

Alaska Workers' Compensation Appeals Commission

Terry L. Smith,
Movant,

vs.

CSK Auto, Inc., and Royal and Sun Alliance
and Wilton Adjustment Services,
Respondents.

Memorandum Decision

Decision No. 012 June 13, 2006

AWCAC Appeal No. 06-012

AWCB Decision No. 06-0054

AWCB Case No. 200106934

Memorandum Decision on Motion for Extension of Time and Motion for Extraordinary Review of Alaska Workers' Compensation Board Order No. 06-0054, 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 Wilton Adjustment Services.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By Kristin Knudsen, Chair:

Terry Smith again asks the commission to review a board decision affirming discovery orders that the board's designee, pre-hearing officer Sandra Stuller, made in a pre-hearing conference. Smith filed his motion for extraordinary review late. We deny his motion to accept the late-filed motion for extraordinary review in view of Smith's prior experience of filing a motion for extraordinary review and litigation, his failure to demonstrate good cause for his delay, and the exceptional nature of extraordinary review. Even if the motion were filed on time, we would deny the motion for extraordinary review for reasons we describe below.

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 and Sun Alliance, and its

adjuster, paid temporary total disability compensation and permanent partial disability compensation, medical benefits, and reemployment benefits to Smith.

Smith entered into a partial compromise and release (settlement) agreement that was approved by the board in 2002, but Smith petitioned the board to set aside the settlement agreement. His petition to set aside the settlement agreement was denied, and the board decision denying the petition¹ is currently on appeal to this commission.²

Smith also filed a claim for additional compensation and benefits. Smith's claim for additional compensation and benefits is still pending before the board. For purposes of that claim, as well as a third party action,³ Smith sought to compel discovery of certain materials from CSK Auto. After limits were placed on his discovery in a pre-

¹ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0053 (March 3, 2006).

² AWCAC Appeal No. 06-010.

³ Smith's first third party action was filed in Alaska Superior Court against CSK Auto, Inc., based on claims for (1) negligence, (2) fraud, (3) bad faith, (4) breach of contract, (5) violations of AS 18.60.075(a), (6) strict products liability, and (7) breach of warranty. *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 819, 24 IER Cases 471, 11 Wage & Hour Cas.2d (BNA) 676 (Alaska 2006), *rehearing denied* (May 05, 2006). Smith's claims arose out of his back injury, allegedly due to the use of a back support belt, and interference with the distribution of medical benefits to him after his injury. *Id.* This action was dismissed with prejudice following removal to the federal courts. *Id.* The U.S. District Court found Smith's claims to be barred by the exclusive remedy provisions of the Alaska Workers' Compensation Act and the relevant statutes of limitations. *Id.* That dismissal was appealed to the Ninth Circuit Court of Appeals. 132 P.3d at 820. Smith also filed a second action in the Alaska Superior Court, alleging the same complaints and adding three additional claims, including a claim for unfair dismissal. 132 P.3d at 819-820. The Superior Court dismissed the second action on grounds of *res judicata* and collateral estoppel. 132 P.3d at 820. Smith appealed to the Alaska Supreme Court, which affirmed the dismissal of Smith's repeated claims and two of the three additional claims, but reversed the Superior Court's dismissal of his claim for wrongful termination noting it was "likely that Smith's claim for wrongful termination requires different proof than his claims stemming from his physical injury." 132 P.3d at 823.

hearing conference by the board designee,⁴ Smith appealed the designee's detailed discovery order⁵ to the board.

The board affirmed the designee's determinations as "supported by reason," "supported by substantial evidence," and "reasonably well-tailored to the actual issues in dispute."⁶ 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.⁷ Smith then filed for reconsideration of the board's decision. In its decision on reconsideration, the board explained 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 This decision was the subject of Smith's first motion for extraordinary review to the commission. After a hearing, we denied the motion for extraordinary review.⁹

We noted in our decision that the board had alluded to other "wide-ranging" demands for information from Dr. Radecki by Smith,¹⁰ but these demands were not raised in the pre-hearing conference and were not the subject of the order reviewed by the board and which Smith asked the commission to review. Instead, those requests (a

⁴ AS 23.30.108 permits discovery disputes to be heard by a board designee in "prehearings" (pre-hearing conferences).

