Alaska Workers' Compensation Appeals Commission

City of Petersburg and Alaska Public Entities Insurance Co.,
Movants,

vs.

Michael Tolson,
Respondent.

Final Decision
Decision No. 096 January 22, 2009

AWCAC Appeal No. 08-021
AWCB Decision No. 08-0149
AWCB Case No. 200704166

Motion for Extraordinary Review of Post-Hearing Order issued July 7, 2008, by Robert Briggs, Chair, southeast panel; and of Interlocutory Decision and Order on Reconsideration No. 08-0149 issued on August 22, 2008, by southeast panel members Michael Notar, Member for Labor, Robert C. Weel, Member for Industry,[1] and Robert Briggs, Chair.

Appearances: Colby Smith, Griffin & Smith, for movants City of Petersburg and Alaska Public Entities Insurance Co. Michael Tolson, pro se, respondent.

Proceedings: Motion for extraordinary review filed July 16, 2008. Notice of hearing issued July 17, 2008, setting hearing date of August 5, 2008. Status conference held July 30, 2008. Hearing date vacated and proceedings suspended by order of the chair July 31, 2008. Motion to resume proceedings filed September 2, 2008. Status conference held September 12, 2008. Order resuming proceedings and consolidating motions for extraordinary review issued by the chair September 12, 2008. Notice of hearing issued September 18, 2008, setting hearing date of October 9, 2008. Notice received October 2, 2008, that board would hear petition for modification of decision issued August 22, 2008. Status conference held October 6, 2008. Hearing date vacated and status conference scheduled by chair October 6, 2008. Status conference

[1] Mr. Weel is a member of the "at large" panel, whose members may sit in any judicial district. AS 23.30.005(a).

held November 17, 2008. Status conference held 11, 2008. Hearing on motions for extraordinary review held December 18, 2008.

Appeals commissioners: Philip Ulmer, Jim Robison, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

This matter originated with a motion for extraordinary review of a decision issued July 7, 2008, by the board chair on a form titled "post-hearing order" after a May 13, 2008, hearing on the respondent's claim for compensation and medical benefits.[2] After the commission set the motion on for hearing, the board notified the commission that it had accepted a petition for reconsideration. Accordingly, after a brief status conference, the hearing date on the motion for extraordinary review was vacated. On August 22, 2008, the board issued an interlocutory order on reconsideration.[3] The movants moved to resume proceedings on the motion for extraordinary review and the commission reopened its proceedings on September 12, 2008. Again the motion was set on for hearing, and again the hearing date was vacated because the board gave notice that it was undertaking further proceedings. Finally, there being no further action from the board, and after two status conferences, the commission heard the motion for extraordinary review on December 18, 2008.

The movants claim that the board unjustly reopened the record in order to put questions to the physician, Dr. Bensinger, who performed the Second Independent Medical Evaluation (SIME), that the questions are not based on the appropriate legal standard, that the questions are based on facts not in the record, that the decision to reopen the record was not based on the record before the board, but the board members' own medical research and speculation regarding concurrent diagnoses on

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[2] The respondent, a harbormaster, claims compensation and medical benefits for an "epiretinal membrane" or "macular pucker" in his right eye after being capsized while attempting to sink a derelict.

[3] *Michael F. Tolson v. City of Petersburg*, Alaska Workers' Comp. Bd. Dec. No. 08-0149 (Aug. 22, 2008).

which the employer was barred from discovery. They argue that the board is improperly engaged in trying to find evidence to support the employee's claim, rather than deciding the claim on the basis of the record before it. The respondent argues that taking up a motion for extraordinary review will only further delay a final decision on his claim, which he asserts has already taken too long.

The parties' contentions require the board to determine if the board's order so far departs from the requirements of due process as to require immediate review. The commission concludes that the strong policy in favor of appeals from final decisions is not outweighed by the issues raised and the circumstances presented in this case. For the reasons set out below, the commission is persuaded that further delay will only add to possible due process concerns and provides guidance to the board.

1. Discussion.

The commission's authority to review interlocutory orders is limited and is not exercised lightly. Extraordinary review is appropriate only in circumstances where the board's actions are so erroneous or unjust, or so prejudicial to the requirements of due process that immediate review is necessary; or where postponement of review will result in injustice, unnecessary delay, significant expense or undue hardship; where immediate review may materially advance the termination of the litigation and the decision involves an important question of law on which there is substantial ground for difference of opinion or the board has issued differing opinions; or in cases involving issues that would likely otherwise evade review and an immediate decision is necessary to guide the board.[4]

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[4] 8 AAC 57.076(a) provides:

> The commission will consider and decide a motion under this section as soon as practicable. 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
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> (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;

As the commission said in *Kuukpik Arctic Catering, LLC, v. Harig,*

> When we examine a board decision for extraordinary review we do so without the record and hearing transcript. We cannot know all the facts before the board, so we act cautiously. We exercise restraint when we consider motions for extraordinary review in order to avoid officious intermeddling in the board process. We do not use extraordinary review to intervene merely because we think the board may have made an error.[5]

The movants have the burden to persuade the commission that the reasons for review outweigh the sound policy of allowing appeals only from final decisions.

