

# Alaska Workers' Compensation Appeals Commission

Stephan C. Mitchell,  
Appellant/Cross-Appellee,

vs.

United Parcel Service and Liberty Mutual  
Fire Insurance Company,  
Appellees/Cross-Appellants.

## MEMORANDUM DECISION

Order on Motion for Attorney Fees and  
Costs

Decision No. 305                      June 12, 2024

AWCAC Appeal No. 18-009  
AWCB Decision No. 18-0042  
AWCB Case No. 199523875

Appearances: Richard L. Harren, Law Offices of Richard L. Harren, PC, for appellant/cross-appellee, Stephan C. Mitchell; Nora G. Barlow, Barlow Anderson, LLC, for appellees/cross-appellants, United Parcel Service and Liberty Mutual Fire Insurance Company.

Commission Proceedings: Appeal filed June 25, 2018; Final Decision No. 272 issued December 6, 2019.

Court Proceedings: Appeal filed January 6, 2020; Opinion No. 7566 issued November 12, 2021; jurisdiction returned to Commission effective December 3, 2021; record received by Commission on December 13, 2021.

Commission Proceedings: Remand to Board issued December 16, 2021; Return of Jurisdiction issued December 16, 2021.

Board Proceedings: Final Decision and Order No. 24-0009 issued February 21, 2024.

Commissioners: James N. Rhodes, Amy M. Steele, Andrew M. Hemenway, Chair *pro tempore*.

By: Andrew M. Hemenway, Chair *pro tempore*.

### *1. Introduction.*

On June 25, 2018, Stephen C. Mitchell filed this appeal, AWCAC Appeal No. 18-009, from a decision of the Alaska Workers Compensation Board (Board) awarding him permanent total disability (PTD) benefits. Mr. Mitchell argued that the Board had erred (1) in denying medical benefits for certain surgery that he had obtained at his own

expense, and (2) in not finding that his permanent disability began at an earlier date. United Parcel Service and Liberty Mutual Fire Insurance Company (UPS) filed a cross-appeal, arguing that (3) the Board erred in awarding certain temporary total disability (TTD) payments.

We issued a decision contrary to Mr. Mitchell's position with respect to the two issues he raised, and in his favor with respect to the issue raised by UPS in its cross-appeal.<sup>1</sup> Mr. Mitchell did not file a motion for attorney fees incurred in defending against UPS's cross-appeal. He appealed our decision to the Alaska Supreme Court (Court); UPS did not file a cross-appeal contesting our decision on the issue it had raised before the Commission.

On November 21, 2021, the Court issued an opinion in which it affirmed our decision regarding the denial of medical benefits and reversed our decision regarding the date on which Mr. Mitchell became eligible for PTD benefits.<sup>2</sup> The Court remanded the case to us with instructions to remand the matter to the Board for an award of additional PTD benefits.<sup>3</sup> We remanded the matter to the Board on December 16, 2021.<sup>4</sup> The Board issued its final decision on remand on February 21, 2024.<sup>5</sup>

On March 4, 2024, Mr. Mitchell's attorney, Richard L. Harren, filed a motion in this appeal, AWCAC Appeal No. 18-009, for attorney fees and costs for work before the Commission in this case during 2018 and 2019. On March 8, 2024, UPS filed an opposition to the motion contending that pursuant to 8 AAC 57.260(a) the motion was untimely.

## *2. Applicable legal standards.*

At the time we issued our decision in this matter, 8 AAC 57.260(a) stated:

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<sup>1</sup> *Mitchell v. United Parcel Serv.*, Alaska Workers' Comp. App. Comm'n Dec. No. 272 (Dec. 6, 2019) (*hereinafter* App. Comm'n Dec. No. 272).

<sup>2</sup> *Mitchell v. United Parcel Serv.*, 498 P.3d 1029 (Alaska 2021).

<sup>3</sup> *Id.*

<sup>4</sup> AWCAC Appeal No. 18-009 (Order on Remand from the Alaska Supreme Court, Dec. 16, 2021).

<sup>5</sup> *Mitchell v. United Parcel Serv.*, Alaska Workers' Comp. Bd. Dec. No. 24-0009 (Feb. 21, 2024) (*hereinafter* Bd. Dec. No. 24-009).