⁵ *Smith v. CSK Auto, Inc.*, AWCBC Decision No. 05-0281, at 2-3 (October 28, 2005).

⁶ *Id.* at 8-9.

⁷ *Id.* at 9.

⁸ *Smith v. CSK Auto, Inc.*, AWCBC Decision No. 05-0322, at 8 (December 9, 2005). In addition to specific items he wished produced, Smith asked the board for broad discovery of all matters relevant to Dr. Radecki because he wished to demonstrate that the physician was biased. In his argument to the commission, Smith challenged 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 *Smith v. CSK Auto, Inc.*, AWCAC Decision No. 002 (January 27, 2006).

¹⁰ AWCBC Decision No. 05-0322, at 7, 9. The specific demands were not described.

list of 13 items) were ruled on by the board's designee in another pre-hearing conference held December 7, 2005.¹¹ Smith appealed the designee's discovery order to the board;¹² the matter was heard on February 16, 2006, in the same hearing as his petition to set aside his settlement agreement.¹³ The board, finding no abuse of discretion, upheld the board designee's order in a decision issued March 3, 2006.¹⁴

Smith filed a motion for extraordinary review on May 4, 2006.¹⁵ The commission issued a docket notice informing him the motion was late and incomplete. Smith filed additional documents in support of his motion on May 12, 2006, including a motion to "except late filing." CSK Auto objects to the late filed motion and to the substance of the motion for extraordinary review.

Arguments to the commission.

Smith argues we should accept his late filed motion for extraordinary review because the decision affirming the discovery order (AWCB Decision No. 06-0054) was issued on the same day as the decision denying his petition to set aside his settlement agreement.¹⁶ He requested board reconsideration of the decision denying the set-aside, but now asserts he filed a notice of appeal listing both cases because "in

¹¹ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-054, at 5 (March 3, 2006).

¹² AS 23.30.108(c).

¹³ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0054, at 6 (March 3, 2006).

¹⁴ *Id.* at 10.

¹⁵ Smith states as grounds for extraordinary review (1) "whether Dr. Radecki C.V. is Discoverable per civil Rule 34," (2) whether Dr. Radecki must produce all his certificates and writings "as to his experience per his C.V.," (3) whether Dr. Radecki must produce his social security number and driver's license number "for a complete background check," (4) "whether Dr. Radecki can hide behind Civil Rule 26 Discovery," and (5) "whether it is up to the employee to gather information which is already in Dr. Radecki's possession." Smith, Statement of Grounds for this Extraordinary Review Appeal, filed May 4, 2006.

¹⁶ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0053 (March 3, 2006).

conjunction with his extra review as at the time of filing their was no decision in the Petition for review and employee did not want to lose his appeal rights in both decisions.” Smith’s notice of appeal was filed April 24, 2006; the board’s decision on reconsideration of AWCB Decision No. 06-053 was issued the same day.¹⁷

Smith asks us to review AWCB Decision No. 06-0054 because it is unfair that he must give information regarding his driver’s license and social security number but Dr. Radecki need not do so. He argues there is an “imbalance of discovery” that must be corrected.¹⁸ He argues the board’s decision requires review now because the issue of what is discoverable in curriculum vitae is applicable to “other up-coming cases” and the “complete and total investigation” of the doctor’s background is necessary before the hearing.¹⁹

CSK Auto argues that Smith, having previously filed a motion for extraordinary review, is familiar with the rules. He was not confused by waiting for a decision on the petition for board reconsideration because his petition was solely concerned with the decision denying the set-aside of his settlement agreement. His motion is late and there is no reason to excuse the delay in filing. Therefore, the commission should deny the motion to extend time for filing the motion for extraordinary review.

