

**Case:** *Linda Rockstad vs. Chugach Eareckson, Zurich American Insurance Company, and NovaPro Risk Solutions*, Alaska Workers' Comp. App. Comm'n Dec. No 108 (May 11, 2009)

**Facts:** The commission denied Linda Rockstad's (Rockstad) motion for extraordinary review (MER) in Alaska Workers' Comp. App. Comm'n Dec. No. 100. The employer sought attorney fees because it viewed the motion as taken in bad faith and frivolous based on *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069 (February 7, 2008).

Rockstad raised a number of issues in her MER that she contends had legal merit. She argued that a 2002 statement of hers was improperly excluded from the second independent medical evaluation (SIME) binders and that the employer's medical evaluations (EMEs) should have been excluded from the binders. She also asserted that she was raising important questions of law, including: if hearsay may be submitted in the SIME binder; if the board must assess the reliability of the scientific evidence before submitting it to the SIME examiner; if a verbal stipulation at a prehearing conference is binding; appropriate sanctions for repeated discovery violations; and, privilege log contents. Finally, she argued that the board's order denied 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.

In terms of the employer's assertions that her MER was frivolous or in bad faith, Rockstad also argued that because "the respondents are represented by an attorney, . . . they should be held to a standard of conduct which is much higher than that required of a pro se litigant." Dec. No. 108 at 3 (internal quotations omitted).

**Applicable law:** AS 23.30.008(d) provides:

In an appeal, the commission shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the commission determines to be fully compensatory and reasonable. However, the commission may not make an award of attorney fees against an injured worker unless the commission finds that the worker's position on appeal was frivolous or unreasonable or the appeal was taken in bad faith.

The commission may take evidence and make findings of fact in deciding motions for attorney fees. AS 23.30.128(c).

The commission described *Sourdough Express, Inc.*, as follows:

[T]he commission held that a controversion filed in bad faith is a legal defense to the two-year time-bar period in AS 23.30.110(c), but that the board failed to make findings of fact sufficient to support a conclusion that the employer's controversion of the employee's claim was filed in bad faith. The commission held that the board could not subject the employer to penalty for a bad faith controversion unless, "after drawing all permissible inferences from the evidence in favor of a facially valid formal

controversion, the board finds that it lacks *any* legal basis or that it was *designed* to mislead or deceive the employee." Dec. No. 108 at 3.

**Issues:** Is there substantial evidence to support a finding that Rockstad filed the MER in bad faith? Was the MER frivolous or unreasonable as a matter of law? Should *pro se* parties be subject to a lower standard of conduct than represented ones?

**Holding/analysis:** The commission found no evidence that Rockstad sought commission review in bad faith. "The respondents rely on board findings regarding the movant's conduct before the board as the basis for their motion for attorney fees, but they presented no evidence that the movant intended to do anything more than seek the commission's review of the board's decision . . . ." *Id.* at 6. In addition, the commission's questioning of Rockstad clarified that she did not withdraw her challenge to the board's order on the inclusion of the EME reports. "Thus, the commission cannot find that she persisted in arguing a position she had abandoned in fact. There is no evidence that the movant's purpose was to vex or harass the respondents or that the movant filed the motion for extraordinary review to obtain an advantage in another proceeding." *Id.* at 7.

In deciding whether Rockstad's motion was frivolous or unreasonable, the commission focused on the positions that she asserted in the motion, not on her conduct before the board or her judgment in deciding to file the motion. The commission concluded, "[t]he motion asserted some colorable legal arguments in support of extraordinary review, therefore, it was not so lacking in legal basis as to be frivolous or unreasonable." *Id.* at 8. The commission noted that the motion was mistaken, incomplete and ultimately unpersuasive, but that none of those things rendered it frivolous or unreasonable as a matter of law. *Id.* at 7.

On the issue of holding *pro se* parties to a lower standard of conduct, the commission held:

[A] self-represented litigant is held to the same standard of conduct before the commission and the board as a represented litigant and . . . a liberal interpretation of a self-represented litigant's pleadings does not include liberal acceptance of a self-represented litigant's discourtesy, disrespect, or dishonesty toward the tribunal and does not excuse failure to cooperate with the tribunal's orders and regulations. *Id.* at 4.

**Note:** Dec No. 100 (February 20, 2009) denied Rockstad's MER 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.