Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage,
Appellant,

vs.

Raymond P. Faust,
Appellee.

Final Decision
Decision No. 078 May 22, 2008

AWCAC Appeal No. 07-028
AWCB Dec. No. 07-0156
AWC Case No. 200321800

Appeal from Alaska Workers' Compensation Board Decision No. 07-0156, final decision and order issued June 18, 2007 by southcentral panel members William Walters, Chairman, Patricia A. Vollendorf, Member for Labor, and Janet L. Waldron, Member for Industry.

Appearances: Nora Barlow, Delisio, Moran, Geraghty and Zobel, for appellant Municipality of Anchorage. William J. Soule, Esq., for appellee Raymond P. Faust.

Commission proceedings: Hearing on appellant's motion for stay of board order pending appeal held August 8, 2007. Stay granted by commission order September 7, 2007; reconsideration denied October 17, 2007. Hearing on appellee's motion to require recusal of the chair held on March 4, 2008, denied by bench order delivered telephonically on March 5, 2008.[1] Oral argument on appeal presented March 6, 2008.

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

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

By: Kristin Knudsen, Chair.

This case originated from the reemployment benefits administrator's denial of an eligibility evaluation to Raymond Faust, who was injured in 2003. The appellant asserts the board erred in reversing the administrator's denial and ordering the administrator to assign a qualified provider to perform an eligibility evaluation, on the basis of

[1] The commission's order denying the motion is attached as Appendix 1.

retrospective application of a 2005 amendment to AS 23.30.041(c).[2] The appellee disagrees; he also contends the board's decision is supportable because remand is

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[2] § 17 ch 10 FSSLA 2005, effective November 7, 2005, rewrote AS 23.30.041(c) to provide:

> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

AS 23.30.041(c), as enacted in 1988, formerly provided:

> (c) If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request. The administrator shall, on a rotating

required because the administrator failed to consider the appellee's continued employment as an extraordinary circumstance preventing him from making a timely request.

The parties' assertions require the appeals commission to decide if the November 2005 amendment to AS 23.30.041(c) applies retrospectively to requests for eligibility evaluation arising from injuries before the effective date of the amendment, notwithstanding AS 01.10.090.[3]

The commission concludes that the 2005 amendment is substantive, not merely procedural. Therefore, the board erred in directing the administrator to apply the amended version of AS 23.30.041(c) retrospectively. Because remand to the administrator is not required, the board's decision is reversed.

1. Factual background.

Raymond Faust was hired as a police recruit by the Municipality of Anchorage in May 2002. During his second month of training at the police academy, he injured his right shoulder. His physician treated the shoulder injury conservatively, but for other reasons Faust was unable to complete the academy. He was assigned to a light duty position. Faust returned to the full duties of his position as a police officer recruit in April 2003, and later re-entered the academy. In December 2003, while still in training, Faust again re-injured his shoulder and he was assigned to light duty. This time, surgery was needed to repair the shoulder; Faust had the surgery in August 2004. He returned to light duty work for the Municipality in October 2004. Faust remained on a light duty assignment for the remainder of his employment by the Municipality.

Faust received a permanent partial impairment rating for his December 2003 shoulder injury. The Municipality paid Faust the permanent partial disability

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> and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

[3] AS 01.10.090 provides:

> Retrospective statutes. No statute is retrospective unless expressly declared therein.

compensation based on the rating in a lump sum ($44,250.00) in October 2005. Faust also applied for and received a "medical retirement"[4] from the Municipality. Faust has not worked for the Municipality since December 1, 2005, when he began receiving occupational disability benefits.

2. Procedural history.

Faust filed a request for an eligibility evaluation for reemployment benefits on December 5, 2006, almost three years after he gave notice of his injury, and more than a year after retiring and accepting occupational disability payments. The reemployment benefits administrator denied his request because it was filed too late, more than 90 days after he knew, or should have known, that he might not be able to return to work as a police officer. Faust appealed the denial to the board in a claim filed December 26, 2006.

a. Proceedings before the board.

The board heard Faust's appeal on May 30, 2007. Faust testified by deposition and before the board. He testified he received an information booklet from the board in May 2004, with copies of information regarding his workers' compensation injuries.[5] He recalled going to the Workers' Compensation Division office, where he "talked to

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[4] Faust's reference to a "medical retirement" refers to occupational disability benefits under AS 39.35.410, which provides that "An employee is eligible for an occupational disability benefit if employment is terminated because of a total and apparently permanent occupational disability, as defined in AS 39.35.680, before the employee's normal retirement date." AS 39.35.680(27) provides that

> "occupational disability" means a physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer or the duties of another comparable position or job that an employer makes available and for which the employee is qualified by training or education; however, the proximate cause of the condition must be a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties and not the proximate result of the willful negligence of the employee.

[5] Tr. 27:15-29:4.

Janet upstairs about my injury and wanted to make sure that I had all my paper work correctly done and – and some issues with my injury because I wasn't exactly sure what all diff – things I needed to do so I know I contacted her."[6] He testified he continued to work for the Municipality, receiving his pay as a police recruit, on light duty, from October 2004 until November 30, 2005.[7] On light duty, he worked in the police lab processing film, digital images, and some fingerprint evidence.[8] Bonnie Carmen, an adjuster, testified regarding Faust's contacts with the Municipality's adjusters.

At the board, Faust argued that the reemployment benefits administrator failed to consider that his continued employment by the Municipality on light duty was an "unusual and extenuating circumstance" that should excuse his late request.[9] He

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6 Tr. 29:15-19.

7 Tr. 24:11-26:16.

8 Tr. 25:3-6.

9 8 AAC 45.520 provides:

> **Determination of unusual and extenuating circumstances.** (a) An employee requesting an eligibility evaluation for reemployment benefits more than 90 days after giving the employer notice of the injury must submit to the administrator
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> (1) a written request for the evaluation;
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> (2) a doctor's prediction that the injury may permanently preclude the employee from returning to the job at the time of injury; and
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> (3) a written statement explaining the unusual and extenuating circumstances that prevented the employee from timely requesting the eligibility evaluation.
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> (b) Within 30 days after receiving the information required under (a) of this section, the administrator will notify the parties, by certified mail, whether the employee had an unusual and extenuating circumstance that prevented the employee from making a timely request for an eligibility evaluation. An unusual and extenuating circumstance exists only if the administrator

argued the adjuster failed to inform him about reemployment benefits, or how to request an eligibility evaluation, and that this prevented him from timely filing a request. He also argued the Municipality should be estopped to contest his request because his continued employment worked to his detriment. Finally, he argued that the administrator improperly considered when he "should have known" he would not be able to return to work. Faust did not argue that his request for an eligibility evaluation was governed by the 2005 amended version of AS 23.30.041(c).

