Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of Corrections,
Movant,

vs.

Scott Dennis, Earthworks, and Umiliak Insurance Co.,
Respondents.

Memorandum Decision and Order
Decision No. 032 February 2, 2007

AWCAC Appeal No. 07-001
AWCB Decision No. 06-0331
AWCB Case No. 200602608M, 199927013

Motion to Permit Chair Kristin Knudsen to Be Excused from Consideration or For Recusal of the Chair on Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision No. 06-0331, issued December 20, 2006 by the southeastern panel at Juneau, Janel Wright, Chair, Richard Behrends, Member for Management, James Rhodes, Member for Labor.

Appearances: Tom G. Batchelor, Batchelor & Assoc., P.C., for respondent Scott Dennis, Talis J. Colberg, Attorney General and Daniel N. Cadra, Assistant Attorney General, for movant State of Alaska, Department of Corrections, and Colby J. Smith, Griffin & Smith, for respondents Earthworks and Umiliak Insurance Co.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The State of Alaska Department of Corrections filed a motion for extraordinary review of a decision by the board directing Corrections to pay benefits under AS 23.30.155(d) as the last employer who may be liable for compensation to Scott Dennis. Before the commission had a chance to hear the motion for extraordinary review and decide if it would allow an appeal under 8 AAC 57.074, the respondent, Scott Dennis, asked that the chair of the commission recuse herself from consideration of the above case because she represented the Governor and the Department of Labor

and Workforce Development in the presentation of the 2005 amendments to AS 23.30.010.

The board's decision, that Corrections asks us to review, quoted from the testimony of the chair in making its decision, as to whether "the 2005 amendments to other portions of the Act eliminated its obligation [as last employer under AS 23.30.155(d)] to commence benefits, subject to reimbursement."[1] Dennis's attorney concedes that the chair was not privy to information regarding Dennis's case, nor involved as an advocate in Dennis's case.[2] He does not claim that she has any bias against, or partiality toward, the parties to this case. He concedes that involvement as "a policy advisor on SB 130 was probably not grounds for recusal."[3] However, he argues she was "a witness whose testimony [to the legislature] was relied upon by the Employee in this case and apparently by the Board in its decision and was apparently privy to off-record negotiations and compromises resulting in the amendments to SB 130 that are the specific subject of argument and interpretation in this particular case,"[4] and therefore she should recuse herself from hearing this case.

When first presented with Dennis's motion to permit the chair to be excused, the chair contacted the Chief Administrative Law Judge for an opinion as to whether the chair's service would violate the code of hearing officer conduct, as provided under AS 44.64.050 and 2 AAC 64.010-060. The motion, responses of the other parties, and a copy of the board's decision, were provided to the Chief Administrative Law Judge. The chair also scheduled a recorded status hearing for January 19, 2007, to review the matter and give the parties as much information regarding the commission chair's response as would be available at that time.

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[1] Resp't Scott Dennis, "Supplemental Mem. on Recusal of Chair Kristin Knudsen" at 1.

[2] Id. at 3.

[3] Id. at 2.

[4] Id. at 3.

Shortly before the status hearing, the Chief Administrative Law Judge's opinion was delivered to the chair and it was shared with the parties.[5] The parties were provided an opportunity to refine the precise nature of the objection, point to the issues below that raised a question, and provide additional comment on the implicit challenge to the design of the commission. The parties were also advised that the chair was concerned that the objections to the chair based on prior advocacy applied to Appeals Commissioners Robison and Ulmer,[6] so that the motion would be taken up by the entire panel assigned to the case.

