

Alaska Workers' Compensation Appeals Commission

Terry L. Smith,
Movant,

vs.

CSK Auto Inc., Royal and SunAlliance, and
Arctic Adjusters, Inc.,
Respondents.

Memorandum Decision and Order
August 28, 2006 Decision No. 017

AWCAC Appeal No. 06-016
AWCB Decision No. 06-0134
AWCB Case No. 200106934

Memorandum Decision on Motion for Extraordinary Review of Alaska Workers' Compensation Board Order No. 06-0134, Fairbanks Panel, by William Walters, Chairman, Jeffrey P. Pruss, Board Member for Labor, and Chris Johansen, Board Member for Management.

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

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By Kristin Knudsen, Chair:

Terry Smith again asks the commission to review an interlocutory decision by the board regarding discovery.¹ After Smith sought a protective order against discovery of certain medical records, the board ordered Smith to sign releases allowing the employer access to records to 1973 of medical treatment of symptoms related to spine, hips, lower extremities, head, heart, and stroke; and, psychological and psychiatric treatment records to 1986.² Smith also sought a protective order against a psychiatric

¹ *Terry Smith v. CSK Auto, Inc.*, AWCAC Decision No. 002 (January 27, 2006); *Terry Smith v. CSK Auto, Inc.*, AWCAC Decision No. 012 (June 13, 2006).

² *Terry L. Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0134, 14 (May 25, 2006).

examination by an employer medical examiner under AS 23.30.095(e), which the board reserved jurisdiction to consider after it received the psychological records.³ Smith asks the commission to grant extraordinary review of the board's order because he has not claimed a mental injury and therefore his psychological status is not relevant. We deny the motion for extraordinary review of the board's order regarding the psychological examination because there is, as yet, no board decision to review. We deny the motion for extraordinary review of the board's order allowing discovery of the medical records because we find the sound policy favoring appeals from final orders is not outweighed by the employee's claims of injustice.

Underlying facts and proceedings.

We make no findings of fact in summarizing the board's recitation of the facts.⁴ This summary is intended to provide context to the motion for extraordinary review.

On March 29, 2001, Smith injured his back by lifting boxes while working as a delivery driver. CSK Auto, Inc., the employer, paid temporary total disability compensation and permanent partial disability compensation, medical benefits, and reemployment benefits to Smith. Smith entered into a partial settlement agreement that was approved by the board in 2002.⁵ He presently seeks additional disability compensation and medical benefits.

At CSK Auto's request, Smith was examined by Patrick Radecki, M.D., a physiatrist,⁶ on July 23, 2003. In his report, Dr. Radecki reported his suspicions that

³ *Terry L. Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0134, 15 (May 25, 2006).

⁴ Our summary is drawn from *Terry L. Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0134 (May 25, 2006).

⁵ Under the agreement, Smith waived only permanent total disability compensation and reemployment benefits. *Terry L. Smith*, AWCB Decision No. 06-0134, 3. Smith petitioned the Board to set aside the settlement agreement. The board refused to set aside the settlement agreement and Smith has appealed that decision. AWCAC Appeal No. 06-010.

⁶ A physiatrist is a physician who specializes in physical medicine and rehabilitation. Physiatrists treat acute and chronic pain and musculoskeletal disorders,

Smith suffered from a possible mental illness or disorder. He also expressed the opinion that Smith's symptoms were unrelated to his 2001 lifting injury. Following Dr. Radecki's report, CSK Auto controverted benefits, and Smith revoked all medical releases. Smith has signed no medical releases since June 4, 2004.

CSK Auto's counsel asked Dr. Radecki in an August 7, 2003 letter whether the employee should be referred for a psychiatric examination, and, on August 18, 2003, Dr. Radecki responded, "Yes." The employer notified the employee on August 31, 2003 that a psychiatric evaluation with S. David Glass, M.D., was scheduled for September 29, 2003. Smith requested a protective order August 29, 2003, and at a pre-hearing conference on October 8, 2003, the parties made some form of tentative agreement, which is not described by the board. A series of disputes were litigated and, the board notes, the agreement broke down.

