Alaska Workers' Compensation Appeals Commission

BP Exploration Alaska, Inc. and ACE USA,
Movants,

vs.

Sherry Stefano,
Respondent.

Final Decision
Decision No. 076 May 6, 2008

AWCAC Appeal No. 08-003
AWCB Decision No. 08-0011
AWCB Case No. 200603870

Motion for Extraordinary Review of Alaska Workers' Compensation Board Decision No. 08-011, interlocutory decision and order issued January 9, 2008, by northern panel members William Walters, Chairman, and Damian J. Thomas, Member for Labor.

Appearances: Robin Gabbert, Russell, Wagg, Gabbert, and Budzinski, P.C., for movants BP Exploration Alaska, Inc. and ACE USA. Timothy B. MacMillan, Esq., for respondent Sherry Stefano.

Commission proceedings: Oral argument on motion for extraordinary review presented March 4, 2008.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The movants ask the commission to review a board decision denying an appeal from the workers' compensation officer's grant of the employee's petition for a protective order, thus barring the movants from requiring the employee to attend an employer medical evaluation by a psychiatrist. The board's decision does not preclude a petition to lift the protective order upon amendment of the employee's claim or establishment of grounds to require such an evaluation based on an employee defense to an employer petition for suspension or termination of reemployment benefits. Although the board's decision reveals a strong possibility of errors of law, immediate

review is not likely to advance the ultimate termination of the litigation or prevent injustice and unnecessary delay, significant expense, or undue hardship. Therefore, the motion for extraordinary review is denied.

1. Factual background and board proceedings.

The facts are drawn from the parties' pleadings and the board's decision.[1] They are summarized here to provide context to the commission's decision.

Sherry Stefano was employed by BP Exploration when she reported an injury in 2006 to her right upper arm and shoulder.[2] Dr. Wickler performed surgery on her right shoulder in April 2006.[3] At the end of 2006, Stefano reported to her physician having "migraine" headaches that Stefano "clearly tied . . . to the stress of the workers' comp issues" and of dealing with the case management nurse retained by BP Exploration's adjuster.[4] To a physical therapist, Stefano expressed anxiety about her job being "given away" and "harassment" by the nurse.[5]

In April 2007, Stefano requested reemployment benefits, and the reemployment benefits administrator assigned Mark Kimberling to perform her eligibility evaluation. Stefano requested reassignment to another provider after one meeting with Kimberling; she revoked her reemployment benefits releases in June 2007. In July, Stefano had another shoulder surgery. In August 2007, her physician reported that Stefano was "situationally depressed because she really wants to go back to work and is not capable right now."[6] Stefano was prescribed counseling and medication to treat the depression.

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[1] The board record is not available when a motion for extraordinary review is considered.

[2] Report of Occupational Injury, Movants' Ex. 2.

[3] Movants' Ex. 5.

[4] Report of Kenneth Moll, M.D., (Dec. 29, 2006), Movants' Ex. 14.

[5] Physical Therapy Treatment Note, Mary M. Olsen, P.T., (Dec. 18, 2006), Movants' Ex. 12.

[6] Chart note (unclear if Dr. W. Laufer or Dr. L. Wickler) (Aug. 9, 2007), Movants' Ex. 21.

Stefano complained of migraine headaches that her physician noted "seems to be directly related to the stressful situation of her shoulder injury."[7]

Stefano obtained a letter from her surgeon, dated August 9, 2007, and addressed to Workers' Compensation Officer Faith White, that stated:

> My patient, Sherry Stefano, is continuing to have migraines due to the stress of this injury. The issue with the vocational rehabilitation counselor she has been assigned to, Mark Kamberling, [sic] has caused her additional stress and migraines. Therefore, I feel it is in her best interest not to attend the rehabilitation conference you have scheduled for August 22, 2007. I strongly support reassignment to a different counselor.
>
> Please excuse her from attendance due to her medical condition.[8]

Stefano admitted in her deposition that she faxed the "sample of her feelings" to her physician and "had a hand" in the letter.[9] After an August 22, 2007, informal rehabilitation conference, Officer White, as the administrator's designee, reassigned Stefano's evaluation to Loretta Cortis.[10] BP Exploration appealed to the board.

Stefano attended psychological therapy at Dayspring Enrichment Center. The Center sent a bill for its services to BP Exploration's adjuster for payment under the workers' compensation act.[11] Following receipt of the bill, the adjuster sent Stefano a request for Stefano's consent to release of records that included records "related to treatment of the employee's **SHOULDERS, UPPER EXTREMITIES, HEADACHES,**

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[7] *Id.*

[8] Letter from Laurence Wickler, M.D., (Aug. 9, 2007),Movants' Ex. 21.

[9] Stefano Depo. (Oct. 30,2007), at 138:20 – 140:8, Movants' Ex. 28.

