

Case: *Patricia and Mark Lawson d/b/a JB Services vs. State of Alaska, Workers' Compensation Division*, Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009)

Facts: Patricia and Mark Lawson (the Lawsons) appealed a board decision assessing a penalty against their business for the failure to carry workers' compensation insurance. The board decision was filed and mailed by certified mail to the Lawsons on January 22, 2009. The Lawsons filed an appeal of the board's decision in the commission on March 10, 2009, with a motion to accept the late-filed appeal.

The Lawsons testified that they did not receive the board decision until February 17, 2009. They argued that they had so much to deal with in their personal lives, including a flood on January 16, 2009, an aunt's illness and their son's arrest, that they could not file a timely appeal. Mark Lawson argued that once he received the decision he was trying to find an attorney and that it took him a lot of time to complete the appeal documents. The Lawsons also argued that they filed an appeal within 30 days of receipt (or actual notice) and that this is sufficient compliance to allow the commission to excuse the delay. The appeal was filed 15 days late.

Applicable law: AS 23.30.127(a) provides in pertinent part, "A party in interest may appeal a compensation order issued by the board to the commission within 30 days after the compensation order is filed with the office of the board under AS 23.30.110."

AS 23.30.128(c) permits the commission to take evidence and determine the credibility of evidence offered in considering whether to accept a late-filed appeal.

The commission excuses late filing of an appeal when good cause is presented for the delay. The burden is on the party seeking to file late to prove good cause for the delay. The commission looks to whether the party presented evidence of circumstances that justify equitable relief: (1) if the delay was due to a circumstance outside the party's control, (2) if the party made a good faith attempt to file on time, (3) the length of the delay, and (4) the prejudice to the opposing party. *Olekszyk v. Smyth Moving Serv., Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 079, 4 (May 28, 2008); *Augustyniak v. Carr Gottstein Foods*, Alaska Workers' Comp. App. Comm'n Dec. No. 064, 12 (November 28, 2007); *Gauthier v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 052, 5 (August 24, 2007); *Berean v. Coleman Brothers Timber Cutting, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 051, 5 (August 2, 2007). *See also Shea v. State, Dep't of Admin.*, 204 P.3d 1023 (Alaska 2009).

Bohlmann v. Alaska Constr. & Eng'g, Inc., 205 P.3d 316 (Alaska 2009) excused Bohlmann's late filing because the employer incorrectly stated during a prehearing conference that it was too late to file an affidavit of readiness for hearing and the board's designee did not either correct the misstatement or explain to Bohlmann how to calculate the filing deadline. The Alaska Supreme Court concluded that Bohlmann would have filed on time had he known that the period had not run.

Kim v. Alyeska Seafoods, Inc., 197 P.3d 193 (Alaska 2008) permitted substantial compliance with the requirement in AS 23.30.110(c) to file an affidavit of readiness for

hearing within two years of an employer's controversion or the claim would be barred. But substantial compliance does not mean that a party "can simply ignore the statutory deadline and fail to file anything." 197 P.3d at 198. Kim substantially complied by filing a timely request for an extension of time to get ready for hearing, rather than filing an affidavit of readiness for hearing.

Issues: Did the employer demonstrate substantial compliance with AS 23.30.127(a) under *Kim*? Did the employer have good cause for the delay?

Holding/analysis: The commission determined that the statutory 30-day appeal period expired at the close of business on February 23, 2009 (because the 30th day was a Saturday, the Lawsons had until the close of business on the next day that was not a Saturday, Sunday, or legal holiday per 8 AAC 57.060(a)(2)).

The commission concluded that the board provided sufficient and timely notice of its decision by mailing the decision to them at their address of record – even though the Lawsons did not receive actual notice until much later because they did not check or go through their mail. The commission found that "the Lawsons did not fail to receive the decision, but that they *failed to collect the decision from the post office* after postal notice had been delivered." Dec. No. 110 at 12. "Mark Lawson's testimony that he believed he had 30 days from the day he *received* the decision to file an appeal is self-serving and the commission finds it is not credible." *Id.* at 17.

The commission concluded that it permits substantial compliance with the filing deadline, noting that when it "receives timely but incomplete appeal documents, it notifies appellants of deficiencies and provides instruction and time to file complete or amended documents." *Id.* at 21 n.60. But the Lawsons' failure to file anything before the deadline did not constitute substantial compliance. The commission concluded the Lawsons did not contact the commission until after the filing deadline and neither the commission nor the division misinformed the Lawsons about the filing deadline or its effect on their attempt to appeal (so *Bohlmann* did not apply).

The commission concluded the Lawsons did not have good cause for the late filing. The commission observed that the flooding around the mailbox occurred six days before the decision was mailed and the Lawsons conceded it did not block access to the mailbox for more than a day or two. The commission found that Mark Lawson's testimony that he was too busy to read his mail for three weeks is exaggerated and not credible.

For example, he testified he was "on the phone all day" about the flooding. While the commission might believe this were true for a day or two, it does not believe this was true for the *entire* period. He admitted as much by saying that after his son was arrested he was "on the phone" to various officials about that – but he conceded on cross-examination that the charges were dismissed by February 5, 2009, well before the end of the appeal period. Finally, if, as Patricia Lawson testified, *she* was not reviewing the mail because she was caring for her aunt, Mark Lawson knew he had a good reason to review the mail himself. *Id.* at 11-12.

"The commission finds that part of the time for appeal was consumed by other affairs, but these events did not prevent them from sending an e-mail or fax or mailing a letter to the commission saying they wanted to appeal the decision." *Id.* at 17-18.

Even though corporations are required to have attorneys before the commission (*see* AS 22.20.040(a)(2)), Lawson could have filed an appeal without one, and, in any event, he asserted that the corporation did not exist and was free to represent himself in an individual capacity before the commission. The commission concluded that Lawson's lack of an attorney did not prevent him from filing on time.

In addition, Mark Lawson made two calls to the workers' compensation division and was advised to file his appeal before the period expired but did not do so, despite being familiar with legal proceedings as a businessman. Finally, the commission found Mark Lawson's "testimony regarding how much time he took to write his appeal is exaggerated, inconsistent, and not credible." Dec. No. 110 at 14. The commission noted that its requirements for filing an appeal are two one-page forms, a copy of the appealed decision and a filing fee. "The commission finds that the process of filing an appeal is not so complex that it prevented Lawson from filing an appeal on time." *Id.*