> *a. Due process issues raised by the movants do not outweigh the strong policy favoring appeals from final decisions in view of the delay suffered by the parties and likelihood that a decision on the issues raised will not advance resolution of the claim.*

The movants' primary argument was that it would be unjust not to review the order because, failing review, the cost of another SIME report will be borne by the movants, and the board has demonstrated a failure to afford the parties due process by considering matters outside the record.

> (2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and
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> > (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;
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> (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
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> (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.

[5] Alaska Workers' Comp. App. Comm'n Dec. No. 038, 11 (Apr. 27, 2007).

The board panel stated that the chair's "post-hearing order" was issued improvidently.[6] Had the board not withdrawn the chair's order, the movants' argument would be much stronger. The question if the board may require an employer to produce an SIME examiner who is resident in another state to appear and answer questions in Alaska, when the board itself has no power to subpoena the resident of a sister state, is a serious question of due process regardless of the cost to the employer of such a proceeding.[7] However, the board did withdraw the improvident order, and relied on a written question procedure, albeit not timely undertaken, established by regulation.

The commission notes that the movants have preserved their objections to the board's further questioning of Dr. Bensinger. If the board's decision rests on matters outside the record, or not based on substantial evidence in the record, the commission may address any defects in the board's decision-making process on appeal. However, whether the respondent's eye was injured when the boat he was sinking capsized will not be resolved by a grant of extraordinary review,[8] and a decision on the claim will only be further delayed if extraordinary review is permitted. A decision at this time by the commission would not be based on facts – it would require the commission to return the case to the board for findings of fact and a decision, further delaying a decision on the merits of the claim for compensation while the appeals commission took

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[6] *Michael F. Tolson*, Bd. Dec. No. 08-0149 at 14.

[7] The board has the power to issue subpoenas and to request the Superior Court to enforce its subpoenas. AS 23.30.005(h). However, while extraterritorial jurisdiction over the claim is set out in AS 23.30.011, the board's ability to compel a witness to attend by subpoena is limited by the Alaska Superior Court's willingness and ability to enforce it. *See Geister v. Kids Corps, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 045, 17-18 (June 6, 2007).

[8] The movants ask that the commission dismiss the respondent's claim. The commission may not do so. First, whether the eye injury was caused by the employment is a question of fact committed to the board's authority. AS 23.30.122, .128(b). Second, if the commission granted extraordinary review, the relief granted would be to hear the appeal of the board's order. If the movants were successful on appeal, the commission could only affirm, reverse, modify, or vacate the order and remand the case so the board could issue a decision on the claim. AS 23.30.128(d).

jurisdiction. Review now would accomplish nothing but more delay in the final resolution of this case.

It is not enough to claim the board erred; the error must "so far [depart] from the accepted and usual course of the board's proceedings and regulations" as to require review and it must result in some prejudice to the movants that cannot await for correction on appeal.[9] While it is true that the board's order imposes the liability for more costs on the movants, and this is prejudicial to the movants, these are costs that might have been imposed before the record closed and the board reduced those costs in its order on reconsideration. Prejudice based on the board's action in reopening the record based on its own medical theories and research, or based on facts not in evidence, like prejudice resulting from findings of fact for which there is no substantial evidence in the record at the time of hearing, may be addressed in the course of an appeal. Here, the board has given notice of the issues it wishes addressed, albeit after the record closed and without *prior* notice that it would go outside the record of the case, and the board invited the parties to participate and offer questions to be addressed by Dr. Bensinger as well. In view of the prolonged delay that has already occurred, the commission is not persuaded that the board's actions compel commission review under 8 AAC 57.076(a)(3).

b. Effect of board delay in reaching a decision once the case has been heard.

At hearing of this motion, Appeals Commissioner Ulmer raised the issue whether the commission should permit review *because* the board has delayed so long in reaching a decision after the claim was heard and, as a result, the board's actions appear to make the process of adjudication unpredictable. The Supreme Court addressed the due process implications of delay in *Brandal v. State, Commercial*

[9] The demonstration of prejudice to the movant is a measure of the weight of the issues raised balanced against the sound policy favoring appeals from final orders or decisions and assures that asserted error does not result in officious intermeddling by the commission.