[10] The material presented with the motion, and the board decision, do not reveal whether Stefano attended the informal rehabilitation conference. Officer White's decision letter was not included in the motion exhibits, but the board's decision noted Officer White's letter was dated September 18, 2006. *Sherry A. Stefano v. BP Exploration Alaska, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0011, 4 n. 25 (Jan. 9, 2008) (W. Walters).

[11] Dayspring Enrichment Center bill, Movants' Ex. 23.

ANXIETY or DEPRESSION."[12] (Emphasis in original.) Other requests included consents to release educational and rehabilitation records, employment records, and mental health treatment related to the compensation claim.[13]

Stefano sought a protective order on October 12, 2007, from attending a psychiatric evaluation;[14] her petition was amended October 15, 2007, to include "employment records insofar as they include anxiety or depression."[15] The board's designee, Workers' Compensation Officer Kokrine, ruled:

> There is no indication that Ms. Stefano is making a claim for mental stress and so psychiatric records and/or a EIME psychiatric examination does not appear to be relevant at this time.
>
> EE's counsel shall provide any and all records pertaining to the therapy visits recommended by Ms. Stefano's treating physician to ER's counsel or have EE sign a release for those records.
>
> EE's counsel shall provide any and all records pertaining to EE's migraine headache treatment to ER's counsel or have EE sign a release for those records.[16]

Officer Kokrine granted Stefano's request for a protective order from attending a psychiatric evaluation as part of an employer medical evaluation or releasing psychiatric records. BP Exploration appealed to the board. The appeal was joined with BP Exploration's earlier appeal of Officer White's decision to reassign Stefano's reemployment benefits evaluation to Cortis.

2. The board's decision.

The board issued the interlocutory order that is the subject of this motion on January 9, 2008, without an oral hearing.[17] The board affirmed Officer Kokrine's order

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12 "Authorization to Release Medical Information per HIPAA Privacy Regulations," Movants' Ex. 25, 3; "Authorization to Release Mental Health Treatment Information per HIPAA Privacy Regulations," Movants' Ex. 25, 6.

13 Movants' Ex. 25, 5, 7-9.

14 Movants' Ex. 26.

15 Movants' Ex. 27.

16 Pre-hearing Conference Summary, (Dec. 6, 2007), Movants' Ex. 29, 2.

to release the records of treatment for migraine headaches and situational stress.[18] Approaching the matter of the psychiatric evaluation, the board began by noting that under AS 23.30.095(e) neither the injured worker nor the board have the right to refuse an Employer Medical Evaluation (EME) "unless it is not reasonably relevant, or unreasonable in some specific respect."[19] The reports of the orthopedist and neurologist who examined Stefano on behalf of the employer were received after the board met on December 13, 2007, to review the record and consider the petitions, therefore, the board ruled, those reports should not be considered part of the record; had they been considered, the board's decision would be the same.[20]

The board stated that in *Frazier v. H.C. Price/CIRI Construction, J.V.,* 794 P.2d 103 (Alaska 1990), the Supreme Court "recognized that EME physicians are agents of their employers during the course of our litigation."[21] Relying on its decision in *Maryann Ammi v. Eagle Hardware*,[22] the board held that "a reasonable person would find a

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[17] *Sherry A. Stefano v. BP Exploration Alaska, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0011, 1 (Jan. 9, 2008).

[18] *Sherry A. Stefano*, Dec. No. 08-0011 at 12.

[19] *Id.* at 13.

[20] *Id.* at 15.

[21] *Id.* at 13, 15.

[22] Alaska Workers' Comp. Bd. Dec. No. 05-0303 (Nov. 16, 2005). In *Sherry A. Stefano,* Dec. No. 08-0011 at 13, n. 62, the board mischaracterized the decision in *Ammi v. Eagle Hardware,* Alaska Workers' Comp. App. Comm. Dec. No. 003 (Feb. 21, 2006), as affirming the board's decision in *Maryann Ammi*, Dec. No. 05-0303. *Ammi* denied a motion for extraordinary review of the board's decision but did not affirm or reverse the board's decision. As the case is now more than two years old, no subsequent history is needed, as a motion for extraordinary review is discretionary and no particular relevance to the merits of the decision attaches to the denial. *See The Bluebook: A Uniform System of Citation* R. 10.7, at 92 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). If subsequent history must be noted, it should be *mot. for extraordinary rev. denied.* Commission criticism of the board's reasoning in *Maryann Ammi,* Dec. No. 05-0303 at 10, might be noted as "*but see Smith v. CSK Auto, Inc.,* Alaska Workers' Comp. App. Comm. Dec. No. 017, 7-8 n. 17 (Aug. 23, 2006) (refusing to endorse reliance upon list of factors in *Mary Ann Ammi v. Eagle Hardware*, Alaska Workers' Comp. Bd. Dec. No. 05-0303, 10 (Nov. 16, 2005), because cases board cited

psychiatric examination by an expert retained for litigation purposes by a hostile party to be inherently intrusive and intimidating."[23] Therefore, the board held it was required to "balance the legitimate, competing interests of the parties to determine the reasonableness" of the employer's request.[24]