CSK Auto renewed its requested release of the medical records on March 9, 2006. Smith filed a new petition for a protective order on March 22, 2006. CSK Auto renewed the request for a psychiatric examination on April 6, 2006 in a pre-hearing conference; Smith responded in the conference by renewing his petition for a protective order. The dispute was appealed to the board.

The board's decision.

In a 15-page decision and order, the board reviewed the history and position of the parties regarding discovery of the medical records in a case in which the record already fills three banker's boxes and the board has issued nine decisions. The board, relying on its review of the available record, found that the employee had sought medical treatment of symptoms related to some of the body parts he claims are injured as far back as 1975 and that the record contains a physician's opinion concerning

including serious disorders of the musculoskeletal system that result in severe functional limitations. They also coordinate the long-term rehabilitation process for patients with spinal cord injuries, cancer, stroke or other neurological disorders, brain injuries, amputations, and multiple sclerosis. American Academy of Physical Medicine and Rehabilitation, <http://www.aapmr.org/condtreat/what.htm> (viewed August 24, 2006).

psychosomatic complaints as early as 1988.⁷ In keeping with long-standing practice, it found a release of medical records for the two years preceding 1975, and of psychological records to two years preceding 1988, was reasonable.⁸ The board then determined that CSK Auto's request for a psychiatric examination was reasonable in view of the psychological issues raised in this claim by the employee's own physicians.⁹ The board specifically found CSK Auto was acting within the limits of AS 23.30.095(e) in its request for a psychiatric examination.¹⁰ Nonetheless, the board did not order the employee to attend an examination. Instead, the board reserved jurisdiction to consider whether to allow the employer to have the psychiatric examination "pending receipt of the relevant records."¹¹

Smith's request for extraordinary review.

Smith argues he should not be compelled to sign medical releases for records going back to 1973, nor give any release of psychological records. Because he has not claimed a mental injury, he urges the commission to require the employer medical examiner to "look at my spine, instead of my brain." He argues that psychological records do not relate to the back injury. He argues the records release should be limited to the specific body part that was injured, which he now argues is his spine. He also objects to the forensic nature of the psychiatric exam, which he likens to being put under the "same microscope as a common criminal."

CSK Auto argues that the employer is entitled to a release going back to two years prior to the appearance of symptoms similar to those complained of by the injured worker. The employer is entitled to look for records that might lead to

⁷ *Terry L. Smith*, AWCB Decision No. 06-0134, 9.

⁸ *Id.*

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 14.

discoverable, relevant evidence. The employee's claim is not limited to symptoms in his back; he claims that he has work-related symptoms in his hip, leg, lower extremity, head, and heart and symptoms of stroke. The requested releases are limited to those areas. As to the need for a mental examination, the board's record also contains a history of psychosomatic complaints as early as 1988. The employer asserts that it is entitled, in these circumstances, to gather evidence that may explain Smith's enduring disability and symptoms. Therefore, the employer argues, it is entitled to research records dating to two years prior to the appearance of psychosomatic symptoms.

Smith fails to present circumstances compelling extraordinary review.

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.

Smith's request for extraordinary review was supported only by his argument; he presented no affidavits or documentary evidence to support his request. He argues that because he is not claiming a mental injury he should not be subjected to a mental examination, nor should psychological records be requested. In other words, he argues that the employer may not, as a defense, assert that the employee's symptoms and disability are explained by a different injury than that claimed by the employee. He argues that the board's action allows the employer to "at a whim bring in and claim another type of injury" justifies review. Smith asserts that the board's order works an

injustice because it is not “in line with a prior decision” of the board in *Mary Ann Ammi v. Eagle Hardware*, AWCB Decision No. 05-0303 (November 16, 2005), and the board's decision in his case therefore represents a division of opinion. He also objects to the board allowing the employer to obtain records as early as two years preceding the first appearance of the symptoms he claims are work-related, instead of limiting the releases to those records generated in the two years prior to the claimed injury.

