

Case: *Stephen Olafson vs. State of Alaska, Department of Transportation and Public Facilities, Alaska Workers' Comp. App. Comm'n Dec. No. 061 (October 25, 2007)*

Facts: The commission permitted Olafson to appeal the board decision affirming the pre-hearing officer's refusal to appoint a new second independent medical examiner despite the parties' stipulation agreeing to a different medical evaluator and to decline to strike the second independent medical evaluation (SIME) report. Olafson objected to the examiner because of an alleged conflict of interest. The pre-hearing officer had appointed Dr. Brooks to do the SIME and records were forwarded to Dr. Brooks, but he was cautioned not to review them until he had disclosed any potential conflicts of interest. In the meantime, the parties stipulated to have Dr. Puziss perform the SIME to avoid any such conflicts. When the pre-hearing officer called Dr. Brooks to cancel the evaluation, he said he had spent extensive time reviewing the records. He acknowledged performing evaluations in the past for the employer but said that it was not so many as to create a conflict of interest. So the pre-hearing officer decided to allow Dr. Brooks to perform the SIME, despite the parties' stipulation. The board decided the officer had not abused her discretion in permitting the SIME to go forward with Dr. Brooks. Olafson sought extraordinary review, the commission granted extraordinary review in Dec. No. 027 and this decision addresses the merits.

Applicable law: 8 AAC 45.092(e) on SIME physician selection and 8 AAC 45.050(f) on stipulations.

Executive branch ethics act, especially AS 39.52.[9]60(4) defining a board or commission as "a board, commission, authority, or board of directors of a public or quasi-public corporation, established by a statute in the executive branch, including the Alaska Railroad, but excluding members of a negotiated regulation-making agency under AS 44.62.710 – [44].62.800." A public officer is defined by AS 39.52.[9]60(21) as a public employee and a "member of a board or commission."

Issues: Does the ethics act apply to SIME doctors? Do the board's procedures in appointing an SIME doctor comply with its regulations? Under what circumstances does an SIME doctor have a conflict of interest? Did the hearing officer abuse her discretion in disregarding the parties' stipulation?

Holding/analysis: AS 39.52, the ethics act, does not apply to SIME doctors because the board-maintained list of SIME doctors is not a "board or commission" and the doctors are not "public officers." "As a body, the list does not meet, takes no official action, makes no recommendations, and decides nothing. We conclude the list, because it has no collective responsibility or authority, is not a board or commission established by statute. . . . [I]t has no other function except to list physicians who may be called on by the board[.]" Dec. No. 061 at 17. Also, SIME doctors are not public officers as defined in AS 39.52.[9]60(21) because they play no role in deciding when an SIME is required and they serve if requested by the board, if available and if they agree to the appointment. Moreover, SIME doctors do not adjudicate the case; they merely provide an expert opinion on disputed medical issues that the board may accept or disregard. The board does not set or pay doctors' fees; the employers pay.

However, the commission concluded that SIME doctors owe a duty of impartiality to the board because they are appointed “to serve the interests of the board, which is required to be impartial.” Dec. No. 061 at 21. Moreover, 8 AAC 45.092 requires the board to consider conflicts of interest when deciding whom to appoint as the SIME physician. Thus, the board must have conflicts information in writing before it appoints the SIME doctor, so that the hearing officer can consider the SIME doctor’s impartiality before appointment. This is important because parties cannot appeal the officer’s decision on whom to appoint.

Only actual partiality is disqualifying, but the appearance of impartiality triggers the doctor’s duty to disclose. A conflict of interest arises when the SIME doctor’s “relationship with a party or its representative, if one exists, renders him a partisan by making the outcome of the claim one in which he has a financial or personal interest.” Dec. No. 061 at 26-27. “Past employment by a party or the party’s representative on another case, especially in cases not concerning workers’ compensation, is not an actual conflict, but an active ongoing relationship may produce an actual conflict and partisanship.” *Id.* at 27.

The commission decided that past relationships are not relevant to determining actual partiality because the ethics act is only concerned with current relationships, not past ones. The commission cannot require more of an SIME doctor than what is required of a “public official” as defined under the ethics act.

The board or its designee is entitled to know of any employment or contractual relationships with a party in which the physician has some current financial interest, e.g., a contract with a partner or employee, or residual financial interest, e.g., an unpaid bill for fully completed work, or personal interest, such as a familial tie. When looking at residual interests, the board or its designee must examine whether (1) the interest is insignificant, (2) the interest does not differ from that of a large class of persons, or, (3) the SIME physician’s report would have an insignificant or conjectural effect on the matter. *Id.* at 29.

The information that Dr. Brooks provided was overbroad because it went back five years to past relationships and was not detailed enough as to whether Dr. Brooks’s work for the State had ended, and whether he had any personal or financial interest in the outcome of Olafson’s case. The commission remanded so the board could determine whether Brooks had an actual conflict and, if so, to craft a remedy given that the SIME had already been performed.

Moreover, the board designee could not ignore the parties’ stipulation to appoint another doctor on the SIME list without good cause because once the designee cancelled the SIME and accepted the stipulation, the stipulation effectively became the new board order. The commission found no evidence in the record that the parties agreed to cancel the SIME only if it could be done without cost.

Thus, the board made two errors – substantial evidence does not support that the designee complied with regulations because she did not consider partiality before the

SIME doctor's appointment, and the board failed to consider whether there was good cause to set aside the stipulation.