Fisheries Entry Comm'n.[10] Harry Brandal waited 22 years for an official denial of his application for a purse seine permit, but during that time he fished on a temporary permit. The court examined the following factors in determining whether an administrative agency's delay violated due process rights: the private interest affected by the administrative action,[11] the risk of error created by delay,[12] the governmental interest in, and justification for, the delay,[13] and whether the delay resulted in prejudice to a private interest.[14]

The Court said "all applicants – including those whose . . . applications are ultimately denied – have a procedural interest in the prompt and fair adjudication of their claims."[15] The legislature intended that the Alaska workers' compensation system should "ensure the *quick, efficient*, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter"[16] and "that all parties shall be afforded due process."[17] In workers' compensation cases, all parties have a procedural interest in a prompt, fair adjudication of claims; a property interest may exist where the employee is denied compensation until the board decides his claim in his favor or the employer is denied an end to liability until the board decides the claim in the employer's favor.

The commission does not equate the delay in this case with the two decades of delay in *Brandal,* nor was this issue raised in the motion for extraordinary review. In the absence of a board decision, the commission has no evidence of prejudice to the parties' interest except, as the respondent stated, the claim proceedings have been

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10 128 P.3d 732 (Alaska 2006).

11 *Id.* at 738-39.

12 *Id.* at 739.

13 *Id.*

14 *Id*. at 740.

15 *Id.* at 739.

16 AS 23.30.001(1).

17 AS 23.30.001(4)

"covered in cold molasses." He desires that the board "make a decision" so he "can get on with my life."

Without the record, the commission is unable to say that the risk of error has increased with delay in this case. Perhaps the board believes it is attempting to avoid possible error by investigating questions not raised by the employee, the employer, or the SIME examiner. Delay creates its own risks of error, as evidence and testimony presented at hearing are forgotten, requiring more time to review the record as the decision is prepared. If delay extends beyond a member's term, a new panel appointee must hear the evidence. In this case, the decision has been delayed far beyond the 30 days allowed by statute for the board to issue its decision[18] and more than 200 days have passed since the panel members heard the testimony and arguments. Although the commission does not identify a specific risk of error in this case, the commission reminds the board that the parties' have a due process interest in the prompt, fair adjudication of their claims and defenses, and that once the matter has been brought to hearing, the board's primary duty is to engage in fair decision-making on the evidence in the record.

2. Conclusion and order.

The commission is not persuaded that the strong policy favoring appeals of final decisions is outweighed by the issues raised by the movant. Review will *not* promote the termination of this litigation and it will prolong the board's already slow progress toward a decision on the merits of the claim for compensation. We therefore deny the motion for extraordinary review. However, in view of the impact of inordinate delay on the parties' rights, the appeals commission respectfully urges the workers' compensation board to expedite the proceedings.

[18] AS 23.30.110(c) provides in part, "Within 30 days after the hearing record closes, the board shall file its decision." The thirtieth day after the record closed on May 13, 2008, was Friday, June 13, 2008; the board chair's order reopening the record was not issued until July 7, 2008, 24 days later.

For the reasons set out above, the appeals commission DENIES the motion for extraordinary review.

Date: *22 Jan. 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision and order on whether the commission will grant extraordinary review of the board's interlocutory (non-final) decisions. This is a not a final decision on the merits of the workers' compensation claim in Mr. Tolson's workers' compensation case no. 200704166. The effect of this decision is that the commission decided not to review the board's orders before a final decision by the board. The movants may still appeal a final board decision on the claim. This decision becomes final on the 30th day after the commission mails or otherwise distributes this decision, unless proceedings to reconsider it or seek Supreme Court review are instituted.

Because this is not a final commission decision on the merits of an appeal from a final board decision, the Supreme Court may not accept an appeal. Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No decision as been made on the merits of this claim, but if you believe grounds for review exist, you should file your petition for review within 10 days after the date this decision was distributed. See the box below for the date of distribution.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts **immediately**:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

The commission will not rehear a motion for extraordinary review. 8 AAC 57.076(b). However, a party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. Reconsideration will not be granted if the party merely reargues the points argued on the motion for extraordinary review.

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of the Final Decision on Motion for Extraordinary Review in the matter of *City of Petersburg and Alaska Public Entity Insurance Co. v. Michael Tolson*, Appeal No. 08-021, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *22nd* day of *January*, 20*09*.

Signed
L. A. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION
I certify that on *1/22/09* I mailed a copy of this AWCAC Decision No. 096 to: M. Tolson (certified) & C. Smith, and faxed a copy to M. Tolson, C. Smith, AWCB Appeals Clerk, WCD Director, and AWCB Juneau (R. Briggs).

Signed
L. Beard, Appeals Commission Clerk