(a) A party may request an award of attorney fees and costs on appeal by filing a motion no later than 10 days after the date shown in the commission's notice of distribution of the final decision.

8 AAC 57.260 did not specifically address the procedure for requesting an award of attorney fees and costs following a remand to the Commission after an appeal to the Court. However, in *Municipality of Anchorage v. Adamson*<sup>6</sup> we ruled that such a request must be made within a reasonable time after the Court decision.

Effective February 4, 2024, we amended 8 AAC 57.260 to specifically address the procedure for an award of attorney fees following an appeal to the Court by adding new subsections (f) and (g):

(f) If a party is unsuccessful on appeal to the commission, yet successful on appeal to the supreme court, that party may request an award of attorney fees and costs for work performed before the commission by filing a motion not later than 10 days after the date shown in the supreme court's notice of distribution of its decision.

(g) If an appeal to the supreme court is filed before a successful party files a motion for attorney fees for work performed before the commission, and that party also prevails in the supreme court appeal, that party may request an award of attorney fees and costs for work performed before the commission by filing a motion not later than 10 days after the date shown in the supreme court's notice of distribution of its decision.

Because success in an appeal for purposes of attorney fees is determined on an issue-by-issue basis,<sup>7</sup> we interpret the reference in subsection (f) to "a party . . . unsuccessful on appeal to the commission, yet successful on appeal" to mean a party who (1) is unsuccessful as to one or more significant issues before the Commission and

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<sup>6</sup> *Municipality of Anchorage v. Adamson*, Alaska Workers' Comp. App. Comm'n Mem. Dec. No. 203 (Nov. 12, 2014) (delay of more than 60 days unreasonable) (hereinafter, *Adamson*). The Court, before it promulgated a rule establishing a time limit for a motion for attorney fees, had similarly held that such a motion must be filed within a reasonable time. *Brunet v. Dresser Olympic Div. of Dresser Indus.*, 660 P.2d 846, 847 (Alaska 1983) (motion filed 70 days after entry of judgement was within a reasonable time).

<sup>7</sup> See *Humphrey v. Lowe's Home Improvement Warehouse, Inc.*, 337 P.3d 1174, 1182 (Alaska 2014); *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1068 (Alaska 2011).

(2) is successful on appeal as to one or more of those issues. For the same reason we interpret the reference in subsection (g) to “a successful party” to mean a party who (1) is successful as to one or more significant issues before the Commission, and (2) is successful as to one or more of those issues on appeal. Neither subsection (f) nor subsection (g) abrogates the general rule set forth in subsection (a) that a party must file a motion for attorney fees within ten days, except insofar as, under (g), a party successful before the Commission on a particular issue fails to file a timely motion for fees under subsection (a) before the unsuccessful party as to that issue files an appeal as to that issue. Interpreting the regulation in this fashion ensures that each party will have the opportunity to consider the fee request by an adverse party before filing an appeal (unless an unsuccessful party, under subsection (g), elects to file an appeal before the ten day period for requesting attorney fees has expired). As the Court has repeatedly observed, it is important that an unsuccessful party have the opportunity to consider the successful party’s fee request before deciding whether to appeal.<sup>8</sup>

### *3. Discussion.*

We issued a final decision in this case, AWCAC Appeal No. 18-009, on December 6, 2019, and it was distributed to the parties on that same day. As a partially successful claimant entitled in that capacity to an award of attorney fees, pursuant to our regulation then in effect Mr. Mitchell was authorized to request an award of attorney fees by motion filed not later than ten days after the notice of distribution. He failed to file a motion within the allotted ten days.

Having achieved further partial success before the Court in a decision issued on November 21, 2021, Mr. Mitchell was, under *Adamson*, authorized to request an award of additional attorney fees from the Commission by filing a motion with the Commission within a reasonable time, which in *Adamson* we ruled is not more than 60 days. He failed to file a motion within 60 days.

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<sup>8</sup> See, e.g., *Alderman v. Iditarod Properties, Inc.*, 32 P.3d 373, 397 (Alaska 2001); *Pruitt v. State, Dep’t of Public Safety*, 825 P.2d 887, 895-896 (Alaska 1992).