We begin with an analysis of the function of the commission. The commission exists to provide an impartial, unbiased, informed, expert and thoughtful *review* of the board's decisions. With very limited exceptions, the commission is not a finder of fact. That function belongs to the board. If, in light of the whole record, there is substantial evidence to support the board's findings, the commission must uphold them. The

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[5] The Chief Administrative Law Judge found that there was no apparent conflict of interest or violation of the code of hearing officer conduct presented by the chair's participation. She advised that the chair should recuse herself only if she believed she was unable to be fair and impartial to the parties. *See,* Office of Administrative Hearings Code of Hearing Officer Conduct, Op. No. 2007-01, (Jan. 19, 2007) (T. Thurbon, Chief ALJ). The substance of the opinion was read in the status hearing and copies were faxed to the parties immediately following the hearing.

[6] Appeals Commissioner Jim Robison was also involved in the development of a series of workers' compensation reform statutes, in 1983, 1988, and 2005. He advocated against the provision in issue on behalf of the Laborers' Union and the AFL-CIO. He was present at meetings, presented testimony, and lobbied legislators. As members of the Labor Management *ad hoc* Committee on Workers' Compensation, he and Appeals Commissioner Phil Ulmer were substantially involved in drafting and advocating passage of the 1988 amendments that resulted in amending AS 23.30.155(d), the statute whose application is at the heart of this dispute, and almost certainly were in a position to know of the pressures brought to bear, and compromises that the legislature or the executive branch made, in achieving passage of the 1988 bill. Despite the respondent's assurance that resolution of this issue does not affect the institutional concerns of the commission, the respondent's objections to the chair logically apply to the appeals commissioners for labor and management as well. The distinction is that the chair acted as an advocate of the executive branch of state government, in which this commission resides.

board's findings, when upheld, are adopted by the commission. The credibility of a witness who appears before the board is decided only by the board.

The right to a neutral decision-maker is a fundamental part of the right to due process. A person whose claim or petition will be decided by the board has the right to an impartial, unbiased fact-finder that will fairly consider the evidence presented. For this reason, board members must not have pre-judged the facts or the credibility of witnesses or received evidence outside the record that bear on the disputed facts.

Similarly, review of the decision made by the fact-finder must be before an impartial, unbiased review panel, that will fairly examine the record of evidence developed before the board for substantial evidence to support the board's findings and give open-minded consideration to the legal arguments presented on appeal. The commission members are barred from connection with the parties, and may not hear a case if they have knowledge of the adjudicative facts of the case, because the commission must be fair, unbiased, and impartial.[7] However, commission members are not barred from knowledge of the workers' compensation law and experience of its application.

A member without experience and knowledge of the workers' compensation law would be disqualified from service on this commission. An attorney who had never considered interpretation of the workers' compensation law would not be qualified to serve as chair. Commission members are not expected to be ignorant of the origins of the law or to have never expressed opinions regarding the ideas embodied in the law before their appointment. Instead, on questions of law and procedure, they are sworn to exercise their "independent judgment."[8] This means they must fairly consider, with an open mind, the arguments by the parties, without fear of partisan reproach.[9]

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[7] AS 23.30.008(l).

[8] AS 23.30.128(b).

[9] 2 AAC 64.030(b)(3)(C). A hearing officer "may not be swayed by partisan interests or fear of criticism." It is the Alaska State Legislature's duty, when confirming

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. That is part of what is meant by exercising independent judgment.

Dennis urges that the chair's position is different from the members' position. His claim of difference is based on the assumed knowledge of the chair, instead of the chair's statutory role on the commission. For reasons we describe below, we do not view the chair's past activity as a state advocate as particularly distinguishable or disqualifying. We do agree that the chair has additional statutory duties on the commission. The statute assigns to the chair the duty to *advise* the commission on the law,[10] but that the chair does not *decide* questions of law; that is a function of the commission as a whole.[11] All members of a commission panel, acting equally, decide what the commission's *collective* judgment shall be.

In effect, the respondent argues here that because the chair testified to legislative committees in 2005, or may have acquired knowledge of the executive branch's reasons certain amendments were proposed, she is in some way a "material witness" to the matter in controversy decided by the board below because the board quoted from her testimony.

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a member of this commission, to examine their background and qualifications and to evaluate whether the commission candidate has an open mind.