The Municipality argued that Faust was informed of the benefits through a brochure titled "Workers' Compensation and You" mailed to him. The "discovery rule," the Municipality argued, has been upheld by the courts, so the administrator's use of it was not an error. The burden is on the employee to show unusual and extenuating circumstances; if the employee failed to give the administrator information regarding his continued employment, the administrator did not err by failing to consider it. The Municipality also argued that even if Faust's continued employment were considered an

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> determines that within the first 90 days after the employee gave the employer notice of the injury
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> > (1) a doctor failed to predict that the employee may be permanently precluded from returning to the job at time of injury;
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> > (2) the employee did not know that a doctor predicted the employee may be permanently precluded from returning to the job at time of injury;
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> > (3) the employer accommodated the employee's limitation and continued to employ the employee;
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> > (4) the employee continued to be employed;
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> > (5) the compensability of the injury was controverted and compensability was not resolved; or
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> > (6) the employee's injury was so severe that the employee was physically or mentally prevented from requesting an eligibility evaluation.
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> (c) Within 10 days after the decision, either party may seek a review of the decision by requesting a hearing under AS 23.30.110.

extraordinary and unusual circumstance, it was not sufficient to excuse a delay of a year after his employment ended and he began receiving occupational disability benefits.

b. The board's decision.

The board reviewed the standard it applies to appeals from reemployment benefits administrator decisions.[10] It then found that the administrator had failed to consider evidence in her determination that Faust had worked in modified employment until December 1, 2005.[11] Because continued employment is an extenuating circumstance under 8 AAC 45.520(b), the board concluded the administrator's failure to consider Faust's employment was an abuse of discretion.[12] The board reversed the administrator's denial and remanded the request to the administrator.[13]

The board instructed the administrator that on remand she was to assign a qualified provider to perform the eligibility evaluation rather than determine if Faust's employment in light duty was an unusual and extraordinary circumstance excusing his late request.[14] Relying on the southeast panel's decision in *Carrell v. Pacific Log and Lumber, LTD.,*[15] and the Alaska Supreme Court's decision in *Pan Alaska Trucking, Inc. v. Crouch*,[16] the board held that the 2005 amendment to AS 23.30.041(c) was procedural because it "made the road easier, by shifting the obligation to order the eligibility evaluation to the [administrator], a mandate required once the employee had been unable to return to work for a 90-day period."[17] The board panel agreed with the

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10 *Raymond P. Faust v. Municipality of Anchorage,* Alaska Workers' Comp. Bd. Dec. No. 07-0156, 7-9 (June 13, 2007). No issue was raised on appeal regarding the standards applied by the board when reviewing the administrator's decision.

11 *Id.* at 11.

12 *Id.*

13 *Id.*

14 *Id.* at 13.

15 Alaska Workers' Comp. Bd. Dec. No. 07-0096 (April 23, 2007).

16 773 P.2d 947 (Alaska 1989).

17 *Raymond P. Faust,* Dec. No. 07-0156 at 12.

southeast panel's conclusion in *Dan L. Carrell* that the eligibility evaluation referral provision of amended AS 23.30.041(c) was to be applied retrospectively as a merely procedural change; therefore, after November 7, 2005 "if an injured employee is unable to return to employment after 90 consecutive days" the administrator must order an eligibility evaluation, regardless of date of injury.[18] The Municipality appealed.

c. Arguments before the commission.

The appellant argues that the board's analysis is flawed because the board did not consider the amendment as a whole, nor whether the amendment affected the substantive rights of more parties than the employee before it. The appellant, like other employers, has a new obligation imposed on it by the amendment, as do employees, who formerly could avoid an evaluation by simply not requesting one. The appellant also argues that the board violated the due process rights of the parties by deciding an issue not raised by the parties in the hearing, without notice and opportunity to brief the issue raised by the board. Finally, the appellant argues that the board should have dismissed the claim of appeal because, even if the administrator had the information regarding appellee's work before her, it could not excuse a one-year delay. Failure to consider the continued work, the appellant effectively argues, was not prejudicial error requiring the board to remand the matter to the administrator.

The appellee argues the board's analysis of the 2005 amendment to AS 23.30.041(c) is correct because the amendment made the "road [to securing a benefit] easier" by eliminating the 90-day period to request an eligibility evaluation and by shifting the burden of requesting an evaluation from the employee to the administrator. Thus, appellee argues, the change in a "triggering event" is merely procedural under *Pan Alaska Trucking v. Crouch* and amendments that are procedural may be given retrospective effect. The appellee argues the instruction on remand raises no due process issue because the southeast panel's decision in *Dan L. Carrell* was the "law on this issue."[19] The decision simply gave notice to the parties that on remand

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[18] *Id.* at 12-13.

[19] Appellant's Br. 25.

the administrator would apply the law retrospectively.[20] Even if the retrospective application was error, appellee argues, the board's decision remanding to the administrator was correct because disregarding the continued employment was an abuse of discretion. The appellee argues there were also other reasons why the administrator's decision should have been overturned; therefore, the administrator's failure to consider the appellee's continued employment cannot be regarded as harmless error.

3. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the board's findings.[21] The commission does not consider evidence that was not in the board record when the board's decision was made.[22] A board determination of credibility of a witness who appears before the board may not be disturbed by the commission.[23]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[24] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[25] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers'

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[20] *Id.* at 25, 32.

[21] AS 23.30.128(b).

[22] AS 23.30.128(a).

[23] AS 23.30.128(b).

[24] AS 23.30.128(b).

[25] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

compensation[26] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[27]

4. Discussion.

The pivotal issue before the commission is this: Did the board err by instructing the administrator to apply AS 23.30.041(c), as amended in 2005, to a request for a reemployment benefits evaluation arising out of a 2003 injury? If the board did not err, the board's decision effectively holds that the administrator should have applied the amended version of AS 23.30.041(c) from the time Faust filed his request, regardless of the date of injury. If the board erred, then the commission may consider whether the board was required to remand the request to the administrator. Therefore, the issue of the board's retrospective application of the 2005 amendment must be resolved first.

a. Statutes are presumed to be prospective unless expressly made retrospective by the legislature.

AS 01.10.090 provides:

> Retrospective statutes. No statute is retrospective unless expressly declared therein.

Contrary to appellee's assertion that there is "no case law that addresses Alaska Stat. §01.10.090,"[28] this section of the Alaska Statutes has been addressed and relied on from the earliest days of this state. In *Watts v. Seward Sch. Bd.*,[29] 412 P.2d 586, 602-603 (Alaska 1966), the Alaska Supreme Court held:

> The general rule on retrospective operation of statutes is embodied in AS 01.10.090 which states: 'No statute is retrospective unless expressly declared therein.' We have had occasion to apply this statute in *Stephens v. Rogers Constr. Co.*[30] Even before its enactment, the rule contained in the statute was

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[26] AS 23.30.007, 008(a). *See also Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[27] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[28] Appellee's Br. 32.

[29] 412 P.2d 586 (Alaska 1966).