The board found that "the desired psychiatric evaluation would not be relevant to the employee's claim."[25] It found "no significant evidence of psychiatric or psychological disorder, and no significant evidence that her shoulder injury or injuries were significantly related to psychiatric or psychological conditions."[26] Therefore, it found there was substantial evidence to support the protective order.[27]

The board stated that the EME physicians "are agents of their employer during the course of our litigation" and that the case manager is "fundamentally an agent of the employer for purposes of this litigation" based on the rationale of the Supreme Court in *Frazier.*[28] The board also stated that, "In accord with the Court's rationale in

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as sources do not provide direct, relevant supporting authority for the adoption of the factors nor list the factors)."

[23] *Sherry A. Stefano*, Dec. No. 08-0011 at 14. The board also cited *Ammi v. Eagle Hardware*, Alaska Workers' Comp. App. Comm. Dec. No. 003, 12-13 (Feb. 21, 2006) for the proposition that "the reasonableness standard also applied to the method, means, and manner of evaluation, and to the degree of invasiveness." *Sherry A. Stefano*, Dec. No. 08-0011 at 13. No "reasonableness standard" was approved or elaborated upon on pages 12 and 13 of Dec. No. 003. The commission's decision said the "State fails to cite any authority for the proposition that employers have a due process right to conduct unlimited psychiatric examinations, either in the workers' compensation arena or in the context of civil litigation" and cited the Alaska Rule of Civil Pro. 35(a), providing that an order for such examination should include the "the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Civil Rule 35(a) applies to both physical and mental examinations; nothing in Rule 35(a) makes distinct provision for mental examinations.

[24] *Sherry A. Stefano,* Dec. No. 08-0011 at 14.

[25] *Id.* at 15.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Black,[29] we would need to weigh the opinions of Dr. Swanson and Ms. Hebert in light of their examination of the employee, and in light of the medical records of her treatment."[30] The board found that neither opinion "arises from a reasonable psychological evaluation, or . . . shows substantial consistency with the medical record of the employee's treatment."[31] Therefore, it found that these opinions were not credible, and gave them little weight, because they were "produced for, and essentially serve, the purpose of argument."[32] The board concluded that "the Board Designee's protective order was based on substantial evidence that the employee's work injury, the stress of being disabled from work, and the frustration of needing to undergo rehabilitation, produced situational stress which contributed to her migraines, and gave rise to Dr. Wickler's recommendation for stress reduction counseling."[33] Therefore, the board reasoned, the protective order was not an abuse of discretion.[34]

BP Exploration filed a timely motion for extraordinary review.[35]

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29 *Black v. Universal Services, Inc.,* 627 P.2d 1073 (Alaska 1981).

30 *Sherry A. Stefano,* Dec. No. 08-0011 at 16.

31 *Id.*

32 *Id.*

33 *Sherry A. Stefano,* Dec. No. 08-0011 at 16.

34 *Id.*

35 The respondent argued that BP Exploration's motion should be rejected because the motion was filed more than 10 days after the board's decision was issued. Opp'n to Mot. for Extraordinary Rev. 6-7 (Jan. 29, 2008). 8 AAC 57.072(a)(1) requires that a motion for extraordinary review be filed within 10 days after the board issues the decision sought to be reviewed. However, 8 AAC 57.060(a)(2) provides that if the last day of a period of time in our regulations falls on a Saturday, Sunday or legal holiday, "the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday." The tenth day after the board issued its decision was Saturday, January 19, 2008. The following Monday, January 21, 2008, was a legal state holiday. 2 AAC 07.810(a)(2). The last day for filing a motion for extraordinary review was thus Tuesday, January 22, 2008. Therefore, BP Exploration's motion, filed on January 22, 2008, was filed within the period allowed for filing a motion for extraordinary review.

3. Discussion.

Between the board's decision on January 9, 2008 and oral argument on this motion March 4, 2008, the Director of the Division of Workers' Compensation announced that Mark Kimberling, the object of Stefano's request for reassignment, had been hired by the State of Alaska and appointed Re-employment Benefits Administrator. This action effectively rendered the motion for extraordinary review of the board's decision regarding reassignment moot because Kimberling could no longer perform the eligibility evaluation. To the extent that the motion for extraordinary review is based on the board's decision regarding Officer White's order, the movants, BP Exploration and ACE USA, concede there is no dispute for the commission to decide.

