Alaska Workers' Compensation Appeals Commission

Hope Community Resources and
Liberty Northwest,
Movants,

vs.

Veronica Rodriguez,
Respondent.

Memorandum Decision and Order
Decision No. 041 May 16, 2007

AWCAC Appeal No. 07-009
AWCB Decision No. 07-0054
AWCB Case No. 200405438

Memorandum Decision on Motion for Extraordinary Review and Motion to Stay Alaska Workers' Compensation Board Interlocutory Decision and Order No. 07-0054 issued March 15, 2007 by the southcentral panel at Anchorage, Rosemary Foster, Chair, Patricia A. Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Jeffrey D. Holloway, Holmes Weddle & Barcott, P.C., for movants Hope Community Resources and Liberty Northwest. Veronica Rodriguez, self-represented, respondent.

Commissioners: Stephen T. Hagedorn, Jim Robison, and Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

The movants ask the commission to allow an appeal of the board's decision denying their petition for board review and modification of the reemployment benefits administrator's decision finding the employee eligible for reemployment benefits. Movants argue the board's decision finally resolves all questions on the employer's petition, so that the movants may appeal as from a final decision. The movants also argue that the board exercised powers it does not have in directing the employee to attend, and employer to pay for, a medical examination under AS 23.30.110(g) and AS 23.30.095 when there is no claim before the board. We agree that the board's order denying and dismissing the petition for review and modification is a final board decision and order, and may be appealed under AS 23.30.127. We agree that the order

directing Rodriguez to undergo, and Hope Community Resources to pay for, a medical examination is also a final appealable order. We stay the board's order for such examination under AS 23.30.125(c). The movant does not request, and we do not grant, a stay of on-going reemployment benefits.

Factual background and proceedings.

The facts recited here are drawn from the board's decision and the parties' pleadings before the commission; [1] they are provided for the purpose of placing the motion in context and they do not constitute findings of fact.

Veronica Rodriguez was employed by Hope Community Resources as a "home alliance coordinator." She reported an abdominal hernia caused by lifting clients at work on February 25, 2004. She returned to her home in Philadelphia, where the hernia was repaired surgically by Dr. Rosato in April 2004. She required a second surgery when the hernia recurred. This surgery, again by Dr. Rosato, took place in March 2005. During the surgery, he found the employee had an enlarged uterus, with uterine fibroid tumors, that occupied 50% of the abdominal cavity. Dr. Rosato reported Rodriguez was fully healed on August 12, 2005.

Hope Community Resources paid compensation and medical benefits without an award. Rodriguez requested a reemployment benefits eligibility evaluation under AS 23.30.041. An employer medical examination on December 6, 2005, by Dr. Braun resulted in an opinion that there was no permanent impairment based on the AMA Guides. Dr. Rosato provided an opinion that Rodriguez would have a permanent impairment in June 2006. Based on Dr. Rosato's prediction of permanent impairment, Rodriguez was found eligible for reemployment benefits on July 7, 2006. Rodriguez selected a plan provider and a plan was developed. Hope Community Resources filed a petition appealing the administrator's decision finding Rodriguez eligible.[2] Hope

[1] Because this matter comes before the commission on a motion for extraordinary review, we do not have the board's record.

[2] Although Hope Community Resources appealed the administrator's eligibility determination, the employer requested that the plan development continue. Rodriguez therefore continues to receive benefits and a plan was submitted. In oral

Community Resources also filed a petition for modification of the eligibility determination based on later acquired evidence (an addendum from Dr. Braun with a rating of zero percent).

The board's decision.

The board determined it would consider Hope Community Resources' petition for modification "in light of the whole record, including the new evidence concerning the employee's condition."[3] On reviewing the administrator's decision,[4] the board would apply the "abuse of discretion" standard. The board determined that Dr. Rosato's prediction of a permanent impairment was substantial evidence on which the administrator could rely to determine that Rodriguez was eligible for benefits.[5] However, based on a finding that Dr. Braun had made a racist remark to Rodriguez in the course of his examination, the board found that "the obvious evidence of racial bias by Dr. Braun means that the Board will give no weight to Dr. Braun's reports."[6] Based on the preponderance of the evidence in the record, the board found Rodriguez remained eligible for reemployment benefits.[7] The board ordered that:

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argument, Hope Community Resources made it clear it is not asking that Rodriguez's on-going reemployment benefits be stayed (stopped) during the appeal.

[3] *Veronica T. Rodriguez v. Hope Community Resources, Inc.,* AWCB Dec. No. 07-0054, 8 (March 15, 2007).

[4] The board stated "the instant case involves a petition for modification of an RBA determination under AS 23.30.130 rather than a direct appeal", AWCB Dec. No. 07-0054 at 8, but earlier stated that "the employer filed a petition for review of the July 7, 2006 eligibility determination," *id.* at 6, and the employer "also filed a petition to modify the eligibility determination." *Id*. at 6.

