

Alaska Workers' Compensation Appeals Commission

Paul Pietro,
Appellant,

vs.

Unocal Corp.,
Appellee.

Memorandum Decision and Order
Decision No. 082 June 26, 2008

AWCAC Appeal No. 08-009
and AWCAC Appeal No. 07-037
AWCB Decision Nos. 08-0029, 07-0260
Case No. 199530232

Motion to Remove Appeal from Alaska Workers' Compensation Board Decision No. 07-0260, issued August 27, 2007, by southcentral panel members Darryl Jacquot, Chair, Janet Waldron, Member for Industry, and Robert Morigeau, Member for Labor, and Board Decision No. 08-0029, issued on reconsideration February 22, 2008, by southcentral panel members Darryl Jacquot, Chair, and Patricia Vollendorf, Member for Labor.

Appearances: Michael J. Jensen, Jensen Law Office, for appellant Paul Pietro. Richard Wagg, Russell, Wagg, Gabbert & Budzinski, for appellee, Unocal Corporation.

Proceedings: Appeal proceedings stayed in Appeal No. 07-037 to allow reconsideration of the board decision appealed issued October 19, 2007; Order lifting stay of proceedings issued March 19, 2008; status conference April 30, 2008; Order consolidating Appeal No. 07-037 with Appeal No. 08-009 issued May 9, 2008.

Commissioners: David Richards, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The appellant filed an appeal to the commission on September 26, 2007, from Alaska Workers' Comp. Bd. Dec. No. 07-0260. This appeal was assigned commission Appeal No. 07-037. The appellant also filed a petition for reconsideration, which was

accepted by the board (Alaska Workers' Comp. Bd. Dec. No. 07-0300). On reconsideration, the board clarified that its decision in Decision No. 07-0260 to address the employee's claim that his skin cancer was the result of his employment (Alaska Workers' Comp. Bd. Dec. No. 08-0029).¹ This decision was also appealed to the commission; it was assigned Appeal No. 08-009.

The appellant moved to consolidate the appeals and "remand" the appeals to the superior court on April 10, 2008.² In a status conference held by the commission chair April 30, 2008, the parties confirmed that Alaska Workers' Comp. Bd. Dec. No. 07-0260 was issued following remand from the superior court. The parties agreed that under the commission's decisions in *Wolf Dental Serv., Inc. v. Wolf*³ and *Thoeni vs. Consumer Electronic Serv.*,⁴ the commission should defer to the superior court's jurisdiction. Appellee did not object to removal of the claims originally decided in *Paul D. Pietro v. Unocal Corp.*,⁵ to the superior court. The chair proposed that the commission should issue an order dismissing the appeal, conditioned upon reopening of *Pietro v. Unocal Corp.*, Super. Ct. No. 3AN 05-12980 Civ., and deferring to the superior court's determination of the scope of its jurisdiction, if it found any part of the appeal was severable.

In *Wolf Dental Serv., Inc. v. Wolf*, the commission said

the general rule [is] that a superior court decision remanding a matter to an administrative agency is not a final, appealable order. The superior court's order in this case does not contain an explicit retention of jurisdiction. However, since the court had

¹ *Paul D. Pietro v. Unocal Corp.*, Alaska Workers' Comp. Bd. Dec. No. 08-0029, 7 (Feb. 22, 2008).

² The appellant used the word "remand" in his motion but the commission considers the appellant's motion as one to "remove" the appeal to the proper forum.

³ Alaska Workers' Comp. App. Comm'n Dec. No. 031 (Feb. 2, 2007).

⁴ Alaska Workers' Comp. App. Comm'n Dec. No. 039 (April 30, 2007).

⁵ Alaska Workers' Comp. Bd. Dec. No. 05-0287 (Nov. 4, 2005).

sole and exclusive jurisdiction over the issues raised on appeal once an appeal was taken, it necessarily retains jurisdiction over that portion of the appeal it did not remand. Unless the court remands for a strictly “ministerial” act, the superior court’s decision is not final. The court implicitly retains jurisdiction to examine the results of the board proceedings on remand and to enter a final appealable order.⁶

In that case, the commission noted that an effort by the “commission to interpret the scope of the court’s order of remand would necessarily conflict with the court’s exclusive jurisdiction to determine whether the board misinterpreted the court’s order of remand.”⁷ The same situation is presented in this case.

