Alaska Workers' Compensation Appeals Commission

Regina B. Sellers,
Movant,

vs.

State of Alaska, Department of Education and Early Development,
Respondent.

Memorandum Decision and Order
Decision No. 043 May 25, 2007

AWCAC Appeal No. 07-007
AWCB Decision No. 07-0045
AWCB Case No. 200202187

Memorandum Decision on Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 07-0045, issued March 7, 2007, by the south-central panel at Anchorage, Krista M. Schwarting, Chair, and John A. Abshire, Member for Labor, Mark Crutchfield, Member for Industry, concurring.

Appearances: William J. Soule, Attorney at Law, for movant Regina Sellers. Talis J. Colberg, Attorney General, and Patricia K. Shake, Assistant Attorney General, for respondent State of Alaska, Department of Education and Early Development.

Commissioners: Andrew M. Hemenway, Jim Robison, Philip E. Ulmer.

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

By: Andrew M. Hemenway, Chair *Pro Tempore*.

Introduction.

Regina Sellers, an employee of the State of Alaska, Department of Education and Early Development, filed a motion for extraordinary review of a board Interlocutory Decision and Order dated March 7, 2007. The State of Alaska opposes the motion.

We grant the motion for extraordinary review.

Underlying Facts and Proceedings[1]

Regina Sellers has been an employee of the State of Alaska since June, 1996. On February 7, 2002, she filed a report alleging a repetitive motion injury. That report of injury is the subject of AWCB Case No. 200202187 [hereinafter, "the 2002 case"].[2] In November, 2002, and again in November, 2003, Ms. Sellers had shoulder surgery to address her symptoms. Temporary disability payments were paid off and on from November, 2002, through July, 2004. On January 28, 2004, and June 9, 2004, following her second surgery, Ms. Sellers's treating physician provided a permanent partial impairment rating for carpal tunnel syndrome.[3] [Pet. at 1, ¶4]

Ms. Sellers's employer conducted an employer's medical examination on December 11, 2004, and on January 3, 2005, controverted all benefits in the 2002 case. On January 7, 2005, through counsel, Ms. Sellers filed a claim in that case,[4] seeking temporary total disability payments for December 15-17, 2004, permanent partial impairment benefits for her neck condition when stable and rated, and medical benefits for her neck condition and carpal tunnel syndrome.[5]

The parties stipulated to a second independent medical examination. Following the second independent medical examination by physiatrist Dr. Judy Silverman on April 27, 2005, Ms. Sellers was diagnosed with myofascial pain syndrome involving her right arm, shoulder and neck, resulting from her employment. Dr. Silverman found that Ms. Sellers was not medically stable and deferred a permanent partial impairment rating for that reason.[6]

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[1] We summarize the facts as they appear on the basis of the limited record and pleadings before us, to provide a context for our ruling. We make no independent findings of fact.

[2] *See* 8 AAC 45.032.

[3] Pet. at 1-2.

[4] See 8 AAC 45.032(5).

[5] Pet. at 2-3; Opp. at 2, n. 1.

[6] Pet. at 3; Opp. at 2.

More than one year later, on June 21, 2006, Ms. Sellers overdosed on prescription medicine in an apparent suicide attempt. She was treated at Alaska Regional Hospital's emergency room. On June 26, 2006, Ms. Sellers filed a report of injury alleging a work-related mental injury on June 21, 2006. Among other things, Ms. Sellers attributed her injury to "living in physical pain daily for several years."[7] The June 26, 2006 report of injury is the subject of AWCB Case No. 2006059494 [hereinafter, "the 2006 case"].

Assistant Attorney General Patricia K. Shake, who was representing the State of Alaska in connection with the 2002 case, contacted the office of William Soule, Ms. Sellers's attorney in that case, and asked if he represented Ms. Sellers with respect to the June 21, 2006, injury. Mr. Soule responded in writing on July 21, 2006, stating that he did not represent Ms. Sellers with respect to any injury arising on June 21, 2006, noting that benefits for that injury had not been controverted, and authorizing opposing counsel to speak directly with Ms. Sellers regarding the June 26, 2006, report of injury.[8]

