Alaska Workers' Compensation Appeals Commission

Nick Stepovich,
Appellant,

vs.

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

Decision No. 117
Order on Motion to Dismiss Appeal
January 5, 2009

AWCAC Appeal No. 08-029
AWCB Decision No. 08-0166
AWCB Case No. 700001722

Appeal from Alaska Workers' Compensation Board Decision No. 08-0166 issued on September 12, 2008, by northern panel members Judith de Marsh, Chair, and Jeffrey P. Pruss, Member for Labor.

Appearances: Allen Vacura, Vacura and Stepovich, for appellant Nick Stepovich. Talis J. Colberg, Attorney General, and Larry A. McKinstry, Assistant Attorney General, for appellee State of Alaska, Division of Workers' Compensation.

Proceedings: Appeal filed October 13, 2008. Motion to dismiss appeal filed by appellee on October 29, 2008. Opposition to motion filed November 7, 2008. Order withdrawing instruction to file briefs pending decision on motion to dismiss appeal issued November 24, 2008.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

By: Kristin Knudsen, Chair.

The appellee, State of Alaska, Division of Workers' Compensation, asks the commission to dismiss Nick Stepovich's appeal because the board's decision is not final. The appellee argues that the board's order directs the hearing of the State's petition for assessment of penalty. No penalty has yet been ordered because the board has not heard the State's petition. Therefore, no "compensation order" was issued and the board's decision is not final.

The commission has, argues the appellee, "jurisdiction to hear final decisions and orders of the board."[1] The appellee argues the appellant's right of appeal is limited to final decisions and [final] orders that fully dispose of all the claimant's rights or, in this case, dispose of the State's petition against Stepovich. Elsewhere the statutes provide that the commission has the power to "review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition."[2] A "decision or order of the board is subject to review by the commission."[3] The commission is the "exclusive and final authority for the hearing . . . *in those matters* that have been appealed to the commission, except for an appeal to the Alaska Supreme Court."[4] Thus, although the commission may "entertain discretionary review," appellee argues such review must be requested by motion for extraordinary review under 8 AAC 57.072-.076.[5]

The appellant responds that the board's order was a final disposition of his petition to dismiss the division's petition for a penalty against him, the board titled the decision "Final Decision," and, therefore, he is entitled to regard it a final decision subject to appeal.[6] He also argues that his petition was "dispositive," because it would have precluded the State from seeking a penalty against him if it had been granted.[7]

The commission addressed the issue of finality of a board order in *Hope Community Resources v. Rodriguez*.[8] The commission said that

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[1] Appellee's Mem. of Points and Authorities in Support of Mot. to Dismiss Appeal, 2, citing AS 23.30.007(a).

[2] AS 23.30.128(b).

[3] AS 23.30.125(b).

[4] AS 23.30.008(a) (emphasis added).

[5] Appellee's Mem. of Points and Authorities in Support of Mot. to Dismiss Appeal at 2.

[6] Appellant's Mem. in Opposition, 1-2.

[7] *Id.* at 3.

[8] Alaska Workers' Comp. App. Comm'n Dec. No. 041, 2007 WL 1523397 (May 16, 2007).

> [w]hether or not a particular board order is a final, appealable order is a question of law and procedure to which we apply our independent judgment under AS 23.30.128(b).[9]

Workers' compensation cases have long lives, and the board often hears claims that are limited to a single dispute rather than a final disposition of the case.[10] When determining the *finality* of a board decision, the commission does not look for the last possible decision the board could make in a case.

In *Hope Community Resources*, the commission relied on the Alaska Supreme Court's decision in *Ostman v. State, Commercial Fisheries Entry Comm'n*,[11] to determine when a board decision is final. In *Ostman*, the commission noted, the Supreme Court

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[9] *Hope Community Resources v. Rodriguez,* Alaska Workers' Comp. App. Comm'n Dec. No. 041, 5; 2007 WL 1523397, *3, (May 16, 2007).

[10] The Alaska Workers' Compensation Act does not contain a closure statute, requiring an insurer or employer to give notice of claim closure and requiring objection to closure or reopening within a certain period. *See, e.g.,* Ariz. Rev. Stats. § 23-1061 (requiring "Notice of Status" and petition for reopening after the status becomes final); Oregon Rev. Stats § 656.262(7)(c) (requiring updated notice of acceptance on claim closure) & § 656.268 (5)("insurer or self-insured employer shall issue a notice of closure of such a claim to the worker, to the worker's attorney if the worker is represented, and to the director.") (am. 2007, eff. Jan. 1, 2008); *but see Koskela v. Willamette Indus., Inc.*, 15 P.3d 548 (Ore. 2000)(finding 1995 statute limiting evidence and process to reopen closed workers' compensation claim unconstitutional); 77 Pa. Stat. Ann. § 772 (requiring notice of "compensation payable" and limiting time to modify or reopen); Wash. Rev. Code. Ann. §51.32.160 (limiting period to reopen after "first closing order" to seven years). Thus, an Alaska *workers' compensation case* may involve a succession of *claims* arising out of the same injury, for different benefits, over a period of years, and re-litigation of ordered benefits, (as the board routinely retains jurisdiction to address disputes flowing from an order). The result is that litigation before the board is usually unlike a personal injury case encompassing all future damages in litigation of a complaint to a single judgment. The practice of hearing only limited claims arising from a single injury and retaining jurisdiction invites repeated claims and "claim splitting," which was disapproved by the Supreme Court in *Robertson v. Am. Mechanical, Inc.*, 54 P.3d 777, 780 (Alaska 2002) (holding that the rule against claim splitting provides that "*all claims arising out of a single transaction must be brought in a single suit*, and those that are not become extinguished by the judgment in the suit in which some of the claims were brought" so that employee's subsequent claim on different theory based on the same injury and the same "core set of facts" as first claim was barred by *res judicata*).

