

Alaska Workers' Compensation Appeals Commission

Dana L. Olson,
Appellant,

vs.

Federal Express Corporation and
Sedgwick CMS,
Appellees.

Final Decision

Decision No. 104 March 20, 2009

AWCAC Appeal No. 08-036

AWCB Decision No. 08-0234

AWCB Case No. 200802181

Motion for Extension of Time, Motion to Accept Amended Complaint, and Motion for Expedited Consideration of Alaska Workers' Compensation Board Order No. 08-0234, issued on November 26, 2008 by southcentral panel members William Soule, Chair, Robert C. Weel, Member for Labor, and Dave Robinson, Member for Industry, on reconsideration of Alaska Workers' Compensation Board Interlocutory Decision No. 08-0199, issued on October 29, 2008, by southcentral panel members William Soule, Chair, Robert C. Weel, Member for Labor, and Dave Robinson, Member for Industry.

Appearances: Dana L. Olson, pro se, appellant. Joseph M. Cooper, Russell, Wagg, Gabbert & Budzinski, for appellees Federal Express Corporation and Sedgwick CMS.

Commission Proceedings: Appeal filed January 5, 2009, with request for fee waiver. Notice of Recusal of Chair with request for *pro tem* chair appointment issued January 14, 2009. Administrative Law Judge Andrew Hemenway appointed Chair *pro tempore* January 15, 2009. Briefing on motions completed March 18, 2009.

Commissioners: Andrew M. Hemenway, Jim Robison, Stephen Hagedorn.

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

By: Andrew M. Hemenway, Chair *Pro Tempore*.

1. Introduction.

Dana L. Olson, an employee of Federal Express Corporation, filed a Notice of Appeal from a workers' compensation board decision. She has also filed a Motion for Extension of Time, Motion to Accept Amended Complaint, and Motion for Expedited Consideration.

Federal Express Corporation asserted that the filings by the employee should be treated as a motion for extraordinary review and as such denied.

Because the decision by the board was an interlocutory order, an appeal is premature. We treat the notice of appeal and related filings as a motion for extraordinary review and, as such, we deny the motion for extraordinary review.

2. Underlying facts and proceedings.¹

Dana L. Olson was an employee of Federal Express Corporation. On February 22, 2008, she filed a report alleging an injury while at work on February 20, 2008. That report of injury is the subject of AWCB Case No. 200802181. The employer paid temporary total disability benefits for February 24–25, and March 10–17, 2008, and controverted any time loss after March 17, 2008. Following an employer's medical examination (EME) on March 26, 2008, and a report by the examining physician, the employer controverted all benefits.

On May 15, 2008, through counsel, the employee filed a claim for medical care, temporary total disability, temporary partial disability, and permanent partial impairment. At the same time, counsel filed a request for a second independent medical evaluation (SIME) due to a dispute between the employee's attending physician and the EME physician. At a prehearing conference on June 25, 2008, the parties stipulated to an SIME and various prehearing deadlines were established.

On July 16, 2008, counsel for Ms. Olson withdrew. On July 30, 2008, employer filed a petition seeking to cancel the SIME. The petition was addressed at a September 4, 2008, prehearing conference attended by the parties in person or telephonically. The matter was not resolved and the issue was scheduled for hearing by a board panel on October 15, 2008. Both parties appeared in person at the hearing.

On October 29, 2008, the board issued a decision on the employer's petition to cancel the SIME.² Applying 8 AAC 45.050(f), the board found no good cause to relieve

¹ We summarize the facts as they are stated in the Interlocutory Decision and Order dated October 29, 2008. We make no independent findings of fact.

the parties from their prior stipulation. The board also concluded that it had authority to order an SIME without regard to the parties' stipulation. The board issued an order for an SIME under AS 23.30.095(k) and AS 23.30.110(g).