The movants argue, however, that the issue regarding the board's decision in the appeal of the protective order is not moot, as the protective order continues in effect. Injustice and unnecessary delay will ensue if the movants are unable to obtain the evidence they seek because (1) Stefano historically used "stress" complaints to delay resolution of her claim and avoid re-employment planning compliance, and, (2) immediate review is required to resolve whether the movants may obtain the psychiatric evaluation they believe they are entitled to obtain.[36] Moreover, the movants argue, the board's findings regarding the credibility of their witnesses, and the errors committed by the board in upholding the decision to grant the protective order, require the commission's immediate review "so that the appropriate standards may be applied at any ultimate hearing on the merits of the claim."[37]

The respondent argues that the movants failed to demonstrate the need for immediate review.[38] Any errors by the board in upholding Officer Kokrine's order are not the "law of the case" as to the credibility of any physician when the board comes to a decision on the merits of her claim. In oral argument, the respondent conceded that the protective order may be lifted if the respondent files a claim for mental health

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[36] Mot. for Extraordinary Rev. 7 (Jan. 22, 2008).

[37] *Id.*

[38] Opp'n to Mot. for Extraordinary Rev. at 8.

treatment benefits or for a mental injury. The board's order is not a permanent bar to obtaining the information, the respondent conceded, but a decision that the workers' compensation officer did not abuse her discretion by ruling that an evaluation was not likely to produce evidence relevant to her claim as made at that time.

a. Extraordinary review will be granted only when the sound policy of allowing appeals from final decisions is outweighed in specific circumstances.

The commission's authority to review interlocutory orders is limited to those cases that meet the standards set out in our regulations.[39] To obtain review, the movants must convince the commission that the sound policy favoring appeals from final board decisions is outweighed because: postponement of review will result in injustice, unnecessary delay, significant expense or undue hardship; the board's actions

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[39] 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;
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> (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
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> > (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.

are so erroneous or unjust, or so prejudicial to the requirements of due process that immediate review is necessary; immediate review may materially advance the termination of the litigation and, either 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, the case involves issues that would likely otherwise evade review and an immediate decision is necessary to guide the board.

In this case, the movants argue that extraordinary review is required under 8 AAC 57.076(a)(1), (postponement of review until appeal may be taken from a final decision will result in injustice and unnecessary delay), and 8 AAC 57.076(a)(2)(A), (immediate review of the decision may materially advance the ultimate termination of the litigation and the decision involves an important question of law on which there is substantial ground for difference of opinion).

In *Kuukpik Arctic Catering, LLC, v. Harig,* the commission said:

> 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.[40]

The question the commission must answer in this motion for extraordinary review under 8 AAC 57.076(a)(1) is not merely, "Did the board err?" The commission must be persuaded that a board error will result in injustice and unnecessary delay, significant expense or undue hardship. The movants must also persuade the commission that the answer to the question, "Do the reasons for *immediate* review outweigh the sound policy of allowing appeals only from final decisions?" is "Yes." Similarly, review will not be granted under 8 AAC 57.076(a)(2)(A) unless *immediate* review will advance termination of the litigation and the movants persuade the commission that the board's decision raises an important question of law on which there is a *substantial* ground for difference of opinion.

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

b. The board's decision raises an important question of law and apparent board error in weighing evidence and applying the law.

The movants assert two board errors will result in injustice or raise important questions of law. They argue that the board improperly considered the credibility of the physicians who wrote letters, and Ms. Hebert's affidavit, when deciding if the evidence produced by a psychiatric evaluation might be relevant to Stefano's claim for compensation and medical benefits. The movants argue that the board, having effectively decided to consider Dr. Swanson's opinion, improperly discounted his opinion because he was an "agent" of the employer. The board's reasoning is reviewed to determine if it raises an important question of law or a strong possibility of board error resulting in injustice.

i. Board error in weighing evidence on the merits of the claim in a discovery dispute.

The board acknowledged that the employer has the right to choose a physician to examine the employee, just as the employee has the right to choose a physician to treat her. In this case, the only reason asserted for a protective order was that the psychiatric evaluation and records were not relevant to the employee's shoulder injury claim. The respondent did not assert, as in *Maryann Ammi v. Eagle Hardware*, that her specific circumstances and beliefs made the prospect of a psychiatric evaluation particularly intrusive.[41] Stefano acknowledged that she had sought psychological treatment for "situational stress" related to her shoulder surgery and had asked her employer to pay for the treatment. In its decision, the board ordered that records of

[41] Maryann Ammi "outlined that she objected to an examination that included questions revolving around the Freudian 'Id' theory. She clarified that a psychiatric evaluator that opined as to her mental health in a sexual context was inappropriate." *Maryann Ammi,* Dec. No. 05-0303 at 5. The *Ammi* decision notes "the board retained jurisdiction over the claim pending receipt of additional information, and the board's decision does not foreclose a mental examination that goes beyond a review of existing records." *Ammi v. Eagle Hardware,* Dec. No. 003 at 10. This fact was significant in the decision not to take immediate review. *Id.* at 11 ("the panel's order does not foreclose an examination by the employer's psychiatrist at a later time, and therefore this issue has been raised prematurely").

this treatment be released to BP Exploration. Stefano also sought accommodation from the state (Division of Workers' Compensation) on the basis of her "stress" and its physical manifestation in the form of reassignment of another qualified provider to prepare her reemployment benefits eligibility evaluation.

