

Case: *Dana L. Olson vs. Federal Express Corporation and Sedgwick CMS*, Alaska Workers' Comp. App. Comm'n Dec. No. 104 (March 20, 2009)

Facts: Dana Olson (Olson) appealed a board decision that denied her employer's petition to cancel a second independent medical examination (SIME). The parties stipulated to the SIME but the employer later petitioned to cancel it. The board found no good cause to relieve the parties from their prior stipulation under 8 AAC 45.050(f) and concluded that it had the authority to order, and would order, an SIME without regard to the parties' stipulation. Olson sought reconsideration, which the board denied. The board's initial decision was titled an Interlocutory Decision and Order; its decision on reconsideration was titled a Final Decision and Order on Reconsideration. Olson appealed to the commission but later filed with the commission a copy of a filing with the board, which states that she has changed her mind regarding an SIME, and asks that the board schedule an SIME.

Applicable law: The title of the board's decision is not conclusive of its status as a final decision for purposes of appeal to the commission, and "[a]n appeal under AS 23.30.127 to the commission should be from a board decision that is final as to the appellant's rights, and leaves no further dispute on a pending claim or petition for the board to resolve." *Hope Cmty. Res. v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 041 at 5, 7 (May 16, 2007).

Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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

Issue: Should the commission grant the motion for extraordinary review (MER) and decide the merits of the issues that Olson raised?

Holding/analysis: Neither of the board's decisions was final for the purposes of an appeal to the commission. Both were interlocutory decisions "regarding a non-dispositive prehearing matter – an SIME – and it left the underlying claim subject to further proceedings before the board." Dec. No. 104 at 5. Thus, the commission treated Olson's appeal as an MER.

Olson did not articulate any grounds for granting an MER, the commission could not discern any grounds, and, most importantly, Olson's most recent commission filing indicated that she changed her mind and wanted the SIME to go forward. "Under these circumstances, and in light of the well-established policy favoring appeals from final judgments, we conclude that the request for extraordinary review should be denied." *Id.* at 6.

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.