That same day, an adjuster wrote to Ms. Sellers, notifying her that an employer's medical examination regarding the June 21, 2006, injury had been scheduled with Dr. John Hamm for August 22, 2006. On August 11, 2006, Ms. Shake wrote to Dr. Hamm, identifying the 2002 case (*not* the 2006 case) as the subject of the letter.[9] The letter described the nature of the 2002 report of injury and the course of events in the 2002 case and noted that Ms. Sellers had filed another report of occupational injury in 2006. The letter characterizes the 2006 report of injury as alleging two types of compensable mental injury to Ms. Sellers arising from her employment with the State of Alaska: first, a mental injury resulting from chronic pain caused by the 2002 physical injury; and second, a mental injury caused by work-related stress.[10]

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[7] Ex. A.

[8] Ex. B.

[9] Ex. C at 1.

[10] Ex. C at 3.

The letter then asked Dr. Hamm (a psychiatrist) to answer a series of 15 questions concerning Ms. Sellers's mental health.[11] Nine of the fifteen questions expressly ask Dr. Hamm to address the connection, if any, between Ms. Sellers's 2002 injury and her current mental health.[12] Seven of those nine questions seek Dr. Hamm's opinion as to whether Ms. Sellers's 2002 injury was a causal factor in her current mental condition.[13] Two of them seek Dr. Hamm's opinion as to whether Ms. Sellers's current mental condition was a causal factor in her recovery from the 2002 injury or in her alleged chronic pain: Question 14 states, "Please describe the impact of Ms. Seller's [*sic*] psychological status on her ability and motivation to recover from her work injury of February 5, 2002, to comply with treatment and return to work"; Question 15 states, "Please feel free to make any additional comments or observations regarding the relationship between or impact of Ms. Seller's [*sic*] mental conditions and the work injury of February 5, 2002. If possible, please address whether any of the mental conditions diagnosed are responsible for Ms. Seller's [*sic*] continued complaints of pain and need for treatment."

Dr. Hamm provided an employer's medical examination report dated August 22 and September 5, 2006.[14] The report states that it is an evaluation and record review for Claim No. 200202187, with a date of injury of February 5, 2002.

Dr. Hamm concluded that Ms. Sellers has a history of recurrent depression, currently in remission with medication, and that the 2002 injury was not a substantial factor in causing "the major depression." In response to Questions 14 and 15, Dr. Hamm offered the opinion that Ms. Sellers's current mental condition does not impair her ability or motivation to recover from her 2002 work injury, and that

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[11] Ex. C at 4-6.

[12] Ex. C, questions 2, 3, 7, 9, 10(c), 11, 14, 15.

[13] Ex. C, questions 2, 3, 7, 9, 10(c), 11.

[14] Ex. D.

Ms. Sellers "does not have a psychiatric condition responsible for her complaints of pain [arising from the 2002 injury]."[15]

Upon receipt of Dr. Hamm's report, the employer controverted all benefits relating to Ms. Sellers's 2006 report of a mental health injury. In addition, the employer included Dr. Hamm's report in a medical summary of records for the 2002 case and served a copy of the report on Mr. Soule.

Upon reviewing Dr. Hamm's report, on October 20, 2006, Mr. Soule filed a motion to strike the report from the medical summary in the 2002 case. Mr. Soule argued that the report is not relevant because Ms. Sellers's mental health is not at issue in the 2002 case, and that the board should strike the report because the employer had obtained it without notification to Ms. Sellers that the report would be utilized in the 2002 case. Following briefing and argument, on March 7, 2007, the board denied the motion.

The board's decision notes that, in general, the record "should be open to all evidence 'relative' to a claim."[16] The board concluded that Dr. Hamm's report was relevant "to the employee's claim, as the employee partially attributed her mental stress to chronic physical pain and other work-related problems."[17] The board observed that Ms. Sellers's "legitimate concerns regarding the use of [Dr. Hamm's] report in the 2002 case" went to the weight to be afforded the report, not to its admissibility.[18] The board concluded that Ms. Sellers's objections to the lack of notice that the report could be used in the 2002 case should be the subject of cross-examination and argument at hearing in the 2002 case.[19]

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[15] Ex. D at 11, ¶¶11, 12.

[16] AWCB Dec. No. 07-0045 at 6, n. 20, citing *Yarborough v. Fairbanks Resource Agency, Inc.*, AWCB Dec. No. 01-0229 (November 15, 2001).

