

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GREGORY THOMAS GUERRISSI,)
) INTERLOCUTORY
Employee,) DECISION AND ORDER
Claimant,)
) AWCB Case No. 201902745
v.)
) AWCB Decision No. 20-0013
STATE OF ALASKA,)
) Filed with AWCB Anchorage, Alaska
Self-Insured Employer,) on March 16, 2020
Defendant.)
)

Gregory Thomas Guerrissi's October 22, 2019 petition for a second independent medical evaluation (SIME) and his October 22, 2019 claim for attorney fees and costs were heard on January 23, 2020 in Anchorage, Alaska, a date selected on December 5, 2019. A November 14, 2019 affidavit of readiness for hearing gave rise to this hearing. Attorney Keenan Powell appeared and represented Mr. Guerrissi (Employee). Assistant Attorney General Lars Johnson appeared and represented State of Alaska (Employer). There were no witnesses. The record closed at the hearing's conclusion on January 23, 2020.

ISSUES

Employee contends there is a dispute between his treating doctor and Employer's medical evaluator (EME), and an SIME should be ordered. Employer agrees there is a medical dispute, but contends an SIME would be of more benefit after additional discovery is completed.

1. Should an SIME be ordered?

Employee contends his attorney provided valuable services in obtaining the SIME, and he should be awarded attorney fees. Employer contends that because an SIME should not be ordered at this time, Employee is not entitled to fees.

2. Is Employee entitled to attorney fees?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) Employee was employed by Employer as a building maintenance foreman. On February 13, 2019, he was working on a ladder when he felt a painful pull in the left side of his neck. (First Report of Injury, February 27, 2019).
- 2) In June 2008, Employee was in two motor vehicle accidents, and complained of bruises to his left hand and knee as well as left shoulder and neck pain. An MRI showed only mild degenerative disc disease at C5 with muscle spasm. (Medical Park Family Care, Chart Note, June 16, 2008).
- 3) On February 14, 2019, Employee reported left shoulder and neck pain to Timothy Coalwell, M.D. Dr. Coalwell ordered cervical spine and shoulder MRIs, and referred Employee to a specialist. (Dr. Coalwell, Chart Note, February 14, 2019).
- 4) On March 12, 2019, Employee was seen by Michael McNamara, M.D. at Alaska Hand-Elbow-Shoulder Surgical Specialists. Employee reported he now had numbness and tingling in his arm and hand and, while he could reach overhead, it caused pain to do so. Dr. McNamara concluded the pain was most likely radicular pain from his neck, but he could not rule out a shoulder injury. (Dr. McNamara, Chart Note, March 12, 2019).
- 5) An MRI taken March 15, 2019 showed three tears of Employee's left rotator cuff, one of which was a full-thickness tear. (University Imaging Center, Radiology Report, March 15, 2019).
- 6) A March 29, 2019 cervical MRI showed a broad-based disc protrusion as C3-4, a posterior disc protrusion as C4-5, a broad posterior disc protrusion at C5-6, and a large herniation as C6-7 that effaced the spinal cord and impinged on the C7 nerve root. (University Imaging Center, Radiology Report, March 29, 2019).
- 7) On April 3, 2019, Eric Olson, M.D. performed a C6-7 epidural steroid injection. (Alpine Surgery Center, Procedure Note, April 3, 2019).

GREGORY THOMAS GUERRISSI v. STATE OF ALASKA

- 8) On June 5, 2019, Ben Rosenbaum, M.D., performed a C6-7 discectomy and arthrodesis. (Creekside Surgery Center, Operative Report, June 5, 2019).
- 9) On September 7, 2019, Employee was seen by David Glassman, M.D., for an EME. Dr. Glassman reviewed Employee's medical records, including the March 15 and 29, 2019 MRIs, and examined Employee. Dr. Glassman opined all of the diagnoses related to Employee's neck were degenerative and were not caused by the work injury. He based that conclusion on the facts that the February 14, 2019 chart note made no mention of cervical spine tenderness or muscle spasm. Additionally, he noted that pulling at shoulder level would not result in a cervical disc herniation. Dr. Glassman also opined the February 13, 2019 work injury was not the substantial cause of Employee's left shoulder symptoms. He explained that because the imaging of the shoulder did not show any muscle strain or ligament injury, the rotator cuff tear was degenerative, and while the work injury caused a temporary aggravation, the shoulder had returned to pre-injury levels by March 12, 2019. Dr. Glassman stated the medical records provided to him were sufficient to render an opinion to a reasonable degree of medical probability. (Dr. Glassman, EME Report, September 7, 2019).
- 10) On September 25, 2019, Employer controverted all benefits related to Employee's neck and cervical spine in reliance on Dr. Glassman's September 7, 2019 EME report. (Controversion Notice, September 25, 2019).
- 11) On October 15, 2019, Employer controverted all benefits related to Employee's left shoulder in reliance on Dr. Glassman's September 7, 2019 EME report. (Controversion Notice, October 14, 2019).
- 12) On October 22, 2019, Employee's attorney entered her appearance on his behalf and filed a claim for benefits and a petition for an SIME. (Entry of Appearance, Claim and Petition, October 22, 2019).
- 13) On October 31, 2019, Dr. Rosenbaum wrote a "to whom it may concern" letter stating the February 13, 2019 work injury was the cause of Employee's cervical symptoms and subsequent care. Dr. Rosenbaum noted the underlying pathology was asymptomatic until the injury, when it became "irreversibly symptomatic." (Dr. Rosenbaum, Letter, October 31, 2019).
- 14) On November 8, 2019, Employer answered Employee's SIME petition. Employer did not oppose the SIME outright, but in reliance on *McCain v. Nana Regional Corp.*, AWCB Decision

