

Case: *Stephen Olafson vs. State of Alaska, Department of Transportation and Public Facilities, Alaska Workers' Comp. App. Comm'n Dec. No. 027 (January 11, 2007)*

Facts: Olafson sought extraordinary review of board's interlocutory decision to affirm 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 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, 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. Paul 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 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.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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 commission grant extraordinary review?

Holding/analysis: The commission accepted review primarily on the grounds that the issue would otherwise evade review under 8 AAC 57.076(a)(4) but also under the grounds in .076(a)(1) and (2).

The commission believes that whether, when, and on what grounds a party has a right to object to an SIME on the grounds of a conflict of interest is an issue that is likely to evade review. In order to preserve the issue for appeal, an appellant would need to demonstrate that the opinion of the SIME physician was relied on by the board, determinative of an outcome unfavorable to the appellant, and that the opinion was so tainted by the purported conflict of interest that the board ought not to have relied on it, or that another SIME physician's appointment would have resulted in a different outcome. We also note, that until a final decision is made by the board, it is difficult for the party objecting to an SIME to measure the party's actual harm. While it is possible that such an appeal may be presented, it is unlikely to be presented in the foreseeable future, while the board continues to be confronted by the issue of allegations of SIME conflict of interest. No board regulations explicitly address this problem. Therefore, the commission believes it may be able to provide guidance to the board by examining this case. The commission also agrees that the resolution of this issue will advance the ultimate termination of this litigation and may avoid substantial expense and delay to the parties. Mr. Olafson has raised issues on which there is substantial difference of opinion regarding the nature of the SIME process. Dec. No. 027 at 4-5.

Notes: Dec. No. 061 (October 25, 2007) decided the merits of this case.

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.