[10] AS 23.30.009(b): "The chair . . . shall *advise* the representative members on matters of law."

[11] AS 23.30.128(b): "the *commission* shall exercise its independent judgment."

If the chair had appeared as a witness before the board, or even had knowledge of the facts in dispute through personal connection to a witness or a party, the chair clearly would be disqualified from hearing this case, and it would require no motion for recusal for her to request appointment of a pro tem chair.[12] However, that is not the case here. The chair did not testify to the board as to any adjudicated fact, her personal knowledge was not in issue, her credibility was not decided by the board, and neither she, nor any appeals commissioner, has personal knowledge of any evidence bearing on a material disputed fact in issue before the board. In the classic sense, she is not a material witness to the "matter in controversy."

What counsel seeks to do is to make the legislation the "matter in controversy" before the board because the parties apparently dispute how it should be interpreted. In doing so, Dennis has not suggested that there is any dispute of fact regarding the passage of the legislation. There is no question about what the chair, or the appeals commissioners, said in any hearing on the 2005 legislation, or the text of any amendment. It is a matter of record. Because there is no dispute of *fact* regarding the legislation, neither the chair, nor any member of the commission, could have been a material *witness* to a factual matter in controversy.[13]

At bottom, the respondent's argument is that because the chair testified on behalf of the bill, the chair has so pre-judged the legal issues that she cannot exercise

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[12] AS 23.30.007(m) provides for the Chief Administrative Law Judge to appoint a chair pro tempore when the chair is unable to be impartial *toward the appeal participants*.

[13] There is a distinction that must be drawn between witness testimony *as an advocate of a legal position* to a legislative committee and witness testimony given in court or another tribunal as to the occurrence of certain events. As an advocate, one owes a duty to the legislative tribunal to disclose one's representative status and other duties, including disclosing "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Alaska Rule of Professional Conduct 3.9, 3.4(a)(3). It is well to remember that one is *not* required as an advocate to personally agree with the position taken by one's employer or client, nor is one required to divulge one's personal beliefs and thoughts when testifying to the legislature in a representative capacity. No one in this case has argued that the chair testified in her *personal* capacity to the legislature.

independent judgment, or, that she is perforce unable to fairly consider the interpretation advanced by the board because it is based in part on her legislative testimony. In short, on the basis of the chair's statements as advocate for the state, Dennis argues that her impartiality on the *legal issue* is open to question.

AS 44.64.050(3) requires all administrative law judges to "perform the duties of the office impartially and diligently." The Hearing Officer Code of Conduct, the regulatory provisions enforcing AS 44.64.050, does not include an equivalent to Alaska Judicial Canon 3-E(1), providing that

> Unless all grounds for disqualification are waived as permitted by Section 3F, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during their association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Instead, 2 AAC 64.040 (a)(2) provides that a conflict of interest exists if "a hearing officer or administrative law judge previously represented or provided legal advice to a party *on a specific subject* before the hearing officer or administrative law judge." However, this provision is qualified by 2 AAC 64.040(d), stating that

> Nothing in this section prohibits a hearing officer or administrative law judge from performing, as part of the hearing officer's or administrative law judge's employment, general legal work such as drafting, reviewing or proposing legislation or regulations, . . . *even if the work is related to a subject that may come before the hearing officer or administrative law judge acting as an adjudicator*.

Also, AS 23.30.008(l)(1) specifically excludes from conflict the chair's prior employment by the State of Alaska, when the state is a party. The Hearing Officer Code of Conduct states that "Commentary on and decisions applying the Alaska Code of Judicial Conduct

may be used as guidance in interpreting and applying 2 AAC 64.010 - 2 AAC 64.050."[14] In commentary on the Alaska Code of Judicial Conduct, it is noted that AS 22.20.020(a)(5) does not require disqualification on grounds of the judge's prior employment as a lawyer for a party *if* the party is the state.