[30] 411 P.2d 205, 208 (Alaska 1966).

established by case law, as noted in our opinion in *Hill v. Moe*.[31] The reason for the rule is perhaps best stated in *Shwab v. Doyle*[32] where the United States Supreme Court approved the following language from Story:[33] 'Retrospective laws are, indeed, generally unjust, and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

The Court then stated as follows:

> There is absolute prohibition against them when their purpose is punitive; they then being denominated ex post facto laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.[34]

The Alaska Supreme Court referred to AS 01.10.090 when construing a series of amendments to AS 23.30.172 and 175 in *Wien v. Arant.*[35] It noted that while repeal of an amendment did not have the impact urged by Wien, neither did it result in retroactive and continuing increases in death benefits as urged by Arant:

> "The legislature specified what retroactive increases were appropriate in AS 23.30.172. It explicitly removed death benefits from the section. If the legislature in 1975 intended the retroactive provision it passed in 1974 to cover death benefits, it

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[31] 367 P.2d 739, 742 (Alaska 1961), *cert. denied*, 370 U.S. 916, 82 S.Ct. 1554, 8 L.Ed.2d 498 (1962).

[32] 258 U.S. 529, 42 S.Ct. 391, 66 L.Ed. 747 (1922).

[33] Story, Const. Sec. 1398.

[34] 412 P.2d at 602-603 (footnotes included), (quoting *Schwab v. Doyle*, 258 U.S. 529, 534, 42 S.Ct. 391, 392, 66 L.Ed. 747, 752 (1922)), *reh. denied*, *Watts v. Seward School Bd.*, 423 P.2d 678 (Alaska 1967), *vacated on other grounds*, *Watts v. Seward School Board*, 391 U.S. 592, 88 S.Ct. 1753, 20 L.Ed.2d 842 (1968), *judgment reinstated on remand*, *Watts v. Seward School Bd.*, 454 P.2d 732 (Alaska May 12, 1969), *cert. denied, Watts v. Seward School Board,* 397 U.S. 921, 90 S.Ct. 899, 25 L.Ed.2d 101 (1970).

[35] 592 P.2d 352 (Alaska 1979).

> probably would have said so. Courts do not infer retroactive operation of statutes in such ambiguous circumstances.[36]

In *City and Borough of Juneau v. Commercial Union Ins. Co.,*[37] the Court noted that AS 01.10.020 modifies to some extent the "iron-clad language" of AS 01.10.090.[38] AS 01.10.020 provides:

> The provisions of 40-90 of this chapter shall be observed in the construction of the laws of the state unless the construction would be inconsistent with the manifest intent of the legislature.

Thus, the Legislature's "clear mandate" expressed in AS 01.10.020 and .090 is that statutes "are not to be applied retroactively unless the language used by the legislature indicates the contrary."[39]

b. There is no express legislative provision for retrospective application of the statute.

The board did not examine ch. 10 FSSLA 2005 for language manifesting the legislature's intent that any part of it would be applied other than as AS 01.10.090 mandates: "No statute is retrospective unless expressly declared therein." If the board had done so, it would have found that specific effective dates were enacted for certain

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[36] 592 P.2d at 362 n. 44, overruled on other grounds, *Fairbanks North Star Borough School Dist. v. Crider*, 736 P.2d 770 (Alaska 1987). The court's holding in *Wien v. Arant* was discussed in *Peck v. Alaska Aeronautical, Inc.*, 756 P.2d 282 (Alaska 1988); the Court noted that the amended rated table construed in *Wien* "prospectively phases in increases; it has no retroactive effect because *it does not grant increases to claimants injured before the new rules were passed.*" *Id.* at 288 (emphasis added).

[37] 598 P.2d 957 (Alaska 1979).

[38] 598 P.2d at 958 n. 3.

[39] *State v. First Nat'l Bank of Anchorage,* 660 P.2d 406, 418 (Alaska 1982) (Uniform Land Sales Practices Act "can hardly be characterized as bringing about mere procedural changes," and holding Act cannot be retrospectively applied to sales predating its application to in-state land sales). The Court rejected the argument that the Act may be applied retrospectively as a "remedial" statute, stating, "Even when a statute is remedial in nature, it will be construed retroactively only if the legislative intent clearly indicates that retroactive operation is intended." *Id.* at 418 n. 23.

sections of the legislation,[40] but the remainder, including § 17, were left to the general effective date of 90 days after enactment. Instead, the board's decision in this case relied on reasoning expressed by the southeast panel in *Dan L. Carrell v. Pacific Log & Lumber, LTD*.[41] But, in *Dan L. Carrell*, the board's southeast panel also failed to acknowledge that the same legislation contained no express provision for retrospective application.

However, a manifestation of intent *not* to apply the legislation retrospectively appears in the failure of the Legislature to adopt an immediate general effective date.[42] The Legislature failed to pass the general effective date clause in section 86 of FC CSSB 130, but it passed the specific effective date clause in sections 84 and 85.[43] This action delayed the general effective date, suggesting that the Legislature intended that most of ch. 10 FSSLA 2005 was to be applied only prospectively.[44] The board's decision in

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[40] *See* 24th Alaska Legis. House Journal 2087-88 (2005), adopting §§ 84-85 FC CSSB 130.

[41] Alaska Workers' Comp. Bd. Dec. No. 07-0096 (April 23, 2007) (R. Briggs). Appellee asserts incorrectly that the southcentral panel directed the administrator to apply the 2005 version because the *Dan L. Carroll* decision was "controlling precedent." Appellee Br. 25. The appeals commission is the *exclusive* administrative quasi-judicial body for determining matters of law under the Alaska Workers' Compensation Act. AS 23.30.008(a). All board panels are equal; no one board panel has authority over another. Over time custom may develop among the panels; one panel may find another's reasoning persuasive. However, within the administrative adjudication system for workers' compensation claims, only the commission's decisions have the force of legal precedent, unless reversed or modified by the Alaska Supreme Court.

[42] *Eastwind, Inc., v. State, Dep't of Labor,* 951 P.2d 844, 847 (Alaska 1997).

[43] *See* 24th Alaska Legis. House Journal 2088 (2005). Section 86 of FC CSSB130 provided "Except as provided in secs. 84 and 85 of this Act, this Act takes effect August 1, 2005." This general effective date was defeated, so the bill was made effective 90 days after enactment pursuant to Alaska Const., art. II, § 18. The bill was not engrossed and enrolled copies transmitted to the Office of the Governor until 2:58 p.m., August 4, 2005 (24th Alaska Legis. Sen. Journal 1781 (2005)); the bill was signed August 9, 2005, thus establishing an effective date of November 7, 2005.

[44] *Eastwind, Inc.,* 951 P.2d at 847 (citing 2 Norman J. Singer, *Sutherland Statutory Construction* § 41.04 (5th ed. 1991) ("Postponement of the effective date for an act indicates that it should have only prospective application.").

this case, like the *Dan L. Carrell* decision, omits any discussion of the principal that postponement of an effective date indicates an intent that legislation should have prospective application only.