Mr. Mitchell eventually requested an award of attorney fees for work performed in connection with AWCAC Appeal No. 18-009, but he did so not by filing a motion with the Commission, but by making a request to the Board in the proceedings on remand.<sup>9</sup> The Board's final decision on remand, issued on February 21, 2024, concluded that it lacked authority to award fees for work performed on appeal to the Commission, and on that basis denied Mr. Mitchell's request for fees for work performed in AWCAC Appeal No. 18-009.<sup>10</sup> Mr. Mitchell has filed an appeal from that decision, which is pending before the Commission in *Mitchell v. United Parcel Service*, AWCAC Appeal No. 24-007. However, before filing that appeal, Mr. Mitchell filed a motion in this case, AWCAC Appeal No. 18-009, for his attorney fees for work performed when it was before us in 2018 and 2019.<sup>11</sup> It is that motion which we are now considering. We leave consideration of whether the Board had authority, on remand, to award attorney fees for work performed before the Commission in AWCAC Appeal No. 18-009 to the panel hearing Mr. Mitchell's appeal in AWCAC Appeal No. 24-007.

As noted above, Mr. Mitchell was entitled to an award of attorney fees for work performed in connection with his appeal in AWCAC Appeal No. 18-009 based on his success in defending against the cross-appeal. Under our regulation then in effect, his

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<sup>9</sup> The proceedings on remand to the Board commenced with Mr. Mitchell's claim filed with the Board on January 21, 2022, 61 days after the Court's decision. *See Mitchell v. United Parcel Serv.*, Bd. Dec. No. 24-0009 at 7 (No. 25). The Board's decision does not indicate whether the claim specified attorney fees for work before the Commission. However, it appears that it did not, because it appears UPS's answer did not contest such an award. *See Mitchell v. United Parcel Serv.*, Bd. Dec. No. 24-0009 at 7 (No. 26), 10 (Nos. 39, 40). It appears that Mr. Harren first raised the issue of fees for work before the Commission by filing an affidavit with the Board in support of an award of those fees on February 27, 2023, one year, three months, and 14 days after the Court decision. *See Mitchell v. United Parcel Serv.*, Bd. Dec. No. 24-0009 at 8 (No. 28).

<sup>10</sup> *Mitchell v. United Parcel Serv.*, Bd. Dec. No. 24-0009 at 28.

<sup>11</sup> This appears to be the procedure that Mr. Harren believed was the appropriate way to bring his request for fees to the Commission: request fees for the appellate work from the Board, and, after a Board decision, file a motion for fees with the Commission. *See Mitchell v. United Parcel Serv.*, Bd. Dec. No. 24-0009 at 11 (No. 44).

motion for attorney fees should have been filed no later than ten days after distribution of the Commission's decision in that case, that is, no later than December 16, 2019. His motion was filed four years, two months, and 16 days after the due date to claim fees relating to his successful defense against the cross-appeal.

The Court decision in this case was issued on November 21, 2021.<sup>12</sup> At the time that decision was issued, our regulation did not specifically address the procedure for requesting an award of additional fees following a successful appeal to the Court. However, under *Adamson* a motion for attorney fees should have been filed within no more than 60 days, that is, prior to January 21, 2022. Mr. Mitchell's motion was filed two years, two months and 12 days after the due date to file a motion for fees relating to his success with respect to the award of additional PPD.

Assuming, without deciding, that our current regulation applies, the motion remains untimely. Currently, 8 AAC 57.260 provides two paths for requesting a fee award following an appeal to the Court. First, under 8 AAC 57.260(f), a party who is unsuccessful as to a particular issue before the Commission, but successful as to that issue on appeal may request an award of fees within ten days of distribution of the Court decision. In this case, Mr. Mitchell was unsuccessful before the Commission and successful on appeal as to one issue, PTD. Under 8 AAC 57.260(f), his motion for attorney fees in connection with that issue was due no later than ten days after the decision was distributed, that is, no later than December 1, 2021. His motion was two years, three months, and three days late. Second, under 8 AAC 57.260(g), if an appeal is filed by an unsuccessful party as to a significant issue before the successful party as to that issue files a motion for attorney fees, and the latter party is also successful on appeal, that party may file a request within ten days after the Court decision is distributed. Subsection (g) does not apply to Mr. Mitchell in this case, because UPS did not appeal the Commission's ruling on the TTD issue.<sup>13</sup>

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<sup>12</sup> *Mitchell v. United Parcel Serv.*, 498 P.3d 1029 (Alaska 2021).