Taken together, it is clear that the hearing officer code of conduct does not bar a *sitting* hearing officer from participation in drafting or proposing legislation that the hearing officer may have later occasion to interpret, much less a *former* state attorney who drafted legislation that has now been presented to the hearing officer for application.[15] This is in accord with well-established administrative law, which has long held that prejudgment of law, policy, or legislative fact is not disqualifying in an administrative tribunal.[16]

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[14] 2 AAC 64.030(c).

[15] Counsel for the state cites the famed examples of Supreme Court Justice Black, who heard the question of the constitutionality of the Fair Labor Standards Act after being one of its principal authors as Senator; Justice Felix Frankfurter, who heard a case interpreting the Norris-La Guardia Act after playing an important role in drafting it; and Justice Breyer, who assessed the constitutionality of the Sentencing Guidelines after service on the commission that drafted them. Movant's Supp. Mem. On Recusal of Chair, 6-7, *citing Baker & Hostetler, LLP v. U.S. Dep't of Commerce,* 2006 U.S. App LEXIS 31455 (D.C. Cir., 2006). See also, Office of Administrative Hearings Code of Hearing Officer Conduct, Op. No. 2007-01, 2-3 (Jan. 19, 2007) (T. Thurbon, Chief ALJ). Recent Alaska history provides a more modest example in Assistant Attorney General Jan Hart DeYoung, who, as the first hearing examiner and administrator of the Alaska Labor Relations Agency (ALRA), assisted in drafting amending legislation to ALRA, testified before the legislature on it, and heard cases under it. The chair of this commission is barred from advocating for legislation on the commission. AS 23.30.007(n)(5).

[16] 2 Richard J. Pierce, Administrative Law Treatise, § 9.8, 669 (4th ed. 2002) *discussing FTC v. Cement Institute*, 333 U.S. 683 (1948). *See also*, 2006 Cumulative Supplement, Richard J. Pierce, Administrative Law Treatise § 9.8, 169 *citing Republican Party of Minnesota v. White,* 122 S. Ct. 2528 (2002) ("It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case . . . . A judge's lack of predisposition regarding the relevant

We have also the example of *Capital Information Group v. State, Office of the Governor.*[17] Capital challenged Superior Court Judge Pegues on the grounds that he had provided, as an assistant attorney general, advice to then Governor Hammond that the statute in issue in the case (AS 37.07.050) was unconstitutional and that he was therefore disqualified under Judicial Canon 3-C(1) (now 3-E(1)). Judge Pegues, the trial judge, refused to recuse himself. Judge Pegues pointed out that his association with the Attorney General's Office had ended more than a decade ago and that it "is unlikely in the extreme" that he had any personal knowledge *about any evidence that may be placed in dispute*.[18] Judge Jahnke affirmed the denial of the motion, pointing out that Judge Pegues's connection was "old and tenuous" and that Capital had not "identified what aspect of Judge Pegues' fund of knowledge is disputed by any party and relevant to his disposition of the case. . . . [T]hey have failed to identify any objective facts from which a fair-minded person could conclude that an appearance of partiality on Judge Pegues' part exists."[19] In short, even in this case the focus of the court's inquiry into impartiality was the judge's knowledge of evidentiary facts.

While the events preceding passage of the 2005 amendments are not so old as in Judge Pegues's case, well over a year has passed since the chair performed any work as an advocate on the legislation on behalf of the Department of Labor and Workforce Development, and, under the code of hearing officer conduct, such work is not a disqualifying conflict. Moreover, Dennis has not indicated that the chair has knowledge of *any evidence* that may have been placed in dispute before the board.

The structure of this commission requires that the members appointed to it have sufficient experience and knowledge of workers' compensation to be qualified to serve

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legal issues in a case has never been thought a necessary component of equal justice, and with good reason.").

17 923 P.2d 29 (Alaska 1996).

18 923 P.2d at 41.