We address first the question of the order to sign a release of the medical and psychological records. The Alaska Supreme Court has long held that the employer has two means of rebutting the presumption that a disability is compensable: (1) by eliminating the reasonable possibility that a disability is work-related or (2) by providing affirmative evidence the disability is not work related, as by evidence of an alternative cause, which if accepted, would eliminate the possibility of work causation.¹² In this case, CSK Auto seeks to show that Smith's continuing disability is not the result of a work-related injury. CSK Auto wishes to explain Smith's continuing disability by a pre-existing, long-standing mental illness or disorder instead of a work-related injury, or to show that the employee's present physical complaints, (including those experienced in other parts of the body than his spine), existed in the same degree or kind before the injury. This approach is the equivalent of arguing, for example, that an employee's continuing disability is the result of an infectious illness or that the same degree and kind of symptoms are attributable to a prior sports injury instead of a later workplace injury. The board found that CSK Auto's asserted defense is based on reason and some evidence. The board's order allowing CSK Auto to gather evidence that may tend to make the question in issue¹³ more or less likely does not present a departure from the accepted and usual course of proceedings, the board's regulations, or the requirements of due process.

¹² *Miller v. ITT Arctic Servs.*, 577 P.2d 1044 (Alaska 1978).

¹³ Is the employee's current disability and claimed need for medical treatment the result of his employment injury five years ago?

We turn now to the psychiatric examination. Smith concedes that the psychiatric examination he seeks to avoid has not yet been ordered by the board, but he is certain it will be, and therefore asks us to prevent the board from ordering the examination. In reviewing the board's decision, we note that the board did not order an examination or approve a protective order against an examination. It reserved jurisdiction to do either,¹⁴ if the records obtained and circumstances supported what it found to be a reasonable request within the limits of AS 23.30.095(e)¹⁵ for such an examination.

Smith, the board wrote, "expressed concerns" that such an exam would be unduly intimidating, objectionable, or painful.¹⁶ Smith did not produce evidence with his motion to the commission, or cite evidence he produced to the board, that such an examination was likely to be unreasonably intrusive. In Smith's case, there is no indication that the board is unaware of potential due process issues or that the board is unwilling to craft privacy protections. The board demonstrated it is attempting to balance the privacy interests of the injured worker with the due process rights of employer in legitimately defending a claim.¹⁷ The board is aware of the public interest in a workers'

¹⁴ *Terry L. Smith*, AWCB Decision No. 06-0134, at 14.

¹⁵ *Terry L. Smith*, AWCB Decision No. 06-0134, 12-13.

¹⁶ *Id.* at 13. It is possible he testified before the board, although that testimony is not cited. Smith cited no evidence that the examination will delve into deeply buried, long forgotten, or overcome matters; that the request for an examination springs from corrupt motives; or the employee's pursuit of his claim has been chilled by intimidation.

¹⁷ *Terry L. Smith*, AWCB Decision No. 06-0134, 11-14. What factors the board should consider when deciding that the board may require a competent professional's review of the complete medical and psychological records to determine whether an employer-requested psychiatric examination under AS 23.30.095(e) should be prohibited (or how it should be limited) is not an issue before us and we do not decide it now. We do not endorse this board panel's reliance upon the list of factors cited from *Mary Ann Ammi v. Eagle Hardware*, AWCB Decision No. 05-0303, 10 (November 16, 2005), because we do not regard the list as an authoritative statement of the law. The *Mary Ann Ammi* panel cited *Donna Moffat v. Wire Communications, Inc.*, AWCB Decision No. 99-0034 (February 17, 1999) and *Brian J. Kelly v. Alaska Petroleum Contractors, Inc.*, AWCB Decision No. 91-0343 (December 24, 1991) in support of its list

compensation adjudication system that bases decisions on sound, tested, and relevant evidence. Because CSK Auto's request for a psychiatric examination was subjected to the board's review, Smith's complaint that the board's decision in his case differed from *Mary Ann Ammi* has no merit. Most importantly, the board has not yet required the examination that Smith asserts he should not have to attend. We see no fundamental disagreement in board opinions compelling our review.