Ms. Olson filed a petition that the board treated as a request for reconsideration. It denied reconsideration in a decision dated November 26, 2008.³

3. Proceedings before the commission.

On December 22, 2008, Ms. Olson filed a Notice of Appeal referencing the board's October 19, 2008 and November 26, 2008 decisions, accompanied by a request for waiver of costs and fees. The commission docketed the filing as AWCAC Appeal No. 08-036, observing it did not include a filing fee or a financial statement affidavit, designation of hearing recording, and proof of service. Ms. Olson was directed to submit the missing materials within ten days.

On January 5, 2009, Ms. Olson filed a designation of hearing record form, which identified a board hearing date of October 15, 2008. At the same time, she filed a motion asking that the commission accept an "Amended Complaint", a motion for an extension of time to serve out-of-state parties, and a financial statement affidavit.

On January 13, 2009, Federal Express Corporation filed a responsive pleading, identifying Ms. Olson's initial filing as a request for discretionary review of the board's decision No. 08-0234, and opposing a grant of discretionary review.

On January 16 and 23, 2009, Ms. Olson filed a certificate of service, indicating that counsel for Federal Express had been served, as had the director of the Alaska Workers' Compensation Division. In addition, on January 23, 2009, Ms. Olson filed a handwritten document entitled "Reconsideration [and] Correction of Docket Notification" listing eight items for the commission's consideration.

On February 25, 2009, the Director of the Division of Workers' Compensation filed a notice of non-participation.

² *Dana L. Olson v. Federal Express*, Alaska Workers' Comp. Bd. Dec. No. 08-0199 (Oct. 29, 2008) (W. Soule, Chair).

On February 26, 2009, Ms. Olson filed a motion to expedite a hearing; on March 4, 2009, Federal Express filed a response construing the motion as a request for expedited consideration of her various filings, noting it did not object to expedited consideration.

Lastly, on March 10, 2009, Ms. Olson filed with the commission a copy of a filing with the board, which states that she has changed her mind regarding an SIME, and asks that the board schedule an SIME.

4. Discussion.

This case was filed and docketed as an appeal. Federal Express contends that it should be treated as a motion for extraordinary review and that review should be denied.

The board decisions from which Ms. Olson has filed an appeal were issued on October 29, 2008, and on November 26, 2008. The issue raised before the board and addressed in those decisions was procedural - whether an SIME should be scheduled. Initially, the parties had stipulated to the SIME; subsequently they both (for different reasons) withdrew from the stipulation. In its initial decision, the board held them to their own prior stipulation for an SIME under AS 23.30.095(k) and in addition, on its own authority under AS 23.30.110(g), ordered that an SIME be scheduled. The board confirmed that decision on reconsideration.

The board's initial decision is titled an Interlocutory Decision and Order; its decision on reconsideration is titled a Final Decision and Order on Reconsideration. However, the title of the board's decision is not conclusive of its status as a final decision for purposes of appeal to the commission, and "[a]n appeal under AS 23.30.127 to the commission should be from a board decision that is final as to the

³ *Dana L. Olson v. Federal Express*, Alaska Workers' Comp. Bd. Dec. No. 08-0234 (Nov. 26, 2008) (W. Soule, Chair).

appellant's rights, and leaves no further dispute on a pending claim or petition for the board to resolve."⁴ As we have noted:

Generally, an order that reflects final disposition [of] 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 claim for hearing are general interlocutory and not final. Review of such orders by the Commission is limited to 8 AAC 57.72-76.^[5]

In this case, notwithstanding the title on the board's decision on reconsideration, that decision was not final for purposes of an appeal to the commission. Rather, it was, like the initial decision, an interlocutory decision regarding a non-dispositive prehearing matter – an SIME – and it left the underlying claim subject to further proceedings before the board.⁶ Because neither the initial decision nor the decision on reconsideration disposed of the claim, and the petition before the board was ancillary to that unresolved claim, the proper procedure to bring the board's decision before the commission is by motion for extraordinary review, under 8 AAC 57.74. Accordingly, the commission treats the notice of appeal as a petition for extraordinary review.⁷

⁴ *Hope Community Resources V. Rodriguez*, AWCAC Dec. No. 041 at 5, 7 (May 16, 2007).