The board did not consider whether the proposed psychiatric evaluation was or was not likely to lead to evidence relevant to the disputed issues in the claim; that is, evidence that may tend to *prove or disprove* that a proposition of the claim (for reassignment of the evaluation provider or for treatment), or a defense to the claim, is more or less probable. The board did not identify the disputed issues to which evidence that may result from such an evaluation might pertain. For example, the movants claimed to the board that Stefano willfully refused to cooperate with the reemployment benefits eligibility evaluator; that she did *not* suffer stress due to her encounters with the provider, and that she is capable of cooperation. The respondent, Stefano, claimed below that she *does* suffer so much anxiety from her encounters with the provider, that she requires accommodation by the state in the form of reassignment to another provider, at increased expense to the employer. Thus, the question of the extent of her anxiety and its source was relevant to the question of cooperation [which affects entitlement to compensation] and her request for accommodation by reassignment of the evaluator. In short, on this issue the movants sought to *disprove the existence* of even a mild, transient mental disorder and the respondent at least initially *asserted its existence* as a result of a physical injury limited her ability to cooperate with Kimberling.

Instead of beginning its analysis by identifying the issues in dispute, the board began by determining that it would not give weight to the reports submitted by the employer in support of its position that Stefano's records demonstrated that a psychiatric evaluation could produce relevant evidence of mental or emotional disorder. The board said "EME physicians are agents of their employers during the course of our litigation" and a "reasonable person would find a psychiatric examination by an expert retained for litigation purposes by a hostile party to be inherently intrusive and intimidating;" therefore, it would "balance the legitimate, competing interests of the parties to determine the reasonableness of the request."

If the board intended by its reference to "balanc[ing] the legitimate competing interests" to announce that it would identify the issues in dispute and determine if the evaluation would be likely to lead to evidence tending to prove or disprove an issue in dispute, the board failed to fulfill its intentions. Instead, the board made findings of fact that appear to concern the merits of Stefano's claim that she required treatment and accommodation for "stress" as a result of her physical injury.[42]

The board said:

> We found the only substantive mental related records were those records from Dr. Wickler which recognized the employee was subject to "situational" stress from her work injury and related disability and rehabilitation, which Dr. Wickler believed was contributing to her migraine headaches. We found no significant evidence of psychiatric or psychological disorder, and no significant evidence that her shoulder injury or surgeries were significantly related to psychiatric or psychological conditions. We find substantial evidence to support the Board Designee's protective order, denying the employer's request for a full psychiatric evaluation of the employee.[43]

A statement that it found no *significant* evidence of mental disorder *significantly related* to the shoulder injury strongly suggests that the board weighed the evidence and made findings of fact, instead of merely examining the record to determine the issues in dispute. The board confirmed that it had done so later, when it said: "we would need to weigh the opinions of Dr. Swanson and Ms. Hebert in light of their examination of the employee, and in light of the medical records of her treatment."[44] As a result, the board found it

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[42] The movants do not claim that Stefano suffered a mental injury as a result of mental stress in the employment. However, it is possible for a mental injury to result from physical injury, either as a traumatic injury to the brain or as a result of the emotional stresses associated with severe physical injury, such as job loss, pain, social isolation, and the inability to meet self-expectations during rehabilitation. The fact that such mental or emotional injuries are the result of physical injury does not mean that they do not require psychological treatment, or that psychological examinations may not reveal information relevant to a claim for benefits.

[43] *Sherry A. Stefano*, Dec. No. 08-0011 at 15.

[44] *Id.* at 16.

> could not find that either opinion arises from a reasonable psychological evaluation, or that either opinion shows substantial consistency with the medical record of the employee's treatment. We do not find the psychological assessment of the employee by Ms. Hebert or Swanson very credible. We give little weight to Dr. Swanson's opinion that the employee needs a full psychiatric assessment. We find these opinions were produced for, and essentially serve, the purpose of argument. We give much greater weight to the records and opinion of her treating physician, Dr. Wickler.[45]

No weighing of evidence of the existence of a mental disorder was necessary at this stage, because it was not appropriate to make findings going to the merits of Stefano's claim for compensation or benefits related to the claimed situational stress. Yet, the board appears to have done so when it said it *would find*

> the Board Designee's protective order was based on substantial evidence that the employee's work injury, the stress of being disabled from work, and the frustration of needing to undergo rehabilitation, produced situational stress which contributed to