The *Dan L. Carrell* decision briefly discussed the Attorney General's bill review.[45] On the subject of retrospective application, the Attorney General's letter stated that

> Sections 17, 18, and 19 of the bill are substantive changes to the reemployment benefits section of the bill and essentially change the benefits an employee would or would not be entitled to. Therefore, these changes would apply only to employees whose injuries occur on or after the effective date of secs. 17 - 19.[46]

The southeast panel disregarded this opinion, because it apparently believed the opinion was inconsistent with the assertion that section 17 was substantive:

> we note that the same writer elsewhere in the same opinion letter noted that the amended referral provision of Section 17 "does not alter standards for eligibility for reemployment benefits," but merely modifies the "trigger" events. [47]

By summarizing the bill review's three paragraphs[48] as noting that the new statute *merely* modifies the trigger events, the southeast panel suggests that if only the trigger event is changed, the statute effects only a procedural change. The bill review letter states, "The 'trigger' event for the time to request reemployment benefits is no longer the date of injury, but is the number of consecutive days of total disability."[49] The legislation eliminated litigation regarding excuses for non-compliance with the 90-day time limit and it marked, as the bill review said, "a structural shift from relying primarily on the employee to come forward and request benefits to mandating an evaluation in

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[45] Dec. No. 07-0096 at 17. A bill review is a letter written to the Governor that provides legal analyses of passed legislation that the Governor has in front of him for signature or veto.

[46] Alaska Att'y Gen. Op. No. 883-05-0106 (July 18, 2005) at 48.

[47] *Dan L. Carrell*, Dec. No. 07-0096 at 17 (footnotes omitted).

[48] *See* Alaska Att'y Gen. Op. No. 883-05-0106 at 28.

[49] *Id.*

all cases of injury serious enough to render an employee totally disabled for 90 consecutive days."[50]

The bill review letter's discussion of the operative effects of the new statute is not inconsistent with its later characterization of the statute as substantive. The mention of a "structural shift" suggests a substantive change because it describes imposition of additional liability and obligations. The bill review letter's reference to change in triggering events does not support the southeast panel's reading of legislative intent that the repeal and reenactment of AS 23.30.041(c) made "only procedural" changes; it does not support the board's decision in this case.

> *c. In the absence of clear legislative intent indicating the statute is to be applied to pre-enactment injuries, the statute must be applied prospectively because it is not only a procedural change.*

The Alaska Supreme Court has repeatedly held that the statute in effect on the date of injury governs the benefits available to the injured worker.[51] Although the board recognized this principal, it held that the new version of AS 23.30.041(c) fit within the "merely procedural change" exception recognized in *Pan Alaska Trucking, Inc. v. Crouch*.[52] The board reasoned that if the change made it easier for Faust to get

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[50] *Id. See also Workers' Compensation: Hearing on SB 130 before the S. Labor and Commerce Comm.* 24th Leg. 2 (Mar. 10, 2005) (statement of Paul Lisankie, Director, Div. of Workers' Comp.) (explaining the legislation "talks about redefining the trigger for when you are eligible for reemployment benefits. . . . A big part of the delay that we are seeing is trying to get someone, typically a doctor, to opine as to whether someone is going to have his physical capacities diminished to the point where they can't meet the requirements of certain jobs. There is an awful lot of people who don't request the benefit within the anticipated 90-day period, because they have not had the opportunity to have a doctor opine about whether they really need it. That adds a lot of delays, because . . . after they finally find out . . . they may have triggered their entitlement, then they have to ask to be excused for not asking on time. So, the trigger has been redefined in terms of how long somebody has been taking off work.").

[51] *Circle De Lumber Co. v. Humphrey,* 130 P.3d 941, 946 n. 32 (Alaska 2006); *Thompson v. United Parcel Serv.*, 975 P.2d 684, 688 (Alaska 1999); *Morrison v. Afognak Logging Co.*, 768 P.2d 1139, 1140 n. 1 (Alaska 1989); *Hood v. State, Workmen's Comp. Bd.,* 574 P.2d 811, 813-814 (Alaska 1978).

[52] 773 P.2d 947 (Alaska 1989).

the evaluation he wanted, it was merely procedural and applied retrospectively. The board's analysis is incomplete.

In *Matanuska Maid, Inc. v. State,* the Alaska Supreme Court held that "the statutory changes in the power to investigate brought about by [the Restraint of Trade Act] affect only procedure and that mere procedural changes which do not affect substantive rights are not immune from retrospective application."[53] The Court noted that "neither appellant may be prosecuted for acts committed prior to the Act's effective date. Such acts, however, may be relevant to possible antitrust violations committed after the effective date of the Act,"[54] so the Court upheld the Superior Court's enforcement of the Attorney General's request for documents executed prior to the effective date of the statute.[55] The Court specifically noted the absence of substantive effect as a result of procedural change: "Matanuska suffers no increased liability as a result of the state's investigatory procedure nor does the procedure otherwise affect Matanuska's substantive rights."[56]

An amendment affects "*only* procedure" and is a "*mere* procedural change" when it does not "change the norms governing out of court conduct"[57] or give "to pre-enactment conduct different legal effect from that which it would have had without passage of the statute."[58] A procedural law "concerns the manner and order of

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[53] 620 P.2d 182, 187 (Alaska 1980). The Court's repetition of modifiers that mean "solely" to describe those amendments not subject to the rule of prospective application ("affect *only* procedure and that *mere* procedural changes that do not affect substantive rights") twice in the same sentence make it clear that amendments of a mixed character, that do not affect *only* procedure, must be applied prospectively.

[54] *Id.* at 187 n. 9.

[55] *Id.* at 187.

[56] *Id.*

[57] *Grober v. State, Dep't of Revenue, Child Support Enforcement Div.,* 956 P.2d 1230, 1235 (Alaska 1998) (holding statute allowing DNA evidence to establish paternity applicable in paternity action, although statute became effective after the paternity action was filed, but before trial). (Emphasis added.)

[58] *Eastwind, Inc., v. State, Dep't of Labor,* 951 P.2d 844, 847 (Alaska 1997) (quoting *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985),

conducting suits or the mode of proceeding to enforce legal rights."[59] Thus, an amendment that merely codifies how a judge may issue an order dividing pension assets may be applied in a divorce action filed before the amendment as a mere procedural change, because the judge already had the authority to divide the pension assets.[60] An amendment setting out an administrative agency's power to revoke a permit granted based on misrepresentations in the application, is merely procedural because the agency already had authority at common law to revoke a permit for providing false information to get the permit.[61] An amendment that requires a claimant request a hearing within two years of his claim being controverted is procedural, as it affects only the claim process *after the claim is filed* and not the legal effect of conduct before the claim is filed.[62]

However, an amendment has a "different legal effect" on pre-enactment conduct if it "would impair rights a party had when he acted, increase a party's liability for past

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citing Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960)). In *Eastwind*, the Supreme Court rejected retrospective application of a 1993 amendment to the Little Davis Bacon Act (AS 36.05.) fixing wage rates on public works contracts at the time the contract was bid, rather than requiring periodic adjustment to prevailing wage rates as wages were paid. The Court noted that "almost any statute or regulation that affects the business environment in some respect--for instance minimum wage laws, building codes, and zoning ordinances--will alter the legal significance of the terms of certain contracts executed prior to enactment" but the act of contracting was the relevant conduct, not the payment of wages, for purposes of determining what "conduct" should be examined for legal effect.