⁵ *Smith v. CSK Auto, Inc.*, AWCAC No. 05-006 at 3, n. 5 (January 27, 2006).

⁶ This case is therefore unlike *Hope Community Resources v. Rodriguez*, AWCAC Dec. No. 041 (May 16, 2007), in which the board had issued a decision dismissing a petition for review and modification of a decision by the reemployment benefits administrator and ordering a medical examination under AS 23.30.110(g) and AS 23.30.095. Because the order for an examination was issued at a time when no claim for additional benefits was pending and the petition for review and modification had been dismissed, and the board "did not retain jurisdiction to examine the results of the medical examination and act upon it," we deemed the order for an examination final for purposes of appeal. *Id.* at 8-9.

⁷ We have previously granted leave to convert a purported appeal to a motion for extraordinary review in similar circumstances. *Kuukpik Arctic Catering, L.L.C. v. Harig*, AWCAC Dec. No. 038 (April 27, 2007); *Agustyniak v. Carr Gottstein Foods, Safeway, Inc.*, AWCAC Dec. No. 064 (November 20, 2007). Allowing conversion does not, however, mean that grounds for granting review have been established. *Id.*, *Kuukpik* at 12; *Agustyniak* at 15.

Pursuant to 8 AAC 57.076(a), the commission will, in its discretion, grant a motion for extraordinary review when the sound policy favoring appeals from final decisions or orders is outweighed because (1) postponement of review will result in injustice and unnecessary delay, significant expense, or undue hardship; (2) immediate review may materially advance the ultimate termination of the litigation and the order involves an important question of law on which (A) there is a substantial ground for difference of opinion, or (B) board panels have issued differing opinions; (3) the board has so far departed from the accepted and usual course of proceedings or the requirements of due process as to call for the commission's power of review; or (4) the issue would otherwise likely evade review and an immediate decision is needed for the guidance of the board.

Ms. Olson has not specifically articulated any grounds for granting extraordinary review, nor can we discern any. The board's authority to order an SIME has not been questioned, and Ms. Olson's filings with the commission do not point to any circumstances that otherwise warrant immediate review of its decision. More fundamentally, Ms. Olson's most recent filing with the commission expressly states that she has "changed [her] mind regarding the board ordering a SIME" and asks that the board schedule an appointment.

Under these circumstances, and in light of the well-established policy favoring appeals from final judgments, we conclude that the request for extraordinary review should be denied.

5. Conclusion.

Treating the purported appeal as a motion for extraordinary review, the motion

for extraordinary review is DENIED. The pending motions relating to the appeal are moot.

Date: March 20, 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Andrew M. Hemenway, Chair Pro Tempore

Signed

Jim Robison, Appeals Commissioner

Signed

Stephen Hagedorn, Appeals Commissioner

APPEAL PROCEDURES

This is not a final commission decision on the merits of an appeal from the board's final decision and order on a claim. However, it is a final decision on whether the employee may appeal the board's decisions and orders to this commission. The effect of this decision is to allow the board to proceed toward a hearing on the merits of the employee's workers' compensation claim. This decision becomes effective when distributed by the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. For the date of distribution, see the box below.

Effective November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of distributing a final decision on appeal 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. Because this is not a final decision on the merits of an appeal of the board's final decision, the Supreme Court might not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No final decision has been made on the merits, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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 or petition for review or hearing 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 in Alaska Workers' Compensation Appeal Commission Appeal No.008-036, *Dana L. Olson vs. Federal Express Corporation and Sedwick CMS*, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 20th day of March, 2009.

Signed
B. Ward, Deputy Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on 3/20/09 a copy of this Final Decision in Appeal No. 08-036 was mailed (certified) to: D. Olson and mailed to: J. Cooper at the addresses of record and faxed to: J. Cooper, AWCB Appeals Clerk and Director, WCD.

Signed
B. Ward, Deputy Appeals Commission Clerk