[45] *Id.* The board did not cite any opinion by Dr. Wickler that psychological assessment was unnecessary for treatment and that it would not be likely to produce information relevant to whether Stefano suffered from "situational stress" that inhibited her ability to cooperate with Kimberling. His referral to a counselor would support an inference that Dr. Wickler believed a psychological assessment of some kind was necessary for treatment. The board states that BP Exploration produced no "reasonable psychological evaluation," but how this is to be accomplished without the employee's cooperation is not explained. The employer need not demonstrate that the employee requires a psychological evaluation in the *treatment* sense when the question is whether an evaluation is likely to lead to evidence relevant to a claim for psychological counseling. Finally, Ms. Hebert's affidavit and Dr. Swanson's letter were not offered as "psychological assessments;" discounting their credibility because they were not psychological assessments is unfair. Ms. Hebert reported on a pattern of conduct and interaction with Stefano. Dr. Swanson, having examined Stefano and read her records, opined that "a psychiatric evaluation with a psychiatrist, . . . could determine the etiology and the presence *or absence* of significant psychiatric disease and could outline programs to help relieve the examinee's depression symptoms and anxiety and her stress-related complaints." Dec. 13, 2007, letter from John R. Swanson, M.D., Movants' Ex. 30. His letter contains no psychological assessment; he acknowledges that an examination may show Stefano has no significant psychiatric disease.

> her migraines, and gave rise to Dr. Wickler's recommendation for stress reduction counseling.[46]

To the extent the board weighed evidence on the claim merits in a ruling on a discovery petition, the board deprived both parties of the opportunity to be afforded elements of fundamental due process: notice of the subject of the hearing, an opportunity to be heard and to call and examine witnesses, and for fair consideration of their arguments and evidence. While the board may weigh competing evidence as to whether the proposed discovery is likely to produce evidence that may tend to prove or disprove the employee's claim that she has a condition that (1) required psychological counseling and (2) inhibited her ability to cooperate with her evaluator, it is error to decide whether the employee's claim for counseling expenses and reassignment has merit.

ii. Board error in applying the law.

The board twice stated in its decision that the Alaska Supreme Court has "recognized that EME physicians are agents of their employers during the course of our litigation."[47] In support of this statement of the law, the Board cited *Frazier v. H.C. Price/CIRI Constr. J.V.,* 794 P. 2d 103, 105-106 (Alaska 1990).[48] In *Frazier,* the Alaska Supreme Court held that a party may not, by asserting a *Smallwood*[49] objection against a report containing the opinion of its own expert witness, require the introducing party to pay for a deposition of the witness. The Court's decision was based on the principle that by choosing the expert witness to give an opinion, the party, in effect, vouches for the witness's credibility and competence, so that an opportunity to cross-examine the witness as to credibility and competence *at the other party's expense* is "less urgent"

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[46] *Id.* The board's projection of what it "would find" if it considered the late-filed documents is troubling, because it constitutes a determination, without allowing the opponent an opportunity to rebut the case with evidence, that (1) Stefano suffered "situational stress" due to her injury (a finding of compensability), (2) the stress contributed to her migraines (possibly a finding of work-relationship), and (3) the compensable injury resulted in the treatment order.

[47] *Id.* at 13, 15.

[48] *Id.* at 13 n. 61, 15 n. 66.

[49] *Commercial Union Companies v. Smallwood,* 550 P.2d 1261, 1266 (Alaska 1966).

than when the document was not produced by the party's own witness.[50] The Alaska Supreme Court held that Alaska Rule of Evidence 801(d)(2)(C) applied in the case when the employee sought to introduce the employer's medical evaluator's report against the employer, because "a statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a person authorized by him to make a statement concerning the subject."[51] Thus, a report containing an employer medical evaluator's opinion is not prohibited hearsay if offered by the employee against the employer, just as the medical report of the employee's attending physician is not hearsay if offered by the employer against the employee, because the report (or opinion statement) is made by a "person authorized" by the party to form the opinion. The board mistakes the Court's ruling in *Frazier*.

To say that the Supreme Court recognized, instead of held, that an employer medical evaluator is an agent of the employer is a distinction without difference. Without limitation or qualification, the board states that the law in Alaska, set out in *Frazier,* is that an employer medical evaluator is an agent of the employer during the litigation of a claim. If the board's rule were accepted, an employer medical evaluator would have all the responsibilities of an agent to his principal and the authority to bind the principal within the scope of the agency – and an attending physician would have the same authority in respect of the employee – notwithstanding the lack of evidence to support any finding that such a relationship exists.[52] The Alaska Supreme Court did not

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[50] *Frazier v. H.C. Price/CIRI Constr. J.V.,* 794 P. 2d 103, 105 (Alaska 1990). The Supreme Court also declined to accept the board's invitation to overturn *Smallwood. See* 794 P.2d at 104 n. 2.