[11] 678 P.2d 1323 (Alaska 1984).

focused on whether the decision was a "final rejection of his permit application,"[12] but also considered the practical effect of the decision, which was to reject Ostman's claims for more points.[13] No further opportunities were available for Ostman to seek additional point awards because the evidence submission period had expired; therefore, since further administrative review would be futile, the Supreme Court held the decision was a final appealable order.[14]

Based on *Ostman*, the commission held that an appeal taken under AS 23.30.127 should be from a board decision "that is final as to the appellant's rights, and leaves no further dispute on a pending claim or petition for the board to resolve."[15] The commission noted that, "as the dissent noted in *Municipality v. Anderson*, it is sometimes 'difficult to predict when there will be a final appealable judgment in ... workers' compensation proceedings.'"[16]

The commission examines the board's decision to determine if it is final as to the appellant's rights and leaves no further dispute on a pending claim or petition for the board to resolve. In this appeal, the commission is not presented with an appeal from an order on a claim for benefits. Instead, the case concerns the State's attempt to assess a penalty against an uninsured employer. The board fixed the legal relationship between the State and Stepovich when it found in its September 6, 2006, decision that Stepovich was uninsured:

> [T]he employer failed to insure or provide security for workers' compensation coverage of its employees, as required by AS 23.30.075, following the effective date of AS 23.30.080(f), from January 27, 2006 through June 6, 2006. The provisions of AS 23.30.080(f) give us the discretion to consider assessing civil

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[12] *Id.* at 1327.

[13] *Hope Community Resources,* App. Comm'n Dec. No. 041 at 6, *citing Ostman,* 678 P.2d at 1328.

[14] *Id*.

[15] *Hope Community Resources*, App. Comm'n Dec. No. 041 at 7, holding that the board's denial of a petition for review of the administrator's order was a final, appealable order, notwithstanding that the board titled it an "interlocutory order."

[16] *Id*. at 7, *citing Municipality v. Anderson,* 37 P.3d 420, 423 (Alaska 2001).

> penalties, if requested by the Division. We find the employer is potentially subject to those penalties, and we retain jurisdiction over this issue, pending a petition for penalties, under AS 23.30.130.[17]

The only issues that remained following this decision were, "If the State sought a penalty, how much would the penalty be? If the board assessed a penalty, on what conditions should it be paid?" In other words, the decision did not determine appellant's rights in regard to the potential penalty.

The main issue in this appeal is whether the board erred as a matter of law in denying Stepovich's petition to dismiss the State's petition seeking penalties because it was filed more than one year after its September 6, 2006, decision.[18] The denial of Stepovich's petition left the dispute over the pending State petition for assessment of a penalty for the board to resolve. Stepovich's rights as to the amount of penalty and the conditions of its payment have yet to be determined.[19] The board's order was, however, a final rejection of a legal defense to the State's petition, that is, Stepovich's argument that the board's jurisdiction to issue a final penalty order expired September 6, 2007.

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[17] Alaska Workers' Comp. Bd. Dec. No. 06-0247, 7 (Sept. 6, 2006) (footnote omitted). Unfortunately, the board did not specify the issue over which it retained jurisdiction; the only issue it decided was that the employer had failed to insure or provide security for workers' compensation coverage.

[18] Appellant's appeal contends on various related grounds that jurisdiction to modify a prior order under AS 23.30.130 expires at the end of one year; because no petition for penalty assessment was filed in that year, the board was without jurisdiction to assess a penalty. Appellant's Statement of Grounds for Appeal, ¶2-6, 8. Appellant's appeal also asserted generally that the board's decision was "not based on substantial evidence and is contrary to law," *id.* at ¶1, and violated the appellant's right to due process or otherwise was contrary to the intent of the legislature, *id.* at ¶7, 9.

[19] *See Velderrain v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 065, 10-11 (Nov. 29, 2007) (holding the board's order was not final because board retained jurisdiction to approve a payment schedule and directed the Division to file the payment schedule for approval within 30 days).

The board's action here is not unlike the denial of a motion to dismiss a complaint under Civil Rule 12(b),[20] Civil Rule 12(c),[21] or for summary judgment under

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[20] Alaska Rule of Civil Procedure 12(b) provides:

> **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A decision granting a motion to dismiss is not a final judgment under Civil Rule 58. When the decision adjudicates all unresolved claims as to all parties, the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.

