

Case: *Chena Hot Springs, LLC and Alaska National Insurance Co. vs. Barbara Elliott*, Alaska Workers' Comp. App. Comm'n Dec. No. 026 (January 11, 2007)

Facts: Chena Hot Springs sought extraordinary review of a board order permitting the employee's claim for benefits from May 15, 2004, and continuing, based on her physician's discovery of a "new condition." (The board dismissed the employee's earlier claims.) Elliott injured her shoulders dragging wet towels as a laundry worker in July 2002. The employer paid benefits until September 2003. An April 2004 MRI revealed a torn rotator cuff in the left shoulder and surgery was performed on May 17, 2004. Elliott filed a claim for benefits for the surgery on May 15, 2006. The board found her claim was timely filed as the torn cuff was a latent defect and she filed within two years of that surgery. Chena Hot Springs contended that the board erroneously applied the latent defect exception to the statute of limitations in AS 23.30.105(a).

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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

Issue: Should commission grant the motion for extraordinary review (MER) based on 8 AAC 57.076(a)(1) or (2)?

Holding/analysis: The commission denied the motion because ultimate review would not speed up the end of litigation because it would need to remand to the board for further findings. "It is not possible to say whether or not the board erroneously applied the statute of limitations in AS 23.30.105(a), as the board's findings of fact lack an explicit date of chargeable knowledge of latent injury or description of new injury. Thus, any appeal would necessarily require a remand for further findings of fact by the board." Dec. No. 026 at 10. "If the evidence supports an earlier date of chargeable

knowledge of the employee's claim, the employer may renew its petition to dismiss the allowed claim once the nature of Elliott's claim is better defined." *Id.* at 9.

Notes: The commission later granted an MER on the issue of defining latent injuries to apply a statute of limitations in *Sourdough Express Inc. v. Barron*, Alaska Workers Comp. App. Comm'n Dec. Nos. 028 (Jan. 17, 2007) (granting review) and 069 (Feb. 7, 2008) (deciding the merits). Unlike *Chena Hot Springs*, no remand was necessary in *Sourdough* and *Sourdough* included a second issue that the commission decided to review, whether invalid controversions trigger the running of a statute of limitations.

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.