

Case: *Kuukpik Arctic Catering, L.L.C. and Alaska National Insurance Co. vs. Lily M. Harig*, Alaska Workers' Comp. App. Comm'n Dec. No. 038 (April 27, 2007)

Facts: Employee filed her request for hearing almost four years after employer controverted her original claim. Board concluded that verbal amendments made during prehearing conferences in November 2003 and July 2006 did not relate back to the original claim filed and controverted in 2002. These new claims, for benefits and compensation after July 15, 2002, had not been controverted and so the statute of limitations had not run. Thus, board permitted employee to proceed on those two claims while denying her 2002 claim as time-barred. Employer appealed, but because board decision was not a final one on the merits the appeal was converted to a motion for extraordinary review (MER). Employer's MER was late because such motions must be filed within 10 days of board decision (unlike appeals that must be filed within 30 days of the board decision).

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).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

Former 8 AAC 57.072(a)(1) requiring MERs to be filed "within 10 days after the date of service of the board order or decision from which review is sought[.]"

8 AAC 57.270(a) providing the "commission may order time periods or procedures that differ from time periods or procedures established in this chapter, if (1) strict adherence to time periods or procedures established in this chapter would work injustice; and (2) the change would . . . advance the prompt, fair and just disposition of appeals."

AS 23.30.110(c) requires claimants to file a request for hearing within two years after employer controverts the claim.

AS 23.30.105(a) requires in part that “if payment of compensation has been made without an award on account of injury . . . a claim may be filed within two years after the date of the last payment of benefits”

8 AAC 45.050 defines a claim as “written request for benefits” in subpart (b)(1) and specifies the requirements needed to make a claim in subpart (b) and to answer a claim in subpart (c), as well as explaining when amendments relate back in subpart (e).

When we examine a board decision for extraordinary review, we do so without the full 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. Dec. No. 038 at 11 (also noting that “We caution that our grant or denial of a motion for extraordinary review should not be interpreted as disapproval or approval of the board's decision.”).

Issues: Should commission grant the MER? Should commission excuse the late filing of the motion?

Holding/analysis: Commission was inclined to grant the MER review under 8 AAC 57.076(2) or (3). The board departed from its standard practice (and regulation, 8 AAC 45.050(e)) of relating verbal amendments back to original claim. The decision to view 2003 and 2006 verbal amendments as “new” claims also conflicted with Alaska Supreme Court case law that a claim is a “written application for benefits” (*e.g.*, *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995), and with the board's own regulations that require claims to be written and answered. The board decision also failed to address why the 2006 claim was not barred by AS 23.30.105(a) (requires the filing of claims within two years of the last compensation payment).

But commission denied motion because motion was filed late and criteria for accepting a late motion were not satisfied (avoiding injustice and promoting prompt, fair and just resolution). Commission concluded that (1) Kuukpik had preserved its objections for appeal; (2) waiting would give unrepresented Harig more time to understand and defend the decision, since concept of relation back and interplay of statute, case law and regulations “are not readily mastered by an inexperienced claimant”; (3) waiting permits the board to address commission's concerns as the appeal moves forward; and (4) waiting sets a good example of the commission staying within its regulatory and statutory authority, especially in a case where issue is board's adherence to its regulations. Dec. No. 038 at 11.

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.