

Case: *Linda Rockstad vs. Chugach Eareckson, Zurich American Insurance Company, and NovaPro Risk Solutions*, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (February 20, 2009)

Facts: Linda Rockstad (Rockstad) sought to stay a second independent medical evaluation (SIME), to take out reports of employer medical evaluations (EMEs) from the binder provided to the examiner, and to penalize the employer for failure to comply with discovery requests. The board denied the petitions in an interlocutory order. Rockstad sought extraordinary review of the board's order. She argued that a 2002 statement of hers was improperly excluded from the SIME binders and that the EMEs should have been excluded from the binders. She also asserted that she was raising important questions of law, including: 1) if hearsay may be submitted in the SIME binder; 2) if the board must assess the reliability of the scientific evidence before submitting it to the SIME examiner; 3) if a verbal stipulation at a prehearing conference is binding; 4) appropriate sanctions for repeated discovery violations; and, 5) privilege log contents. Finally, she argued that the board's order denies her due process because 8 AAC 45.092(i) requires her to prepay the examiner's deposition fees, without a right to obtain a fee waiver as an indigent person.

Regulation: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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 grant the motion for extraordinary review (MER) and decide the merits of the issues that Rockstad raised?

Holding/analysis: The commission denied the motion. The commission observed that the test for extraordinary review is difficult to satisfy in order to avoid "unnecessary

meddling in the board's fact-finding process." Dec. No. 100 at 8. On the exclusion of the 2002 statement, the commission concluded that any error by the board in deciding it was not a "medical record" was not prejudicial because Rockstad could convey the same information to the examiner in giving a history or presenting it as a question to the examiner under 8 AAC 45.092(j)(2). On the failure to exclude the EME reports, the commission concluded:

The movant seeks to put the cart before the horse, requiring the board to weigh the evidence before the hearing on the claim and before the board, faced with conflicting medical opinions, obtains the opinion of its own medical expert on the medical disputes. . . . Allowing the other party to submit its evidence does not prejudice the movant's ability to submit her evidence. Any error, if there was error, does not require immediate review. *Id.* at 11-12.

On other issues, the movant failed to show a conflict in the board decisions and to explain how deciding the issues would advance the end of the litigation. The commission concluded the case would only be delayed if it took up review and that Rockstad had preserved her objections for an appeal after a final resolution on the merits.

On the due process issue, the commission concluded: "The speculative possibility that the movant might be faced with having to depose the SIME examiner is insufficient to establish grounds for review because the SIME has not taken place, the examiner has not issued a report, and the movant has not been refused an opportunity to examine, or cross-examine, the SIME examiner." *Id.* at 3.

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.

Note: Dec. No. 108 (May 11, 2009) denied respondents' motion for attorney fees and Dec. No. 140 decided the merits of an appeal brought by Rockstad after the board's final decision on the merits in her case (November 5, 2010)

Note: Rockstad appealed to the Alaska Supreme Court. The supreme court issued Memorandum Opinion and Judgment No. 1405 on January 18, 2012, affirming the commission's decision.