[5] AWCB Dec. No. 07-0054 at 14.

[6] *Id.*

[7] *Id.*

> The employer's petition for modification of the RBA Designee's determination is denied and dismissed. The employer's petition to set aside the eligibility determination is denied and dismissed.[8]

However, having denied and dismissed both petitions, the board found "there is a significant medical dispute between the employee's physician, Dr. Rosato, and the employer's physician, Dr. Braun."[9] The board found the dispute ranged over the areas of causation, compensability, treatment, medical stability, and the employee's degree of impairment. The board found that these disputes were significant and that an SIME was required "to address the issues in this case, including review of any causal connection between hernias and fibroids, as well as expertise in performing impairment ratings."[10] Therefore, the board ordered:

> Workers' Compensation Officer Maria Elena Walsh shall schedule an SIME pursuant to AS 23.30.110(g) and AS 23.30.095 with a physician selected by Ms. Walsh, in accord with the procedure in 8 AAC 45.092(h).
>
> An SIME shall be conducted regarding the nature and extent of the employee's work injury, and determining what, if any, further treatment is reasonable and necessary for the employee's condition, the extent of work-related disability, whether the employee has reached medical stability, if the employee has or is expected to have a ratable PPI, the work-related need for vocational retraining, and any other dispute determined by the Board Designee to be necessary or appropriate to resolve the disputed issues of this claim.
>
> The parties shall proceed with the SIME in accord with the process outlined in 8 AAC 45.092(h).[11]

This motion for extraordinary review followed.

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[8] *Id.* at 16.

[9] *Id.* at 15.

[10] *Id.*

[11] *Id.* at 16.

Discussion.

We have repeatedly stated that the commission's authority to review interlocutory orders is limited[12] and that we do not exercise that authority lightly. However, we recognize that a board order, whether termed "interlocutory" or "final" in the title, may require examination to determine whether it is truly final or interlocutory in effect. Whether or not a particular board order is a final, appealable order is a question of law and procedure to which we apply our independent judgment under AS 23.30.128(b).

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[12] *See, Kuukpik Arctic Catering, L.L.C. v. Harig*, AWCAC Dec. No. 038, 10 (April 27, 2007) ("[W]e are constrained by our limited powers to grant extraordinary review only when a motion for review meets the standards set out in our regulations."). Our regulations provide at 8 AAC 57.076(a):

> The commission will consider and decide a motion under this section as soon as practicable. 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
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> (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;
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> (2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and
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> > (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;
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> (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
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> (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.

The test for determining finality of an administrative order is similar to that for determining the finality of a trial court judgment – it is "essentially a practical one."[13] Of judgments generally, the Alaska Supreme Court said:

> The basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case, . . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment . . . . Further the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein.[14]

In *Ostman v. State, Commercial Fisheries Entry Comm'n*,[15] the Alaska Supreme Court, examining administrative agency decisions from other jurisdictions, found helpful a Washington holding that a letter is a final decision if it was both a denial of a right and the fixing of a legal relationship as the consummation of the administrative process. In Ostman's case, the Supreme Court focused on whether the decision was a "final rejection of his permit application,"[16] but also considered the practical effect of the decision, which was to reject Ostman's claims for more points.[17] No further opportunities were available for Ostman to seek additional point awards because the evidence submission period had expired; therefore, since further administrative review would be futile, the decision was a final appealable order.[18]

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[13] *Ostman v. State, Commercial Fisheries Entry Comm'n*, 678 P.2d 1323, 1327 (Alaska 1984), quoting *Matunuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980); quoting *City and Bor. of Juneau v. Thibodeau*, 595 P.2d 626, 628 (Alaska 1979).

[14] *Ostman*, 678 P.2d at 1327, *quoting Greater Anchorage Area Bor. v. City of Anchorage*, 504 P.2d 1027, 1030-31 (Alaska 1972). The "decretal" language refers to the text of the "decree" – which, in a board decision, is the board's order.

[15] 678 P.2d 1323, 1327 (Alaska 1984).

[16] 678 P.2d at 1327.

[17] 678 P.2d at 1328.

[18] *Id*.

An 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. We agree that, as the dissent noted in *Municipality v. Anderson*,[19] it is sometimes "difficult to predict when there will be a final appealable judgment in . . . workers' compensation proceedings."[20] The possibility of filing successive or overlapping claims for, or petitions related to, different benefits flowing from the same injury complicates the determination of when a compensation order "fixes" a legal relationship. However, when there are no pending proceedings before the board, an appeal should not wait upon the possibility that a party will file another claim or petition in the future.

