

Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and NovaPro
Risk Solutions,
Appellants,
vs.
Paul Mahe,
Appellee.

Memorandum Decision No. 125
Decision and Order on Motions
October 27, 2009

AWCAC Appeal No. 09-015
AWCB Decision No. 09-0068
AWCB Case No. 200705818

Motion to Require a Translation of Appeal Brief and Motion for Extension of Time in appeal of Alaska Workers' Compensation Board Decision No. 09-0068 issued April 7, 2009, by southcentral panel members Linda M. Cerro, Chair, Don Gray, Member for Industry, Howard A. Hansen, Member for Labor.

Appearances: Erin Egan, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants Municipality of Anchorage and NovaPro Risk Solutions. Paul Mahe, pro se, appellee.

Commission proceedings: Appeal filed April 20, 2009, with Motion for Stay. Opposition to Motion for Stay filed April 28, 2009. Hearing on Motion for Stay held May 8, 2009.¹ Order on Motion for Stay issued May 14, 2009. Order extending time to file appellee's brief issued August 12, 2009. Motion for Samoan translation filed August 28, 2009. Motion for a second extension of time filed September 8, 2009. Hearing on motions held September 24, 2009.

Appeals Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By: Kristin Knudsen.

Paul Mahe is a former employee of the Municipality of Anchorage, a resident of Anchorage, and a native of Samoa. He asks for a second extension of time to prepare his appellee's brief and for a translation of the appellants' brief to Samoan. The

¹ The commission provided a Samoan interpreter, Lucy Hansen, for this hearing.

appellants object to further extension because Mahe has been granted one extension, despite the commission's statement that it would expedite this case in its order denying appellants' motion for stay pending appeal.² The appellants object to the requirement that it provide a translation of its brief.

EVIDENCE PRESENTED IN HEARING ON MOTIONS

The commission held a hearing on the motions on September 24, 2009. The commission supplied an interpreter for the hearing.³ Mr. Mahe presented testimony from his wife, Reta Mahe, and from Robert Rehbock, as well as his own statements in response to commission questioning. The appellants presented no testimony or evidence. In addition, Mr. Mahe filed affidavits by Reta Mahe, Robert Rehbock, and JoBeth Millar, and himself.

Mrs. Mahe testified that her husband's first language is Samoan and that he speaks Samoan at home. She assists her husband with reading and writing in English. She translates documents for him. She is employed. She testified that for her, English is not the problem with the brief, but the legal language is a problem. She had a hard time understanding a Samoan translation of commission documents. She testified that Mr. Mahe is sometimes slow to understand what is happening in his workers' compensation case.

Mr. Rehbock testified that he felt he could communicate with Mr. Mahe, if Mrs. Mahe was translating. His conversation with them, and his staff's conversations, were made possible by Mrs. Mahe's ability to translate. He testified that, so far as he could tell, Mr. and Mrs. Mahe understood his explanations. He testified that he would enter an appearance and prepare a brief if an extension was granted.

Mr. Mahe stated he went to school for some years in Hawaii, but he did not graduate. He went back to Samoa and then came to Alaska. He understands and speaks his own language very well, and he understands spoken English. He is not able to read and write English very well. Also, he never learned to write well in Samoan. He

² Order on Motion for Stay, 6 (May 14, 2009).

³ Lucy Hansen again served as the commission's interpreter.

has no experience of legal matters. He is not from American Samoa, so even the court system is different. He has a hard time understanding the written Samoan translation of commission documents.

The commission also questioned its interpreter, who explained that certain words are not directly translatable from American English to Samoan. When such a word is translated, an explanation must be crafted to explain the concept the word represents. The interpreter's duty is not to explain, so the interpreter must use an English word if no Samoan equivalent is available.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The commission finds the testimony offered by Mrs. Mahe and Mr. Rehbock is credible, and the statements of Mr. Mahe were un rebutted. No counter-affidavits were filed. The commission finds that Mrs. Mahe is accustomed to aiding her husband and understands English very well. She has a better education and is more familiar with how government works. She is able to understand and explain unfamiliar concepts. The commission finds that, owing to his wife's ability to translate for him, Mr. Mahe's ability to respond to the brief filed by the appellants is not dependent upon a translation of the appellants' brief. Instead, Mr. Mahe's lack of knowledge of legal matters and legal terms not readily translatable to Samoan,⁴ poor reading and writing skills, and perhaps lack of practice in abstract analysis, are the barriers to his understanding. With the aid of his wife and his attorney, these barriers can be overcome.

