Alaska Workers' Compensation Appeals Commission

Terry Smith, Movant, vs. CSK Auto Inc., Royal Sun Alliance and Arctic Adjusters, Respondents.	Final Decision Decision No. 002 January 27, 2006 AWCAC Appeal No. 05-006 AWCB Decision No. 05-0322 AWCB Case No. 200106934

Final Decision on Motion for Extraordinary Review of Alaska Workers' Compensation Board Order No. 05-0322, Fairbanks Panel, by William Walters, Chairman, and Chris Johansen, Board Member for Management.

Appearances: Terry Smith, movant, *pro se*; Robert L. Griffin, Griffin & Smith, for respondents CSK Auto Inc., Royal Sun Alliance, and Arctic Adjusters, Inc.

This decision has been edited to conform to technical standards for publication.

Commissioners: Jim Robison, Marc Stemp, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

Terry Smith asks the commission to review a decision by the board that affirmed discovery orders that the board's designee, pre-hearing officer Sandra Stuller, made in a pre-hearing conference on September 26, 2005. The board heard Smith's appeal of the designee's discovery orders on October 13, 2005. The board's decision affirming the orders was issued on October 28, 2005. Smith filed a petition for reconsideration November 3, 2005, which was heard on the written record. The board's decision on reconsideration was issued December 9, 2005. Smith then appealed to this commission, seeking extraordinary review of the board's December 9, 2005 order refusing reconsideration and affirming the discovery orders. We deny the motion for extraordinary review of the December 9, 2005 order.

Underlying facts and proceedings.

Smith injured his back while working as a delivery driver by lifting boxes on March 29, 2001. CSK Auto, Inc., through its insurer, Royal Sun Alliance, and adjuster, Arctic Adjusters, paid temporary total disability compensation and permanent partial disability compensation, medical benefits, and reemployment benefits to Smith. Smith, who stated to the commission that he was advised by the Alaska Injured Workers' Alliance at the time, entered into a partial compromise and release agreement (settlement) that was approved by the board in 2002.

Over a year later, Smith petitioned the board to set aside the settlement agreement and also filed a claim for additional compensation and benefits. While his claim and petition were pending before the board, Smith sought discovery of certain materials from CSK Auto and Arctic Adjusters, including a MSDS[1] on the back belt supplied to him and a back belt Certificate of Training.[2] Smith also sought to obtain copies of medical records and letters sent by Arctic Adjusters to Dr. Patrick Radecki, one of the employer's medical examiners, and copies of the publications listed in his résumé. Smith also sought a complete log of all contacts regarding his case by the employer, an "unredacted log."

The petition to compel discovery was heard in a pre-hearing conference by the board's designee, pre-hearing officer Sandra Stuller, in a procedure permitted under AS 23.30.108. The designee gave a detailed order of discovery in the pre-hearing conference summary[3] and scheduled Smith's appeal to the board for hearing on October 13, 2005.

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[1] Material Safety Data Sheet, a document prepared by a materials manufacturer to comply with hazard communication standards required by the Occupational Health and Safety Administration (*See* 29 CFR 1910.1200; 29 CFR 1926.59).

[2] In the course of argument before us, and in his reply, Smith asserted the back belt information was relevant to the subject matter of the claim and "ongoing medical treatment" (Reply, 1) but did not describe how or why it was relevant.

[3] The designee's order was not submitted by Smith, but is replicated extensively in the board's October 28, 2005 Order, AWCB Decision No. 05-0281, at 2-3. The

The board's orders.

After hearing Smith's arguments, the board issued an interlocutory order[4] (AWCB No. 05-0281). The board affirmed the board designee's determinations as "supported

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commission must assume that if the board omitted anything of significance in its discussion of the discovery order, the omission would have been brought to the commission's attention.

[4] We note that an "interlocutory order" is one in which "some further steps are required to be taken to enable the court to adjudicate and settle the rights of the parties. . . ." *Stokes v. Van Seventer,* 355 P.2d 594, 595 (Alaska 1960). The nature of the workers' compensation process in Alaska may lead to difficulty distinguishing interlocutory orders and final decisions. It is possible for a discovery matter to be the only dispute before the board, even in the absence of a claim for compensation, as when an employee seeks a protective order under AS 23.30.108 from an overbroad authorization to release information before a claim is filed. A discovery matter may come before the board on a petition by the employee or the employer during the pendency of a claim, but other issues may also be brought by petition independent of a claim. Petitions under the board's regulations are the means for making "A request for action by the board other than by a claim." 8 AAC 45.050(2).