<sup>13</sup> If 8 AAC 57.260(g) did apply, the due date for his motion would still have been December 1, 2021; the motion is equally untimely under subsection (g).

We turn to whether the motion should be accepted notwithstanding that it is untimely. Mr. Mitchell's motion does not address that question. Mr. Mitchell's motion states:

Employee . . . moves for an award of Attorney fees and costs incurred before the Commission in the unsuccessful appeal to the Commission. . . . This motion is based upon . . . the Employee's good faith effort to obtain an award for . . . these fees from the [Board] following this commission's remand to the Board for an award of PTD, attorney fees, costs, and interest incurred in obtaining that relief. Employee[']s effort to obtain the fees was unsuccessful in [Board] decision No. 24-0009 issued on February 21, 2024.<sup>14</sup>

This wording suggests that Mr. Harren may have read our order remanding the case to the Board as a directive for it to award attorney fees for work before the Commission. As we have noted, it is up to the panel considering AWCAC Appeal No. 24-007 (Mr. Mitchell's appeal of AWCAC Dec. No. 24-0009) to determine whether, independently of an order of remand directing that it do so, the Board had authority to award attorney fees for work performed in AWCAC Appeal No. 18-009 (Mr. Mitchell's appeal of AWCAC Dec. No. 18-0042). However, to the extent that Mr. Harren suggests our order instructed the Board to make an award for work performed in connection with the appeal, he is mistaken. Neither the Court's order of remand nor ours made any reference to an award of attorney fees: both orders simply remand the matter for an award of PTD benefits. Neither order suggests that the remand to the Board required it to award attorney fees for work performed before the Commission. To the extent that our order of remand controls, the award of fees on remand to the Commission for work performed in connection with this case, AWCAC Appeal No. 18-009, was subject to motion practice before the Commission, as in any other appeal to the Commission.

While Mr. Mitchell's motion offers no explanation or excuse for the failure to file a timely motion, it appears that issue was addressed before the Board on remand. The Board's decision notes Mr. Harren's contentions that "there was no clear guidance in the

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<sup>14</sup> Motion for Attorney Fees and Costs Incurred in the Above Referenced Appeal Before the Commission (Mar. 4, 2024).

law when he was supposed to file a motion for fees before the Commission when he lost the appeal at the Commission but won before the Court” and that “it would be inequitable to forfeit Employee’s attorney fees due to a procedural matter.”<sup>15</sup>

The first of these contentions does not apply insofar as Mr. Mitchell was successful with respect to the cross-appeal. 8 AAC 57.260(a) expressly set a deadline of ten days for “a party” to request an award of attorney fees. It was quite clear under our long standing precedents that because he was successful with respect to the cross-appeal, Mr. Mitchell was a successful party for purposes of AS 23.30.008(d). The absence of a clear guideline for when an unsuccessful party before the Commission should request fees following a successful appeal to the Court would not excuse the failure to timely request an award of fees in AWCAC Appeal No. 18-009 with respect to the cross-appeal.

The second contention, that it would be inequitable to deny a fee because of a procedural issue, is in effect a plea to extend the time for filing a motion pursuant to 8 AAC 57.270(a)(1), under which we may extend the time if strict adherence to the regulation would work injustice. But while it might be unjust to deny a fee for a brief or excusable delay, we do not see that it is unjust to deny a fee where there is an inexcusable delay of more than four years. To award fees for the cross-appeal at this late juncture would render 8 AAC 57.260(a) meaningless. The request for attorney fees with respect to the cross-appeal is untimely and in the absence of any showing of a reason to excuse the delay, the time will not be extended.

