

Case: *ASRC Energy Services, Inc. and Arctic Slope Regional Corporation vs. Jeffrey L. Kollman*, Alaska Workers' Comp. App. Comm'n Dec. No. 186 (August 21, 2013)

Facts: The employer sought review of two of the board's interlocutory orders that permitted the employee Jeffrey Kollman (Kollman) to have a witness present and record employer's medical evaluations (EMEs), and that Herbert A. Schwager, Ph.D., may be identified as a physician, as defined in AS 23.30.395(31). The commission granted interlocutory review, concluding that the employer's petition satisfied a criterion for that review. In this decision, the commission addresses the merits. In terms of Dr. Schwager's qualifications, the board found that Dr. Schwager holds a Ph.D. in psychology and is a licensed psychologist in Arizona. He is licensed in psychology by the National Register for Health Services. He is not a licensed psychologist in Alaska, but is certified as a licensed professional counselor.

Applicable law: AS 23.30.095(e) reads:

The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.

AS 23.30.395(31) reads: "physician' includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists[.]"

Issues: Did the board err in permitting the claimant to have a witness and record EMEs? Did the board err in identifying Dr. Schwager as a physician?

Holding/analysis: The commission held that “employees’ counsel may attend and record EMEs provided that, in their sole and unfettered discretion, the EME physicians agree to them doing so.” Dec. No. 186 at 10.

The commission concluded that AS 23.30.095(e) and the board regulation were silent on the issue of the witnessing and recording of examinations. The commission distinguished an Alaska Supreme Court (supreme court) case because the rule that case interpreted, Civil Rule 35, was substantially different than AS 23.30.095(e). The civil rule gave the court, rather than a party, the right to choose the doctor performing the examination.

The commission concluded that allowing the witnessing and recording of EMEs would have a chilling effect on the employer’s statutory right to choose the doctor because the employer could not choose a doctor who would not allow witnesses and recordings, and a survey indicated that a “significant percentage” of second independent medical evaluation doctors would refuse to do exams that were witnessed and recorded. The commission concluded that it would be unfair to allow the employee to have a witness (including counsel) present but not the employer.

The commission discussed two articles that indicated that the presence of an observer could taint the integrity of the examination process by causing the examinee to change his or her presentation to the examiner, and that involved third-party observers pose an ethical conflict in a neuropsychological exam. The commission concluded that medical considerations favored excluding witnesses from exams.

In addition the commission stated, “As a matter of respect for another profession, in this case, the medical profession, it is appropriate that we give the examiners the benefit of the doubt as far as the propriety of their examinations are concerned, unless and until they provide reasons not to.” Dec. No. 186 at. 9.

The commission concluded that the board properly identified Dr. Schwager as a physician because, although psychologists are not listed in subsection .0395(31), the supreme court has held they are physicians. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007).

Note: A petition for review of this decision has been filed with the Alaska Supreme Court.