[51] *Frazier,* 794 P. 2d at 105 (omissions in original) *quoting* Alaska Rule of Evidence 801(d)(2)(C). Alaska Rule of Evidence 801(d)(2)(D) refers to "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." If the Alaska Supreme Court had considered an employer medical evaluator an "agent" of the employer, then it would have relied on Rule 801(d)(2)(D) instead of 801(d)(2)(C).

[52] *See generally*, *Manes v. Coats*, 941 P.2d 120, 123 (Alaska 1997) (citing *Foster v. Cross*, 650 P.2d 406, 408 (Alaska 1982) ("While the questions of what constitutes agency and whether evidence is competent to show it are questions of law,

adopt such a rule in *Frazier* because the Court (1) held that the employer medical evaluator was a "person authorized . . . to make a statement concerning the subject" under Rule 801(d)(2)(C), instead of an "agent or servant [making a statement] concerning a matter within the scope of the agency or employment," under Rule 801(d)(2)(D), and (2) did not remand the case to the board to determine if there was evidence to support a finding that an agency relationship existed.

The board's mistake arises from the Alaska Supreme Court's citation to a 1967 Texas Civil Court of Appeals case that held that an employee's testimony as to unrecorded statements of employer physicians made to him about his condition may be admitted at trial as an exception to the hearsay rule, if offered in court against the employer.[53] The citation to the Texas case as supporting authority at the end of a short

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the evaluation of the evidence and the decision on whether an agency relationship exists is for the factfinder.") and *Sparks v. Republic Nat'l Life Ins.*, 132 Ariz. 529, 542, 647 P.2d 1127, 1140 (1982) ("While it is true that the question of whether an agency existed is one of fact, when the material facts from which the agency relationship could be inferred are not in dispute, the question of whether an agency relationship exists is a question of law."). In *Manes*, the Alaska Supreme Court held that in order for an agency relationship to exist, the agent must have "a power to alter the legal relations between the principal and third persons." 941 P.2d at 123-24 (quoting Restatement (Second) of Agency § 12 (1958)). The principal must have "the right to control the conduct of the agent with respect to matters entrusted to him." *Id.* at 124, (quoting Restatement (Second) of Agency § 14 and citing *Nicholas v. Moore*, 570 P.2d 174 (Alaska 1977) (for master and servant agency relationship to exist, principal must exercise control over the agent)). The "extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made." *Id.* (quoting Restatement (Second) of Agency § 376; also citing *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me.1991) ("The agent's duties are based on the manifestations of consent of the parties and ordinarily must be inferred from the parties' conduct."). The board did not make such findings in this case. *See also*, *Cummins, Inc. v. Nelson*, 115 P.3d 536 (Alaska 2005); *Harris v. Keys*, 948 P.2d 460 (Alaska 1997).

[53] 794 P. 2d at 105, *citing Argonaut Southwest Ins. Co. v. Morris,* 420 S.W. 2d 760, 763 (Tex. Civ. App. 1967). Relying on Texas law, the Texas appeals court upheld a trial court's admission of unsworn, out-of-court statements by physicians concerning the employee's physical condition, testified to by the employee, as admissions against interest because there was sufficient evidence to support an implied

review of cases from other jurisdictions is not convincing as a statement adopting the sweeping rule declared by the board: that employer medical evaluators are *agents* of employers during litigation of a claim.[54] There is a strong possibility that the board erred as a matter of law in ascribing such a rule to the Supreme Court's decision in *Frazier.*[55] Reasonable minds could differ on the question of law presented by the proposition that the Alaska workers' compensation statutes, and Alaska Supreme Court case law, support adoption of a 1967 Texas rule.[56]

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finding that the doctors were agents of the employer. *Id.* Current Texas Rule of Evidence 801(e)(2)(C) is substantially similar to Alaska Rule 801(d)(2)(C); we have been unable to determine if the Texas Law of Evidence (a statutory code) included such a provision in 1967. The Texas Supreme Court did not adopt Rules of Civil Evidence until 1983; it adopted its first uniform Rules of Evidence in 1997. *See Texas Court Rules: History and Process*, excerpted from Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither* (Sept. 1997), updated by Robert H. Pemberton (Nov. 1998), *available at* www.supreme.courts.state.tx.us/rules/history.asp.

[54] As noted above, if the Alaska Supreme Court had adopted the 1967 Texas rule, the Court would have cited Alaska Rule of Evidence 801(d)(2)(D) instead of 801(d)(2)(C). Alaska Rule 801 distinguishes between "a person authorized" and "an agent or employee."

[55] Nothing in *Frazier* suggests that an employer medical evaluator's report offered against an employer lacks credibility because the evaluator was selected by the employer. *Frazier* applies to all parties, not just employers.

