

SANDRA HARVEY  
(Appellee)

v.

AFFILIATED LABORATORY, INC.  
(Appellant)

and

CROSS INSURANCE TPA, INC.

Decided: June 14, 2022  
Corrected: June 21, 2022

PANEL MEMBERS: Administrative Law Judges Chabot, Pelletier, and Sands  
BY: Administrative Law Judges Chabot

### **ORDER DISMISSING APPEAL**

[¶1] Affiliated Laboratory, Inc., appeals from an interlocutory order of the Workers' Compensation Board (*Hirtle, ALJ*) dated March 17, 2022, sustaining Sandra Harvey's objection to Affiliated Laboratory's request to expand a search for an independent medical examiner (IME), when no appropriate examiner from the Board's list was available. *See* 39-A M.R.S.A. § 312. Ms. Harvey has filed a Motion to Dismiss the Appeal, contending the appeal is interlocutory in nature and no exception applies that would allow for an immediate appeal from a nonfinal judgment in this case. Affiliated has filed its response to the motion.

[¶2] The Appellate Division Rules provide for appeals from "ALJ decisions." Me. W.C.B. Rule, ch. 13, § 3. That rule further provides:

For purposes of this chapter, "decision" means a final decision issued by an Administrative Law Judge that fully disposes of the matters pending before the Administrative Law Judge. "Decision" does not include interlocutory or non-final decisions including, but not limited to, provisional orders.

The Appellate Division has construed this rule to allow for interlocutory appeals that fit within one of the recognized exceptions to the final judgment rule. *Estate of Boyle v. Lappin Brothers*, Me. W.C.B. No. 17-18, ¶ 9 (App. Div. 2018).

[¶3] Affiliated contends this case fits within the “death knell” exception to the final judgment rule. The Law Court has outlined the parameters of that exception:

The death knell exception applies if substantial rights of a party will be irreparably lost if review is delayed until final judgment. A right is irreparably lost if the appellant would not have an effective remedy if the interlocutory determination were to be vacated after a final disposition of the entire litigation. Put differently, where an interlocutory order has the practical effect of permanently foreclosing relief on a claim, that order is appealable.

*Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 14, 974 A.2d 918. (quotation marks and citations omitted).

[¶4] Affiliated asserts that the right to have an opinion from an IME is a significant right that will be irreparably lost if review is delayed until final judgment. It argues that it will not have an effective remedy if it is forced to litigate the case without an IME.

[¶5] Even if we agreed that a section 312 examination is a substantial right under the Act, the death knell exception is available “only when the injury to the appellant’s claimed right, absent appeal, would be imminent, concrete and irreparable.” DONALD G. ALEXANDER, MAINE APPELLATE PRACTICE § 304(a) at 227 (4<sup>th</sup> ed. 2013). The death knell exception does not apply because the appellant’s rights will not be irreparably lost if review is delayed until final judgment. *See Tungate v. MacLean-Stevens Studios, Inc.*, 1997 ME 113, ¶ 5, 695 A.2d 564.

[¶6] Accordingly, the appeal is DISMISSED. Once a final decision is made, either party may appeal any earlier ruling that was properly opposed at the time. MAINE APPELLATE PRACTICE § 306 at 237.

The entry is:

The appeal is DISMISSED.

Attorneys for appellant:  
Anne-Marie Storey, Esq.  
John K. Hamer, Esq.  
RUDMAN WINCHELL  
P.O. Box 1401  
Bangor, ME 04402-1401

Attorney for appellee:  
Carol G. McMannus, Esq  
McMANNUS LAW, P.C.  
56 Chamberlain Street  
Brewer, ME 04412