Smith's objection to the examination because it is a forensic examination is without merit. The word "forensic" in this context does not imply a criminal investigation. It refers to scientific or technical evidence produced in a form "used in or suitable to courts of law."¹⁸

of considerations as to whether a diagnostic procedure or test is invasive and whether the ability of the employer to conduct the diagnostic procedure should be limited. *Brian J. Kelly* concerned an employee with Reiter's disease, a severe form of inflammatory arthritis, seeking to avoid giving a blood sample of less than one ounce for a "serum antibody tests could indicate whether a definitive prior infection resulted in the onset of Reiter's disease or whether the disease is not caused by environmental factors." The board did not list or discuss the factors cited by the board panel in *Mary Ann Ammi* in *Kelly*, and in *Kelly* the board ordered the employee to submit to the blood test, noting the employee had freely given blood to for other tests and his treatment: "In view of this, we do not believe he should now be able to use the invasiveness argument as a shield to keep us from obtaining evidence that may help us in deciding whether his condition arose in the course and scope of employment." *Brian J. Kelly*, AWCB Decision No. 91-0343, 3. *Donna Moffat* concerned an EMG exam, recommended by an employer medical examiner and the employee's own physician. The question was whether the employee could have the exam done by her physician at the expense of the employer. The *Moffat* panel held, "based on the AS 23.30.095(e), that an EME physician may not conduct a medically appropriate invasive diagnostic test, if Employee has not had a reasonable opportunity to have the test performed by his own physician." *Donna Moffat*, AWCB Decision No. 99-0034, 18. The *Moffat* panel did not list or discuss the factors listed in *Mary Ann Ammi*. More significantly, the issue of whether the test should be ordered at all was not before the *Moffat* board. Neither *Moffat* nor *Kelly* provide direct, relevant supporting authority for the adoption of the factors listed in *Mary Ann Ammi* and cannot be regarded as the source of the list.

¹⁸ *Black's Law Dictionary*, 676 (8th ed. 2004).

Conclusion.

For the reasons above, we conclude the employee failed to produce circumstances compelling extraordinary review of the board's May 25, 2006 order under 8 AAC 57.076. The motion for extraordinary review is DENIED and DISMISSED.

Date: 23 August 2006

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision of the Alaska Workers' Compensation Commission rejecting extraordinary review of a non-appealable order. It becomes effective when filed in the office of the Commission unless proceedings to appeal it or reconsider it are instituted. However, **this is not a final decision on the employee's workers' compensation claim.** By refusing to allow an appeal from the Board's interlocutory order, the Commission sent this case back to the Alaska Workers' Compensation Board to complete its proceedings on the claim.

Effective November 7, 2005 proceedings to appeal a Commission decision must be instituted in the Alaska Supreme Court within 30 days after this decision was filed and distributed by the Clerk 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. However, because this decision leaves the claim pending before the Alaska Workers' Compensation Board, and the Alaska Workers' Compensation Board has not issued its final decision on the claim, the Alaska Supreme Court might reject an appeal from this decision. A petition for review by the Supreme Court as provided by the Alaska Rules of Appellate Procedure must be instituted in the Alaska Supreme Court within 10 days after the date this decision was filed and distributed by the Clerk.

A person who wishes to appeal or petition for review of this decision by the Supreme Court should may wish to seek legal advice.

If you wish to appeal to the Alaska Supreme Court, or file a petition for review to the 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

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).

RECONSIDERATION BY THE COMMISSION

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 Memorandum Decision and Order in motion for extraordinary review filed by Terry L. Smith v. CSK Auto, Inc., Royal and SunAlliance, and Arctic Adjusters, Inc.; AWCAC Appeal No. 06-016; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 28th day of August, 2006.

Signed

Linda Beard, Deputy Appeals Commission Clerk

I certify that a copy of the foregoing Final Decision No. 017 in AWCAC Appeal No. 06-016 was mailed on 8/28/2006 to T. Smith, R. Griffin, the AWCB – Fbx, the AWCB Appeals Clerk, and the Director, Workers' Compensation Division at their addresses of record, and faxed to the AWCB – Fairbanks Office.

Signed 8/28/06
Linda Beard, Deputy Appeals Commission Clerk Date