

Case: *Alcan Electrical and Engineering, Inc. and Seabright Insurance Company vs. Michael Hope, and Redi Electric, Inc. and NovaPro Risk Solutions*, Alaska Workers' Comp. App. Comm'n Dec. No. 097 (January 23, 2009)

Facts: The motions for extraordinary review (MERs) arise from a board order at the conclusion of a hearing on a petition to join a second employer and request for a continuance. At hearing, the board verbally directed the second employer, Alcan Electrical and Engineering, Inc. (Alcan), be joined in the employee's claim against an earlier employer, Redi Electric, Inc. (Redi), and directed Alcan to pay temporary total disability (TTD) compensation under AS 23.30.155(d) until the claim was heard. In its written decision, the board ordered Redi to pay for a second independent medical examination (SIME) under AS 23.30.110(g).

Alcan asks the commission to stay the payments of TTD. It asserts that the board denied it due process because it failed to give notice and an opportunity to be heard before ordering payment. In addition, it argues the board failed to accord due process because no claim was filed against Alcan when payment was ordered. Finally, it asserts that the board violated its own procedures and regulations by considering evidence not in the record at the time of the hearing and by ordering an SIME with an examiner that had opined Alcan's employment was the substantial factor in bringing about the need for surgery.

Redi filed a cross-motion, asserting that its due process rights to notice and opportunity to be heard were violated by the board's order directing payment for an SIME without notice and opportunity to be heard.

The employee, Michael Hope (Hope), argued that the MERs should not be granted because *State, Department of Corrections v. Dennis*, Alaska Workers' Comp. App. Comm'n Dec. No. 036, 2-3 (Mar. 27, 2007), settled the issue underlying the objection to payment of TTD. He also argued that Redi's MER is defective because it fails to identify the relief it requests.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation), provides in relevant part:

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.

The commission may grant a stay of payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate it "would otherwise suffer irreparable damage," AS 23.30.125(c), and that the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful as to make . . . a fair ground for litigation and thus more deliberate investigation." *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992). Continuing future periodic compensation payments may not be stayed unless the appellant can show both irreparable harm *and* "the existence of the probability of the merits of the appeal being decided *adversely to the recipient* of the compensation payments." AS 23.30.125(c).

AS 23.30.110(a) gives the board authority to "hear and determine all questions in respect to a claim." But, the Alaska Supreme Court limited this grant of authority: "the language 'all questions' is limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

AS 23.30.155(d) provides in part:

When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

Dennis, App. Comm'n Dec. No. 036 at 11, explained that AS 23.30.155(d) relieves the employee of the wait for temporary compensation when there is no dispute that he is entitled to the compensation and the only dispute is which party is liable to pay the compensation. Dec. No. 097 at 9.

Issues: Should the commission grant the motion and cross-motion for extraordinary review under 8 AAC 57.76(a)(3) and/or (4)? Should the commission grant a stay of the SIME? Should the commission stay TTD payments?

Holding/analysis: The commission granted the motions under (a)(3) because the board made two orders apparently without giving the parties notice and an opportunity to be heard, i.e. Alcan was ordered to pay TTD, Redi was ordered to pay for an SIME,

and Hope was ordered to attend the SIME. The board may have violated its own regulation, 8 AAC 45.072(g), that limits it to deciding issues identified on the prehearing conference summary. Moreover, the board relied on *Dennis* but did not apply it completely as Redi was arguing it was not liable either because Alcan is liable or because Redi's employment was not a substantial factor in bringing about the need for surgery and resultant disability.

The commission also granted the motions under (a)(4). "The commission finds these are issues that may evade review, because the ultimate decision will result in an order of reimbursement or an award of the compensation paid under AS 23.30.155(d), leaving no relief that can be granted by appeal. The examination, once completed, cannot be undone nor, possibly, the cost reimbursed. Because the board ordered the examination and named the examiner without notice, a party is unable to challenge the examiner or need for examination as provided under 8 AAC 45.092." Dec. No. 097 at 11.

The commission stayed the SIME ordered under AS 23.30.110(g). Redi demonstrated irreparable harm because it had "no possibility of recovering the cost of the examination from the employee if [it and its insurer] prevail on appeal because the board's regulations provide that the cost must be borne by the employer. [Redi] may not recover the cost of the examination from the other employer, if it is found liable, because the cost of an examination under AS 23.30.110(g) is not a listed legal cost." Dec. No. 097 at 12-13. In addition, the employee is spared attending the SIME and an SIME could still be ordered under .095(k), if needed. Moreover, Redi met the "serious and substantial questions" test since the MERs were granted.

The commission denied the stay of TTD payments unless the board directed payments beyond the date of medical stability, in which case, the commission stayed the payments effective the date of medical stability. The commission found:

The movants present a strong argument that the board failed to provide adequate notice that it intended to take up the issue whether the employee is presently entitled to compensation and whether the sole dispute is which employer is responsible for payment. The movants argue they have strong defenses in the failure of the employee to file a claim and the statute of limitations. They argue there is some evidence in the concurrent receipt of unemployment insurance that the employee's disability is not total and the board disregarded this evidence. However, they presented no evidence or argument the employee will probably not be found to be entitled to compensation in the relevant period as a result of this appeal. Therefore, the majority cannot find that the movants met their burden of demonstrating it is probable that the outcome of the appeal will be adverse to the employee, who, in the majority's view, is the "recipient" of the ordered compensation. Dec. No. 097 at 15.

However, the commission stayed TTD payments after medical stability, anticipated to be six to eight weeks after the hearing, noting the "short period of payment mitigates,

in the majority's view, the hardship represented by the possibility that the movants will be unable to recover the payments made pursuant to the board's order." Dec. No. 097 at 16.

Dissent: One commissioner would have stayed the TTD payments because he believed the commission would likely overturn the TTD payments order under AS 23.30.155(d); thus, the appeal was likely to be decided adverse to Hope, even if Hope was ultimately found eligible for TTD. Without a stay, Alcan would suffer irreparable harm because it could not seek reimbursement from Hope and it may not be able to seek reimbursement from Redi if Redi was not liable to Hope. The commissioner agreed with the granting of the MERs and the stay of the SIME.

Notes: Dec. No. 112 (July 1, 2009) addresses the merits of the MERs.

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.