The Alaska system permits the filing of claims for further compensation within two years of the last payment of voluntarily paid compensation, AS 23.30.05(a), which may have been paid long after adjudication of a claim for another disputed benefit. In some cases, new claims filed are filed for new or additional benefits after adjudication of a particular benefit. After a new injury with the same employer, (8 AAC 45.050(b)(5)), joinder of claims may result in additional adjudication of issues related to a previously adjudicated claim. Finally, the board itself may address the issues raised in a claim in stages, as issues ripen with the development of evidence and the injured worker's recovery. For example, it may hear the portion of a claim dealing with causation and temporary disability compensation a year or more before it hears that portion of a claim dealing with permanent partial impairment compensation and reemployment benefits. This process advances the legislative goal of a quick and efficient compensation system, but does not inevitably lead to a single final adjudication or settlement of all the rights of the parties.

Therefore, when evaluating whether a motion for extraordinary review of an order on a petition presents sufficient reasons outweighing the sound policy favoring appeals from final orders or decisions, we take into account the flexibility inherent in the Alaska workers' compensation system. Generally, an order that reflects final disposition the issues raised in a petition filed independently of a claim or in the absence of a claim will usually be a final decision. However, petitions for board action closely intertwined in, or arising from, preparation of a pending claim or portion of a

by reason," "supported by substantial evidence," and "reasonably well-tailored to the actual issues in dispute."[5] It modified the order to direct *in camera* review of the entire adjuster file by the employee, with a board designee to rule on whether challenged documents were privileged.[6]

Smith then filed a petition for reconsideration of the board's order. Smith argued then, as he does here, that he is entitled to *all* unprivileged evidence about his injury. To the board, he argued that the information he sought, particularly the MSDS, was relevant to a possible third party action under AS 18.60.075.[7] He asked for broad

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claim for hearing are generally interlocutory and not final. Review of such orders by the commission is limited to 8 AAC 57.72-76. The order presently before is plainly interlocutory in nature.

[5] *Smith v. CSK Auto, Inc.*, AWCB Decision No. 05-0281, at 8-9, (October 28, 2005).

[6] *Id.* at 9. The parties agreed before the commission that this review took place as scheduled.

[7] AS 18.60.075 provides:

> Safe employment. (a) An employer shall do everything necessary to protect the life, health, and safety of employees including, but not limited to
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> (1) complying with all occupational safety and health standards and regulations adopted by the department;
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> (2) furnishing and prescribing the use of suitable protective equipment, safety devices, and safeguards as are prescribed for the work and work place;
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> (3) adopting and prescribing control or technological procedures, and monitoring and measuring employee exposure in connection with hazards, as may be necessary for the protection of employees; and
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> (4) furnishing to each employee employment and a place of employment that are free from recognized hazards that, in the opinion of the commissioner, are causing or are likely to cause death or serious physical harm to the employees.
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> (b) An employee shall comply with occupational safety and health standards and all regulations issued under

discovery of all matters relevant to Dr. Radecki because he wished to demonstrate that the physician was biased. The board's decision on reconsideration, AWCB Decision No. 05-0322, was issued December 9, 2005. In it the board elaborated on the standard of review it applied to the board designee's September 26, 2005 discovery orders set out in the pre-hearing conference summary.[8] It is that decision which Smith challenges here.

Smith's argument to the commission and our analysis.

Smith asks the commission to "go all the way back" and review all of the discovery demands that he claims has been frustrated by the board and the appellee. Before the commission, Smith also asserted he needed documents from third parties (only Dr. Radecki was named) in order to pursue a third party claim.[9] Smith presented no specifics of the documents he was unable to obtain by the board's orders, or how such documents might affect the outcome of his claim or petition, beyond his assertion that the board refused to allow him to obtain information from Dr. Radecki and the

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> AS 18.60.010 - 18.60.105 that are applicable to the employee's own actions and conduct.

This statute imposes certain duties on employers and employees. Smith asserts it is the basis of his "third party action." A third party action is one by an employee (or an employer) against a person "other than the employer or a fellow employee . . . liable for damages" to the employee. AS 23.30.015(a). Smith indicated no other basis for his alleged third party action and no specific third party target of his action.

[8] *Smith v. CSK Auto, Inc.,* AWCB Decision No. 05-0322, at 8 (December 9, 2005). Because the application of the board's standard of review was not challenged in this proceeding, we do not address it in this decision. Smith's argument does not focus on how the board reviewed the order, but challenges the board's refusal to take up his new demands for discovery by limiting itself to review of the designee's order and by not reversing the designee's order.

[9] Nothing in the orders before us suggests that Smith requested and was denied a subpoena against a third party. The board decisions concern only his effort to obtain evidence from his employer and employer's adjuster.

