Alaska Workers' Compensation Appeals Commission

J.C. Marketing, James Cottrell IV, Ohio Casualty, and Liberty Northwest,
Movants,

vs.

You Don't Know Jack, Inc., Republic Indemnity Co. of America, Casualty Insurance Co., and Gilbert P. Siemens,
Respondents.

Final Decision
Decision No. 132 March 30, 2010

AWCAC Appeal No. 09-031
AWCB Decision No. 09-0197
AWCB Case Nos. 200704638, 200818556

Motion for Extraordinary Review from Alaska Workers' Compensation Board Decision No. 09-0197 issued December 17, 2009, at Anchorage, Alaska, by southcentral panel members William Soule, Chair, Dave Kester, Member for Industry, and Patricia Vollendorf, Member for Labor.

Appearances: Tasha M. Porcello, Law Offices of Tasha M. Porcello, for movants J.C. Marketing, James Cottrell IV, Ohio Casualty, and Liberty Northwest. Erin K. Egan, Russell, Wagg, Gabbert & Budzinski, P.C., for respondents You Don't Know Jack, Inc., Republic Indemnity Co. of America, and Casualty Insurance Co. Michael J. Patterson, Law Offices of Michael J. Patterson, for respondent Gilbert P. Siemens.

Commission proceedings: Motion for Extraordinary Review and Request for Additional Time filed on December 28, 2009. Movants' Supplemental Argument to Motion for Extraordinary Review and Notice of Excerpt of Record (20) exhibits filed on December 31, 2009. Response to motion filed January 11, 2010. Hearing on motion held February 25, 2010. Notice of Decision issued February 26, 2010.

Appeals Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By: Jim Robison, Appeals Commissioner.

1. Introduction.

J.C. Marketing asks for extraordinary review of a board decision denying its petition to strike Dr. Fred Blackwell's Second Independent Medical Evaluation (SIME) reports from the record. J.C. Marketing argues that the board denied due process by

failing to notify it about the pending SIME and failing to provide an opportunity to participate in the SIME process. J.C. Marketing also argues that You Don't Know Jack, Inc. [hereinafter Jack] should have been required to join J.C. Marketing as a party before the SIME occurred because it was defending against a claim brought by Gilbert P. Siemens by arguing that J.C. Marketing, rather than Jack, was Siemens' last injurious employer.

Jack opposes the motion, arguing that none of the board's asserted errors is so extraordinary as to call for the commission to depart from the sound policy favoring appeals from a final board decision. Jack contends that because J.C. Marketing may still depose Dr. Blackwell or seek its own SIME, that it cannot show prejudice. Finally, Jack claims that it could not seek joinder of J.C. Marketing until Siemens filed a claim against J.C. Marketing and Siemens did not do so until after the SIME process had begun.

The commission concludes that the board has not "so far departed from the requirements of due process" that the sound policy favoring appeals from final decisions is outweighed.[1] Moreover, although the requirements for joinder in the Workers' Compensation Act and regulations raise an "important question of law on which there is substantial ground for difference of opinion," deciding this question now will not advance the end of the litigation[2] and is moot since J.C. Marketing has been joined. Therefore, the commission denies J.C. Marketing's motion for extraordinary review.

2. Factual background and board proceedings.

When deciding whether to grant a motion for extraordinary review, the commission does not have the board's record to review. These facts are drawn from the board's decision and the excerpts from the record included with Jack's motion, which are not challenged by the other parties.

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1 *See* 8 AAC 57.076(a)(3).

2 *See* 8 AAC 57.076(a)(2).

Siemens reported injuring his lower back moving a pallet in a warehouse while working for Jack on April 12, 2007.[3] His employment with Jack ended on May 16, 2007, and he began working for J.C. Marketing on about May 22, 2007.[4] On November 27, 2007, Siemens filed a claim against Jack seeking medical treatment for the April injury.[5] Jack asserted that Siemens' employment with Jack may not have been "the last injurious exposure," among its defenses in its answer to the claim and in controversions filed in February 2008, May 2008, and September 2008.[6]

Siemens testified in his deposition in April 2008 that his duties at J.C. Marketing were similar to those at Jack's but that he did more deliveries and pulling of orders.[7] He testified that he suffered no new injuries while working at J.C. Marketing but that "lifting and loading" caused him pain.[8] After taking a leave of absence and then returning to lighter duty at J.C. Marketing, he testified that his work did not aggravate his symptoms any more "than they're always aggravated."[9]

In August 2008, Siemens sought a hearing on the merits of his claim, a request that Jack opposed.[10] In September 2008, Jack petitioned for a SIME citing a medical dispute over whether Siemens' injury at Jack was the substantial cause of his need for surgery.[11] Siemens and Jack stipulated to the need for an SIME in September 2008.[12]

It was not until November 18, 2008, that Siemens filed a claim against J.C. Marketing, seeking the same benefits as the claim against Jack and noting that Jack

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3 Movants' Exc. 8, Siemens Dep. 36:16 – 37:20.

