

Case: *State of Alaska, Department of Corrections vs. Scott Dennis, Earthworks, and Umiliak Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 032 (February 2, 2007)

Facts: State moved for extraordinary review of board's decision directing Department of Corrections to pay for benefits to employee under AS 23.30.155(d) as the most recent employer who may be liable. Employee asked commission chair to recuse herself because she represented governor and Department of Labor testifying before the Legislature when the Workers' Compensation Act was amended in 2005. Employee argued 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. Dec. No. 032 at 2.

Applicable law: Code of hearing officer conduct, as provided under AS 44.64.050 and 2 AAC 64.010 – 060.

Issue: Should chair recuse herself due to a conflict of interest or an inability to be fair and impartial to the parties?

Holding/analysis: Commission chair sought guidance from the Chief Administrative Law Judge (Chief ALJ), who found that there was no apparent conflict of interest or violation of the code of hearing officer conduct presented by the chair's participation. Chief ALJ advised that the chair should recuse herself only if she believed she was unable to be fair and impartial to the parties. Commission concluded that the hearing officer code of conduct "[did] 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." Dec. No. 032 at 8 (citations omitted). "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."

Moreover, prior advocacy arguments also applied to the other commissioners on the panel. Commissioners must have experience with and knowledge of workers' compensation law to qualify for service on the commission.

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. Dec. No. 032 at 10.

Lastly, commission noted that issue currently before it was not how to interpret AS 23.30.010 and 23.30.155(d) but whether movant had met burden for extraordinary review. Commission noted that, if the appeal was allowed and record later revealed information that made a member believe he or she could not be impartial, that member could recuse himself or herself at that time.

Note: Dec. No. 036 denied the motion for extraordinary review in this case.