MSDS and Certificate of Training on a back belt.[10] He asserts, again without describing any specific instance, that his claim has "stagnated" and that there has been spoliation of evidence due to resistance to discovery and the board's refusal to reverse the designee. The core of Smith's argument is that the board and board's designee "picked and chose" his case for him; that he is entitled to all material relating to his claims; that he, not the board's designee, should decide what is needful for him to present his case; and, that the control exercised by the board's designee results in a denial of due process.

This commission will consider only the order before it on the motion for extraordinary review.[11] Smith's demand that the commission, in this proceeding, review the whole history of discovery in his claim is outside the scope of this proceeding. Those orders are not the subject of this motion. Smith also asked the commission to sanction the employer for failing to give him unnamed documents. The commission has no power to impose discovery sanctions in matters before the board; it may only review the board's imposition of sanctions.

We will grant extraordinary review only in exceptional circumstances set out in 8 AAC 57.076(a).[12] Smith argues that his claim is being stagnated, and evidence

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[10] On questioning by the commission, Smith made the remarkable statement that he had learned the back belt was not under OSHA jurisdiction (subject to OSHA's materials disclosure requirements), but regulation of back belts was within the jurisdiction of the Food & Drug Administration.

[11] The commission has before it a motion for extraordinary review of a particular order issued December 9, 2005. We do not have jurisdiction to review the whole history of Smith's claim in this proceeding, although those issues may be preserved in any future appeal of a final decision and order issued by the Board in this case.

[12] 8 AAC 57.076(a) provides in pertinent part:

> 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

destroyed, because his discovery is being delayed, and thus delay until a final decision is issued will result in injustice and unnecessary delay, 8 AAC 57.076(a)(1). He also argues that the board has denied him due process, so as to call for the commission's review, 8 AAC 57.076(a)(3).

Smith's argument that his claim is being stagnated by refusal to grant him discovery stumbles on his acknowledgement that he wants the appealed discovery materials for a third party action instead of his claim. The employer's concession that his injury is work-related advances his claim, rather than stagnates it. Smith's other complaints about events in the past were not before the board, and therefore are not part of this appeal.

Smith's own statements to the commission undermine Smith's argument that evidence is being destroyed by delay. The specific errors alleged by Smith in the

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> (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;
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> * * *
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> (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.

The commission's power to review non-final orders is based on its authority under AS 23.30.125(b), providing that "[n]otwithstanding other provisions of law, a decision *or* order of the board is subject to review by the commission as provided in this chapter;" and AS 23.30.128(b), permitting the commission to "review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining *or otherwise acting* on a compensation claim or petition." (Emphasis added). In our view, the commission has jurisdiction to hear appeals from "final decisions" "determining" a claim or petition and "orders," final and non-final, "otherwise acting" on a claim or petition. If the commission could review only final decisions, the words "hearing . . . or otherwise acting on" in AS 23.30.128(b) would be superfluous. This interpretation is consistent with the language of AS 23.30.125(b), providing that "[n]otwithstanding other provisions of law, a decision *or* order of the board is subject to review by the commission."

Board's order concern the MSDS on the back belts, Certificates of Training (on the back belts), and the board's refusal to order discovery from Dr. Radecki. The issue of the MSDS (and Certificate of Training) is moot, Smith having conceded to the commission that back belts are not within the regulatory ambit of OSHA; therefore, OSHA could require no MSDS. Smith's concession is an acknowledgement that the documents he sought from the appellees probably do not exist. What did not exist cannot be destroyed and is unlikely to be relevant to his claim.

Smith is no longer demanding copies of Dr. Radecki's publications from the appellees (the issue before the designee). While the board alluded to other "wide-ranging" demands for information from Dr. Radecki by Smith,[13] these demands were not raised in the pre-hearing conference and were not the subject of the order reviewed by the board. Because the board was reviewing a decision on appeal from a discovery order by the board's designee, it did not consider new demands for discovery raised on reconsideration.[14]

The commission understands that the appellate process frustrates Smith, who is appearing pro se. He believes that the board ought to have issued the discovery orders he wants, without requiring him to start over with the designee. However, there are sound reasons why the board may, in its discretion, require a person to return to the designee if, in the course of the board's review, he seeks to renew his request for a discovery order (or to obtain a subpoena) against a different person, (in this case, someone other than the appellee), or for a different record. The board's designee, in

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[13] AWCB Dec. No. 05-0322, at 7, 9. The specific demands were not described.

[14] AS 23.30.108(c). "If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee." Although not reflected in the board's decision, nor raised by Smith, the commission assumes that the board instructed the employee how to seek the additional material he wants through the board's discovery process or to obtain a determination as to why that additional material is not available to him.

this case a pre-hearing officer, is granted the discretion to review discovery matters. The board may wish to allow the designee the opportunity to exercise that discretion.