[59] 2 Norman J. Singer, *Sutherland Statutory Construction* §41.4 (6th ed. 2001).

[60] *Rice v. Rice*, 757 P.2d 60, 61-62 (Alaska 1988). (explaining that "prior to the amendment of AS 39.35.500, it was clearly within the trial court's power to order the employee spouse to pay the non-employee spouse a percentage of the retirement benefits. . . . . as amended [the statute] merely codifies the means by which to distribute an asset.").

[61] *Kjarstad v. State, Commercial Fisheries Entry Comm'n,* 703 P.2d 1167, 1170-71 (Alaska 1985) ("[The amendment] merely codifies and provides standard procedures for the CFEC to follow when exercising its existing revocation power.").

[62] *Pan Alaska Trucking, Inc. v. Crouch,* 773 P.2d 947, 948-949 (Alaska 1989).

conduct, or impose new duties with respect to transactions already completed."[63] Therefore, a procedural statute that "significantly alters the legal consequences of the events giving rise to the cause of action, is treated as substantive in character."[64]

As the Supreme Court explained in *Pan Alaska Trucking, Inc. v. Crouch*, a procedural statute that alters only the events that occur during the legal process may become operative "when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of the occurrence of the events giving rise to the cause of action."[65] The reason for this rule was further explained earlier by the Supreme Court

> [Procedural] statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively.
>
> This reasoning, however, assumes a clear-cut distinction between purely "procedural" and purely "substantive" legislation. In truth the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.[66]

The fact that a procedural change may, if ignored by the person who has commenced the process, prove dispositive of his case, does not make a procedural change

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[63] *Rush v. State, Dep't of Natural Resources,* 98 P.3d 551, 555 (Alaska 2004) (construing amendment affecting disposition of improvements on leaseholds of state land upon expiration of the lease).

[64] *Pan Alaska Trucking, Inc. v. Crouch,* 773 P.2d at 949.

[65] 773 P.2d at 948 (citing *Matanuska Maid, Inc. v. State*, 620 P.2d at 187, quoting *Aetna Casualty & Surety Co. v. Industrial Accident Comm'n*, 30 Cal. 2d 388, 182 P.2d 159, 161 (1947)).

[66] *State, Dep't of Revenue v. Alaska Pulp America, Inc.*, 674 P.2d 268, 273 (Alaska 1983) (quoting *Aetna Casualty & Surety Co. v. Industrial Accident Comm'n*, 30 Cal.2d 388, 182 P.2d 159, 161-62 (1947), also citing *Matanuska Maid, Inc. v. State*, 620 P.2d at 187.).

substantive if the change does not make the legal process "more difficult to travel or the goal less to be desired."[67]

However, the converse is not true; a substantive change is not rendered "merely procedural" simply because the party advocating its application would enjoy a greater benefit, or find engaging in the process worth more. Thus, in *Eastwind, Inc., v. State, Dep't of Labor,* contractors in the midst of performing certain public works contracts sought application of a statutory change establishing that the prevailing wage rate would be fixed for two years or the duration of a public works contract, instead of adjusted periodically during the life of the contract.[68] Bidding a contract is easier if wages are fixed; a level wage structure, without periodic adjustment, is easier to pay and likely to avoid wage inflation -- a desirable goal for the contractors.[69] However, if applied to contracts predating the statute, the statute would give a different legal effect to the act of entering the contract by altering the obligations of the parties under the contract; even if the parties' obligations are reduced, the statute may not be applied retrospectively.[70]

AS 23.30.041(c), before enactment of § 17 ch. 10 FSSLA 2005, provided that

> If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The *employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request.* The administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

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67 773 P.2d at 949.

68 951 P.2d 844 (Alaska 1997).

69 The contractors argued that the triggering event for application of the statute was payment of wages, so that the law in effect at the time the wages were paid governed wage payment. 951 P.2d at 848.

70 951 P.2d at 849.

After November 7, 2005, AS 23.30.041(c) provided that

> An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. *If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted.* If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

The later version of AS 23.30.041(c) does not change how to file a request or process requests for eligibility evaluations. It changes when the right to request may be invoked and what pre-request events "trigger" the right to file a request.[71] The later version removes the time limit for requesting the evaluation (90 days from the date of the employee gives the employer notice of injury), but it imposes a prerequisite on all requests; an employee may not request an evaluation until he or she has been "totally

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[71] *See West v. John Morrell & Co.*, 460 N.W. 2d 745, 747 (S.D. 1990) (holding change in "triggering event" for running of 2-year limitation period from date of last payment to date of coverage denial was substantive and could not be applied retroactively); *Caterpillar Tractor Co. v. Mejorado,* 410 N.W. 2d 675, 677 (Iowa 1987) (change that "regulates and restricts the rights of employers and employees" is substantive).

unable to return to the employee's employment for 60 consecutive days as a result of the injury." Thus, if an employee who is partially able to return to his or her employment (e.g., on light duty, part time, in a temporary assignment, or with reasonable accommodation) within 60 days, notwithstanding a physician's prediction of permanent preclusion from "the employee's *occupation* at the time of injury, the employee may not request an evaluation. If the employee is totally unable to return to the his or her employment for 90 consecutive days as a result of a compensable injury, the statute directs the administrator to order, and the employer to pay for, an eligibility evaluation. Thus, even in the absence of a physician prediction, the employer must pay for, and the employee cooperate with, an evaluation.

Under the earlier statute, the length of time an employee was totally unable to return to his or her employment had no legal effect with respect to the right to request an evaluation. Under the new statute, the date of notice of injury has no effect. Under the new statute, the employee may not refuse a mandatory evaluation without (1) achieving medical stability, and (2) executing a detailed waiver under oath.[72] Previously, an employee refused an eligibility evaluation by simply not requesting one – unless the employer requested an evaluation, he had no obligation to be evaluated. Under the new version, the administrator is directed to order an evaluation without awaiting a request from a party, which previously the administrator was unable to do. Mandatory evaluations are paid for by the employer; the statute thus increases the employer's liability. The administrator is directed to inform employees of the right to request evaluations at a certain point, which the administrator was not previously required to do.

