

Alaska Workers' Compensation Appeals Commission

Stephen Olafson,
Movant,

vs.

State of Alaska, Dep't of Trans. & Pub.
Facilities,
Respondent.

Memorandum Decision and Order

Decision No. 027 January 11, 2007

AWCAC Appeal No. 06-033

AWCB Decision No. 06-0301

AWCB Case No. 199017083

Motion for Extraordinary Review from Alaska Workers' Compensation Board Decision No. 06-0301, issued November 9, 2006 by the south-central panel at Anchorage, Krista M. Shwartzing, Chairman, Patricia A. Vollendorf, Member for Labor, and S. T. Hagedorn, Member for Management.

Appearances: Michael J. Jensen, Law Offices of Michael J. Jensen, for movant Stephen Olafson; Talis J. Colberg, Attorney General, and Joe Cooper, Assistant Attorney General, for respondent State of Alaska, Department of Transportation and Public Facilities.

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

Commissioners: John Giuchici, Chris N. Johansen, and Kristin Knudsen.

By: John Giuchici, Appeals Commissioner.

Stephan Olafson moved the commission to grant extraordinary review of the board's interlocutory decision to affirm the pre-hearing officer's refusal to appoint a new SIME despite the parties' stipulation and to decline to strike the Second Independent Medical Evaluation (SIME) report. Because we believe that review at this time will provide guidance to the board on an issue that will otherwise evade review, we grant extraordinary review.

Factual background and board proceedings.

The parties to this claim agreed to an SIME on January 26, 2006. The pre-hearing officer selected Dr. Charles Brooks to perform the SIME and scheduled the evaluation for March 27, 2006. The employee, Mr. Olafson, provided questions for the

SIME in February, expressing particular concern regarding any potential conflict of interest. The pre-hearing officer's appointment letter to Dr. Brooks asked him to disclose any previous medical evaluations performed on behalf of the employer, the State of Alaska, over the previous year; any other potential conflict of interest; and asked him not to begin reviewing the medical records before he revealed any potential conflict.

To avoid any such conflicts, on March 16, 2006, the parties stipulated that another physician, Dr. Paul Puziss, should perform the SIME. However, when the pre-hearing officer called Dr. Brooks to cancel the evaluation on March 20, 2006, he informed her that he had already spent "an extensive amount of time reviewing the medical records." Dr. Brooks also acknowledged that he had performed some evaluations for the employer, but not so large a number as to constitute a conflict of interest for him to perform the SIME. As a result, the pre-hearing officer decided that the SIME should go forward as originally scheduled with Dr. Brooks.

Following up on their conversation, on March 21, 2006, Dr. Brooks wrote to the pre-hearing officer on the conflict of interest issue. He reported that he had performed two recent employer medical examinations for the State of Alaska and that review of his computer records revealed another five such evaluations since he began doing work in Alaska in 2002. He stated that given the low volume of work that he had done for the State of Alaska, he did not believe there was any conflict of interest.

Mr. Olafson then filed an emergency petition to continue the SIME and wrote to the State of Alaska requesting that it provide a list of all the cases in which Dr. Brooks had been retained as an expert over the previous twelve months.

The SIME went ahead as scheduled on March 27, 2006. Mr. Olafson stated that at the examination, Dr. Brooks said that he had not yet reviewed all the medical records.

Mr. Olafson requested that the pre-hearing officer reconsider her decision about the SIME. The pre-hearing officer denied that request *because* she lacked authority to alter the decision about the appointment once made, without board approval.

On April 26, 2006, the State of Alaska disclosed that it had paid Dr. Brooks approximately \$66,000 for evaluations over the previous year and that six of the cases in which it had retained Dr. Brooks remained open.

Dr. Brooks issued his SIME report on May 20, 2006, concluding that Mr. Olafson had experienced a work injury, that he was not permanently and totally disabled and did not require retraining or ongoing medical treatment. The parties deposed Dr. Brooks on September 8, 2006. During his deposition, Dr. Brooks acknowledged that there might be an appearance of a conflict of interest given the amount of work he had done for the State of Alaska, but he repeated his assertion that he did not believe that there was a conflict and that he would not bias an opinion based on the volume of work he had done for a party.

On October 3, 2006, Mr. Olafson petitioned the board to strike Dr. Brooks's SIME and order a new SIME pursuant to the parties' stipulation, arguing that the pre-hearing officer abused her discretion in ordering that the SIME with Dr. Brooks go forward. On November 9, 2006, the board issued an interlocutory decision and order finding that the pre-hearing officer had not abused her discretion in ordering that the SIME go forward.¹ The board further determined that, although Mr. Olafson had raised genuine concerns about the impartiality of the SIME, those concerns affected the weight to be given to this evidence rather than its admissibility.² Thus, it declined to strike the SIME report.