4 *Gilbert P. Siemens v. You Don't Know Jack, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0197, 3 (Dec. 17, 2009) (W. Soule, chair).

5 *Id.*

6 *Id*. at 4.

7 Movants' Exc. 8, Siemens Dep. 51:14-15.

8 Movants' Exc. 8, Siemens Dep. 52:17-24.

9 Movants' Exc. 8, Siemens Dep. 53:2-54:6; 55:2-4.

10 *Siemens*, Bd. Dec. No. 09-0197 at 4.

11 *Id.*; Movants' Exc. 14.

12 *Siemens*, Bd. Dec. No. 09-0197 at 5.

was denying liability for medical treatment based on the last injurious exposure defense.[13] The board served this claim on December 1, 2008.[14] Meanwhile, in November 2008, Dr. Blackwell conducted the SIME and issued his report.[15] He noted, "Based on reasonable medical probabilities, the substantial cause for the patient's current condition is the employment of May 17, 2007."[16] Siemens was unemployed on that date. Blackwell issued a supplemental SIME report on December 3, 2008.[17]

J.C. Marketing petitioned to strike the SIME reports because it was denied procedural due process as it had no of notice of the SIME until it was served with the SIME report.[18] It argued that Jack was obligated to join J.C. Marketing when it first developed sufficient evidence to controvert Siemens' claims on the basis of a last injurious exposure defense, and that if Jack had done so, J.C. Marketing could have participated in the SIME process.[19]

At the hearing on the petition to strike, all the parties stipulated to joinder and consolidation of claims.[20] The board concluded the joinder issue was moot since all the parties had stipulated to joinder and consolidation of claims.[21]

The board denied J.C. Marketing's petition to strike Blackwell's SIME reports from the record. It concluded that "there was nothing improper about the way the SIME was handled between Employee and Jack."[22] Moreover, the board decided that J.C.

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13 *Id*.

14 *Id*. The board was required to "notify the employer . . . that a claim has been filed" "within 10 days after receiving a claim." 8 AAC 45.050(b)(4). The 10-day period in this case ended on a Friday, so, taking out the weekend, the board apparently was one day late. *See* 8 AAC 45.063.

15 *Siemens*, Bd. Dec. No. 09-0197 at 5.

16 *Id*.

17 *Id*.

18 Movants' Exc. 16 at 2, 20 at 2.

19 *Id*.

20 *Siemens*, Bd. Dec. No. 09-0197 at 2.

21 *Id.* at 15.

22 *Id.*

Marketing's exclusion from the SIME process could be remedied by requesting its own SIME and/or deposing Blackwell.[23] The board noted that "J.C. has legitimate concerns regarding Dr. Blackwell's SIME report; however, these arguments go to the weight, not the admissibility of the evidence."[24] Finally, the board permitted J.C. Marketing to depose Blackwell at its own expense within 30 days of its decision because the usual deadline for taking a deposition of an SIME doctor had passed before J.C. Marketing had received the SIME report.[25]

J.C. Marketing filed this motion for extraordinary review with the appeals commission and petitioned the board for reconsideration of the deadline for taking Blackwell's deposition. J.C. Marketing asked the board to modify its order because Blackwell was unavailable for deposition until after the board's 30-day deadline.[26] On reconsideration, the board provided that J.C. Marketing "may depose Dr. Blackwell at its own expense, should it so desire, at a mutually convenient time to all parties and Dr. Blackwell, up to five working days before the hearing on the merits."[27]

3. Discussion.

The commission does not lightly exercise its limited authority to review interlocutory decisions. As we stated in *Kuukpik Arctic Catering, LLC, v. Harig*:

> When we examine a board decision for extraordinary review we do so without the record and hearing transcript. We cannot know all the facts before the board, so we act cautiously. We exercise restraint when we consider motions for extraordinary review in order to avoid officious intermeddling in the board process. We do not use extraordinary review to intervene merely because we think the board may have made an error.[28]

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[23] *Id*. at 15-16.

[24] *Id*. at 16.

[25] *Id*.

[26] *Gilbert P. Siemens v. You Don't Know Jack, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 10-0014, 4-5 (Jan. 21, 2010) (W. Soule, chair).

[27] *Id*. at 5.

[28] Alaska Workers' Comp. App. Comm'n Dec. No. 038, 11 (April 27, 2007).