On the merits of the motion for extraordinary review, CSK Auto argues Smith has not produced “a single fact or circumstance” satisfying the commission regulations for extraordinary review. CSK Auto contends the board’s decision was correct and that

¹⁷ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0090 (April 24, 2006).

¹⁸ Smith asks the commission to “over turn an imbalance of discovery from a IME Dr who thinks he is invincible to discovery of the contents of his Curriculum Vitae and his personal self.” Employee’s Mem. For Extraordinary Rev., p. 1, filed May 12, 2006. Smith has a copy of the physician’s curriculum vitae. Smith presented no facts, argument, or legal rulings to support his assertion that the details of a witness’s personal life is relevant to his capacity to form an expert opinion or qualification to testify as an expert.

¹⁹ *Id.* at 3.

Smith has not been prevented from obtaining most of the information that he wants, which is as available to him as it is to CSK Auto.

Smith does not present good cause for delay in filing the motion for extraordinary review, so the late filing is not excused.

8 AAC 57.140(a) provides that the commission may, on motion of a party showing good cause, (1) extend the time period when an act must be done, either before or after its expiration, or (2) validate an act done after the expiration of the time period. Smith asks us to extend the period of time for filing his motion for extraordinary review.

8 AAC 57.072(a)(1) requires a motion for extraordinary review to be filed within 10 days after the date of service of the board order for which review is sought. In this case, the motion for extraordinary review should have been filed by Monday, March 13, 2006. Smith filed his incomplete motion for extraordinary review on May 4, 2006, nine days after the commission corrected the board decision number on the commission's docket notice of Smith's appeal of AWCB Decision No. 06-0053. At that point, his motion was 52 days late.

8 AAC 57.072(a)(2) requires a motion for extraordinary review to be filed "before the filing of a timely motion for reconsideration." Smith filed a timely motion for board reconsideration of AWCB Decision No. 06-0053, which did not address the issues in AWCB Decision No. 06-0054. He did not file a motion for reconsideration of AWCB Decision No. 06-0054. He filed a notice of appeal that listed both decisions on April 24, 2006. Thus, if his notice of appeal could have been considered as *initiating* a motion for extraordinary review, it was 42 days late.

Smith presented no reason for his delay in filing a motion for extraordinary review of AWCB Decision No. 06-054. He claims he filed a notice of appeal on April 24, 2006, because he wanted to preserve his right of appeal in both decisions, although the board had not issued a decision on his petition for reconsideration. This statement does not explain his delay in seeking review because he did not petition for reconsideration of AWCB Decision No. 06-0054. He also offers no explanation of why

he filed a notice of appeal of an interlocutory order instead of a motion for extraordinary review.²⁰

Smith is aware of the rules governing commission proceedings. He filed a timely motion for extraordinary review less than six months before this motion. In our decision on his first motion, we noted that orders on “petitions for Board action closely intertwined in, or arising from, preparation of a pending claim or portion of a claim for hearing are generally interlocutory and not final. Review of such orders by the Commission is limited to 8 AAC 57.72 -76.”²¹ That decision was issued only five weeks before AWCB Decision No. 06-0054.

Smith presented no facts or circumstances that prevented him from making a timely filing. It appears that he included a challenge to the discovery order in his appeal in an effort to avoid the consequences of his delay, since the prospect of an appeal in AWCB Decision No. 06-0053 is not a reason to delay a motion for extraordinary review in AWCB Decision No. 06-0054. He made no effort to show “good cause” as required by 8 AAC 57.140(a) to relax the time limit in 8 AAC 57.72(a)(1) in his favor.

In view of Smith’s extensive and recent experience as a litigant,²² his absence of an excuse for the delay and showing of good cause, the fact that AWCB Decision No.

