Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and Ward North America, Appellants, vs. David N. Syren, Appellee.	Memorandum Decision and Order on Motion for Extraordinary Review Decision No. 007 March 7, 2006 WCAC Appeal No. 06-003 AWCB Case No. 200319873M

Motion for Extraordinary Review from the Alaska Workers' Compensation Board Decision No. 06-0004; Rebecca Pauli, Chairman; David Kester, Member for Management; John Abshire, Member for Labor.

Appearances: for Appellants Municipality of Anchorage and Ward North America, Trena Heikes; for Appellee David N. Syren, Chancy Croft.

Before: Jim Robison and Philip Ulmer, Commissioners, Kristin Knudsen, Chair.

By: Kristin Knudsen, Chair.

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. Our decision in *Eagle Hardware v. Ammi*,[1] sets out in detail our reasons for asserting the authority to exercise review of non-final decisions, and we see no reason to add to that discussion here. However, our ability to undertake extraordinary review of an interlocutory decision is limited and we will not exercise it lightly. The commission will grant review if the commission can confidently find that the issue presented by the motion is sufficiently compelling to outweigh the sound policy favoring appeals from final decisions for a reason stated in 8 AAC 57.076(a). We do not find that policy is outweighed here.

Of the several issues presented by the motion, one issue was of such concern that we considered extraordinary review. After close examination of the facts, however, we conclude review would be premature.

---

[1] AWCAC Decision No. 003 (February 21, 2006).

According to Ms. Heikes' statement to the commission in oral hearing, unchallenged by Mr. Croft, the board issued, on the employer's behalf, a subpoena of certain records, and the employer served the subpoenas on records custodian for MONY.[2] The MONY records custodian refused to deliver all the subpoenaed records as directed by the subpoena.[3] Alaska Regional, served with a release, refused to provide records directly to the employer, due to concern for liability if it disclosed more than the employee wished.

The employer sought a broader release of information from the employee, so as to obtain the records from MONY and Alaska Regional, free of employee "screening" the documents that would be disclosed. The employee petitioned for a protective order, and about seven months after the hearing on the protective order, the board issued a decision granting the protective order on the Alaska Regional records and stating:

> The Board finds Alaska Regional is not a party to this action. However, Alaska Regional cannot simply ignore the release or a subpoena. It is subject to discovery and subpoena of its records. . . . [I]t may request an advancement of the reasonable cost of producing the relevant medical records. Therefore, the employer may serve a *subpoena duces tecum* and under Civil Rule 45 Alaska Regional can move to quash the subpoena.[4]

---

[2] The subpoena was not mentioned in the board's discussion of the facts surrounding the employer's efforts to obtain the MONY records. *David N. Syren v. Municipality of Anchorage,* AWCB Decision No. 06-004, p. 4 (January 6, 2006). A copy of the original subpoena was not included in the material initially submitted to the commission. The statement in oral argument was ambiguous as to whether the subpoena was served on MONY or MONY and Alaska Regional. We made inquiry of the parties, who agreed a subpoena was served on MONY, but neither had a record that a subpoena was served on Alaska Regional. A copy of the MONY subpoena was provided at the request of the commission.

[3] The subpoena ordered production of "all disability claim records or other documents in reference to David Syren."

[4] *David N. Syren v. Municipality of Anchorage,* AWCB Decision No. 06-004, p. 11 (January 6, 2006).

The board said of the MONY records that

> [O]nly those portions of the [MONY] file that *are relevant* to the injury for which he or she is seeking workers' compensation benefits are discoverable. The employer has not established that information contained in the MONY file is relevant. If MONY is alleging discoverable documents are privileged, then it is directed to provide a privilege log identifying those documents it asserts are privileged. In this regard, the employee's request for a protective order is denied in part and granted in part.[5] (*emphasis added*).

The Municipality moved for extraordinary review of the protective order limiting the release to the "body part" that was injured.[6]

---

[5] *Id.,* at p. 12.