Extraordinary review is appropriate only when "the sound policy favoring appeals from final orders or decisions is outweighed" because the board's actions are so prejudicial to the requirements of due process that immediate review is necessary; postponing review will result in injustice and unnecessary delay, significant expense or undue hardship; immediate review would end the litigation and involves an "important question of law" with substantial grounds for differing opinions or the board itself has issued different opinions; or the issue would likely evade review and an immediate decision would provide guidance to the board.[29] As movant in this case, J.C. Marketing bears the burden of establishing that at least one of these standards is satisfied.[30]

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[29] 8 AAC 57.076(a) provides:

> The commission will consider and decide a motion under this section as soon as practicable. 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
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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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> (2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and
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> > (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;
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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; or
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> (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.

[30] *E.g., BP Exploration Alaska, Inc. v. Stefano*, Alaska Workers' Comp. App. Comm'n Dec. No. 076, 10 (May 6, 2008).

J.C. Marketing argues that the failure to provide notice and an opportunity to participate in the SIME process amounts to a violation of due process. The SIME sought to obtain medical opinion on whether the last employment was the substantial factor in Siemens' need for surgery. The board received Siemens' claim against J.C. Marketing before Dr. Blackwell completed his report. Although the two claims had not been joined, the board's designee should have been aware that the pending SIME addressed questions relevant to Siemens' claim against J.C. Marketing. Thus, J.C. Marketing asserts that it should have been notified of the SIME and allowed an opportunity to participate in the ordered SIME, such as by supplying records to the examiner or putting forward questions to the board designee that the SIME could address. However, J.C. Marketing has not shown that the board's failure to strike Blackwell's reports from the record has resulted in an immediate prejudice to its ability to defend the claim. Even if the board erred, which we do not decide, any error would be harmless because J.C. Marketing has other opportunities to present its case discrediting Blackwell's SIME reports.[31] The board has permitted J.C. Marketing to depose Dr. Blackwell under a timeframe more generous than its regulations would otherwise permit.[32] In addition J.C. Marketing may still cross-examine or impeach

[31] Harmless errors are those that do not affect the outcome of the case. *See Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224, 228 (Alaska 2000) (holding board's error in failing to attach compensability presumption was harmless where it conducted alternative analysis and concluded the presumption was rebutted in any event); *Dwight v. Humana Hosp. Alaska*, 876 P.2d 1114, 1120 (Alaska 1994) (holding that the failure to inform parties of right to SIME was not harmless because, given equivocal medical evidence, a SIME may have influenced the decision to deny benefits).

[32] *Siemens*, Bd. Dec. No. 10-0014 at 5; 8 AAC 45.095(j)(1) (requiring a party that wishes to submit interrogatories or depose a SIME examiner "file with the board and serve upon the examiner and all parties, within 30 days of receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories.")

The board modified its order on the deadline to depose Dr. Blackwell, mooting J.C. Marketing's arguments made in this motion for extraordinary review that Dr. Blackwell's unavailability made it impossible for J.C. Marketing to avail itself of the deposition remedy. *Siemens*, Bd. Dec. No. 10-0014 at 5.

Blackwell at hearing,[33] or, in the event that a medical dispute arises between its doctor and Siemens' doctor, it may request another SIME.[34] Therefore, we conclude that granting extraordinary review at this stage would be premature and would result in officious intermeddling in the board's ongoing process in this case.[35]

J.C. Marketing's situation stands in stark contrast to a case in which we granted extraordinary review for possible due process violations. In *Alcan Electrical and Engineering, Inc. v. Redi Electric, Inc.*, the board decided to order payment of compensation and an SIME without notice to any of the parties that it would decide these issues, and deliberated in the presence of three unauthorized people in an unrecorded session closed to the parties.[36] Unlike J.C. Marketing's circumstances, later actions by the board or an appeal after a final board decision would not adequately remedy these errors. We held "given the extent of the board's departure from the announced issue, the board's failure to give notice to the parties . . . and the lasting impact of the board's findings and order on the rights of the parties, the error is not harmless."[37] We also concluded that "the presence of three unauthorized persons for the duration of the deliberations . . . was prejudicial to the substantive rights of the parties and cannot be cured because there is no way to permit the parties to respond to

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[33] 8 AAC 45.120(c) (providing that "each party has the following rights at hearing: (1) to call and examine witnesses; . . . (3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination; (4) to impeach any witness regardless of which party first called the witness to testify; and (5) to rebut contrary evidence.").