²⁰ Had the board included its interlocutory orders in the same decision as the final decision on the petition to set aside the settlement, our decision here might be different. However, the board issued two orders, so that the differing subjects of the orders could be readily distinguished and reviewed separately. The board’s effort to maintain orderly documentation of the process in Smith’s case is commendable.

²¹ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 002, n. 5 at 4 (January 27, 2006).

²² Smith has filed three motions for extraordinary review and one appeal to this commission, as well as two Alaska Superior Court actions, one Alaska Supreme Court appeal, a petition for rehearing in the Supreme Court, and an appeal to the Ninth Circuit Court of Appeals, all arising out of the same injury.

06-0054 had become final²³ before Smith made any effort to obtain extraordinary review, and the exceptional nature of extraordinary review,²⁴ we decline to extend the time limit in 8 AAC 57.072(a)(1).

Smith's motion for extraordinary review lacks issues of sufficient merit to outweigh the sound policy favoring appeals from final decisions.

Even if we did permit Smith to file his motion for extraordinary review late, we would find his motion for extraordinary review does not present issues sufficiently compelling to outweigh the sound policy favoring appeals from final decisions.²⁵ The

²³ A compensation order becomes effective when filed with the office of the board as provided in AS 23.30.110, and, unless proceedings to reconsider, suspend or set aside the order are instituted as provided in AS 23.30, the order becomes final on the 31st day after it is filed. AS 23.30.125(a).

²⁴ Our adherence to the limits set on the commission's ability to grant extraordinary review reduces interference in the orderly advance of the board's dispute resolution process and thereby advances the policy of "quick, efficient, fair and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject" to the Alaska Workers' Compensation Act. AS 23.30.001(a).

²⁵ 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

(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;

crux of his complaint appears to be that the board refused to overturn the designee's refusal (1) to direct the employer or witness to provide materials (articles and the like) that are in the public domain or as available to Smith as to the employer; (2) to direct the witness to supply driver's license and social security numbers so that Smith can make a "complete and total investigation" of his background; and (3) to direct the employer or the witness to provide documents referred to or supporting every item on the witness's curriculum vitae (C.V.), including high school records and certificates.

Smith did not demonstrate that he is unable, after seeking the listed articles and publications through public institutions such as libraries or through publishers, to obtain the record of Dr. Radecki's published opinions and knowledge, so as to cross-examine him or undermine the weight of his opinion in Smith's own case. He did not demonstrate that knowing Dr. Radecki's driver's license and social security numbers will lead to information likely to be relevant in understanding, explaining, distinguishing, or undermining his professional opinion in Smith's case. Smith's argument for requiring Dr. Radecki to produce his driver's license and social security numbers may be reduced to: "Since I had to give mine, he should have to give his."²⁶

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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
 - (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.

²⁶ Rules that apply to employer witnesses also apply to employee witnesses. Injured workers would soon find difficulty obtaining medical treatment if their physicians were required to supply social security numbers and driver's license numbers for a background investigation of the kind that Smith wishes to conduct of Dr. Radecki. Smith's assertion of an "imbalance of discovery" hinges on his belief that he has been subjected to a more searching discovery process than Dr. Radecki. Smith, however, is the claimant seeking benefits from CSK Auto and its insurer. Dr. Radecki is a witness; he is not a party to the claim. Smith does not claim CSK Auto sought and obtained such personal information about Smith's witnesses. We also note that personal information may be relevant to distinguish public information regarding a claimant with a common family name such as "Smith" or for board record-keeping purposes.