The Supreme Court held in *Dworkin v. First National*, 444 P.2d 777 (Alaska 1968) that

> [a] Civil Rule 12(b)(6) motion for dismissal which [is] grounded on the "failure to state a claim upon which relief can be granted" ... tests the legal sufficiency of the complaint's allegations. Well pleaded allegations are deemed admitted for purposes of the

Civil Rule 56.[22] Stepovich sought dismissal of the State's petition as a matter of law because the board no longer had subject matter jurisdiction. In each case, the civil rule

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> motion but unwarranted factual inferences and conclusions of law are not considered admitted in resolving the merits of such motions.

Id. at 779 (footnote omitted).

[21] Alaska Rule of Civil Procedure 12(c) provides:

> **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A decision granting a motion for judgment on the pleadings is not a final judgment under Civil Rule 58. When the decision adjudicates all unresolved claims as to all parties, the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.

[22] Alaska Rule of Civil Procedure 56 provides in pertinent part:

> (c) **Motion and Proceedings Thereon.** The motion shall be made pursuant to Rule 77, and may be supported by affidavits setting forth concise statements of material facts made upon personal knowledge. There must also be served and filed with each motion a memorandum showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party. A decision granting a motion for summary judgment is not a final judgment under Civil Rule 58. When the

provides that a grant of the motion (to dismiss the complaint or for summary judgment) "is not a final judgment" but that when the effect is to adjudicate all disputes, the court must enter a separate final, appealable judgment. The board's regulations have no such provision.[23] Therefore, the board's own description of its order, and the appeal procedure following it, are the parties' only guidance as to the board's understanding of the effect of its order.

Had the board *granted* Stepovich's petition to dismiss, the resulting order would have adjudicated all disputes, finally fixed the parties' rights, and left no further dispute on a pending claim or petition for the board to resolve. In such a case, the board's description of its order as a "final decision" would be accurate. However, the denial of Stepovich's petition merely allowed the State's petition for penalty assessment to be considered. It resulted in no decision on the merits of the penalty the State seeks.[24]

> decision adjudicates all unresolved claims as to all parties, the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.
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> (d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. . . .

[23] The only regulation directly related to the procedure in petitions against uninsured employers is found at 8 AAC 45.174(f), "Proceedings conducted under this section must conform to the Administrative Procedure Act, AS 44.62.330 – 44.62.630."

[24] The board was asked to decide if Stepovich was liable for penalties, *In re Nick Stepovich*, Bd. Dec. No. 06-0247 at 1, but it decided that "the employer is subject to potential civil penalties under AS 23.30.080(f) for the period in which it was

Because the board's decision left the parties' rights in the petition for the assessment of a penalty unresolved, the denial of the petition to dismiss must be regarded as a non-final order from which there is no right of appeal under AS 23.30.127.[25]

However, in view of the board's action in labeling its decision a "Final Decision," and the probability of reliance on that description in the absence of a regulation requiring a specific finding of final adjudication in cases where dispositive petitions are granted or dismissed, the commission permits the appellant to convert his appeal to a motion for extraordinary review.[26] The commission recognizes that the issue presented in this appeal may be litigated after a final decision and order on the penalty petition is entered, nonetheless, the appellant has the right to ask the commission for discretionary review of a board order disposing of his petition. The commission will not deny him the right to ask for review merely because the board made an error in the title of its decision.

Therefore, for the reasons set out above, the commission ORDERS that

1. The petition to dismiss the appeal is GRANTED, PROVIDED that the appellant may choose to convert his appeal to a motion for extraordinary review by filing a complete motion for extraordinary review of Alaska Workers' Comp. Bd. Dec. No. 08-0166 within 10 days of this decision.
2. If appellant elects not to file a motion for extraordinary review, his right to assert as error the board's denial of his petition (to dismiss the State's petition for penalty assessment) in an appeal of a final board order in Alaska Workers' Compensation Board Case No. 700001722 is not waived.
3. If the appellant elects to file a motion for extraordinary review of Alaska Workers' Comp. Bd. Dec. No. 08-0166, the appellant shall use the same appeal number,

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uninsured following the effective date of that section of the statute, from January 27, 2006 through June 6, 2006." *Id.* at 8. That decision was not appealed.

[25] The appellant preserved the issue of the board's authority to act on the petition for assessment of penalties.

[26] 8 AAC 57.270. *See Kuukpik Arctic Catering v. Harig*, Alaska Workers' Comp. Bd. Dec. No. 038, 2 (Apr. 27, 2007).

but reform the caption to substitute "movant" for "appellant" and "respondent" for "appellee."

4. If no motion for extraordinary review is filed within 10 days of this order, the commission will issue a Final Order dismissing this appeal.

Date: *5 Jan. 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

Published by order of the Chair, issued September 29, 2009, upon dismissal of the Motion for Extraordinary Review as resolved by settlement.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the Order on Motion to Dismiss Appeal in the matter of *Nick Stepovich vs. State of Alaska, Division of Workers' Compensation,* AWCAC Appeal No. 08-029, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 5, 2009.

Date: *Sept. 30, 2009*

Signed
Linda Beard, Appeals Commission Clerk