

Case: *Bradford T. Wilson vs. Eastside Carpet Company and AIG Claim Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 098 (February 2, 2009)

Facts: Bradford Wilson (Wilson) moved to certify his appeal of a compensation wage adjustment to the Alaska Supreme Court (supreme court) because the commission lacks jurisdiction over constitutional questions. Wilson argued it would be more efficient and less costly if he did not have to brief an appeal twice, when he is challenging the constitutionality of AS 23.30.220(a)(4) as applied.

Applicable law: The doctrine requiring exhaustion of administrative remedies usually applies in appeals involving both constitutional and non-constitutional questions. The exhaustion doctrine may not apply when an appeal raises solely constitutional questions. The purpose of the exhaustion doctrine "is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Standard Alaska Production Co. v. State, Dep't of Revenue*, 773 P.2d 201, 206 (Alaska 1989) (citing *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 122 (Alaska 1988) (emphasis added)).

Issue: Should the commission issue an order certifying the appeal to the supreme court because Wilson challenges the constitutionality of a statute as applied to him?

Holding/analysis: No. The commission will still consider and decide the appeal because there are issues that the commission has jurisdiction over that may moot the constitutional issue, including whether substantial evidence supports that AS 23.30.220(a)(4) most closely fits Wilson's earning pattern and whether the board correctly applied the statute to his facts. Because Wilson's challenge is an as-applied one, it necessarily involves more than constitutional issues so the exhaustion doctrine applies to his appeal. The commission noted that its "review ensures that, in the case presented to the Supreme Court, the constitutional challenge is both unavoidable and well-grounded in fact; instead of an unnecessary challenge based on hypothetical or unsupported facts." Dec. No. 098 at 6. Moreover, the "commission's explanation of fundamental policy underlying the Legislature's enactment of AS 23.30.220, and the Department's regulations, may be given 'some weight' when the Supreme Court decides if, as appellant asserts, the 'board's decision and the statute create bad public policy in contravention of the Act.'" *Id.* at 7.

In addition, the commission lacks authority to seek an advisory opinion on the constitutional issue, which is, in effect, what Wilson is seeking. "Nothing in the Rules of Appellate Procedure, the Alaska Constitution, or the workers' compensation statutes permit the commission to seek an advisory opinion from the Alaska Supreme Court in a pending appeal." *Id.* at 4. Only federal courts can certify questions to the state supreme court.

Note: Dec. No. 099 (February 2, 2009) decided the merits of the appeal denying a compensation rate adjustment, and Dec. No. 106 (May 4, 2009) addressed the director's petition seeking reconsideration of Dec. No. 099.