

Case: *Terry L. Smith vs. CSK Auto, Inc., Royal and SunAlliance, and Arctic Adjusters, Alaska Workers' Comp. App. Comm'n Dec. No. 017 (August 28, 2006)*

Facts: Employee Smith sought protective order to prevent disclosure of psychological records and to avoid employer psychological medical exam. He argued the records were irrelevant because he had not claimed a mental injury. But the board ordered release of records because the employer asserted that a pre-existing or longstanding mental illness or disorder was the cause of Smith's continuing disability, rather than a work-related injury. The board stated that it would consider, upon receipt of the records, whether to order the psychological medical exam by employer's medical examiner. Smith sought extraordinary review.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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) and decide the merits of Smith's appeal?

Holding/analysis: The commission denied the MER as to both the discovery of medical records and the psychiatric exam. The board had not yet decided whether to require Smith to attend a psychiatric exam so there was no decision to review. Regarding the medical records, the commission concluded they were arguably relevant to the employer's defense and therefore, the board's order allowing discovery of them was not a departure from the board's usual course of proceedings, regulations or due process under .076(a)(3).

Notes: Comm'n Dec. Nos. 002 and 012 also deal with Smith's motions for extraordinary review on other issues. 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).

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.