Smith's argues that he is denied due process and a fair hearing because the board, through the board's designee, is "picking his vegetables for him." Smith asserts he is being frustrated in obtaining evidence about how his injury occurred because the designee stated that the issue of causation was not in dispute. Smith argues he is entitled to seek all information relating to his injury for his own uses, even if the injury is not disputed in his workers' compensation claim.

The board's designees have discretion to identify or simplify the issues for hearing, 8 AAC 45.065(a). The commission recognizes it may be difficult for a person to distinguish between being prevented from presenting an argument or evidence on an issue the person believes to be important and having the issues identified or simplified for hearing. The employer concedes that the employee had a work-related back injury and Smith does not argue that the employer in fact disputes that his injury arose out of and in the course of his employment. Therefore, the designee's identification of the issue as not disputed was correct.

Smith did not raise a question related to his *disputed* benefits that could be informed by discovering the role the back belt played in bringing about his injury, (information regarding his use of the back belt in post-injury employment, rehabilitation, or re-employment benefits), or other relevant information to which the back belt information might lead so as to establish that it is potentially relevant evidence in his workers' compensation claim.

Smith argues he should not have to raise such questions to justify his demand for the information. He asserts he is entitled to *any* evidence relative to his claim, not just disputed issues in his claim. We do not consider this argument. If he were correct, or if he had raised questions relating to a disputed issue, his concession that the information sought from the appellees probably does not exist renders the demand for MSDS material and other OSHA documents moot.

Smith does not challenge the board's affirmation of the order that the *employer* is not required to produce Dr. Radecki's publications; instead he argued the board

should have made new orders directing Dr. Radecki to deliver material in the course of the board's review of the designee's discovery order. The board limited review of the designee's discovery order under AS 23.30.108(c). The board's refusal to make the orders Smith wanted was not based on an evaluation of whether he was entitled to them or not; under AS 23.30.108(c) the board did not consider Smith's new and "wide-ranging" requests for discovery. We cannot say that a question of denial of due process was raised here.

Smith argues that the designee violated his due process rights simply by exercising her discretion under AS 23.30.108(c) to decide what he is entitled to receive based on the issues in dispute. He challenges her *authority* to "pick and choose," not merely whether she chose correctly. In essence, he argues that AS 23.30.108(c) violates the employee's right to due process, on its face. We do not have the jurisdiction to consider a facial challenge to the constitutionality of a statute -- that is a question for the courts.

The designee, frequently a pre-hearing officer, plays an important role in the workers' compensation process within prescribed bounds of authority.[15] If the question were before us, we could consider whether the board properly affirmed the exercise of the designee's discretion as within the bounds of her authority. However, the questions surrounding the MSDS are moot. We need not consider, and do not decide here, if a

[15] The pre-hearing officers assist injured workers in obtaining the forms and information they need to protect their rights and obtain remedies available under the Alaska Workers' Compensation Act (AS 23.30). They are often relied on to explain the workers' compensation system and the process of resolving their disputes to unrepresented workers. They owe an equal duty to assist and inform unrepresented employers or adjusters. They frequently assist parties, represented and unrepresented, to resolve their disputes informally. At the same time, they cannot provide legal advice to the parties. The pre-hearing officers have discretion to identify or simplify the issues for hearing, 8 AAC 45.065(a), and their summaries of their pre-hearing conferences determine the issues heard by the board, 8 AAC 45.065(c), but they cannot determine the *validity* of particular claim or defense. They are authorized, when designated, to make rulings under AS 23.30.108(c), but only the board may impose sanctions. AS 23.30.108(c).

party may be denied otherwise relevant discovery by the opposing party's concession of a disputed issue in a claim.

Conclusion.

We have considered all of Smith's arguments, and determined that the sound policy favoring appeals from final orders or decisions is not outweighed in this case. The motion for extraordinary review is DENIED.

Date: January 27, 2006 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Not available to sign at time issued
Marc Stemp, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision. It becomes effective when filed in the office of the commission unless proceedings to appeal it are instituted. Beginning November 7, 2005, proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days from the date this decision is filed and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of *Terry Smith/Movant v. CSK Auto, Inc.; Royal SunAlliance and Arctic Adjusters/Respondents,* Appeal No. 05-006, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 27th day of January, 2006.

*Signed*_____
Kristin Knudsen, Commission Chair

I certify that a copy of the foregoing Final Decision in AWCAC Appeal No. 05-006 was mailed on *27 Jan. 06* to Terry Smith, Robert Griffin, the AWCB-Fbx, and the Director of the Workers' Compensation Division at their addresses of record.

K.S. Knudsen *27 Jan. 06*
Signature Date