 U.S. 112, 115 (1952). “This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court. This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by the explicit language or by necessary implication.” *Id.* at 116-117. The Ninth Circuit described the rule succinctly: “[w]hile there is often a presumption against retroactive application of new legislation to pending cases, this presumption generally does not apply to rules conferring or withdrawing jurisdiction.” *In re Arrowhead Estates Development Corp.*, 42 F.3d 1306, 1311 (9th Cir.1994).

of commission jurisdiction. The appeal may not continue if it is settled or dismissed short of completion; but the phrase does not, on its face, grant the Superior Court discretion to transfer the pending appeal to this commission. Instead, it provides that a pending appeal may continue despite the loss of Superior Court jurisdiction.

The superior court may not decline jurisdiction absent legislative provision.

AS 22.10.020(c) permits the superior court judge to “issue injunctions, writs of review, mandamus, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction.” Similarly, the Rules of Appellate Procedure provide that a superior court judge may, in an administrative appeal, “may make such orders as are necessary and proper to aid its appellate jurisdiction.” Alaska R. App. P. 609(a). The commission is hesitant to question the exercise of the Superior Court’s broad discretion to issue such orders. However, in view of the legislature’s explicit saving of superior court jurisdiction over pending appeals, we must the question whether Judge Burbank’s order transferring the appeal to this commission is an order “proper to the complete exercise of its jurisdiction” or “to aid its appellate jurisdiction.”

The principal that the courts, if given jurisdiction, may not decline it dates to the earliest days of our republic. Justice Marshall observed of the United States Supreme Court that “this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a

Recent decisions of the Alaska Supreme Court recognize the distinctive nature of statutes changing jurisdiction as opposed to changes in substantive rights or procedural rights. For example, in *Cline v. Cline*, the court held that the superior court lacked jurisdiction to award more than 50% (the maximum allowed by federal law) of a veteran’s retirement benefits to his spouse in a divorce settlement, noting that whether a controversy is of the type a court may resolve cannot be identified by terminology alone, but rather should be determined by reference to whether the matter can more plausibly be characterized as one of subject matter jurisdiction *or* of merits or procedure. 90 P.3d 147, 152-153 (Alaska 2004). (emphasis added). The savings clause in Section 80 works to avoid sudden failure of the court’s jurisdiction over cases appealed before November 7, 2005, which would leave appellants without their appeals in court and unable to file another in the commission if the time for appeal had passed.

measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821).

Very recently, this principal was applied again by the Supreme Court, as it reversed the Ninth Circuit's holding that a State's vesting of exclusive jurisdiction over probate matters in a special state court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting tax liability, debt, gift, or tort.¹² The Ninth Circuit, the Supreme Court said, "had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception" and could not decline jurisdiction by extending the class of cases it would not hear.¹³

The workers' compensation system is entirely a creature of statute;¹⁴ and the basis for the board to exercise jurisdiction over a workers' claim for compensation, or this commission to hear an appeal, is found in the statute.¹⁵ The statute exempts Adepoju's pending appeal from the commission's primary jurisdiction, so it is not a case in which Superior Court otherwise might defer to an administrative agency's jurisdiction due to the agency's expertise.¹⁶ Because this appeal was filed before the effective date of the commission's enabling act, this is not a case of concurrent jurisdiction, when the

¹² *Marshall vs. Marshall*, 547 U.S. _____, No. 04-1544, p.2 (May 1, 2006).

¹³ *Id.*, at 2, 15.

¹⁴ "Workers' compensation is purely a creature of statute. There is no common law right to it." *Alyeska Pipeline Service v. DeShong*, 77 P.3rd 1227, 1238 (Alaska 2003).

¹⁵ AS 23.30.020. *Nickels v. Napolilli*, 29 P.3d 242 (Alaska 2001).

¹⁶ *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1032 (Alaska 1972) (overruled on other grounds by *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979)). See also, *Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.*, 99 P.3d 553 (Alaska 2004).

commission might have discretion to exercise jurisdiction because to do so would otherwise deny the appellant an appeal¹⁷ or the court may decline jurisdiction on its own motion.¹⁸ This is not a case in which the legislature, for policy reasons, intentionally created a jurisdictional “no man’s land,” between the commission and the courts¹⁹ or provided authorization to the Superior Court to decline jurisdiction.²⁰ This is a case in which the statute at the time the appeal was filed gave the Superior Court jurisdiction over appeals from board decisions and the commission did not exist. Because the legislature saved to Superior Court jurisdiction appeals pending at the time this commission was created, jurisdiction remains with the Superior Court.

