

Case: *Thomas A. Olekszyk vs. Smyth Moving Service, Inc. and Alaska Insurance Guaranty Ass'*, Alaska Workers' Comp. App. Comm'n Dec. No. 079 (May 28, 2008)

Facts: Thomas Olekszyk appealed the board's decision on February 12, 2008, twenty-one days after the statutory appeal period ended. Olekszyk asserted the commission should accept his late-filed appeal because: (1) He was "legally blind" and unable to read the decision until the middle of January. He had surgery to fix cataracts in October and mid-December. He admitted that he could see well enough to drive in January and that a friend read him parts of the board decision. A doctor reported that his vision was corrected to 20/40 as of Feb. 18, 2008, six days after he actually appealed. (2) He is disabled due to his back injury, so he was unable to drive to town for his mail and, as a result, did not receive it in time to appeal. Despite his back pain, he testified that he drove to Anchorage in January and that he also had other people drive him. He conceded that he had the decision by January 1. (3) The decision was not issued properly, because Linda Hutchings was not present at the hearing and her signature was a bracketed S., so the time for appeal did not run. The hearing officer certified that Linda Hutchings was present, that her voice was recorded at the hearing, that her signature was attached to the decision, and that the hearing officer recalled her participation. Lastly, Olekszyk argued that because of his need and the seriousness of the board's errors he should be permitted to file a late appeal.

Applicable law: 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 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."

8 AAC 57.060(a)(2): If the last day of the appeal period falls on Saturday, Sunday or a legal holiday, the appeal period runs until the next day that is not a Saturday, Sunday or a legal holiday.

On excusing a late-filed appeal, the commission stated: "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." *Berean v. Coleman Brothers Timber Cutting, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 051, 5 (August 2, 2007).

The commission determines the credibility of evidence, including testimony, in deciding whether there is good cause for a late appeal. The appellant must produce sufficient evidence to persuade the commission by a preponderance of the evidence that he should be excused from compliance with the statute. Dec. No. 079 at 2.

Issue: Did Olekszyk presented credible evidence of good cause to allow his late-filed appeal?

Holding/analysis: The board decision was filed in the board office on December 21, 2007, starting the period to appeal. The last day to file an appeal was January 22, 2008, taking out the weekend and a legal holiday. Olekszyk filed late, on February 12, 2008.

The commission found Olekszyk was neither credible nor persuasive. On his claim of legal blindness, he admitted that he had substantial improvement and could drive without glasses. He had the decision by New Year's Day and had friends read it to him. He testified he could read as of January 20, when he got glasses. The commission concluded that "[h]is testimony does not establish that he was prevented by his substantially improved eyesight from filing an appeal on time with . . . assistance, . . . Poor eyesight is an obstacle, but not an insurmountable one; it would not impair Olekszyk's ability to decide to file an appeal and contact the commission by January 22, 2008." Dec. No. 079 at 7.

On his driving difficulties, the commission decided that, "difficulty driving due to back pain did not prevent him from driving to Anchorage in January or receiving his mail by New Year's Day; it did not prevent him from coming to Anchorage in February; and it would not have prevented him from filing an appeal by facsimile, e-mail or mail from Palmer." *Id.*

Lastly, "[t]he commission finds, based on the certification of the hearing officer, that the panel member Linda Hutchings participated in the hearing and signed the decision." *Id.* at 7-8.

On his other arguments, the "commission does not have authority to permit untimely appeals based on need. . . . workers' compensation is not a public entitlement awarded according to need." In addition, the board's decision on its face is based on its assessment of the weight of medical evidence; the decision "reveals no clear, major errors of law on its face that indicate denial of the opportunity to file a late appeal may work a serious injustice." *Id.* at 8 n.5.