In sum, the effect of the post-2005 version of AS 23.30.041(c) is to impose new duties on the administrator, the employer, and the employee and to change the legal effect of conduct (such as not requesting an evaluation or being totally unable to return to employment) that occur *before* the process is invoked by a request for an eligibility evaluation. The fact that Faust, had he been injured November 8, 2005, would have

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[72] AS 23.30.041(q).

been required to undergo the evaluation he presently seeks despite his prior delay does not make the statute only procedural. The changes to AS 23.30.041(c) impose obligations on parties that did not previously exist by requiring what was previously voluntary or ordered by the administrator after a request.

The changes to AS 23.30.041(c) are not *only* or *merely* procedural changes; they impose different legal effect on conduct by the employee and administrator before an eligibility evaluation is requested or mandated. They impose new obligations. Therefore, the changes to AS 23.30.041(c) may not be applied retrospectively to requests for evaluation arising out of injuries before November 7, 2005. The board erred in requiring the administrator to order apply the latest version of AS 23.30.041(c) to Faust's request for an evaluation.

d. Faust's right to request an evaluation expired before he made his request in December 2006.

The administrator initially denied Faust's request for an evaluation because he did not request one within 90 days of notifying his employer of his injury. On reviewing the medical evidence, the administrator determined that Faust knew, or should have known of the likelihood that he would not be able to return to his employment as a police recruit (or complete his training to become a patrol officer) no later than June 25, 2005. The board did not find that there was insufficient evidence of record to support the administrator's finding. However, it found that the administrator failed to consider whether Faust's continued employment constituted an "unusual and extenuating circumstance" under 8 AAC 45.520(b).

Accepting, for the sake of this appeal, that Faust's light duty employment until the end of November 2005 was an unusual and extenuating circumstance that ought to have been considered by the administrator, it does not follow that the administrator's error requires a remand for administrator consideration. A remand is not required when it is certain that the outcome would not change.

Faust testified to contacting the state retirement system about rehabilitation the day after his retirement, to satisfy a retirement system obligation. He testified that he believed his much later contacts with the Division of Vocational Rehabilitation were

connected with workers' compensation. None of this is *evidence* that the Municipality's continued employment of Faust on light duty prevented him from requesting an evaluation under AS 23.30.041(c) after the employment ended. Once Faust's employment ended, he could no longer claim continued employment as an "unusual and extenuating circumstance" that "prevented [him] from making a timely request." At that point, the 90 days to request an evaluation began to run. Thus, even allowing for Faust's continued employment, the 90-day window to request an evaluation closed on March 3, 2006. At that point, Faust's time to request an evaluation expired.

By the time Faust filed his request in December 2006, the latest possible 90-day deadline had long passed. There was no evidence in the record before the board that could have supported a claim of another circumstance under 8 AAC 45.520(b) that would apply to make the December 2006 filing timely. While the board correctly determined that continued employment was a circumstance that should have been considered, Faust failed to demonstrate that the administrator's consideration of the circumstance could possibly result in a different outcome.[73]

Faust asserts that he raised different legal theories and arguments that, if considered, could lead to a different outcome. He argued before the board that (1) once a circumstance listed in 8 AAC 45.520(b) is established, the 90-day period does not apply, even if the circumstance ends; (2) the employer should be estopped from enforcing the 90-day limit because the employer's employment prevented Faust from requesting an evaluation; and, (3) the adjuster's failure to provide forms prevented him from filing on time. These arguments were not considered by the board; in any case, they are without merit. Faust testified he contacted the employer and adjuster about vocational rehabilitation after March 3, 2006, but he contacted no one about vocational rehabilitation (except to "check in" with the state public employees'

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[73] *See Irvine v. Glacier Gen. Constr.,* 984 P.2d 1103, 1104 (Alaska 1999) (holding board error in upholding administrator's denial of eligibility was harmless because even if administrator had considered physician opinion, record conclusively established appellant would not have prevailed).

retirement system) in the 90 days after leaving employment.[74] Later contacts would not excuse Faust's lack of action before March 3, 2006.

The record established that Faust's request for an eligibility evaluation was filed well after the last possible timely date, even if his period of continued employment is considered. A remand to the administrator in such circumstances is futile.[75]

5. Conclusion.

The decision of the board is REVERSED.

Date: *May 22, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission REVERSED the board's decision on Mr. Faust's appeal (of the reemployment benefits administrator's denial of an eligibility evaluation) that directed the administrator to order an eligibility evaluation. The appeals commission's decision ends all administrative proceedings in Mr. Faust's appeal of the administrator's denial of the evaluation. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision is distributed, look at the Certificate of Distribution box below.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed 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.

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[74] Tr.43:14-45:21, Faust Depo. 11:22-12:3, 14:22-15:20.

[75] The disposition of this case makes it unnecessary for the commission to address the appellant's assertions of error based on lack of due process.

You may wish to consider consulting with legal counsel before filing an appeal.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. 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 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 this decision to the Alaska Supreme Court, or petition the Supreme Court for other review, 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 appeals 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 appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Alaska Workers' Compensation Appeals Commission's Decision No. 078, the final decision in the appeal of the *Municipality of Anchorage v. Faust*, Appeal No. 07-028, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *22nd* day of *May*, 20*08*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No. 07-028 was mailed on *5/22/08* to William Soule and N. Barlow at their addresses of record and faxed to Soule, Barlow, Director WCD, & AWCB Appeals Clerk.

Signed *5/22/08*
J. Ramsey, Deputy Clerk Date

APPENDIX 1

The following order was delivered telephonically as a bench order. The members of the commission panel and representatives of the parties were present in the telephone conference due to the scheduled oral argument on appeal the next day. The commission offered to make the recorded CD available if a party wished to take the matter to the Supreme Court for review before the decision on the merits was issued. The commission also informed the parties that the order would be incorporated in the final decision. Minor revisions have been made to conform the order to publication format.

ORDER ON MOTION TO REQUIRE RECUSAL OF CHAIR

Raymond Faust, the appellee, asks the commission to require the commission chair to recuse herself for cause. He argues that the chair was the author of a bill review letter that expresses a legal opinion on whether a particular statute should be applied retrospectively or prospectively and her opinion is adverse to his legal position in the appeal. Because the opinion in the bill review letter is adverse to his position, he argues she cannot act as an impartial judge on the subject of this legal issue. Human nature will compel her to rule against his position. The appellee wonders if his participation is "a formality and a waste of time." He asserts that the chair cannot express an opinion different from that expressed as an assistant attorney general without damage to her reputation. He also argues that the chair is required to recuse herself because, even if she has not prejudged the issue in this case, there is an appearance of impropriety owing to her inferred participation as an assistant attorney general in the bill review letter. Finally, he argues that she represented him, one of the citizens of the state, as an assistant attorney general, and therefore is disqualified from hearing this appeal.

