Case*:* *Municipality of Anchorage vs. Raymond P. Faust*, Alaska Workers' Comp. App. Comm'n Dec. No. 078 (May 22, 2008)

Facts: Faust re-injured his shoulder while training as a police recruit in December 2003. He had shoulder surgery in August 2004 and returned to work on light duty from October 2004 until December 1, 2005. He applied for and received a medical retirement at that time. He requested an eligibility evaluation for reemployment benefits on December 5, 2006. The administrator denied his request as untimely because his request was made more than 90 days after he gave notice of his injury. The administrator did not consider whether Faust's light-duty employment was an "unusual and extenuating circumstance." Faust appealed to the board. The board decided that the version of AS 23.30.041(c), amended in 2005, applied to Faust's claim since Faust sought benefits after the statutory amendment took effect on November 7, 2005. Although generally amendments to the Workers' Compensation Act apply only to claims in which the injury occurred after the effective date of the amendment, the board concluded that the changes made to .041(c) constituted an exception as they were "merely procedural." Thus, the board reversed the administrator's decision and ruled Faust was entitled to an eligibility evaluation. The employer appealed this decision to the commission. The employer argued the 2005 version should not apply because Faust was injured in 2003, Faust's request was untimely under the former version of the statute, and the board denied the parties due process by deciding the case based on an issue that the board had not given the parties an opportunity to address, namely which version of AS 23.30.041(c) applies.

Applicable law: AS 23.30.041(c), prior to the 2005 amendment, provided in relevant part 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. . . .

After November 7, 2005, AS 23.30.041(c) provided in relevant part 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. . . .

The Alaska Supreme Court has held that the statute in effect on the date of injury governs the benefits available to the injured worker. *E.g., Circle De Lumber Co. v. Humphrey,* 130 P.3d 941, 946 n.32 (Alaska 2006). *Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947 (Alaska 1989), recognized a "merely procedural change" exception to this rule. An amendment affects "*only* procedure" and is a "*mere* procedural change" when it does not "change the norms governing out of court conduct," *Grober v. State, Dep't of Revenue, Child Support Enforcement Div.,* 956 P.2d 1230, 1235 (Alaska 1998), or give "to pre-enactment conduct different legal effect from that which it would have had without passage of the statute[,]" *Eastwind, Inc., v. State, Dep't of Labor,* 951 P.2d 844, 847 (Alaska 1997). 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. *Crouch,* 773 P.2d at 948-49.

AS 01.10.090 provides that "Retrospective statutes. No statute is retrospective unless expressly declared therein."

AS 01.10.020 provides that "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."

Under the former AS 23.30.041(c), 8 AAC 45.520(b) provided in part that:

> An unusual and extenuating circumstance exists only if the administrator determines that within the first 90 days after the employee gave the employer notice of the injury
>
> > (1) a doctor failed to predict that the employee may be permanently precluded from returning to the job at time of injury;
> >
> > (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;
> >
> > (3) the employer accommodated the employee's limitation and continued to employ the employee;
> >
> > (4) the employee continued to be employed;
> >
> > (5) the compensability of the injury was controverted and compensability was not resolved; or
> >
> > (6) the employee's injury was so severe that the employee was physically or mentally prevented from requesting an eligibility evaluation.

Issues: Which version of AS 23.30.041(c) applies to Faust's attempt to receive an eligibility evaluation for reemployment benefits? If the pre-2005 version of AS 23.30.041(c) applies, did the administrator err in concluding Faust's request was untimely, especially since the administrator failed to consider the effect of Faust's light-duty employment? Did the board violate the parties' due process rights by not giving them an opportunity to address which version of the statute applied?

Holding/analysis: The commission concluded that AS 23.30.041(c), as amended in 2005, did not apply to Faust's request for reemployment benefits because the Legislature did not manifest an intent to apply the statute retroactively and because the amendments were substantive, not merely procedural. On the first point, the commission noted that statutes are applied retroactively only when the Legislature expressly indicated that they should be and concluded that "a manifestation of intent *not* to apply the legislation retrospectively appears in the failure of the Legislature to adopt an immediate general effective date [citing *Eastwind, Inc.,* 951 P.2d at 847]." Instead the statutory changes took effect 90 days after passage, per the state constitution. On whether the changes were substantive or procedural, the commission disagreed with the board's interpretation of a bill review letter. The letter stated in part 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. Alaska Att'y Gen. Op. No. 883-05-0106 (July 18, 2005) at 48.

The letter also stated that, "[t]he '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." *Id.* at 48. The board's decision disregarded this letter as inconsistent because the board apparently viewed the discussion of a trigger event as meaning the statute was purely procedural. The commission disagreed. Moreover, the commission concluded that the changes to AS 23.30.041(c) were substantive because:

> 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. Dec. No. 078 at 21.

In addition the commission concluded that substantial evidence supported that Faust's request was untimely under the pre-2005 version of the statute. Although the board correctly pointed out that the administrator erred in failing to consider the light-duty employment as an extenuating circumstance, no remand was necessary because the error did not change the result. Faust stopped working in December 2005. Even assuming he had 90 days after that extenuating circumstance ended, his deadline for

requesting an eligibility evaluation was in March 2006 and his request was made in December 2006. Moreover, no evidence supported a claim of another extenuating circumstance under 8 AAC 45.520(b) that would apply to make the December 2006 filing timely.

The commission did not address the due process argument as it was moot since the 2005 version of the statute did not apply.

Appendix addressing motion to recuse the chair: Faust sought recusal because the chair, as an assistant attorney general, may have been involved in the drafting of the bill review letter and therefore expressed an opinion on a legal issue now before the commission. (Confidentiality prevented the chair from revealing her role with the letter.) The commission denied recusal because:

1. The Chief Administrative Law Judge stated 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." Comment on the law before appointment does not create the appearance of impropriety. Judicial officers often must reconsider previously expressed opinions. "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." Dec. No. 078 at 29.

2. All of the commissioners have years of expertise in workers' compensation law and if prior expression of opinions required recusal, it would be impossible for the commission to operate. Moreover, the chair does not have special authority in deciding a case in which interpretation of law is required simply because she has a law degree while the other commissioners may not. Instead, the chair's role is to advise the other commissioners on matters of law and each commissioner has a vote on the deciding 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." *Id.* at 31.

3. There are specified circumstances when chair pro tempore may be appointed, AS 23.30.007(*l*) and (m), and avoiding controversy is not among the circumstances.

4. Faust'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 AS 23.30.007(*l*), which exempts former state employment by the chair from disqualification for conflict of interest based on former employment by a party.

5. 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. Statutory provisions, AS 23.30.007(j), insulate the commissioners so that they won't lose their positions due to the decisions they make. They can be removed only for good cause.

6. The chair does not know the parties or have any personal or contractual connection to them or their representatives, other than to be a resident of the Municipality of

Anchorage, *see* AS 23.30.007(*l*). "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." Dec. No. 078 at 34.

Note: This case was appealed to the Alaska Supreme Court but the appeal was dismissed.