

Case: *Alcan Electric and SeaBright Insurance Co. vs. Alan James*, Alaska Workers' Comp. App. Comm'n Dec. No. 084 (July 18, 2008)

Facts: The employer wanted the board to decide its petition to dismiss James' claim for a failure to timely request a hearing under AS 23.30.110(c) before the board decided the merits of James' claim. The workers' compensation hearing officer, Kokrine, denied the petition to bifurcate "pursuant to regulation." At a prehearing conference on March 5, 2008, Kokrine set both the petition to dismiss and the hearing on the merits on July 31, 2008.

The board reviewed Kokrine's decision, citing the "specific delegated discretionary authority to set hearings and determine issues to be heard" in 8 AAC 45.065 and 45.070. The board observed that the employer did not yet have a right to have its petition set for hearing when the prehearing conference occurred because the time for opposing the affidavit of readiness had not passed. The board found that by setting the petition to dismiss as the first matter for hearing July 31, 2008, Kokrine had protected the employer's rights and had not abused her discretion. The employer sought extraordinary review, arguing that it was denied due process because Kokrine failed to provide her reasons for the denial, the board should have reviewed Kokrine's decision *de novo*, and the employer was subject to the considerable expense of preparing for a hearing on the merits.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation), provided in part:

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.

Issue: Should the commission grant extraordinary review and hear the merits of Alcan Electric's appeal?

Holding/analysis: The commission summarized its prior motion for extraordinary review (MER) decisions, noting that review had been granted only 3 times. The commission denied the MER in this case. The commission concluded the board did not apply the wrong standard of review.

The employer demonstrated the possibility of pre-hearing conference officer error, but the error was not sufficiently prejudicial to the employer's rights as to require immediate review. The possible error was that the officer did not provide her reasons for rendering the decision and the decision was a departure from board regulations because (1) she set the case for more than 60 days after the pre-hearing, which is only done when the parties agree to the hearing date, its "the first possible date on the board's hearing calendar," or "good cause" existed to set a later date, 8 AAC 45.065(e); and (2) she was not yet required to set a hearing date on the petition to dismiss because the time for James to object had not yet passed. However, immediate review was not required because (1) the employer objected only to the date that was set, not to the process that Kokrine used and both parties agreed to allow her to make the decision date earlier than what was required; (2) the employer failed to have the prehearing conference summary modified to reflect Kokrine's statement that "we don't do that in Fairbanks" was her rationale for declining to hear the petition to dismiss separately, thereby failing to preserve that objection; and (3) the issue may be moot because the hearing date for the merits was pushed back to November 2008, so Kokrine could choose to revisit the decision not to bifurcate.

The commission also concluded that the board's decision contains possible error because of the similar failures to explain its rationale, but, because the employer did not demonstrate what material evidence would have been provided to the board or Kokrine relevant to the factors favoring bifurcation, failure to consider those factors by Kokrine or the board did not prejudice the employer. And, again, the board has time to reconsider the decision not to bifurcate since the hearing date changed. The commission suggested a number of factors relevant to finding good cause to bifurcate: (1) the complexity of the case as a whole, and severability of contested factual or legal disputes; (2) the contribution of the parties to fair, orderly and economical resolution of the case; (3) whether a party has alleged all the elements of a defense in a petition to dismiss the claim that would, if valid, dispose of the entire case; (4) whether the board, parties and any witnesses will be saved considerable time and expense to prepare for hearing, if the dispositive petition is successful and the possibility of settlement if the dispositive petition is not successful; and (5) the board calendar, and whether the possible benefits of hearing the dispositive petition first and separately outweigh the burden to the claimant associated with any delay of the hearing on the merits and the burden to the defendants if presentation of evidence on the merits affects fair consideration of the dispositive petition.

Third, immediate review by the commission will not advance termination of the litigation; if the appeal is allowed, resolution of the merits of the petition to dismiss the claim will only be delayed.

Finally, the commission concluded the board may not consider the likelihood of one party prevailing over another on the merits of the claim, or of an attorney's ability to recover his fee, as a reason to avoid bifurcation. Considering such factors encourages a prejudgment of which party ought to prevail at hearing and so the board properly did not comment on these arguments.

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.