[56] In *Peratrovich v. Quality Asphalt Paving,* Alaska Workers' Comp. App. Comm'n Dec. No. 067, (January 24, 2008), the commission upheld the hearing officer's decision sustaining an objection to employee testimony to a comment made shortly before an examination of the employee by the employer's medical evaluator, who had testified earlier by deposition. The decision in that case primarily rested on the hearing officer's discretion to refuse to admit irrelevant testimony; the proponent of the testimony had denied that a challenge to credibility of the declarant was the point of the offered testimony and the evaluator's statement was so susceptible to varied meanings that it was not probative of the proposition that the evaluator was confused when he wrote his report. *Id*. at 15-16. However, the offered testimony was not "unexcused hearsay" as we said; it was excludable, but not because it was unexcused hearsay. The employee's testimony was evidence of a statement made by a "person authorized" by the party against whom the statement was offered and, at least arguably, concerned the subject of the authorized statement, therefore it was not within the definition of hearsay, notwithstanding that it was also evidence of a statement by a declarant not before the board, offered for the truth of the matter

c. The movants failed to show that immediate review is required to prevent injustice, or that immediate review will advance termination of the litigation.

On initial review, the board's errors raise important questions of law. However, the particular facts of this case do not demonstrate that immediate review is required to prevent injustice, hardship, or unnecessary delay. The respondent employee has withdrawn the request for payment of counseling services. The respondent conceded in oral argument before the commission that the board's order does not constitute the law of the case as to the merits of her claim or credibility of the physicians, and that the order does not bar the movants from petitioning the board to lift the stay. Reassignment would have occurred anyway owing to Kimberling's appointment as Reemployment Benefits Administrator. No dispute presently exists to decide on appeal.

It is not enough to demonstrate that the board may have erred on a point of law to require immediate review under 8 AAC 57.072. Every appeal involves a party's claim the board erred as a matter of law; legal error, if it exists, generally will not result in injustice if the error is corrected on appeal. In this case, owing to the unanticipated events following Officer White's decision and Officer Kokrine's decision, injustice to the movants will not necessarily follow in the absence of immediate review. There is no prejudice to the movants' ability to litigate the present case. Unless the reemployment evaluation is delayed, or other events impact the movants' future rights, there is no ongoing harm. Therefore, an immediate review of the board's order will do more than serve as an advisory opinion; it will not advance the final resolution of the claim.

With respect to delay, expense, and hardship, the board's order does not bar all future discovery, including a psychological evaluation. A protective order is limited to the material circumstances that gave rise to it. The board's decision does not foreclose a psychological evaluation if Stefano's claim is amended to include a claim for benefits for future psychological counseling or treatment; an assertion of disabling mental or

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asserted in the statement. The proponent did not make this point in the discussion of the objection at hearing and the hearing officer's exclusion (on relevance or foundational grounds) was not an abuse of discretion. The commission here corrects its error. In other respects, the decision in *Peratrovich* stands.

emotional symptoms as a result of the shoulder injury; a claim for compensation and additional time to complete reemployment benefits or for additional medical treatment as a result of mental or emotional conditions, whether work-related or not; or, a defense to a petition to suspend compensation for non-cooperation with reemployment benefits providers based on an asserted mental or emotional condition that inhibits Stefano's ability to cooperate or to complete a plan. This is an illustrative list and is not intended to be a complete list of situations that may result in the board lifting the stay.

4. Conclusion.

Although the board's decision reveals the strong possibility of errors of law, the evidence accompanying the motion and the movants' argument failed to establish that the movants face injustice at this time, owing to the circumstances of this case. Extraordinary review may not be used to intervene in the board process solely because the board may have erred.

The motion for extraordinary review is DENIED.

Date: *6 May 2008* 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 on the merits of this motion for extraordinary review, but it is not a final decision on the claim for workers' compensation, AWCB Case No. 200603870. The effect of this decision is that the workers' compensation claim may continue to proceed to hearing or other resolution before the Alaska Workers' Compensation Board. This decision does not affect the final decision of the board on the claim.

Because this is not a final commission decision on an appeal of a final board order on a claim, the Supreme Court may not accept an appeal under AS 23.30.129. An appeal, if

available, must be instituted in the Supreme Court within 30 days of the date this decision is distributed. See the box below to find the date of distribution.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review or hearing within 10 days after the date of distribution of this decision. You may wish to consider consulting with legal counsel before filing a petition or an appeal.

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. 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 appeal is not available, proceedings for other review under the Appellate Rules must be instituted within 10 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 40 days after the date this decision is mailed to the parties, whichever is earlier.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 076, Final Decision on the Motion for Extraordinary Review in *BP Exploration, Inc., and ACE USA v. Stefano*, AWCAC Appeal No. 08-003, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission at Anchorage, Alaska, this *6th* day of May, 2008.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *5/6/08* a copy of this Final Decision in AWCAC Appeal No. 08-003 was mailed to Gabbert & MacMillan at their addresses of record, and faxed to Gabbert, MacMillan, AWCB Appeals Clerk, AWCB-Fbx, & WCD Director.

Signed *5/6/08*
L. Beard, Appeals Commission Clerk Date