Conclusion

The principal that jurisdiction prescribed by law cannot be declined by the superior court is the converse of the principal that where the legislature has limited the

¹⁷ See, *Alaska Workmen's Compensation Bd. v. Marsh*, 550 P.2d 805, 809, (Alaska 1976) (holding it error by the board to decline jurisdiction “when a party's only effective remedy is before the workmen's compensation board, . . . because of a civil action which is pending only in a technical sense.” The implication of this statement is that the board *may* decline jurisdiction because of a pending civil action within the court’s jurisdiction.)

¹⁸ *Waller v. Richardson*, 757 P.2d 1036 (Alaska 1988).

¹⁹ *Hill v. Moe*, 367 P.2d 739, 741-742. 49 L.R.R.M. 2373, 2375 (Alaska 1961). The Alaska Supreme Court rejected the employer’s argument that states have power to act in labor controversies where the National Labor Relations Board declines to take jurisdiction. Congress, the employer argued, did not intend to create a jurisdictional “no-man’s land” which would exist if the Board declined jurisdiction and the state was powerless to act. The Alaska Supreme Court pointed out that the U.S. Supreme Court found Congress did intend such a no-man’s land “subject to regulation of no agency or court” to advance a policy of uniformity and “if the no man’s land were to be eliminated, it would have to be done by Congress.” *Id.*, citing *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10-11 (1956).

²⁰ The Uniform Child Custody Jurisdiction and Enforcement Act provides an example of statutory authority to decline jurisdiction, AS 25.30.360-370.

superior court's jurisdiction, the superior court may not expand its jurisdiction beyond legislative limits through the exercise of its general powers.²¹ This commission has no authority to tell the Superior Court that it has exceeded the limits imposed by the legislature; similarly, this commission has no authority to require the Superior Court to act within those limits. The commission may defer action to allow Adepoju to request the Superior Court to reexamine its transfer of Adepoju's appeal to the commission in light of the savings clause in Section 80(a) and that is the course we undertake here.

The commission will not dismiss Adepoju's appeal yet, although the commission is convinced that it has no jurisdiction to decide the appeal. Dismissing Adepoju's appeal before the Superior Court has exercised the opportunity to reconsider and vacate the order transferring the appeal would create just such a jurisdictional no-man's land we believe the legislature wished to avoid by enacting Section 80(a).

Therefore, we announce our intent to decline jurisdiction and we SUSPEND our consideration of Adepoju's appeal for sixty days. We direct Adepoju to immediately request the Superior Court to vacate the order transferring his appeal to the commission because the commission lacks jurisdiction, attaching a copy of this opinion.²² The commission clerk will retain custody of the appeal file until given instruction by the Clerk of the Superior Court.

²¹ See, for example, *State v. E.E.*, 912 P.2d 1 (Alaska Ct. App. 1996) (holding that although legislature granted authority to superior court to order minor committed to department for probationary supervision, the authority to review a placement decision by department for abuse of discretion does not permit court to usurp department's decision making function by curtailing range of department's placement options: concern for minor's best interests did not empower court to exercise powers reserved to department by legislature).

²² Although Adepoju asked the court to stop the transfer, he did not raise the issue of jurisdiction, and it appears the court did not consider it. We agree that having transferred jurisdiction to the commission, the court may believe that it no longer may enter an order in the appeal; however, if the order was entered in error, we believe the court has the authority to correct it.

The commission is willing to assist the Superior Court in the exercise of the Superior Court's jurisdiction so far as we are able.²³

Alaska Workers' Compensation Appeals Commission

Dated: May 11, 2006

Signed
Kristin S. Knudsen, Chair

Signed
Marc Stemp, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

I certify that on May 11, 2006, a copy of this Decision was mailed to Adepoju & Hoffman at their addresses of record, mailed to Super. Ct. Clerk H. Johnson, and faxed to AWCB-App. Clerk, Director WCD, AAG Paton-Walsh.

Signed
C. J. Paramore
Appeals Commission Clerk

²³ If there is a service the commission can provide to the superior court in this case based on the commission's expertise in workers' compensation, we are ready to do so. However, the Alaska Supreme Court has emphatically stated that, with regard to references to special masters, the "responsibility for deciding questions of law lies with the judiciary." *Dean v. Firor*, 681 P.2d 321, 328 (Alaska 1984). The Supreme Court's list of circumstances where appointment of a special master is appropriate, *Peter v. Progressive Corp.*, 986 P.2d 865, 870 (Alaska 1999), does not include administrative appeals, but concludes "We believe that these factors reflect a respect for the immense and often unreasonable burdens placed on trial courts' time and resources, while avoiding an undesirable shift in the role of trial courts to that of "quasi-appellate" courts. Perhaps more importantly, the guidelines attempt to ensure nonwealthy litigants' access to the courts." (*citations omitted*). *Id.*