

Case: *Municipality of Anchorage and Ward North America vs. David N. Syren*, Alaska Workers' Comp. App. Comm'n Dec. No. 007 (March 7, 2006)

Facts: The commission stated, "This motion for extraordinary review raised questions relating to the structure of discovery in workers' compensation proceedings, the board's obligations, and the commission's powers." *Id.* at 1. The commission discussed in detail only one issue – a concern that the board may not have compelled enforcement of a board subpoena.

Regulation: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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.

The commission also stated "our ability to undertake extraordinary review of an interlocutory decision is limited and we will not exercise it lightly." *Id.* at 1.

Issue: Should the motion for extraordinary review (MER) be granted?

Holding/analysis: "Because the parties are dependent on the board or department for enforcement of the only means of compelling discovery from non-parties, we will examine the board's enforcement of its subpoenas in light of the requirement that parties be afforded a fair hearing and due process. A subpoena for documents that may be relevant to a claim, or the defense of a claim, without enforcement by the board is useless. Refusal to enforce a subpoena may undermine the right to an opportunity to have evidence fairly considered at hearing. However, on the facts presented, we conclude review is premature." *Id.* at 4-5. It seems review was premature because the subpoena issue was moot since the board ultimately issued a protective order limiting the release of the records at the request of the employee and the commission decided not to take up extraordinary review of the protective order. Mostly, this case stands for

a warning to the board that it should enforce its subpoenas or, if it doesn't, the commission will probably be willing to take up extraordinary review.

Notes: Syren sought attorney fees before the commission, an issue decided in Comm'n Dec. No. 015.

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.