The first board decision addressed Pietro’s claim that his peripheral neuropathy was caused by his exposure to arsenic and other chemicals or metals in his employment.⁸ The board said, “Based on a preponderance of the medical evidence, we conclude that the employee’s peripheral neuropathy is not work related. We conclude the employer is not liable for any medical care or timeloss benefits related to the employee’s peripheral neuropathy.”⁹ This decision was appealed to the superior court.¹⁰

In 2006, the appellant petitioned the board for modification of its November 4, 2005, decision on the grounds that it could not have considered whether Pietro’s skin cancer was work-related and asked the board to consider new evidence. In order that the board could take up the petition for modification, the superior court, (Mark Rindner,

⁶ *Wolf Dental Serv., Inc.* App. Comm’n Dec. No. 031 at 4 (citations omitted).

⁷ *Id.* at 5.

⁸ *Paul D. Pietro v. Unocal Corp.*, Alaska Workers’ Comp. Bd. Dec. No. 05-0287 (Nov. 4, 2005).

⁹ *Id.* at 25.

¹⁰ *Pietro v. Unocal Corp. and Alaska Workers’ Comp. Bd.*, 3 AN 05-12980 Civ. The board’s decision on reconsideration, Alaska Workers’ Comp. Bd. Dec. No. 05-0317 (Nov. 30, 2005), was also appealed and joined in Superior Court No. 3AN 05-12980 Civ.

Judge), stayed the appeal in a brief order issued November 1, 2006. The board's decision issued on August 27, 2007, (the subject of the appeal to the commission filed September 26, 2007), was made on that petition for modification.¹¹

The superior court implicitly retained jurisdiction of the 2005 appeal because the court did not make a final disposition of the parties' rights. Judge Rindner's remand order was not ministerial because it required the board to exercise the board's statutory power to make findings of fact based on new evidence and to modify its prior decision.¹² The superior court necessarily retains jurisdiction of these issues because it has yet to enter a final order in the superior court appeal filed by Pietro, who mistakenly appealed the board's decision on the court's remand to the commission.

The legislature intended that the superior court's jurisdiction over pending matters be saved to the superior court upon the effective date of the bill creating this commission, for some of the same reasons stated in *Adepoju v. Fred Meyer Stores, Inc.*,

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..." 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.¹³

Thus, this case was "saved" to the superior court as a pending appeal.

¹¹ *Paul D. Pietro v. Unocal Corp.*, Alaska Workers' Comp. Bd. Dec. No. 07-0260, 1 (Aug. 27, 2007) (identifying the issue before the board as "[w]hether to grant modification of our prior decisions . . .").

¹² AS 23.30.130.

¹³ Alaska Workers' Comp. App. Comm'n Dec. No. 010, 3 (May 11, 2006).

The commission finds that the issues related to the board's decisions following the court's remand to hear a petition to modify, and denying compensability of the peripheral neuropathy and skin cancer claim (Bd. Dec. Nos. 07-0260 and 08-0029) are not sufficiently discrete to allow the commission to hear an appeal of them while the superior court reopens the appeal of the first board decisions (Bd. Dec. Nos. 05-0287 and 05-0317). The board's determination that the peripheral neuropathy is not work-related was based on the same evidence of employment events that Pietro relies upon to establish his claim of work-related skin cancer. Judge Rindner's order remanded this matter to the board to do exactly what the board did: consider the petition for modification. No new, independent claims, filed after the effective date of the statute creating the commission, were decided by the board. Thus, whether the board had sufficient evidence to support its decision to deny modification, or applied an incorrect standard of law in denying modification, are issues closely intertwined in the proper exercise of the superior court's jurisdiction over the appeal of the board's first decisions.

