

Case: *Izaz E. Khan vs. Adams & Associates and Insurance Company of the State of Pennsylvania*, Alaska Workers' Comp. App. Comm'n Dec. No. 057 (September 27, 2007)

Facts: Khan appealed the board's decision on July 24, 2006. After proceedings regarding Khan's request to waive the filing and transcript fees, the commission chair issued instructions to file briefs on January 10, 2007. Khan was directed to file a brief by February 9, 2007. Khan requested and was granted several extensions of time based on his lack of an attorney and because English was not his first language. On May 9, 2007, he was told to file his brief by June 25, 2007, and warned that no more extensions would be granted and his appeal could be dismissed if he did not comply. No brief was filed. On July 30, 2007, the commission declared Khan in default of a commission order and told him he must file his brief by close of business on August 13, 2007, or his appeal would be dismissed. The July 30, 2007, notice of default was sent to Khan's address of record via certified mail and provided to Khan's attorney in another matter so that the attorney could give a copy to Khan. The commission received no response by August 13, 2007. After the employer requested entry of an order of dismissal, Khan sent a letter to the commission received on August 30, 2007. The letter asked "the commission to put a hold on my brief until I find some one to write my brief or I get an attorney," based on his lack of English fluency and increasing pain from his work injury when he reads, writes or works on a computer.

Applicable law: AS 23.30.128(c)(4) permits the commission to rely on new evidence that was not before the board when deciding whether to dismiss an appeal for failure to prosecute.

8 AAC 57.140 on extensions of time. To show "good cause," party must demonstrate "diligence and substantial need."

We will suspend proceedings when the orderly progress of appeals requires us to do so, as when the parties have negotiated a dispositive settlement but must obtain board approval of it or the commission cedes jurisdiction to the board for action on a petition for reconsideration. However, in such cases, suspension of commission proceedings promotes the orderly progress of the appeal toward final resolution; it does not cast the appeal into limbo. Dec. No. 057 at 4-5 n.5.

Issue: Should the commission dismiss Khan's appeal for a failure to prosecute?

Holding/analysis: Based on Khan's persistent lack of compliance with briefing deadlines and his failure to demonstrate a good faith effort to comply over several months of extensions, the commission dismissed his appeal. The commission noted that the time extensions exceeded 180 days and instructions, statutes, regulations, forms and a copy of the record on appeal was provided to him at no cost. Moreover, Khan had more than a year to find someone else to help him write his brief.

The commission also noted that Khan had a right to be represented by an attorney but the commission was not required to provide him with one or excuse him from proceeding until he has one. The commission stated that Khan could argue his appeal

without an attorney because his appeal was not complex and he had sufficient writing skill to make his argument. The commission observed that pro se litigants are provided with materials and instructions to help them write their briefs, that they are held to a less demanding standard in preparing briefs, that their briefs are read generously to discern the basic arguments on appeal and that their arguments are not viewed as less weighty merely because they were not legally trained or proficient in English grammar and spelling. In addition, the commission could exercise its discretion to require oral argument to help it understand the nuances of a pro se litigant's arguments.

Lastly, the commission concluded that "the legislative mandate that workers' compensation 'ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers' is impeded when an appellant delays bringing his appeal to hearing before the commission, and certainly is not fulfilled if an appeal is suspended indefinitely." Dec. No. 057 at 6.

Note: This case was appealed late to the Alaska Supreme Court and then dismissed for lack of prosecution. Dec. Nos. 019 and 025 deal with Khan's application to waive fees based on indigency.