

Case: *BP Exploration Alaska, Inc. and ACE USA vs. Sherry Stefano*, Alaska Workers' Comp. App. Comm'n Dec. No. 076 (May 6, 2008)

Facts: The employee suffered from a shoulder injury. The employee alleged the shoulder injury led to migraine headaches, stress, and depression, which required counseling and caused her to request reassignment to a different reemployment benefits provider. The employer contested paying for counseling services and the proposed reassignment; the employer wanted the employee to attend a psychiatric medical evaluation. The board upheld the hearing officer's decision to issue a protective order so that the employee would not have to attend the psychiatric evaluation. The employer moved for extraordinary review of that interlocutory decision on the grounds that either injustice would result under 8 AAC 57.076(a)(1) or that review would materially advance the end of litigation under 8 AAC 57.076(a)(2).

Applicable law: Repealed regulation, 8 AAC 57.076(a) (see below note).

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 commission grant extraordinary review in order to decide whether board erred in upholding the protective order?

Holding/analysis: The commission concluded neither test was met because there was no longer a dispute. The employee withdrew her request for payment of counseling services and there was no current dispute over cooperation with reemployment benefits. (The employee would have been transferred to a different counselor anyway because her original counselor was promoted and was no longer doing eligibility evaluations.) Although parts of the board's order appeared to decide the merits of her claim or the credibility of her doctors, the commission noted that those observations were not the law of the case. The commission also noted the

protective order could be lifted for numerous reasons, including if the employee amended her claim to include mental stress or if she asserted a defense to a petition to suspend compensation for non-cooperation with reemployment benefits providers based on an asserted mental or emotional condition that inhibited her ability to cooperate or to complete a plan.

Commission noted that the board should identify disputed issues and then consider whether the proposed discovery is likely to lead to relevant evidence that would tend to prove or disprove those disputed issues. The board should not make decisions as to the merits of the evidence in deciding a discovery petition. Commission also concluded that board likely erred in deciding that the employer's physicians are agents of the employer under *Frazier v. H.C. Price/CIRI Constr. JV*, 794 P.2d 103, 105 (Alaska 1990).

The commission observed:

It is not enough to demonstrate that the board may have erred on a point of law to require immediate review under 8 AAC 57.072. Every appeal involves a party's claim the board erred as a matter of law; legal error, if it exists, generally will not result in injustice if the error is corrected on appeal. In this case, owing to the unanticipated events following Officer White's decision and Officer Kokrine's decision, injustice to the movants will not necessarily follow in the absence of immediate review. There is no prejudice to the movants' ability to litigate the present case. Unless the reemployment evaluation is delayed, or other events impact the movants' future rights, there is no ongoing harm. Therefore, an immediate review of the board's order will do more than serve as an advisory opinion; it will not advance the final resolution of the claim. Dec. No. 076 at 19.

Note: The commission's motion for extraordinary review (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.