

Case: *Terry L. Smith vs. CSK Auto, Inc., Royal and Sun Alliance, and Wilton Adjustment Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 012 (June 13, 2006)

Facts: Smith moved for extraordinary review of the board's discovery decision. His motion was late.

The 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 Dec. No. 012 at 8-9.

Applicable law: Former 8 AAC 57.140(a) (amended in 2011) provides that the commission may "on motion of a party showing good cause, (1) extend the time period, either before or after its expiration; (2) validate an act done after the expiration of the time period."

Former 8 AAC 57.072(a)(1), repealed in 2011, requires a motion for extraordinary review (MER) to be filed within 10 days after the date of service of the board order for which review is sought.

Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).

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;

(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.

Issues: Did Smith timely file an MER? If not, did he show good cause for filing late? If so, should the commission grant the MER?

Holding/analysis: The commission denied the motion because he filed late and did not show good cause for doing so. The board issued two separate decisions on the same day, one denying his petition to set aside a settlement agreement and this one on the discovery decision. But the commission found Smith was well aware of the commission procedures, having properly filed an MER before the commission six months before, and he did not file a timely MER or appeal or give any reasons for the delay.

Nevertheless, the commission would have denied review anyway because none of the tests for review were met.

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. Finally, the question is capable of review in the future if the board affirms the board designee's denial of an appropriate petition. *Id.* at 12.

Notes: Smith sought extraordinary review two more times for other issues that resulted in commission decisions; *see* Dec. Nos. 002 and 017. Smith also appealed the board's decision denying his petition to set aside a partial compromise and release, Dec. No. 037, reversed by the Alaska Supreme Court, 204 P. 3d 1001 (Alaska 2009).

The commission's MER regulations, 8 AAC 57.072, .074, .076, were repealed effective 3/27/11. The commission enacted new regulations, 8 AAC 57.073, .075, .077, effective 12/23/11, providing for petitions for review of non-final board decisions based on similar but not identical criteria as those under the MER regulations.

The regulation on motions for extensions of time also was amended in 2011. It retained language requiring and defining good cause but it limited the amount of time an act can be done late when good cause is shown. The regulation was changed in other ways as well.