

Case: *Pacific Log & Lumber and Alaska National Insurance Co. vs. Dan Carrell*, Alaska Workers' Comp. App. Comm'n Dec. No. 047 (June 29, 2007)

Facts: Pacific Log & Lumber (Pacific Log) sought extraordinary review of a decision by the board reversing the reemployment benefits administrator's denial of an eligibility evaluation. Without giving the parties a chance to address which version of AS 23.30.041(c) should apply, the board applied the newest version of the statute retroactively, thereby permitting Carrell to receive an eligibility evaluation, regardless of the timeliness of his requesting one under the former .041(c). Pacific Log sought extraordinary review. In the meantime, Pacific Log also controverted benefits because it learned of a second injury with a subsequent employer, which might result in that subsequent employer, rather than Pacific Log, being held liable for any reemployment benefits.

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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

The test for determining finality of an administrative order is "essentially a practical one." *Ostman v. State, Commercial Fisheries Entry Comm'n*, 678 P.2d 1323, 1327 (Alaska 1984). A board decision is final when it

leaves no further dispute on a pending claim or petition for the board to resolve. . . . The possibility of filing successive or overlapping claims for, or petitions related to, different benefits flowing from the same injury complicates the determination of when a compensation order 'fixes' a legal relationship. However, when there are no pending proceedings before the board, an appeal should not wait upon the possibility that a

party will file another claim or petition in the future. *Hope Community Res. v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 041, 7 (May 16, 2007).

Unless the board remands for a strictly "ministerial" act, its decision is not final. *See Municipality of Anchorage, Police and Fire Retirement Bd. v. Coffey*, 893 P.2d 722, 725 n.6 (Alaska 1995); *Wolf Dental Servs., Inc. v. Wolf*, Alaska Workers' Comp. App. Comm'n Dec. No. 031 (Feb. 2, 2007).

Issues: Should commission grant motion for extraordinary review (MER)? Was board's decision final such that Pacific Log could appeal from it, rather than moving for extraordinary review?

Holding/analysis: Although the commission agreed that whether the statute applied retroactively was "an important question of law" under 8 AAC 57.076(a)(2)(A), it denied the motion because resolving the retroactive question would not advance the end of the litigation. The commission noted that the issue of a second injury under a subsequent employer could render the dispute over reemployment benefits between Pacific Log and the employee moot.

However important the questions raised by the movant, the parties to an appeal must have a recognized interest in the outcome of the appeal. This requirement serves as a check on the commission's exercise of its power of review – it prevents the commission from giving general advisory opinions and thereby intermeddling in the board's power to approve, and the department's authority to adopt, regulations that interpret and enforce the workers' compensation statutes. Dec. No. 047 at 6.

The commission also concluded that the board's decision was interlocutory, rather than a final, appealable one. In its decision, the board remanded to the reemployment benefits administrator (RBA) to provide an eligibility exam as well as to the pre-hearing officer "to identify the unresolved disputes, including those presented in part by, or potentially affected by, the appeal to the board." *Id.* at 6. Because the directions to the pre-hearing officer were not purely ministerial but required the exercise of some discretion, the board's decision was interlocutory. (If board had remanded only to the RBA, the board decision would be considered final.) Thus, the commission concluded that Pacific Log could either wait to raise the retroactivity question on appeal after a final decision, or request entry of a final order to appeal from, if the prehearing officer segregates the reemployment benefits issue.

Commission nevertheless engaged in some discussion about whether AS 23.30.041(c) should apply prospectively or retroactively, while warning that it was not deciding this question.

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.