19 *Id.*

on it. Once appointed, the appeals commissioners and chair are barred from advocating for a change in the workers' compensation statutes.[20] Recusal only because of *prior* advocacy before the legislature, the courts, or in any other public forum, concerning the workers' compensation statutes, or the possibility of some knowledge gained in the legislative process, would result in frequent disqualification of the commission members, especially given the breadth of legislative changes to the workers' compensation statutes in 1988 and 2005. The interpretation advanced by Dennis would, if extended to its logical conclusion, render the commission unable to function as designed.

The Alaska Supreme Court had firm words for those who used recusal on suspect grounds to avoid their primary duty: to consider and decide all matters assigned to the judge except those in which the judge's disqualification is *required*. In *Feichtinger v. State*,[21] the Court said:

> Judges will frequently be assigned cases involving unpleasant issues and difficult problems. Often litigants and their attorneys will be particularly vexatious. In many cases, publicity adverse to the judge is virtually certain no matter what decision he or she reaches. In such cases, judges insufficiently attuned to their responsibilities might readily welcome a baseless request for recusal as an escape from a difficult case. To surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage. While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.

It is the responsibility of the members of the commission to decide, impartially and diligently, every appeal that he or she is privileged to hear, without fear of partisan criticism, unless disqualification is required. We agree the chair, and the members of this panel, are not disqualified.

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[20] AS 23.30.007(n).

[21] 779 P. 2d 344, 348 (Alaska App. 1989).

Finally, this case comes to us on a motion for extraordinary review. Dennis has "jumped the gun" by moving for recusal on this basis of the pressing need to review the legislative history of amendments to the workers' compensation statutes. The commission has not yet decided to accept the appeal. The issue before us is not how AS 23.30.010 and AS 23.30.155(d) should be interpreted, but is rather whether the movant has met the burden set out in 8 AAC 57.076. If appeal is allowed, the record of the case might reveal information that raises a question in a member's mind regarding whether he or she can be impartial. If so, the member will recuse himself or herself. On the information presented with the motion for extraordinary review, however, the commission chair and the appeals commissioners find that they are able to be impartial on the matter immediately in controversy or open-minded regarding the legal arguments presented.

The commission therefore DENIES the motion to permit the chair to be excused from consideration or to recuse the chair on the grounds advanced by the respondent.

Date: *2 February 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Phil Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on this motion to permit chair Kristin Knudsen to be excused from consideration or for recusal of the chair on motion for extraordinary review from the board's decision and order. However, it is not a final decision on the motion for extraordinary review, or on whether the board's interlocutory decision was correct, or on whether employee's claim is compensable and which employer must pay benefits. The effect of this decision is to allow the commission panel to continue proceedings to reach a decision on the motion for extraordinary review.

This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. To find the date the decision is filed in the commission's office, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision 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. AS 23.30.129. Because this is not a final decision on the merits of the claim, or even the underlying motion for extraordinary review, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing. No decision has been made on the merits of the underlying motion for extraordinary review, or the underlying workers' compensation claim, but if you believe grounds for review of the commission's decision on this motion exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

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. AS 23.30.128(f).

If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, 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 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 commission within 30 days after delivery or mailing of this decision. The commission will not hear a motion for rehearing on denial of a motion for extraordinary review. 8 AAC 57.076(b).

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision on Motion to Permit Chair Kristin Knudsen to Be Excused or for Recusal of Chair, AWCAC Dec. No. 031, in the matter of *State, Dep't of Corrections v. Scott Dennis, Earthworks, and Umiliak Ins. Co.*, AWCAC Appeal No. 07-001, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 2nd day of February, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

DISTRIBUTION: I certify that a copy of this Memorandum Decision No. 032 in AWCAC Appeal No. 07-001 was mailed on *2/2/07* to T. Batchelor, D. Cadra, C. Smith at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, AWCB-Juneau, Batchelor, Cadra, and Smith

Signed *2/2/07*
C. J. Paramore, Appeals Commission Clerk Date