[6] We express no opinion on the limitation of the release by refusing to take extraordinary review of this issue. AS 23.30.095(h) requires all parties to submit *to the board and each other all* medical reports relative to the claim in their possession or control within five days of filing a claim. AS 23.30.095(h) does more than require the parties to file reports upon which they intend to rely at hearing – it requires them to file all reports "relative" to the claim. The medical reports need not be helpful to the submitting party nor just those on which the party intends to rely. They may contain information that may undermine a claim or defense, but if "relative" to the claim and in the control of the party, they must be filed. AS 23.30.107, governing releases at all stages of a workers' compensation matter whether a claim is filed or not, is not a substitute for requiring complete disclosure of medical reports after a claim is filed.

8 AAC 45.052(a) requires that the parties disclose every medical report "which is *or may be* relevant to the claim." (*emphasis added*). AS 23.30.095(h) imposes the duty to file on records in the party's control, but 8 AAC 45.052 is limited to documents in the party's possession. This limitation does not excuse the failure to file reports that are in the party's control but not possession; it simply means such medical records are not subject to the medical summary requirement until possessed by a party. Any material, supportive or not, relative to the claim in the hospital file must be served by Syren on the employer and filed with the board. If the hospital records come into his possession, even temporarily, he must file the medical summary as required by AS 23.30.095(h). The knowing withholding of a document relative to the claim from the submission of documents required under AS 23.30.095(h) may open Syren, and anyone who assists him in concealing a document, to investigation under AS 23.30.280. Until the process under AS 23.30.095(h) is shown to be insufficient to compel Syren's production of those documents under his control, or the board refuses to enforce a board subpoena against

The Superior Court is authorized to enforce board subpoenas on application by the department, the board, or any board member.[7] Parties are not authorized by statute to apply to the court to obtain enforcement of a board subpoena. The power to enforce the board's subpoenas, the sole means permitted to employees and employers under the Workers' Compensation Act to compel production of information from non-parties, rests with the board, any member of the board, and the department.

It is clear that MONY initially refused to obey the subpoena on advice of its New York counsel. MONY did not move to quash the subpoena. If MONY had continued to refuse to produce documents required by the subpoena, or if a similar subpoena had been served on Alaska Regional before the employee sought a protective order, and the board's decision had been the same, our opinion may have been different.

The board's decision did not address the public interest in the board's exercise of the power to make its "investigation or inquiry or conduct its hearing . . . in the manner by which it may best ascertain the rights of the parties"[8] in light of its obligation to conduct fair and impartial hearings and to provide all parties with "due process and an opportunity to be heard and for their arguments and evidence to be fairly considered."[9] 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.[10] A subpoena for documents that may be relevant to a claim,

---

Alaska Regional, the issues raised by the motion are not sufficiently urgent and weighty under 8 AAC 57.076(a) as to compel our intervention.

[7] AS 23.30.005(h).

[8] AS 23.30.135(a).

[9] AS 23.30.001(4).

[10] The employee petitioned to join Alaska Regional as a party. The board, without making findings required under 8 AAC 45.040(j), concluded Alaska Regional was not a party. Whether Alaska Regional was or was not properly joined and therefore subject to a party's disclosure obligations under AS 23.30.095(h) was not a question raised in this motion.

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.[11] However, on the facts presented, we conclude review is premature.

The motion for extraordinary review is DENIED.

ALASKA WORKERS' COMPENSATION
APPEALS COMMISSION

Dated: ___March 7, 2006_____

___*Signed*_____
Philip Ulmer, Commissioner

___*Signed*_____
Jim Robison, Commissioner

___*Signed*_____
Kristin Knudsen, Chair

On _3/7/06____, mailed to Heikes, Croft, AWCB-Anc at addresses of record, faxed to WCD, AWCB Appeals Clerk Jankowski, AWCB-Anc.

___*Signed*_____
C. J. Paramore
Appeals Commission Clerk

---

[11] 8 AAC 45.52(a) requires disclosure of medical reports that "may be" relevant. The board's decision appears to conclude that it will not enforce the MONY subpoena because the employer did not support it's claim that the remaining MONY documents *are* relevant, which is, at least so far as medical reports are concerned, less than what the board's regulations require of parties. We do not express an opinion in this decision whether the board may impose a more restrictive discovery standard on non-medical documents than it by regulation requires of medical records.

The board directed MONY to produce a "privilege log" as to the documents withheld, but does not explain how it intends to enforce its directive to MONY without enforcing a subpoena. The board's direction suggests that MONY will make a determination of what documents are subject to an evidentiary privilege held by MONY and produce the remainder.