The appellant argues that the chair is not required to recuse herself for cause, relying on the reasoning expressed in the commission's decision in *State Dep't of Corrections v. Dennis,* Alaska Workers' Comp. App. Comm'n Dec. No. 032 (Feb. 2, 2007), which appellee's counsel indicated he was not aware of at the time he filed this

motion. Having since read it, he argues it is distinguishable from the present case, because of the special quality a bill review letter, as opposed to opinions expressed in testimony before the legislature or a section by section analysis provided to the legislature. The appellant also relies on the Code of Hearing Officer Conduct, and the January 19, 2007 opinion of the Chief Administrative Law Judge cited in *State v. Dennis.* The appellee responded minimally that the Code and the Chief Administrative Law Judge's opinion support his motion because they call for the chair to avoid the appearance of impropriety.

This motion was scheduled for oral argument so that Mr. Faust could appear and make his case to the commission. Although he did not appear except through counsel, he did supply an affidavit. The affidavit was typed by counsel's office, but, according to the affidavit, the statements and opinions in it are the appellee's own. The affidavit of the appellee states: "It also seems like Ms. Knudsen would have to admit that she was wrong in her July 18, 2005 letter to the governor in order for her to admit that I am right in my position on the MOA's appeal on this same issue. *I question whether she would be able to do that and save face."* By using the words "save face," the appellee avers that not only is the chair's "professional reputation" (i.e., for honesty, independence, diligence, scholarship, dignity, courtesy, patience, fairness, and faithfulness to the law) at stake if she changes her opinion, Mot. for Recusal of Commission Chair, at 5, 8 and 9, but that her personal honor and prestige would be inevitably harmed by changing her mind and "admitting that [he is] right." Although challenged in oral argument by such a reading, extending it to its logical conclusion, and given the opportunity to disclaim this interpretation of his client's position, appellee's counsel did not deny this was Mr. Faust's position. Counsel confirmed that he had not sought to disabuse him of this position, saying, "My opinion doesn't matter."

At variance with counsel's position at oral argument, the motion recites that "Mr. Faust does not question the uprightness of the chair." Mot. for Recusal at 10. By uprightness, we assume that Mr. Faust means those virtues encompassed in the old word "upright" – honest, just, conscientious, scrupulous, and honorable: in short, a resolute, thoughtful adherence to high moral principle. We choose to accept this as the

true statement of Mr. Faust's opinion, and to disregard the lack of disclaimer at oral argument [to the characterization of his client's position as being that a change of position would damage the chair's *personal* reputation in the community as a woman of good character]. We take Mr. Faust's affidavit as expressing a belief that the chair cannot express a different opinion than that he ascribes to her based on the bill review letter because he believes that she cannot admit she was wrong in a 2005 legal opinion without harm to her professional standing in 2008.

Thus, the whole sum of the assertion of cause [for recusal] is that the chair, when an assistant attorney general, expressed an opinion on the legal issue now before the panel, based on the chair's initials on the bottom of the letter.[1]

Faust argues that because the letter was purportedly drafted by the chair, it necessarily expresses her personal opinion instead of an institutional opinion. Since the bill review letter is not signed by the chair, but that at least one published attorney general opinion does show her signature, an equally strong inference could be drawn is that the bill review letter does not reflect her personal opinion. However, for the purposes of argument of this motion, we accept the inference drawn by the appellee. Mr. Faust urges that human nature being what it is, the chair's need or desire to "save face" will override the chair's admitted "uprightness" and deprive him of a fair hearing before an impartial commission. Because the appellee apparently invests the chair with authority to decide what the law is, he regards the chair's perceived bias or partiality as tainting the entire commission. There are serious flaws in his reasoning.

To establish that an appearance of impropriety exists, the appellee must identify objective facts from which a fair-minded person could conclude that an appearance of partiality on the chair's part exists. *Capital Information Group v. State, Office of the Governor,* 923 P.2d 29, 41 (Alaska 1996). The chair availed herself of the opportunity to seek an independent ruling from the Chief Administrative Law Judge on whether this situation presents a violation under the Code of Hearing Officer Conduct, which

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[1] The chair cannot reveal her role in producing the letter because the Office of Attorney General has informed her that the attorney-client and attorney work product privileges are not waived.

incorporates the canon that the chair, who acts as an administrative law judge, must "avoid impropriety and the appearance of impropriety." AS 44.64.050(b). The Chief Administrative Law Judge's opinion was distributed to the parties.

The Chief Administrative Law Judge expressed the opinion that the chair is not required to recuse herself because the "forming or holding of a general legal opinion does not, in and of itself, reasonably call into question an adjudicator's ability to hear a particular case impartially." She must faithfully follow the law and not be swayed by partisan interests or criticism, even if that requires her to change her mind. Only if she cannot be open-minded and fairly consider the arguments on their merits, and treat the parties fairly and impartially, should the chair recuse herself.

Assuming for the sake of this argument that the chair formed an opinion on whether the statute in issue should be read prospectively or applied retroactively, we are guided by the Administrative Law Judge's opinion, which is that a record demonstrating prior formation of opinion on how this statute, or statutes of this type generally, should be construed is not enough to call into question an adjudicator's ability to hear a particular case impartially. The legal opinion expressed in the bill review letter is not an "objective fact from which a fair-minded person could conclude that partiality . . . exists." This is the first flaw in Mr. Faust's argument: comment on the law before appointment does not create the appearance of impropriety. After reading the cases cited by Mr. Faust, we are not persuaded that a subjective belief of the commissioner's partiality, unsupported by objective fact, is a sound basis to require recusal of the chair or any other appeals commissioner.

Judicial officers are often called on to reconsider their previously expressed opinions. Every judicial officer experiences reversal and every decision requires the adjudicator to accept that a reviewing body will find error. Even the Supreme Court has been known to acknowledge that a rule should be overturned. The statute establishing this commission's appeal process incorporates the possibility of a change of opinion in the section providing for reconsideration. There is no loss of professional reputation, honor, prestige or "face" in faithfully following the law, even when it means that one must acknowledge that one's previous opinions were wrong.

In *State v. Dennis*, on page 5, we said:

> Open-minded consideration of the arguments presented to the review panel does not mean empty-minded consideration by the panel members. Part of a commission member's duty on this commission is to continue to develop knowledge and expertise and to stay informed of developments in workers' compensation in Alaska and in other states. This commission, as a reviewing body, is expected to be open to persuasion within the law as enacted by the State Legislature and interpreted by the Supreme Court; for example, to fairly consider an argument urging extension of a legal principle, or distinguishing a prior holding by this commission or the Supreme Court.

As Appeals Commissioner Hagedorn pointed out in oral argument, Mr. Faust's argument is based on inferences drawn from a document that his counsel says is "98% innocuous" but that contains a basic statement of the law regarding prospective application of a statute. The appellee asks the commission to disqualify the chair based on speculation about the trend of the chair's opinion *and her character.* It would not matter if the chair held the legal opinion he finds objectionable if the chair kept an open mind; therefore, a necessary predicate to his argument is that the chair will disregard her oath and obligation to faithfully follow the law rather than fairly consider his arguments. Mr. Faust's affidavit does not recite objective facts from which a fair-minded person could conclude the chair is partial; his basis for his belief is only his understanding of "human nature" and the unsupported assertion that the chair cannot "save face" if she "admits" he is right.

