

Case: *Alaska Mechanical, Inc. and Zurich American Insurance Company vs. Nathanael W. Harkness*, Alaska Workers' Comp. App. Comm'n Dec. No. 176 (February 12, 2013)

Facts: Nathanael Harkness (Harkness) was injured while working as a carpenter for Alaska Mechanical, Inc. (Alaska Mechanical) when a wind gust caused a board to fall on the back of his neck on November 2, 2004. Harkness was paid temporary total disability (TTD) through late 2004. On June 4, 2007, he filed a claim for TTD, permanent partial impairment (PPI), and medical benefits after he was diagnosed with "brain damage." On July 19, 2007, he filed an affidavit of readiness for hearing (ARH). A day later, Alaska Mechanical filed a controversion but never filed an opposition to the ARH. No hearing was scheduled, much less one in 60 days.

A prehearing conference (PHC) was held on September 17, 2007, the 60th day after the ARH was filed. Harkness attended with Michael Wenstrup, an attorney, who stated he was representing Harkness and that he would withdraw the ARH and file another one later, if necessary. Alaska Mechanical agreed a medical dispute existed between the parties. Wenstrup filed an entry of appearance a day later. In October 2007, another PHC was held. Wenstrup's paralegal attended. The summary noted that Wenstrup would serve the second independent medical evaluation (SIME) form on Alaska Mechanical to start the SIME process and that another PHC would be scheduled once the board received the SIME form. The SIME form was never filed with the board.

On November 27, 2009, Harkness sent a letter to the board indicating that he no longer wanted Wenstrup to represent him. Little activity had occurred on his claim since the last PHC held more than two years earlier. On December 16, 2009, a PHC was held. Harkness wanted an SIME; Alaska Mechanical opposed the SIME and asserted defenses that his claim was time-barred under AS 23.30.110(c) and AS 23.30.105(a). That same day, Harkness filed a petition requesting an extension of time to hold a hearing. At a January 4, 2010, PHC, Harkness explained that the purpose of that petition was to seek an extension of time for filing an ARH. On January 8, 2010, Harkness filed an ARH.

Also in 2010, Harkness sought to have a guardian appointed due to his lack of mental competency. One was never appointed.

The board panel denied Alaska Mechanical's petition to dismiss, concluding that (1) procedurally, ARHs cannot be withdrawn; (2) Wenstrup could not withdraw it because he had not yet filed an entry of appearance and so did not represent Harkness yet; (3) the board failed in its duty to advise Wenstrup and Harkness about the .110(c) deadlines; (4) the board failed to set a hearing within 60 days of the ARH as the statute requires; and (5) Harkness lacked mental competency. For these reasons, the board panel decided that Harkness either timely filed or that Harkness' failure to timely comply with the .110(c) deadline was excused. Alaska Mechanical appeals.

Applicable law: AS 23.30.110(c) provides in relevant part:

Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has

completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

AS 23.30.110(h) provides:

The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.

The Alaska Supreme Court (supreme court) permits substantial, rather than strict, compliance with AS 23.30.110(c). *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 196 (Alaska 2008).

8 AAC 45.178 requires individuals who represent parties before the board to document that representation by filing appearances and withdrawals with the board.

8 AAC 45.065(a)(2), which covers prehearings, allows the board's designee to amend papers that have been filed.

In Richard v. Fireman's Fund Ins. Co., the supreme court held "that a workmen's compensation board . . . owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law." 384 P.2d 445, 449 (Alaska 1963).

In *Bohlmann v. Alaska Constr. & Eng'g, Inc.*, 205 P.3d 316, 321 (Alaska 2009), a pro se claimant filed his ARH late after the employer's counsel erroneously commented at a prehearing that the .110(c) deadline had already run. The court held that the board owed a duty to Bohlmann to inform him of the correct deadline or how to calculate it. Because of evidence that Bohlmann would have timely filed had he known that he needed to do so, the Court deemed his affidavit timely filed.

Some board decisions support permitting tolling of the time for filing an ARH during the SIME process.

Issues: Can an ARH be withdrawn? Did substantial evidence support that Wenstrup did not represent Harkness when he withdrew the ARH? Did the board's failure to schedule a hearing within 60 days of the ARH excuse Harkness' failure to timely file another ARH?

Did the board's failure to properly advise Harkness prevent dismissal of his claim? If Harkness was mentally incompetent, would this excuse his failure to timely file?

Holding/analysis: The commission concluded that Harkness was not required to file his ARH after a controversion. The commission concluded that Wenstrup had the authority to withdraw the ARH because Harkness was present at the PHC, expressed no objection to Wenstrup's representation, and agreed to the withdrawal. The board was overly reliant on the technicality that Wenstrup had not entered an appearance, which he did the next day.

The commission disagreed that there was no legal authority for withdrawing an ARH. The commission concluded the withdrawal had the same legal effect as requesting a continuance under .110(h). Although the hearing had not yet been calendared, Harkness was seeking an SIME, acknowledging he was not ready for hearing. The board designee's acknowledgement that the ARH was withdrawn constituted board approval of the continuance. Under .110(h), the two-year time period began to run again in Harkness' case. Additionally, 8 AAC 45.065(a)(2) permits amending of papers and the withdrawal could be viewed as an amendment to the ARH. Finally, in *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1122 (Alaska 1995), an ARH was cancelled at a PHC and the supreme court recognized a later-filed ARH as the operative ARH. The commission viewed the cancellation as tantamount to a withdrawal.

The board's failure to schedule a hearing within 60 days of the ARH was harmless error because at the prehearing conference held on the 60th day, Harkness sought to withdraw the ARH, effectively admitting he was not prepared for hearing anyway. No prejudice occurred as a result of any error.

The board had no duty to advise Harkness about the .110(c) deadline when he was unrepresented, because Harkness had already complied with the requirement by filing the ARH. When Wenstrup was representing Harkness, the board had no duty to advise Harkness because that was his attorney's job. The commission distinguished *Bohlmann* because that claimant was pro se and Harkness was represented.

The commission concluded that Harkness' mental competency was irrelevant to considering whether his failure to timely file an ARH should be excused. Harkness was represented by counsel during the timeframe that he needed to file an ARH. "Because Wenstrup could have filed a timely hearing request on Harkness's behalf, it alleviates any concern that Harkness might have been mentally incapable of doing so himself." Dec. No. 176 at 20.

The SIME process was not underway in Harkness' case such that it would toll the running of the two-year period. The parties had not stipulated to an SIME, the board did not order an SIME, and no documents were filed to start the SIME process.

The commission reversed the board and dismissed Harkness' claim as time-barred.

Note: This decision is currently on appeal to the Alaska Supreme Court.