With respect to the PTD issue as to which Mr. Mitchell was unsuccessful before the Commission, but was successful on appeal to the Court, his contentions are not entirely unpersuasive. Prior to this case, Mr. Harren had not appeared before us and successfully taken an appeal to the Court: he would have had no occasion to consider when to request attorney fees from the Commission for success in the Court on an issue

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<sup>15</sup> *Mitchell v. United Parcel Serv.*, Bd. Dec. No. 24-0009 at 11 (No. 44).

as to which he had been unsuccessful before the Commission.<sup>16</sup> Absent a specifically applicable regulation, and given a good faith but mistaken understanding that our remand order included a directive for the Board to award fees for work before the Commission, or that (without relying on the order of remand) the appropriate procedure was to make a request to the Board rather than to the Commission, Mr. Harren's failure to file a motion for fees with the Commission might be considered excusable neglect. However, that he believed it proper to request fees from the Board rather than from the Commission does not mean that his motion is timely. Treating the filing of a claim with the Board as tolling the time for filing a motion with the Commission through the date of the Board's decision, his motion to the Commission was filed 61 days after the Court decision, outside the time limit we have previously established. Treating the filing of an affidavit in support of fees as tolling the time, his motion was filed 98 days after the Court decision.

In any event, that the delay in filing a motion with the Commission may have been the result of excusable neglect does not mean that the time for filing the motion should be extended under 8 AAC 57.270(1). Excusable neglect to make a timely filing may be grounds for equitable relief when the delay is not unreasonably long.<sup>17</sup> However,

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<sup>16</sup> Mr. Harren has appeared before us in four other cases, in none of which was he partially or wholly successful before the Commission or the Court. *See Phillips v. Bilikin*, AWCAC Appeal No. 14-012 (Petition for Review denied); *Patterson v. Matanuska-Susitna Borough Sch. Dist.*, Alaska Workers' Comp. App. Comm'n Dec. No. 283 (Nov. 17, 2020), *affirmed*, *Patterson v. Matanuska-Susitna Borough Sch. Dist.*, 523 P.3d 945 (Alaska 2022); *Jespersen v. Tri-City Air*, Alaska Workers' Comp. App. Comm'n Dec. No. 295 (Aug. 11, 2022), *affirmed*, *Jespersen v. Tri-City Air*, Slip Op. No. 7698, \_\_\_\_ P.3d \_\_\_\_ (Alaska, May 2, 2024).

<sup>17</sup> *Compare, ConocoPhillips v. Williams Alaska Petroleum*, 322 P.3d 114 (Alaska 2014) (not an abuse of discretion to permit ten-day delay even in absence of prejudice, where party claims excusable neglect based on alleged ambiguity); *Conger v. Conger*, 950 P.2d 119, 122 (Alaska 1997) (6 days or less late filing is excusable neglect where due date was ambiguous) *with Alderman v. Iditarod Properties, Inc.*, 232 P.3d 373, 397 (Alaska 2001) (not an abuse of discretion to accept motion for attorney fees after reasonable delay of 70 days).

inexcusable neglect is not grounds for equitable relief, even to avoid injustice,<sup>18</sup> and it is not clear to us that the delay caused by Mr. Harren’s decision to request fees from the Board, rather than from the Commission, is excusable.<sup>19</sup> Generally, when it comes to an attorney’s procedural default, it is not unjust that the attorney’s client bears the burden of the default, as the client must generally bear the consequences of his chosen attorney’s litigation mistakes or choices.<sup>20</sup> So much the less should it be deemed unjust when the party harmed is the attorney, not the client. In short, it is not unjust that Mr. Harren should be denied an attorney fee due to his own unreasonable delay in filing a motion with the Commission, even in the absence of any showing of prejudice to the other party.<sup>21</sup>

Under our regulation in effect at the time of our decision in AWCAC Appeal No. 18-009, Mr. Harren had ten days to file a motion for fees regarding Mr. Mitchell’s success on the cross-appeal. Mr. Harren did not file a motion within the allotted ten days. He could have accompanied such a motion with a request for fees with respect to the other issues

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<sup>18</sup> See, *Chena Obstetrics & Gynecology v. Bridges*, 502 P.3d 951, 958-963 (Alaska 2022) (inexcusable neglect, short of conduct equivalent to abandoning the client, is not grounds for relief even to prevent injustice).