1. The board's orders in this case are final and appealable.

When we examine the language of the board's order, we see that the board fixed the rights of the parties with respect to reemployment benefits and terminated all proceedings on the appeal of the administrator's order and the petition to modify.[21] The practical effect of the board's order was to deny Hope Community Resources any further appeal of the administrator's decision and to completely reject the petition to modify the administrator's decision.[22] If the parties' statements in oral argument are correct, there was no other claim or petition pending before the board that could affect the appellants' liability for reemployment benefits.[23] Thus, the board's order denying

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[19] 37 P.3d 420 (Alaska 2001) (Justice Matthews, with Chief Justice Fabe joining in the dissent).

[20] *Id.* at 423.

[21] *See, Evron v. Gilo,* 777 P.2d 182, 185 (Alaska 1989). The commission has the authority to review board decisions on a "claim *or petition"* AS 23.30.128(b) (emphasis added).

[22] Hope Community Resources may file another petition to modify, but different grounds for such a petition must appear before July 7, 2006.

[23] Counsel for the movants stated emphatically that no written claim had been filed with the board before the board hearing. Rodriguez did not deny this. She stated that there were no issues other than the SIME outstanding, once it was understood the employer was not seeking a stay of her reemployment benefits. The

and dismissing both petitions ended all litigation before the board. It is a final, appealable order. We conclude the movants may appeal the board's order denying and dismissing their petitions under AS 23.30.127 as a final decision and order of the board.[24]

We turn now to the board's order directing Hope Community Resources to pay for, and Rodriguez to attend, an examination under AS 23.30.110(g) and AS 23.30.095. If the board had ordered the examination in order to assist it in reaching a decision on the petition to modify, we doubt the board's order would be the subject of a motion for extraordinary review. However, the board denied and dismissed the petition to modify, finally resolving the dispute between the parties. It chose to rely on one physician and to give no weight to the opinion of the other physician. After it decided the dispute before it, which was based on conflicting medical evidence, the board found that a conflict in the medical evidence existed – and ordered a medical examination on the basis of that conflict.[25]

The board did not retain jurisdiction to examine the results of the medical examination and act upon it. It simply ordered the parties to participate in the

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board's decision, in its recitation of events, does not contain a statement that Rodriguez filed a claim or the date she filed it, although the board recites the date of Rodriguez's other filings, such as her notice of injury and her request for eligibility determination for reemployment benefits. Instead, the board stated the "employer accepted the claim and paid." AWCB Dec. No. 07-0054 at 3. We have said before that there is no provision in the Alaska workers' compensation statutes for "acceptance of a claim" as in other states, *S&W Radiator Shop v. Flynn*, AWCAC Dec. No. 016 (August 4, 2006), although an employer may formally concede liability in an answer to a written claim for benefits. We conclude the board was referring to the employer's voluntary payment of benefits without an award.

[24] Because the commission concludes that the board's order in AWCB Dec. No. 07-0054 is a final, appealable order, we need not consider whether the movant has satisfied the requirements for review of a non-final order.

[25] AS 23.30.095(k) provides in pertinent part, "In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, . . . the board may require that a second independent medical evaluation be conducted . . . ."

examination and the division staff to arrange it. At the time the board ordered the examination, no claim was before the board[26] for additional benefits and the board had resolved the dispute regarding the employee's entitlement to reemployment benefits. The board did not instruct the parties to return for further board proceedings. Indeed, the board's order suggests that the medical examiner's report is being conducted to resolve disputed issues, so that nothing will be left for the board to decide. The practical effect of the board's order is to require the parties to obey the board's order by obtaining a medical examination – or appeal.

The board's order does not instruct the parties on their obligations after the examination; it does not alter the parties' relationship regarding receipt of or liability for benefits. The report may, or may not, result in the parties initiating further proceedings, but other events or discoveries may also result in one party filing a claim or petition. Our examination of the text of the order persuades us that the board's order directing a medical examination leaves nothing to be done but for the division staff to execute the order and the parties to comply. Therefore, it is a final order, despite its interlocutory title. We conclude the board's medical examination order is also a final, appealable order. The movants may appeal it under AS 23.30.127.

2. We stay the board's order for payment of a medical examination but we do not stay on-going reemployment benefits.

Our authority to stay a board order derives from AS 23.30.125(c). The commission may grant a stay of single, lump sum payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate the appellant "would otherwise suffer irreparable damage"[27] and that the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult

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[26] The board's order suggests that a claim had been filed: "An SIME shall be conducted regarding the nature and extent of the employee's work injury, and . . . any other dispute determined by the Board Designee to be necessary or appropriate to resolve *the disputed issues of this claim*." AWCB Dec. No. 07-0054 at 16. (Emphasis added.).