[17] *Id.*, citing AS 23.20.107(a) and Report of Injury (June 26, 2006).

[18] *Id.*, at 7.

[19] *Id.*

Issues Raised for Review

1. Did the board abuse its discretion in concluding that Dr. Hamm's report is or may be relevant?

2. Did the board abuse its discretion in failing to strike the report in whole or in part as a sanction?

Grounds Asserted for Review

Pursuant to 8 AAC 57.076(a), the commission will, in its discretion, grant a motion for extraordinary review when the sound policy favoring appeals from final decisions or orders is outweighed because (1) postponement of review will result in injustice and unnecessary delay, significant expense, or undue hardship; (2) immediate review may materially advance the ultimate termination of the litigation and the order involves an important question of law on which (A) there is a substantial ground for difference of opinion, or (B) board panels have issued differing opinions; (3) the board has so far departed from the accepted and usual course of proceedings or the requirements of due process as to call for the commission's power of review; or (4) the issue would otherwise likely evade review and an immediate decision is needed for the guidance of the board.

Ms. Sellers asserts that review is appropriate in light of subsections (1), (2)(A), (3) and (4); the State argues that review is not warranted.

With respect to 8 AAC 57.076(a)(4), Ms. Sellers asserts that inclusion of Dr. Hamm's report is error that is capable of repetition yet evading review. [Pet. at 7] The State contends that the board's ruling is "not sufficiently unique" to warrant discretionary review. [Opp. at 13-14]

As we have observed, "we do not exercise extraordinary review lightly."[20] The State suggests that granting review "could result in the proliferation of discretionary

[20] *David Berrey v. Arctec Services*, AWCAC Dec. No. 009 at 8 (April 28, 2006).

appeals concerning evidentiary rulings by the Board."[21] But evidentiary rulings by the board during the course of a hearing are quite distinct, procedurally, from decisions governing the creation of a record for review by the board's own second independent medical examiner. The issues raised in this case concern not only the relevance of Dr. Hamm's medical report, but also the manner in which the record provided to a second medical examiner is created and the board's role in ensuring that appropriate procedures are adhered to. These are matters of general importance; they are capable of repetition, and would likely evade review.[22] Review at this time will provide useful guidance to the board. We conclude that under the facts of this case, review is warranted under 8 AAC 57.076(a)(4).[23]

Discussion

Ms. Sellers argues that the board erred in two respects: first, in concluding that Dr. Hamm's report is relevant [Pet. at 11-12]; second, in declining to strike it as a sanction for the manner in which it was obtained. [Pet. at 8-10] The employer argues that the report is relevant [Opp. at 11-12] and that it was obtained following appropriate procedures. [Opp. at 12-13]

We exercise our independent judgment regarding the scope and interpretation of AS 23.30.095(e), 2 AAC 45.052, and 8 AAC 45.120(e). We review the board's determination to include or exclude evidence from the record for abuse of discretion.[24]

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[21] Pet. at 11.

[22] *Cf. Olafson v. State, Dep't of Trans. and Pub. Facilities*, AWCAC Dec. No. 027 at 4-5 (January 11, 2007).

[23] Because we conclude that review is warranted under 8 AAC 57.076(a)(4), it is not necessary to address the applicability of 8 AAC 57.076(a)(1)-(3).

[24] The employer argues that the board's determination that the medical report is relevant is factual, and therefore not subject to review in the context of a motion for extraordinary review, citing *Berrey v. Arctec Services*, AWCAC Dec. No. 009 at 10, n. 20 (April 28, 2006). [Opp. at 9]

Contrary to the employer's assertion, a determination that evidence is relevant is not a factual finding: it is a legal conclusion, reviewed for abuse of discretion. *See Bachner v. Rich*, 554 P.2d 430, 446 (Alaska 1976).

The decision to impose, or not to impose, a sanction for violation of procedures mandated by AS 23.30.095(e) is likewise reviewed for abuse of discretion.