<sup>19</sup> The Commission, not the Board, is by statute the designated fact-finder for purposes of an award of fees on appeal to the Commission. AS 23.30.128(c). The Board’s regulation addressing attorney fees is expressly inapplicable to appellate proceedings. 8 AAC 45.190(a).

<sup>20</sup> Mr. Harren has, in fact, been in that position. See, *Jespersen v. Tri-City Air*, Slip Op. No. 7698, \_\_\_ P.3d \_\_\_ (Alaska, May 2, 2024).

<sup>21</sup> The Court has not held that prejudice is necessary in all cases, although it has noted that prejudice is a “relevant” consideration. *Pruitt v. State, Dep’t of Public Safety*, 825 P.2d 887 (Alaska 1992) (seven-month delay in filing motion for attorney fees is unreasonable, relief denied, “relevant that Pruitt has shown he was prejudiced” in that late motion required him to file motion to supplement points on appeal and for permission to file supplemental briefing). For our purposes, we think it relevant that if Mr. Harren had filed a timely motion for fees on the issue as to which he was successful, the issues of an appropriate rate and amount of fees would have been at issue prior to the earlier appeal in this case, and any disputes in that regard would have been resolved by the Court in the prior appeal, potentially avoiding unnecessary additional appellate proceedings.

on appeal, contingent on success on appeal to the Court.<sup>22</sup> Absent a regulation specifically addressing attorney fees on remand from the Court, counsel can reasonably be expected to act in accordance with *Adamson*, our published decision addressing that issue.<sup>23</sup> Moreover, in the absence of a specifically applicable regulation, a prudent attorney would make an inquiry to the Commission, or to fellow practitioners, as to the

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<sup>22</sup> See, *Darrow v. Alaska Airlines*, AWCAC Appeal No. 14-024 (Order Staying Enforcement of Attorney's Fees Pending Appeal, Dec. 7, 2015). In an analogous situation, we entertained a motion to preserve the question of attorney fees pending remand to the Board. See, *Atkins v. Inlet Transp. and Taxi Serv., Inc.*, AWCAC Appeal No. 14-011 (Memorandum and Order Remanding Case, July 16, 2015).

<sup>23</sup> We have identified nine cases since *Adamson* was issued in which a party represented by counsel was unsuccessful before the Commission but was successful on appeal. In all but one of them, a timely motion was filed. See, *Vue v. Walmart*, Alaska Workers' Comp. App. Comm'n Dec. No. 260 (2019), *reversed*, 474 P.3d 270 (Alaska 2020) (J. C. Croft, counsel for appellant; motion filed 28 days after remand to Commission); *ARCTEC v. Traugott*, Alaska Workers' Comp. App. Comm'n Dec. No. 249 (2018), *reversed*, 465 P.3d 494 (Alaska 2020) (E. Croft, counsel for appellant; motion filed five days after remand to Commission); *Alaska Interstate Constr. v. Morrison*, Alaska Workers' Comp. App. Comm'n Dec. No. 243 (2018), *reversed*, 440 P.3d 224 (Alaska 2019) (J. Kalamarides, counsel for appellee; motion filed 28 days after remand to Commission); *Rusch v. Southeast Alaska Reg'l Health Consortium*, Alaska Workers' Comp. App. Comm'n Dec. No. 245, *affirmed in part, reversed in part*, 453 P.3d 784 (Alaska 2019) (Order on Appellant's Motion for Extension of Time to File Motion for Attorney's Fees and Costs, Jan. 21, 2020) (J. Franich, counsel for appellants; motion filed 31 days after Court decision); *State, Workers' Comp. Benefits Guar. Fund v. Adams*, Alaska Workers' Comp. App. Comm'n Dec. No. 252, *reversed*, 467 P.3d 1053 (Alaska 2020) (Order on Appellee's Motion for Attorney Fees, Oct. 23, 2020) (C. Coe, counsel for Appellee, motion filed 13 days after Court decision); *Vandenburg v. State of Alaska*, Alaska Workers' Comp. App. Comm'n Dec. No. 211, *reversed*, 371 P.3d 602 (Alaska 2016) (Order on Motion for Attorney's Fees, May 23, 2016) (J. Kalamarides, counsel for appellant; motion filed within 13 days of Court ruling); *First Student v. Bockus*, Alaska Workers' Comp. App. Comm'n Dec. No. 205, *reversed*, 384 P.3d 801 (Alaska 2016) (J. Franich, counsel for appellee; motion filed 17 days after remand to Commission); *Huit v. Ashwater Burns, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 191, *reversed*, 372 P.3d 904 (Alaska 2016) (R. Rehbock, attorney for appellant; motion filed 19 days after remand to Commission).