Smith's Civil Rule 34 argument assumes the board must apply this Rule of Civil Procedure.²⁷ AS 23.30.115 provides that the testimony of witnesses may be taken by

²⁷ Alaska Rule of Civil Procedure 34 provides:

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

deposition or interrogatories “according to the Rules of Civil Procedure” but in other respects, as AS 23.30.135(a) provides, the board “is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter.” We understand Smith’s question as asking: Did the board improperly fail to reverse the designee for an abuse of discretion in refusing to issue orders (i.e., subpoenas) requiring production of certain documents by a person who is not a party to the claim?²⁸

The designee provided a detailed order responding to Smith’s 13 requests. The designee’s order declined to issue a subpoena to produce records to the employer or the witness for certain information and also determined that certain information (notably the witness’s driver’s license and social security numbers) bore no relevance to Smith’s claim. The board upheld the designee’s order applying an “abuse of discretion standard.” Since Smith was specifically provided an opportunity to return to the designee for a subpoena if he was unable to obtain relevant information from public

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

²⁸ AS 23.30.005(h) grants the board power to “examine or cause to have examined the parts of the books and records *of the parties to a proceeding* that relate to questions in dispute.” (emphasis added). However, AS 44.62.430(a) provides in part: “Before the hearing begins the agency shall issue subpoenas and subpoenas *duces tecum* at the request of a party in accordance with the rules of civil procedure. After the hearing begins the agency hearing a case or a hearing officer sitting alone may issue subpoenas and subpoenas *duces tecum*.” AS 44.62.430 is applicable to the board “where procedures are not otherwise expressly provided by the Alaska Workers’ Compensation Act.” AS 44.62.330(a)(12). 8 AAC 45.054(b) provides that “upon the petition of a party, the board will, in its discretion, order other means of discovery,” but does not list what those “other means of discovery” shall be or to whom they may be directed.

and institutional sources,²⁹ and Smith has not demonstrated that he is unable to obtain that relevant information without a subpoena, the question is not ripe for the commission to address it.

Review of the board's order at this time would necessarily require speculation. Smith presented no facts to support a commission finding that intervention is necessary to materially advance the ultimate termination of the claim, or that postponement will result in injustice, significant expense or undue hardship. Instead, review of the board's order at this time would hamper the ultimate termination of the claim and interject further expense and delay. Smith has not presented board decisions reflecting inter-panel conflict on a point of law important to his claim. Because the board left open the opportunity for Smith to return to obtain a subpoena if he is unable to obtain the relevant information he seeks, we do not find Smith presented facts suggesting a violation of board regulations or due process, or that the board deviated from its usual course of proceedings, so as to call for our review.³⁰ Finally, the question is capable of review in the future if the board affirms the board designee's denial of an appropriate petition.

Smith's arguments do not persuade us that the sound policy favoring appeals from final orders or decisions is outweighed in this case. Therefore, if the motion for extraordinary review of AWCB Decision No. 06-0054 had been filed on time, we would deny the motion for extraordinary review.

²⁹ *Smith v. CSK Auto, Inc.*, AWCB Decision No. 06-0054, at 10 (March 3, 2006). Smith did not demonstrate that the information he wanted regarding Dr. Radecki's publications or certificates was, in fact, in the employer's "possession, custody, or control." Most of the information is available to the public from government bodies, (e.g., licensing authorities), institutions, and publishers; Smith has as much opportunity and right to the information as the employer. In this sense, there is no "imbalance of discovery" as Smith claims.

³⁰ Smith does not challenge the abuse of discretion standard the board used to review the designee's decision, or the actual procedure used by the board to review the designee's decision, so we need not address it here.

Conclusion.

The motion for an extension of time to file a motion for extraordinary review is denied because the movant did not show good cause why an extension of time should be granted. The motion for extraordinary review is denied and dismissed as untimely.

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Dated: June 13, 2006

Signed

Philip Ulmer, Appeals Commissioner

Signed

Jim Robison, Appeals Commissioner

Signed

Kristin Knudsen, Chair

I certify that on 6/13/06 a copy of this Decision No. 012 was mailed to Smith and Griffin, and faxed to AWCB Appeals Clerk, AWCB-Fbx, Director WCD and Griffin.

Signed

C.J. Paramore
Appeals Commission Clerk