A. Relevance

Ms. Sellers argues that Dr. Hamm's report is not relevant, because her mental health is not at issue in the 2002 case. She points out that she has not sought benefits in the 2002 case for any mental health injury, and that the employer has not controverted the claim in the 2002 case based on an allegation that her disability is the result of, or affected by, a mental health condition. [Pet. at 11]

The employer responds that Ms. Sellers placed her mental health at issue when she filed a 2006 report of a mental health injury attributing that injury, in part, to the physical condition that is at issue in the 2002 case. [Opp. at 7]

Evidence is relevant when it has a tendency to make the existence of a fact that is of consequence to the determination of the case more or less probable.[25] A determination that evidence is relevant, therefore, involves two steps: first, identification of a factual question that is of consequence to the determination of the case; and second, demonstration of a logical connection between the evidence to be admitted and the resolution of that factual question.[26]

In some cases, the determination of relevance may turn on the existence or non-existence of specific facts. *See* Evidence Rule 104(b). However, in this case, the board did not make *any* factual findings regarding admissibility, other than to note in passing that in her 2006 report of injury "the employee partially attributed her mental stress to chronic physical pain and other work-related problems." AWCB Dec. No. 07-0045 at 6. That Ms. Sellers attributed her mental injury, in part, to chronic physical pain is not disputed. It is the significance of that the employee's attribution that is in dispute, not its existence.

[25] *See* Evidence Rule 401. Under 8 AAC 45.120(e), the technical rules of evidence do not govern, but admissibility is limited to relevant evidence. The concept of relevance is a logical one; we see no reason to interpret the term as it is used in 8 AAC 45.120(e) any differently than as it is used in the Alaska Evidence Rules.

[26] *See Poulin v. Zartman*, 541 P.2d 352, 260 (Alaska 1975) ("The dual concepts of logical relevance, *i.e.*, some tendency to establish the ultimate point for which the evidence is offered, and materiality, *i.e.*, germaneness of the ultimate point to issues in the trial, have been emphasized repeatedly in our opinions."); *Boling v. Municipality of Anchorage*, AWCB Dec. No. 06-0011 at 13 (January 13, 2006).

The board's decision in this case concludes that Dr. Hamm's report is relevant to the employee's claim, "[because] the employee partially attributed her mental stress to chronic physical pain and other work-related problems." [Dec. at 6] But Ms. Sellers made that attribution in the *2006* case, in connection with a claim for disability resulting from an alleged mental health injury. The factual question raised by Ms. Sellers's 2006 report of injury is this: Was Ms. Sellers's chronic pain from the 2002 physical injury a substantial factor in her 2006 mental condition? That is not a question whose resolution is of consequence to the determination of the 2002 case, because (so far as can be discerned from the limited record before us) Ms. Sellers has not made any claim for medical benefits for mental health treatment in the 2002 case, she did not in the 2002 case assert that she has a disabling mental health injury, and the employer has not controverted the 2002 claim on the ground that her alleged injury is the product of a mental health condition.

The employer argues that notwithstanding the lack of any allegation in the pleadings in the 2002 case *by either party* that creates a factual issue regarding the existence of a mental health condition, evidence of Ms. Sellers's mental health developed in connection with the 2006 case is relevant in the 2002 case. The employer asserts that parties and the board "routinely consider evidence developed in other claims when assessing an employee's current entitlement to benefits." [Opp. at 11] As an example, the employer hypothesizes a case in which an employee has separate work injuries to her back and knee, neither of which would in itself permanently preclude the employee from working but which, taken together, might have that effect. [Opp. at 11-12] Or, the employer suggests, consider AS 23.30.190(c), under which a permanent impairment rating for a particular injury must be reduced by a pre-existing impairment. [Opp. at 12]

As both of the employer's analogies suggest, a *prior* injury is *frequently* relevant to a *subsequent* claim. But this does not mean that a *subsequent* claim is *always* relevant to a *prior* injury. To demonstrate in a particular case that the subsequent claim is relevant to the prior injury, it is incumbent on the party asserting its relevance to establish that there is a logical connection between the two, such that evidence

regarding the subsequent claim will make more or less likely the existence or non-existence of a fact of consequence to the determination of the prior case.

The board's decision does not identify a basis in the pleadings or in the record for a conclusion that Ms. Sellers's mental health is of consequence to the determination of the 2002 case, and we are unable to discern one from the limited record before us. In the absence of the full record, we express no opinion as to whether the board's ruling was an abuse of discretion.