In *Kang v. Mullins*, Alaska Workers' Comp. App. Comm'n Dec. No. 230, *reversed*, 420 P.3d 1210 (Alaska 2018) no motion for fees was filed following remand to the Commission. However, counsel in that case, Mr. Franich, was plainly familiar with the appropriate procedure as he had filed timely motion in a prior case.

proper procedure. Finally, the promulgation of our revised regulation, with constructive and actual notice to Mr. Harren, should have alerted Mr. Harren to the appropriate procedure,<sup>24</sup> and that the time for requesting attorney fees for work before the Commission had long since passed. Still, he did not promptly file an untimely motion and request an extension of time with an explanation of the ground for granting such a request. Rather, he filed the current motion, without any attempt to explain or excuse the failure to file it in a timely manner, only after the Board's decision denying his request.

In our view, given (1) an unreasonably long delay in filing the motion, (2) the failure to file a timely motion for fees following his partial success in the appeal to the Commission, (3) the failure to file a timely motion for an additional fee contingent upon success on appeal to the Court, (4) our published decision in *Adamson* addressing the procedure for requesting fees following a successful appeal, (5) the absence of any inquiry to the Commission or, so far as the record indicates, to any fellow practitioner, as to the appropriate procedure, (6) the failure to file an appropriate motion promptly following the promulgation of our current regulation, and (7) the absence of any discussion in his motion of the need for an extension of time or of any alleged grounds for extending the time for filing the motion, it is not unjust that Mr. Harren should be deprived of a fee.

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<sup>24</sup> Constructive notice was provided when members of the worker's compensation bar (including Mr. Harren) were sent notice of the proposed changes to our regulations, specifically referencing 8 AAC 57.260, on October 23, 2023, and actual notice was provided when copies of the new regulations were sent to all the attorneys with cases then pending before the Commission (including Mr. Harren) on February 6, 2024.

4. Order.

The motion for attorney fees is DENIED as untimely.

Date: June 12, 2024 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



*Signed*

James N. Rhodes, Appeals Commissioner

*Signed*

Amy M. Steele, Appeals Commissioner

*Signed*

Andrew M. Hemenway, Chair *pro tempore*

PETITION FOR REVIEW

A party may file a petition for review of this Memorandum Decision with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). See AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review not later than 10 days from the date shown in the Certificate of Distribution below.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:  
<http://www.courts.alaska.gov/>

RECONSIDERATION

The Alaska Supreme Court ruled in *Warnke-Green vs. Pro West Contractors, LLC*, 440 P.3d 283 (Alaska 2019), that "AS 23.30.128(f) does not prohibit the Commission from reconsidering orders other than the final decisions described in AS 23.30.128(e) because the authority to reconsider is necessarily incident to the Commission's express authority to 'issue other orders as appropriate.'"

A party may ask the Commission to reconsider this Memorandum Decision by filing a motion for reconsideration not later than 10 days from the date shown in the Certificate of Distribution below. If a request for reconsideration of this Memorandum Decision is filed on time with the Commission, any proceedings to file a petition for review with the Alaska Supreme Court must be instituted not later than 10 days after the date shown in the Certificate of Distribution of the order on reconsideration.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision No. 305 issued in the matter of *Stephan C. Mitchell v. United Parcel Service and Liberty Mutual Fire Insurance Company*, AWCAC Appeal No. 18-009, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 12, 2024.

Date:         June 13, 2024        



*Signed*

        K. Morrison, Appeals Commission Clerk