[27] AS 23.30.125(c).

and doubtful as to make . . . a fair ground for litigation and thus more deliberate investigation."[28] There is no request to stay on-going periodic benefits, so there is no requirement that we consider the existence of the probability of the merits of the appeal being decided adversely to the recipient of payments.

The motions for extraordinary review and for stay were based on the following arguments by Hope Community Resources: first, the board's order was made to "create this dispute" and that the board is "advocating for the employee," thus undermining the impartiality of the board adjudication process; second, in the absence of a claim for benefits, or a medical dispute relevant to currently paid benefits, the board does not have the statutory authority to order an examination, especially of a condition for which there is no medical evidence of work causation; and, third, Hope Community Resources will suffer irreparable harm if it is successful on appeal, because it will be unable to recoup the cost of an examination.

We find that Hope Community Resources will suffer irreparable harm if it is successful on appeal but it pays for the examination. A medical examination ordered by the board under AS 23.30.110(g) is not a form of compensation which may be recouped from an employee as an overpayment under AS 23.30.155. It is directed at the discretion of the board for the board's purposes, not to treat an employee's injury or to compensate the employee for loss of wages, earning capacity, or impairment; it may result in no benefit to the employee at all. No provision exists for recovery of costs of an examination ordered by the board under AS 23.30.110(g) or AS 23.30.095(k), if the board abused its discretion in ordering the examination to take place. Thus, if the movant pays for the examination and later succeeds in its appeal, the money paid cannot be recovered; if the respondent attends, her time and trouble cannot be recompensed.[29]

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[28] *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992).

[29] In the commission's experience, the cost of a board-ordered examination and impairment rating of the scope ordered in this case is likely to be in the thousands of dollars, and may exceed $10,000 if scans are ordered to evaluate the uterine tumors.

Rodriguez argues that she is entitled to an impairment rating and should be able to have one without further delay. However, Rodriguez may obtain a referral from her treating physician to another who will perform a valid rating.[30] She does not require a board order to obtain an impairment rating. Although a rating, if performed, may favor either party, we find that due to the unrecoverable nature of the cost of an impairment rating under AS 23.30.110(g), the balance of hardship tips in favor of the movants.

We find that the movants present serious and substantial issues on appeal, especially the legal question as to whether the board has the statutory authority to order a medical examination, based on existence of a medical dispute, *after* it has resolved the disputed benefit issues (arising from the medical dispute) in favor of one party or another. It is an issue that has not previously been addressed by the commission or the Supreme Court, and it concerns the scope of the board's powers to make its investigation or inquiry under the workers' compensation statutes.

Having found that Hope Community Resources will suffer irreparable harm if a stay is not granted and it prevails on appeal, that Rodriguez will not suffer irreparable harm because no ongoing benefits are stayed and her access to her attending physician is not impacted by a stay, and that serious and substantial questions are raised on appeal, we conclude that the board's order directing the employer to pay for an examination under AS 23.30.110(g) and AS 23.30.095 should be stayed.

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[30] An impairment rating must comply with AS 23.30.190(b):

> All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

If Dr. Rosato cannot perform a rating in accord with the American Medical Association Guides, he may refer Rodriguez to a physician who is able to do so as a "[r]eferral to a specialist by the employee's attending physician" under AS 23.30.095(a).

Order.

We STAY the Alaska Workers' Compensation Board's Decision and Order No. 07-0054, issued on March 15, 2007, pursuant to our authority under AS 23.30.125(c). Because we find that the appealed order is a final, appealable order, grant of a motion for extraordinary review is not necessary. The board's title of its decision and order was confusing, and a timely motion for extraordinary review was filed; therefore, we ORDER that the appeal may be filed late. We ORDER the movants to file their notice of appeal, other appeal documents, and filing fee within 10 days of the date of this order. The respondent, Ms. Rodriguez, may file a cross-appeal if she wishes within 30 days of the date of this order.

This appeal concerns the scope of the board's powers to order medical examinations, which are executed by the staff of the Alaska Workers' Compensation Division. We invite the participation of the Director in this appeal.

Date: *May 16* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final commission decision on the merits of this appeal from the board's decision and order. However, it is a final decision on whether the movants may appeal the board's decision and order to this commission. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

Because this is not a final decision on the merits of this appeal, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision and Order on Motion for Extraordinary Review, AWCAC Dec. No. 041, in the matter of *Hope Community Resources vs. Rodriguez*, AWCAC Appeal No. 07-009, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *16th* day of May, 2007.

Signed
Ruth Bauman, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No.07-009 was mailed on *5/16/07* to Ms. Rodriguez (certified) and Holloway at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, & Holloway.

Signed *5/16/07*
Ruth Bauman, Appeals Commission Clerk Date