Mr. Olafson now moves the commission for extraordinary review of board's interlocutory decision and order.

Discussion.

The commission's authority to review interlocutory orders is limited and we do not exercise that authority lightly. Such 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

¹ *Stephen Olafson v. State of Alaska*, AWCB Dec. No. 06-0301 (November 9, 2006).

² *Id.* at 8.

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 in cases involving issues that would likely otherwise evade review and an immediate decision is necessary to guide the board.³

Mr. Olafson argues that the board erred in determining that the pre-hearing officer did not abuse her discretion in rejecting the parties' stipulation that another doctor should perform the SIME; and that it was not an abuse of discretion to order that the SIME proceed on the basis of incorrect or incomplete information regarding Dr. Brooks's potential conflict of interest. He complains that the Board's approach to reviewing the pre-hearing officer's decision "removes any assurance that the SIME process be impartial and fair."

The State of Alaska objects on the grounds that the reasons advanced by the movant are not sufficiently compelling to justify review. In particular, the State of Alaska asserts that the parties' ability to argue both the SIME physician's alleged bias and credibility is not lessened, and that these issues should be considered at the hearing of the claim. The State of Alaska argues that Mr. Olafson's complaints go to the weight to be given to Dr. Brooks's findings, not their admissibility. Also, the State objects to the delay, which it approximates at six to ten months, that would be caused if we grant review.

The commission believes that whether, when, and on what grounds a party has a right to object to an SIME on the grounds of a conflict of interest is an issue that is likely to evade review. In order to preserve the issue for appeal, an appellant would need to demonstrate that the opinion of the SIME physician was relied on by the board, determinative of an outcome unfavorable to the appellant, and that the opinion was so tainted by the purported conflict of interest that the board ought not to have relied on

³ 8 AAC 57.076(a). *See also, David Berrey v. Arctec Services, AWCAC* Decision No. 009 (April 28, 2006) at 8.

it, or that another SIME physician's appointment would have resulted in a different outcome. We also note, that until a final decision is made by the board, it is difficult for the party objecting to an SIME to measure the party's actual harm. While it is possible that such an appeal may be presented, it is unlikely to be presented in the foreseeable future, while the board continues to be confronted by the issue of allegations of SIME conflict of interest. No board regulations explicitly address this problem. Therefore, the commission believes it may be able to provide guidance to the board by examining this case. The commission also agrees that the resolution of this issue will advance the ultimate termination of this litigation and may avoid substantial expense and delay to the parties. Mr. Olafson has raised issues on which there is substantial difference of opinion regarding the nature of the SIME process.

Conclusion and Order.

The movant presented compelling issues related to the role of the SIME physician and potential conflict of interest, which are likely to evade review, and in which the commission may provide guidance to the board. We GRANT the motion for extraordinary review, but only on the issues relating to the SIME process and the pre-hearing officer's actions.

The movant is ORDERED to file within fourteen days of the date of this order a notice of appeal limited to the appellant's challenges within the scope of the following questions:

1. Did the pre-hearing officer abuse her discretion by ignoring the parties' stipulation to chose another physician?
2. Did the pre-hearing officer abuse her discretion by not requiring the requested disclosure to the parties before the SIME took place?
3. Is there a right to object to a SIME on grounds of conflict of interest after the board chooses the SIME?
 - a. If so, what are the bounds of that right?
 - b. When can it be exercised?
 - c. What is the measure of a conflict of interest?
 - d. Does AS 39.52 apply to SIME panelists?

4. Did the pre-hearing officer fail to provide adequate explanation of her decision to proceed so that the board could review the decision?

The respondent may file a cross-appeal.

Date: 11 Jan. 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

John Giuchici, Appeals Commissioner

Signed

Chris N. Johansen, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final commission decision on the merits of this appeal from the board's decision and order. However, it is a final decision on whether the appellant is permitted to appeal the board's decision and order to this commission. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the merits of this appeal, 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 has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

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

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision and Order on Motion for Extraordinary Review, AWCAC Dec. No. 027, in the matter of *Stephen Olafson v. State of Alaska, Dep't of Trans. & Pub. Facilities*; AWCAC Appeal No. 06-033, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 11th day of January, 2007.

Signed

C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No.06-033 was mailed on 1/11/07 to M. Jensen, & J. Cooper at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, M. Jensen, & J. Cooper.

Signed

L. Beard, Deputy Clerk

1/11/07

Date