

Case: *City of Petersburg and Alaska Public Entities Insurance Company vs. Michael Tolson*, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (January 22, 2009).

Facts:

The movants claim that the board unjustly reopened the record in order to put questions to the physician, Dr. Bensinger, who performed the second independent medical evaluation (SIME), that the questions are not based on the appropriate legal standard, that the questions are based on facts not in the record, that the decision to reopen the record was not based on the record before the board, but the board members' own medical research and speculation regarding concurrent diagnoses on which the employer was barred from discovery. They argue that the board is improperly engaged in trying to find evidence to support the employee's claim, rather than deciding the claim on the basis of the record before it. The respondent argues that taking up a motion for extraordinary review will only further delay a final decision on his claim, which he asserts has already taken too long. Dec. No. 096 at 2-3.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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 the motion for extraordinary review (MER), primarily under 8 AAC 57.076(a)(3)?

Holding/analysis: Due process issues were alleviated by the board not requiring the employer to produce an SIME examiner who lives in another state to appear and answer questions in person, but rather by withdrawing that order and requiring answers

to written questions instead. The movants preserved their objections to further questioning of the SIME doctor and may raise these objections on appeal; the questions are ones that can “await for correction on appeal.” Dec. No. 096 at 6. Moreover, if the commission granted review, it would only delay the resolution of the case on the merits.

The commission warned the board that the parties have a due process interest in the prompt adjudication of their claim and that delay “creates its own risks of error, as evidence and testimony presented at hearing are forgotten, requiring more time to review the record as the decision is prepared. If delay extends beyond a member’s term, a new panel appointee must hear the evidence.” Dec. No. 096 at 8. Here, the timeframe was past the 30-day deadline to issue a decision and more than 200 days since the hearing. The commission urged the board to expedite its decision but did not grant review on this basis and cautioned that it did “not identify a specific risk of error” because of the delay in this case. *Id.*

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.