

Case: *J.C. Marketing, James Cottrell IV, Ohio Casualty, and Liberty Northwest vs. You Don't Know Jack, Inc., Republic Indemnity Company of America, Casualty Insurance Company, and Gilbert P. Siemens*, Alaska Workers' Comp. App. Comm'n Dec. No. 132 (March 30, 2010)

Facts: Gilbert Siemens (Siemens) reported injuring his lower back moving a pallet while working for You Don't Know Jack, Inc. (Jack) in April 2007. About a month later, he stopped working for Jack, was unemployed for about a week and then started a job with J.C. Marketing. In November 2007, Siemens filed a claim against Jack seeking medical treatment for the April injury. Jack argued in part that it was not the "last injurious exposure." Siemens acknowledged that his job duties at J.C. Marketing caused him pain but that he had suffered no new injuries to his lower back. In September 2008, Siemens and Jack stipulated to a second independent medical evaluation (SIME), agreeing that there was a medical dispute over causation of Siemens' lower back injury. In November 2008, Siemens filed a claim against J.C. Marketing. That same month, Dr. Blackwell conducted the SIME and issued a report. J.C. Marketing petitioned to strike the SIME from the record because it was denied procedural due process since it had no notice of the SIME and it should have been joined as a party to the claim earlier. The board denied the motion to strike, concluding that J.C. Marketing could either seek another SIME or depose Dr. Blackwell. J.C. Marketing sought extraordinary review.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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 the commission grant the motion for extraordinary review (MER) under (a)(2) or (a)(3)?

Holding/analysis: The commission concluded that the board had not “so far departed from the requirements of due process,” such that the commission should take up review. J.C. Marketing argued the failure to provide notice and an opportunity to participate in the SIME process violated due process. The commission did not decide if the board erred, but concluded that, even if the board erred, J.C. Marketing failed to demonstrate that it suffered prejudice in its ability to defend against the claim since J.C. Marketing had other opportunities to discredit Dr. Blackwell’s report.

Second, the commission agreed that the requirements for joinder and consolidation of claims raise an “important question of law on which there is substantial ground for difference of opinion” but denied review because deciding this question now will not advance the end of the litigation. Dec. No. 132 at 2. “J.C. Marketing is now a party, mooted the question of whether an employer may waive or be equitably estopped from asserting a last injurious exposure defense because of a persistent failure to seek joinder of a last injurious employer.” *Id.* at 11.

Note: 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.