

**Case:** *ENCO Heating and Alaska National Insurance Co. vs. Mariska Borgens, beneficiary of Kevin K. Borgens*, Alaska Workers' Comp. App. Comm'n Dec. No. 034 (February 26, 2007)

**Facts:** ENCO Heating (ENCO) sought extraordinary review of a board decision finding that ENCO waived its right in a settlement agreement to reduce death benefits based on a cost of living adjustment for beneficiaries who moved out of state. The board concluded that the intent of the parties at the time the agreement was made was to set the rate at a fixed amount. But the board also ruled that because the settlement agreement provided that the death benefits would be administered under the terms of the Workers' Compensation Act and the Act allowed for the offsetting of Social Security survivors' benefits, that the beneficiaries were obligated to release their Social Security records to resolve this question. Board believed survivors might have an equitable estoppel argument against applying the offset but did not decide this question.

**Applicable law:** Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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 extraordinary review under 8 AAC 57.076(a)(2)?

**Holding/analysis:** The commission denied the motion for extraordinary review (MER) because immediate review would not advance the end of the litigation since the board would still need to decide the question of the Social Security offset, over which it retained jurisdiction as it did not yet have the records. The commission found that the other prong of the test was met (important question of law on which there may be substantial ground for differing opinions), especially because of the apparent "internal inconsistency in the board's handling of the two contested issues" and the board's

failure to apply the *Milne v. Anderson* test (576 P.2d 109, 112 (Alaska 1978)) for determining whether a party impliedly waived a known right. Dec. No. 034 at 6. The commission noted that waiting for a final decision would help it consider this issue because “production of a complete record and decision will permit, if either party appeals from a final board decision, a sound and thoughtful review of the board's decision without speculation regarding the board's reasons for its decision.” *Id.* at 7.

**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.