

January 6, 2010

The Honorable Clark Bishop
Commissioner, Department of Labor & Workforce Development
State of Alaska
PO Box 111149
Juneau, AK 99811-1149

Re: Workers' Compensation Officers' Authority to Decide Disputed Procedural
Issues, AGO No. AN2009104342

Dear Commissioner Bishop:

You have asked for our opinion as to the role that non-attorney workers' compensation officers can play with respect to conducting prehearing conferences and whether an officer is engaged in the unauthorized practice of law when the officer decides disputed procedural and preliminary issues.¹ You also inquired whether the decision in *Bohlmann v. Alaska Construction & Engineering, Inc.*, 205 P.3d 316 (Alaska 2009), has a legal impact on how workers' compensation officers conduct prehearing conferences involving unrepresented parties.

In brief, it is our opinion that workers' compensation officers may exercise the full authority as the board's designee in conducting prehearings and are not engaged in the unauthorized practice of law when they decide disputed procedural issues. In addition, it is our opinion that the Alaska Supreme Court's *Bohlmann* decision does not affect the designation of workers' compensation officers to conduct prehearings, as permitted by both statute and regulation, even when a party at the prehearing is not represented by counsel. A more detailed analysis of these responses follows.

¹ By statute and regulation, the Workers' Compensation Board (board) may have "the board's designee" conduct prehearings conferences. See AS 23.30.108, AS 23.30.110(c), and 8 AAC 45.065. The board historically has designated non-attorney workers' compensation officers to conduct these prehearing conferences.

I. A workers' compensation officer does not engage in the unauthorized practice of law when the officer conducts a prehearing conference and rules on disputed procedural issues.

Alaska Bar Rule 63 defines the "unauthorized practice of law." Under this rule, the "unauthorized practice of law" occurs when a person represents oneself by words or conduct to be an attorney and either (i) represents another before a court or administrative body or (ii) provides legal advice for compensation. Alaska Bar Rule 63 reads:

Rule 63. Unauthorized Practice of law – AS 08.08.230.

For purposes of AS 08.08.230 (making unauthorized practice of law a misdemeanor), "practice of law" is defined as:

(a) representing oneself by words or conduct to be an attorney, and, if the person is authorized to practice law in another jurisdiction but is not a member of the Alaska Bar Association, representing oneself to be a member of the Alaska Bar Association; and

(b) either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii) for compensation, providing advice or preparing documents for another which affect legal rights or duties.

Workers' compensation officers do not engage in the unauthorized practice of law when they make procedural rulings as authorized under AS 23.30.108, AS 23.30.110(c), and 8 AAC 45.065. First, workers' compensation officers do not hold themselves out as attorneys. The workers' compensation officer position description does not require the officer to be an attorney and an officer is not acting as an attorney when serving as the board's designee in conducting a prehearing conference. Second, a workers' compensation officer neither represents a party before an agency nor provides legal advice to a party for compensation. As the board's designee, the workers' compensation officer is acting for the agency, not as an advocate. And the designee's prehearing determinations, including decisions on contested procedural issues, are specifically authorized by statute and regulation. We are unaware of any pertinent legal theory or authority that could construe a workers' compensation officer's authorized prehearing decision-making as the unauthorized practice of law.

II. The *Bohlmann* decision does not affect the practice of designating non-attorney workers' compensation officers to conduct prehearing conferences when a party is not represented by counsel.

In *Bohlmann v. Alaska Construction & Engineering, Inc.*, 205 P.3d 316, 319 (Alaska 2009), the Alaska Supreme Court expanded on the duty set out in *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445 (Alaska 1963), that the Alaska Workers' Compensation Board "must assist claimants by advising them of the important facts of their case and instructing them on how to pursue their right to compensation." *Bohlmann* held that this duty included correcting an employer's erroneous assertion to a pro se claimant that the two-year period to seek a hearing on his claim had expired, or at a minimum to inform the claimant of how to determine the actual deadline. *Id.* at 320.

Nothing in the *Bohlmann* decision affects the board's practice of designating non-attorney officers to conduct prehearing conferences and decide procedural or preliminary issues. Nor did the court rule or infer that a non-attorney board designee could not provide the required assistance. To the contrary, the court specifically held that the board designee conducting *Bohlmann*'s prehearing conference should have corrected the employer's erroneous assertion that the deadline had already run. *Id.* "Correcting [the employer's] misstatement or telling *Bohlmann* the actual date by which he needed to file an affidavit of readiness for hearing to preserve his claim would not have been advocacy for one party or the other." *Id.* at 321. The board's designee is not acting as a lawyer, but as the adjudicative body, "with a duty to assist claimants . . . similar to that of courts to assist unrepresented litigants." *Id.* at 320.

In summary, it is our opinion that non-attorney workers' compensation officers may make the array of prehearing decisions authorized under AS 23.30.108, AS 23.30.110(c), and 8 AAC 45.065, even in cases where a party is not represented by counsel. However, the officers, like the board, should be mindful of the duty to assist claimants as set out in *Richard* and *Bohlmann*.

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If you have any questions regarding this advice, please feel free to contact me.

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Sincerely,

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cc: Trena Heikes, Director of the Division of Workers' Compensation