This is the second flaw in the appellee's reasoning, that the chair's honor would compel her to abide by a mistaken opinion against persuasive argument to the contrary. It is rather the other way around, that the chair's obligation to her oath requires her to faithfully follow the law, even if doing so is uncomfortable and subjects her to partisan pressure or criticism. Nothing Mr. Faust has presented in his affidavit suggests that he believes that the chair is not sensible of her oath; instead, he acknowledges her "uprightness." The appellee has not demonstrated a reasonable basis for requiring the commission to disqualify the chair, or the chair to recuse herself.

The third flaw in the appellee's reasoning is that he believes the chair has special authority in establishing the rule of law adopted in a case in which interpretation of the law is in question. We also said in *State v. Dennis* that

> The statute assigns to the chair the duty to *advise* the commission on the law, but that the chair does not *decide* questions of law; that is a function of the commission as a whole. All members of a commission panel, acting equally, decide what the commission's *collective* judgment shall be.

The chair is obligated to provide *to the commissioners* advice on matters of law – she advises, but does not decide, except as a member of the panel. The deliberations of the commission are confidential; the chair does not individually publish advice. No statute binds the appeals commissioners to follow the chair's advice, assuming the chair urged one legal interpretation over another. The statute directs the chair, the chief executive officer of the commission, to provide advice, herself and through staff, but it does not give the chair the power to *rule* alone on how the law ought to be interpreted; the chair may only rule on procedure. To suggest otherwise reduces the role of the other commissioners on the commission. The representative appeals commissioners do not lack reasoning ability merely because they lack a law degree (indeed, an otherwise qualified representative member would not be disqualified from service as a representative appeals commissioner by a law degree). The chair is one vote among three on the commission panel. The commission's special authority rests in the knowledge and experience of *all* members of the commission panel collectively; the *collective* will and judgment of the commission is expressed in its decisions.

Moreover, as Appeals Commissioner Robison stated in oral argument, all of the commissioners have years of experience and expertise in workers' compensation and have often expressed opinions regarding the law and what it should mean over the period of their involvement in the workers' compensation field. This commission is founded on the long tradition of workers' compensation as a unique legal regime in which the voices of labor and industry play a direct part in the development of the law. If the prior expression of opinions, either in a ruling below, or in testimony to the legislature, or in other public forums, constituted cause for recusal of an appeals

commissioner, it would be impossible for the commission to do its work. If the commission accepted the appellee's argument, the commission would soon be unable to function, as one commissioner or another was challenged as partial and biased on a point of law. This is the fourth flaw: appellee's argument [that] partiality demonstrated by prior statement of legal opinion does not apply equally to the appeals commissioners, but that every instance of alleged "prejudgment of the law" may be cured by appointing a different chair.

The appellee's counsel urges that this is a simple matter to resolve, and the commission could avoid all questioning of the chair, by requesting the appointment of a pro tem chair by the Chief Administrative Law Judge from the Office of Administrative Hearings. There is no guarantee that the Chief would appoint from the Office of Administrative Hearings. The Chief Administrative Law Judge may appoint any qualified person, including, for example, a qualified retired Superior Court Judge. The appellee does not know if that appointee would have expressed an opinion about the prospective or retroactive application of statutes, which is not an issue unique to workers' compensation. However, the chair may only request a pro tem appointment when

1. there exists a conflict of interest under AS 23.30.007(*l*)(1)-(3) or (5), which appellee does not assert exists, or
2. the chair's participation would violate her obligations under the Code of Conduct, which the Chief Administrative Law Judge has opined is not the case, or
3. the chair is absent owing to illness or leave for 10 work days or more,[2] or
4. the chair is unable to be fair, impartial and unbiased toward the appeal participants.

Appointment of a *pro tem* chair is the exception to the general rule that the chair is required to devote all her time to the duties of the chair of the commission. She may not engage in any other employment or business, nor hold any other office or position, nor hold any position in a political party or organization. See AS 23.30.009(d). In other

[2] We note that the chair's pneumonia has not kept her from performing her duties.

words, the chair may not request a pro tem appointment in order to avoid controversy, as appellee's counsel suggests.

The appellee's argument that the chair's former service as an assistant attorney general disqualifies her because she represented him as a citizen of the state is answered by the statute, which exempts former state employment by the chair from disqualification for conflict of interest based on former employment by a party. Providing advice to the governor in a bill review letter does not create an attorney-client relationship between individual citizens and the Attorney General.

Finally, the appellee argues that because the chair's position as an assistant attorney general was a political appointment, (wherein, he believes, expression of an opinion out of line with the position of the Attorney General could result in termination), her past tenure at the "pleasure of the Governor" compromises her ability to be independent now. AS 23.30.007(j) should reassure the appellee as to the independence of the commission. The chair, like the [other appeals] commissioners, does not serve at the will of the Governor, but is protected by statute from dismissal except for good cause, including, misconduct in office or violation of AS 39.52; conviction of a felony, conviction of a misdemeanor related to workers' compensation, inability to serve, and "neglect of duty, incompetence, unjustified failure to handle the caseload assigned, or similar nonfeasance of office."

The chair, like the other appeals commissioners, is a "political appointee," in that she is appointed by the Governor from a list forwarded by the Chief Administrative Law Judge, and confirmed by the Legislature. However, she does not serve at the pleasure of the Governor. The commission chair may not be "fired," as appellee's counsel argues, merely because she holds an opinion different from the Attorney General on a point of law. The independence of judgment is also enforced by the requirement that the chair "uphold the integrity and independence of the office." AS 44.64.050(b)(1). The argument that the chair may lose her job if she makes a politically inexpedient decision, or takes a position contrary to that taken by the administration, is plainly wrong. The argument that the chair is somehow less independent now because of her *former* position as an assistant attorney general makes no sense. Instead, the chair's

present status insulates her, as it does the other commissioners, from any constraint that might exist in rejecting opinions developed before appointment. Appellee's reasoning is flawed on this point too.

The chair, and each appeals commissioner, is obligated by the oath of office to consider and decide all matters assigned to him or her except those in which the commissioner's disqualification is *required*. As the Supreme Court said in *Feichtinger v. State*, "While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility." The chair, and other commissioners, may be charged with "unjustified failure to handle the caseload" if they avoid their obligation to decide the questions brought before them.

In this case, the chair has no knowledge of the parties, no personal connection to the parties, (except to be a resident of the Municipality of Anchorage), and no contractual relationship with any party or representative of a party. She is not acquainted with Mr. Faust and is not acquainted with the management of the Anchorage Police Department. She knows of no reason that she cannot be open-minded and give fair consideration to the arguments presented by the parties *on their merits*, without bias or partiality or fear of criticism, and she will endeavor to do so to the best of her ability. Appeals Commissioners Robison and Hagedorn agree.

For these reasons, we deny the motion to require recusal of the chair for cause.