

Case: *Terry Smith vs. CSK Auto, Inc., Royal Sun Alliance, and Arctic Adjusters*, Alaska Workers' Comp. App. Comm'n Dec. No. 002 (January 27, 2006)

Facts: Smith sought extraordinary review when the board affirmed the hearing officer's discovery orders. Smith was seeking to overturn a partial settlement agreement he had entered into a year earlier as well as additional benefits and compensation for a 2001 back injury. Smith sought discovery of certain materials from CSK Auto and Arctic Adjusters, including a Material Safety Data Sheet on the back belt supplied to him and a back belt Certificate of Training. Smith also sought to obtain copies of medical records and letters sent by Arctic Adjusters to one of the employer's medical examiners, and copies of the publications listed in examiner's résumé. Smith also sought a complete unredacted log of all contacts regarding his case by the employer. The board hearing officer had limited Smith's discovery requests to ones that were relevant to the disputed issues.

Regulation: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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 Smith's appeal?

Holding/analysis: In *Smith*, the MER was denied as none of the above criteria in the regulation was satisfied.

First, Smith argued that his claim was being stagnated, and evidence destroyed, because his discovery was being delayed, and thus delay until a final decision was issued would result in injustice and unnecessary delay, 8 AAC 57.076(a)(1). The commission rejected this argument because he conceded some of the evidence

probably did not exist, he admitted he was no longer seeking discovery of some of the evidence and the rest of the evidence he wanted in order to make a possible claim against a third party. Thus, his failure to obtain the discovery was not impeding the resolution of his disputed workers' compensation benefits because discovering the role the back belt played in bringing about his injury would not help resolve his claim for worker's comp benefits.

Smith also argued that the board denied him due process, so as to call for the commission's review under 8 AAC 57.076(a)(3). The commission concluded that Smith was challenging the designee's authority under AS 23.30.108(c) on its face and the commission lacked the authority to consider a facial challenge to the constitutionality of a statute.

Notes: Smith sought extraordinary review two more times for other issues, see Dec. Nos. 012 and 017. Smith also appealed the board's decision denying his petition to set aside a partial compromise and release, Dec. No. 037, reversed by Supreme Court, 204 P.3d 1001 (Alaska 2009).

Also, 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.