

**Case:** *Regina B. Sellers vs. State of Alaska, Department of Education and Early Development*, Alaska Workers' Comp. App. Comm'n Dec. No. 043 (May 25, 2007)

**Facts:** Employee filed two claims, one in 2002 for a repetitive motion injury, and one in 2006 for a mental health injury. In the 2006 claim, she alleged that the chronic pain from her 2002 injury was in part responsible for her 2006 injury. She was scheduled for an employer medical exam, as far as she knew concerning the 2006 injury, but the employer's letter to the examiner Dr. Hamm referenced the 2002 injury as the subject and asked two questions that were relevant only to the 2002 injury. A number of the other questions addressed the connection between the two injuries. The employee sought to strike this report from her 2002 claim because her mental health was not relevant to that claim and because she was not on notice before the examination that the medical report would be used in the 2002 case (thus, she wanted the report struck as a discovery sanction for the manner in which it was obtained). The board denied her motion to strike on both grounds and she filed a motion for extraordinary review (MER).

**Applicable law:** Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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

**Issue:** Should the commission grant the MER?

**Holding/analysis:** The MER was granted under 8 AAC 57.076(a)(4). The commission distinguished the circumstances of this case, creating a record for review by the board's second independent medical examiner, from evidentiary rulings that occur during the course of a hearing.

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. Review at this time will provide useful guidance to the board. Dec. No. 043 at 7.

Commission goes on to discuss merits of employee's motion, whether board properly decided report was relevant to 2002 case and whether it properly decided report was admissible. Commission lays out the rules on these questions, but states it is not deciding merits because it did not have the board record before it since this was an MER. Commission ordered employee to file a notice of appeal.

**Note:** 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.