B. Sanction

AS 23.30.095(e) allows an employer to conduct, without authorization from the employee, two employer's medical examinations in a case. In the 2002 case, the employer conducted employer's medical examinations by Drs. Radecki and Schrader on December 11, 2004. The employee contends, and the employer does not dispute, that the employer may not conduct another employer's medical examination in the 2002 case without the employee's consent.

Ms. Sellers argues that Dr. Hamm's report should be stricken as a sanction for the employer's failure to follow appropriate procedures in obtaining it: She argues that Dr. Hamm was solicited to provide a report regarding the 2002 case, contrary to AS 23.30.095(e). [Pet. at 8-10] She points out that the board has in the past stricken from the record medical reports obtained in violation of AS 23.30.095(e), as a sanction for failure to follow appropriate procedures, even though the report may be relevant.[27] [Pet. at 9]

In response, the employer admits that its letter to Dr. Hamm requesting an evaluation specified the 2002 case as the subject of the inquiry. The employer contends, however, that its reference to the 2002 case was mistaken and that the actual purpose of the letter to Dr. Hamm was to conduct an employer's medical evaluation and render opinions for use in the 2006 case, not the 2002 case. [Opp. at 7]

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[27] *See, e.g., Withrow v. Crawford & Co.*, AWCB Dec. No. 00-0162 (July 28, 2000), *appeal dismissed* (Super. Ct. No. 4FA -01911-Civ.), *rev'd*, *Crawford & Co. v. Baker-Withrow,* 81 P.3d 982 (Alaska 2003).

It is undisputed that the employer failed to obtain the employee's consent for an employer's medical examination by Dr. Hamm in the 2002 case. The employer's letter to Mr. Soule does not purport to seek Mr. Soule's consent to discuss the 2002 case with the employee or to conduct a medical examination regarding the 2002 case, and Mr. Soule, in response to the letter, did not provide authorization for the employer to contact the employee regarding the 2002 case or to conduct an employer's medical examination concerning the 2002 case. When the employer subsequently contacted Ms. Sellers and requested her to attend an employer's medical examination, the employer represented to Ms. Sellers that the examination was in connection with the 2006 case, not the 2002 case.

Despite having represented to both the employee and her attorney that the employer's medical examination was for purposes of the 2006 case, the employer's letter *to Dr. Hamm* expressly identifies its subject as the 2002 case. Furthermore, Question 14 and Question 15 solicit Dr. Hamm's opinion regarding facts of direct consequence to the 2002 case that are of no apparent consequence to the 2006 case. On the limited record before us, the employer's medical examination conducted by Dr. Hamm could reasonably be characterized as in violation of AS 23.30.095(e).

The board acknowledged that Ms. Sellers has "legitimate concerns regarding the use of [Dr. Hamm's] report in the 2002 case," but concluded those concerns should go to the weight and not the admissibility of the report.[28] Whether a sanction should be imposed is a question concerning admissibility, not the weight of the evidence. The board's decision avoids the procedural question raised by Ms. Sellers's concerns, rather than resolving it, and we are unable to determine on the limited record before us whether the denial of the motion to strike was an abuse of discretion.

Conclusion and Order

The employee has raised important issues which are likely to evade review, and a decision will provide useful guidance to the board. We therefore GRANT the motion for extraordinary review, to the extent that the movant is permitted to file an appeal on

[28] AWCB Dec. No. 07-0045 at 7.

the issues raised in the motion for extraordinary review as identified in this decision. We express no opinion on the merits of the board's decision to deny the motion to strike.

The movant is ORDERED to file a notice of appeal as permitted above within 14 days of this order. The respondent may file a cross appeal.

Date: *May 25, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Andrew M. Hemenway, Chair Pro Tempore

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

APPEAL PROCEDURES

This is a 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 movant may 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.

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 in Regina Sellers vs. State of Alaska, Department of Education and Early Development, AWCAC Appeal No.07-007, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *25th* day of May, 2007.

Signed
Linda Beard, Deputy Appeals Commission Clerk

I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No. 07-007 was mailed on *May 25, 2007* to:
William Soule,
Patricia K. Shake,
at their addresses of record and faxed to
W. Soule, P. Shake, AWCB Clerk, & WCD

Signed
Linda Beard, Deputy Appeals Commission Clerk Date *May 25, 2007*