

Case: *David J. Berrey vs. Arctec Services and Lumbermens Mutual Casualty Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 009 (April 28, 2006)

Facts: The employee sought review of an interlocutory order by the board. In its decision, the board voided the Reemployment Benefits Administrator (RBA) designee's determination that Berrey was eligible for reemployment benefits because the designee did not have an "affirmative prediction of ratable impairment." It directed Berrey to attend a second independent medical examination (SIME) because of conflicting medical evidence on the question of whether the employee had a ratable permanent impairment, and retained jurisdiction to determine whether he had a compensable permanent impairment and whether his condition was medically stable. Berrey agreed the RBA designee had no medical evidence on which to base the decision that he would have a ratable impairment on the date the designee found him eligible for reemployment benefits, but he argued that because some later evidence supported the RBA designee's decision, the board should have affirmed the determination. He argued that the board's failure to do so and its ordering of an SIME would create unnecessary delay and undue hardship.

Regulation: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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

Issue: Should the commission review the merits of the board's decision to void the designee's determination and to order an SIME?

Holding/analysis: The commission denied the motion for extraordinary review (MER). The commission noted the board's immediate ordering of an SIME, rather than sending the process back to the RBA designee, shortened the time Berrey must wait for

a final decision on the merits. In addition, “[t]he board made no final decisions on the merits of the issues the parties agreed should be presented to it: Berrey’s eligibility for reemployment benefits and the date of medical stability. Berrey has not been denied the opportunity to present evidence and argument and he has not been subjected to unreasonable delay. The process of board review of the RBA designee determination was not irrational, nor did it violate the board’s regulations, and the merits of the board’s decision will not evade review. There is no compelling reason to intervene in the board process at this time.” *Id.* at 16.

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.