[34] *See* AS 23.30.095(k) (permitting a SIME in the event of a medical dispute); *Dwight*, 876 P.2d at 1114 (requiring board to give parties notice of their right to request and obtain a SIME in the event of a medical dispute). *See also Siemens*, Bd. Dec. No. 09-0197 at 15 (noting "J.C.'s right to an SIME vis-à-vis Employee's doctors and its EME have not been abrogated through any action on Employee's or Jack's part.")

[35] *See Eagle Hardware & Garden v. Ammi*, Alaska Workers' Comp. App. Comm'n Dec. No. 003 at 12-13 (Feb. 21, 2006) (denying extraordinary review of a board's protective order as premature because the board could later permit an employer's psychiatric exam).

[36] Alaska Workers' Comp. App. Comm'n Dec. No. 112, 2-3 (July 1, 2009).

[37] *Id*. at 13.

anything the audience may have contributed."[38]

J.C. Marketing also argues that Jack should have sought its joinder as a last injurious employer well before seeking a SIME, and had it properly done so, J.C. Marketing could have participated in the SIME process. J.C. Marketing asserts that Jack undertook a strategy to develop its last injurious exposure defense without the involvement of the asserted last injurious employer and that this strategy deprived J.C. Marketing of an "equal playing field." Jack contends that only Siemens could file a claim against J.C. Marketing and that without a claim against J.C. Marketing, it could not seek joinder. Although we have previously held that employers may file claims against other employers[39] and, therefore, Jack was not compelled to wait for Siemens' claim, we are not persuaded that J.C. Marketing's assertions require our intervention before a final decision on the merits. J.C. Marketing is now a party, mooting the question of whether an employer may waive or be equitably estopped from asserting a last injurious exposure defense because of a persistent failure to seek joinder of a last injurious employer. We agree J.C. Marketing raises "important questions of law on which there is substantial ground for difference of opinion" regarding how the regulations on joinder and consolidation of claims[40] should operate in such a case, but conclude our immediate review would not advance the end of the litigation in this case. As we have stated:

> However important the questions raised by the movant, the parties to an appeal must have a recognized interest in the outcome of the appeal. This requirement serves as a check on the commission's exercise of its power of review – it prevents the commission from giving general advisory opinions . . . ."[41]

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[38] *Id*. at 37.

[39] *Alcan Elec. and Eng'g, Inc.,* App. Comm'n Dec. No. 112 at 28 (concluding that "8 AAC 45.040(a) permits an employer to file a claim against another employer and provides that an employee must be joined in the claim.").

[40] *See* 8 AAC 45.050(b)(5) on consolidation and 8 AAC 45.040 on parties.

[41] *Pacific Log & Lumber v. Carrell*, Alaska Workers' Comp. App. Comm'n Dec. No. 047, 6 (June 29, 2007) (denying extraordinary review when the board might resolve a separate issue of a second injury under a subsequent employer in a way that

Therefore, we conclude J.C. Marketing has not persuaded us that any of the tests for exercising extraordinary review are present in this case.

4. Conclusion.

We conclude that the movants have failed to show immediate prejudice from the asserted denial of due process because they may depose Blackwell or request another SIME in the event of a medical dispute between Siemens' doctor and their doctor. We also conclude that resolving the question of when joinder should have occurred would not hasten the end of this litigation since the parties are now joined and the question is moot. Therefore, the commission DENIES the motion for extraordinary review. This denial is not a determination that the board did not err and does not affect the parties' rights to appeal from a final board decision.

Date: *3/30/10* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Unavailable for Signature[42]
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this motion for extraordinary review. The effect of this decision is that the commission decided not to review the board's order before a final decision is issued by the board. The movants may still appeal a final board decision when it is reached on the claim. Denial of a motion for extraordinary review is not a judgment on the merits of the movants' objections to the board's decision.

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would render the disputed questions moot). *See also Stefano*, App. Comm'n Dec. No. 076 at 19 (denying extraordinary review of a protective order since the dispute was moot in part because the employee was no longer seeking reimbursement for counseling services and the employer could petition the board to lift the stay).

[42] Ms. Knudsen's term as chair expired March 1, 2010, before this final decision was issued.

This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Because this is not a final commission decision on the merits of an appeal from a final board 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 decision has been made on the merits of this claim, but if you believe grounds for review exist, you should file your petition for review within 10 days after the date this decision was distributed.

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

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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

The commission will not rehear a motion for extraordinary review. See 8 AAC 57.076(b). However, a party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. Reconsideration will not be granted if the party merely reargues the points argued on the motion for extraordinary review. 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.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 132 issued in the matter of *J.C. Marketing v. You Don't Know Jack, Inc.,* AWCAC Appeal No. 09-031, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 30, 2010.

Date: *4/09/10*

Signed
B. Ward, Appeals Commission Clerk