

Case: *Eagle Hardware & Garden, Hartford Insurance Co., and State of Alaska (self-insured) vs. Maryann Ammi*, Alaska Workers' Comp. App. Comm'n Dec. No. 003 (February 21, 2006)

Facts: Eagle Hardware and the State as former employers moved for extraordinary review of the board's grant of a protective order so that the employee did not have to attend an employer psychiatric medical exam that she asserted was too intrusive and irrelevant because she had not alleged a mental injury. The board concluded, in light of the intrusive nature of the examination and the extensive medical record (including prior psychological records), that it was premature to subject her to an employer psychological evaluation and permitted the employer to review psychiatric records under AS 23.30.095(e).

Regulation: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).

The commission will grant a motion for extraordinary review if the commission finds the sound policy favoring appeals from final orders or decisions is outweighed because

(1) postponement of review until appeal may be taken from a final decision will result in injustice and unnecessary delay, significant expense, or undue hardship;

(2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and

(A) the order or decision involves an important question of law on which there is substantial ground for difference of opinion; or

(B) the order or decision involves an important question of law on which board panels have issued differing opinions;

(3) the board has so far departed from the accepted and usual course of the board's proceedings and regulations, or so far departed from the requirements of due process, as to call for the commission's power of review; or

(4) the issue is one that otherwise would likely evade review, and an immediate decision by the commission is needed for the guidance of the board.

Issues: Does commission have jurisdiction over appeals of non-final board decisions? If so, should the commission grant the motion for extraordinary review (MER) in this case?

Holding/analysis: Commission concluded that it had implied jurisdiction over interlocutory appeals but denied the MER. On the merits in *Ammi*, the commission denied review under 8 AAC 57.076(a)(1) because the employers asserted only a claim of legal error which standing alone is not enough to amount to an injustice. "A claim of legal error is inherent in any appeal; legal error, if it exists, generally will not result in injustice if the error is corrected on appeal." *Id.* at 11. The commission denied review under .076(a)(2)(B) because the board order was not inconsistent with other panel

decisions; no other panel decisions considered the invasiveness of an employer's psychiatric exam. And the commission denied review under .076(a)(3) because of a lack of authority supporting an employer's due process right to conduct unlimited psychiatric examinations. Even assuming such a right existed, the issue was raised prematurely because the board could still later order an exam after reviewing the psychiatric records.

Note: The commission's MER regulations, 8 AAC 57.072, .074, .076, were repealed effective 3/27/11. The commission enacted new regulations, 8 AAC 57.073, .075, .077, effective 12/23/11, providing for petitions for review of non-final board decisions based on similar but not identical criteria as those under the MER regulations.