The commission is guided by the Supreme Court's holding in *Kalmakoff v. State, Commercial Fisheries Entry Comm'n*, 693 P.2d 844 (Alaska 1985). On appeal of denial of a limited entry permit in the Chignik purse seine salmon fishery, Kalmakoff argued

⁴ British colonial rule of Samoa ended in 1962, but English remains a secondary language of Samoa. The Samoan court system's terminology derives more from British common law than its neighbor American Samoa. *See generally*, Jennifer Corrin Care, Tess Newton Cain & Don Paterson, *Introduction to South Pacific Law*, (2nd ed., Routledge-Cavendish 2007) (1999). English is the language of the high courts of Samoa. *See, e.g., Lauano v Samoa Nat'l Provident Fund Bd.*, 2009 W. Samoa Ct. of App. 3; CA 11 of 2008 (1 May 2009) (available through the Pacific Islands Legal Information Institute website, <http://www.paclii.org/>).

that the lack of a commission-provided interpreter constituted a denial of due process.

The Supreme Court said

In itself, we see no constitutional violation in the Commission's failure affirmatively to provide an attorney or an interpreter for Kalmakoff. No one requested such assistance. Kalmakoff was told that he had the right to have an attorney present. He did not exercise this right, choosing instead to have at the hearing a non-attorney as his personal representative. Nor is it obvious to us that the lack of an interpreter denied Kalmakoff due process of law. When translation was necessary, Mrs. Kalmakoff did the translating. Further, review of the recording of the hearing leads us to agree with the Commission that Mr. Kalmakoff's faulty memory, rather than his lack of fluency in English, was primarily responsible for his testimony being incomplete and ambiguous.⁵

Thus, Supreme Court recognized that lack of an interpreter could constitute denial of due process of law, but it did not in Kalmakoff's case because his wife was able to interpret for him and because lack of English fluency was not the primary barrier to presentation of his evidence.

The commission provided an interpreter at commission expense for hearings before the commission in Mahe's case, as it has in other appeals. The commission has allowed indigent parties in other appeals to submit briefs in their own language, where the inability to write in American English is a significant barrier to participation in an appeal. In such cases, the commission obtains a translation of the brief at commission expense. However, the commission has never required an appeal participant to prepare a translation of its brief for the opposing party.

It is the generally the responsibility of the receiving party to obtain a translation of a document filed in the common language of the tribunal, not the responsibility of the tribunal or the party filing the document. Because the commission is well aware of the costs associated with good translation, the commission is reluctant to impose this cost on a party unless it is the only way of overcoming a significant barrier to meaningful participation in an appeal and the requesting party is able to demonstrate

⁵ *Kalmakoff v. State, Commercial Fisheries Entry Comm'n*, 693 P.2d 844, 847 (Alaska 1985) (citation omitted).

inability to pay for the translation. Because Mrs. Mahe is able to read and understand the brief as well as most English-literate persons without a legal education, because Mrs. Mahe demonstrated ability to explain proceedings to Mr. Mahe at the hearing, and because Mr. Mahe failed to establish that he is unable to obtain a translation without the commission or opposing party providing it, the commission is not persuaded that such a step is necessary in this case to assure Mr. Mahe due process in this appeal.

The commission is persuaded, however, that a short delay to allow Mr. Rehbock to enter a formal appearance and file a brief on Mr. Mahe's behalf will promote the prompt and just resolution of this appeal. The commission directs that the appellee's brief, formerly due September 11, 2009, shall be filed by November 6, 2009, which is an extension of 56 days. No further extensions will be granted, as the motions, and hearing on the motions, have already resulted in delay.

ORDER

The commission DENIES the motion for a translation of the appellants' brief. The commission GRANTS the motion for a second extension of time, and ORDERS that appellee shall file his brief on appeal on or before Friday, November 6, 2009. The commission will accept facsimile or electronic filing of the brief with same day mailing of the original signed brief, two copies, and the accompanying excerpt of record.⁶

Date: 27 Oct. 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



signed

Philip Ulmer, Appeals Commissioner

signed

Jim Robison, Appeals Commissioner

signed

Kristin Knudsen, Chair

⁶ The commission clerk is directed to publish the text of this decision and order.

Published at the direction of the commission by the Appeals Commission Clerk.

I certify that, with the exception of changes made in formatting for publication, and correction of typographical errors, this is a full and correct copy of the Decision and Order on Motions in the matter of *Municipality of Anchorage v. Mahe*, AWCAC Appeal No. 09-015, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 27, 2009.

Date: 12/29/09



signed

B. Ward, Appeals Commission Clerk