The effective date clause of the 2005 legislation did not cut off the superior court's retained jurisdiction in remanded cases. There is a means to reach the underlying appeal in the superior court without filing a new appeal.¹⁴ This commission, if it decided the merits of the appeal of the remanded issue (to allow the board to decide the petition for modification), would necessarily infringe on the exercise of the superior court's jurisdiction in the original claim arising out of the same injury and facts. Therefore, the commission must decline to act on this appeal until the court instructs

¹⁴ The exclusion of appeal to the superior court found in AS 23.30.129 is not a barrier to resumption of proceedings in the superior court because the Alaska Supreme Court recognized two means of returning to the superior court: either to file a new appeal from the board's most recent order and consolidate it with the earlier appeal, or to move the superior court, in the first appeal, for proceedings to resume in that appeal. *See, Wade Oilfield Services v. Providence Washington*, 759 P.2d 1302, 1305 (Alaska 1988) *citing Jeffries v. Glacier State Telephone*, 604 P.2d 4, 6-7 (Alaska 1979). Thus, Pietro may move for resumption of proceedings in the original appeal.

the commission otherwise.¹⁵ In short, because this appeal clearly belongs in the superior court, the commission defers to Judge Rindner's determination of what severable part of this appeal, if any, the commission may consider, and when the commission may do so.¹⁶

In order that the parties' rights may be preserved in the event that the commission misunderstands the law, or the superior court instructs the commission that it may consider some portion of this appeal, the commission will stay the effective date of dismissal of the appeal for 90 days, so as to allow the superior court opportunity to instruct the commission.

CONCLUSION AND ORDER

The commission concludes it does not have jurisdiction over Paul Pietro's appeal of Alaska Workers' Compensation Board Dec. Nos. 07-0260 and 08-0029.

It is ORDERED that the appeal to the commission is DISMISSED effective Monday, September 22, 2008, or upon earlier notice that proceedings in *Pietro v. Unocal Corp. and Alaska Workers' Comp. Bd.*, 3AN 05-12980 Civil, have resumed in the superior court and the superior court has taken full jurisdiction of this appeal, PROVIDED the commission is not otherwise instructed by the superior court prior to the effective date of this order.

¹⁵ The commission may decide that an appeal of a board decision on remand from the court is entirely outside commission jurisdiction; it is another for the commission to delineate the court's jurisdiction over issues in a mixed decision on remand. In *Adepoju*, the commission recognized it has no authority to give directions to the superior court. App. Comm'n Dec. No. 010 at 10. The scope of the superior court's jurisdiction to hear any part of this appeal is not a question the commission may decide; therefore, the commission defers to the superior court's determination.

¹⁶ If the superior court determines that a severable part of the appeal lies outside its appellate jurisdiction and therefore must be decided by this agency, the commission is willing, if so instructed by the superior court, to suspend its proceedings on appeal until the superior court proceedings are concluded in the interest of an orderly disposition of Pietro's appeal.

All other proceedings before the commission in this appeal are STAYED pending dismissal of this appeal or receipt of instructions from the superior court.

Date: 26 June 2008

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Philip Ulmer, Appeals Commissioner

Signed

David W. Richards, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final decision on the merits of this appeal, and it is not a final dispositive decision to dismiss the appeal. The commission concluded it does not have jurisdiction over the appeal, and announced it will dismiss the appeal. However, it has stayed the commission's order dismissing the appeal to allow the superior court to decide if any part of the appeal lies outside the court's jurisdiction. The effect of this decision is to stay, or "put a hold on," AWCAC Appeal No. 08-009 (consolidated with Appeal No. 07-037) for 90 days so that the appellant may ask the superior court to resume proceedings in Superior Court Case No. 3AN-05-12980. The commission will issue a final decision and order after ninety days, or sooner if the superior court gives the commission instructions regarding jurisdiction over the appeal.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final 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. Because this is not a final commission decision, the Supreme Court may not accept an appeal.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed (find the date of distribution in the box below). You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

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 distributed (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 or petition for review or hearing 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 distribution of this decision.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of this Memorandum Decision and Order, Alaska Workers' Compensation Appeals Commission Decision No. 082, in the matter of *Paul Pietro v. Unocal Corp.*; AWCAC Appeal No. 08-009 and Appeal No. 07-037, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 26th day of June, 2008.

Signed

L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on 6/26/08 a copy of this Memorandum Decision and Order in AWCAC Appeal No. 08-009 and 07-037 was mailed to Jensen and Wagg at their addresses of record, and faxed to AWCAC Appeals Clerk, WCD Director, Jensen & Wagg.

Signed
J. Ramsey, Deputy Clerk

6/26/08
Date