No., 11-0025 (March 4, 2011), asked that the SIME be held in abeyance until more discovery has been completed. (Answer, November 8, 2019).

15) On January 14, 2020, Employee filed his attorney's affidavit regarding fees. His attorney detailed 7.6 hours spent on the SIME issue, and requested \$425.00 per hour "pursuant to *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019)". In addition to describing her experience in workers' compensation, Employee's attorney described a variety of other litigation she had been engaged in since she was admitted to the bar in 1983. (Employee, Fee Affidavit, January 14, 2020).

16) In its brief for the January 23, 2020 hearing, Employer contended it would be denied due process if the SIME proceeded before it had had adequate time to conduct discovery. Employer noted Employee had filed his petition for an SIME on October 22, 2019, the same day he filed his claim. Attached as exhibits to Employer's brief are military medical records indicating Employee reported shoulder pain in July 1995 that do not appear to have been filed on a medical summary. (Employer, Hearing Brief and Exhibits).

17) At the January 23, 2020 hearing, Employee's attorney supplemented her fee affidavit, detailing an additional 3.7 hours spent on the SIME issue, for a total of 11.3 hours. (Hearing Representation; Observation).

18) Employee's attorney was recently awarded attorney fees based on an hourly rate of \$400.00. (*Cavitt v. D&D Services, LLC*, AWCB Decision No. 20-0012 (March 6, 2020)).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

(3) this chapter may not be construed by the courts in favor of a party;

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

The Supreme Court has cautioned against considering the workers' compensation process "a game of 'say the magic word,' in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature." *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 194 (Alaska 2013).

AS 23.30.010. Coverage.

(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

AS 23.30.095. Medical treatments, services, and examinations.

. . . .

(k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and

medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . .

AS 23.30.110. Procedure on claims.

. . . .

(g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.

AS 23.30.095(k) and AS 23.30.110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCBC Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co.*, AWCBC Decision No. 98-0076 (March 26, 1998). Wide discretion exists under AS 23.30.110(g) for the board to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best “protect the rights of the parties.” *Hanson v. Municipality of Anchorage*, AWCBC Decision No. 10-0175 at 18 (October 29, 2010).

The Alaska Workers’ Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board’s authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the AWCAC confirmed “[t]he statute clearly conditions the employee’s right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.” *Id.* Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an opinion would help the board. *Id.* at 5.

The AWCAC further stated that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Id.* at 4. Under either AS 23.30.095(k) or AS 23.03.110(g), the purpose for ordering an SIME is to assist the board. It is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician’s opinion. *Id.*

8 AAC 45.092. Second independent medical evaluation.

....

(g) If there exists a medical dispute under in AS 23.30.095(k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

(A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or

(B) the board on its own motion determines an evaluation is necessary.

....

j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to

(1) submit written questions or depose the examiner, the party must

(A) file with the board and serve upon the examiner and all parties, not later than 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the written questions; if notice or the written questions are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves written questions; and

(B) initially pay the examiner's charges to respond to the written questions or for being deposed; after a hearing and in accordance with AS 23.30.145 or 23.30.155(d), the charges may be awarded as costs to the prevailing party; (

2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board;

In *McCain v. NANA Regional Corp.*, AWCB Decision No. 11-0025 (March 4, 2011), an employee injured his low back at work. He had injured his low back 23 years earlier while in the military, and was receiving disability benefits as a result. A dispute arose between the employee's and employer's doctors, and the employee sought an SIME. The employer asked that the SIME be delayed until the military medical records, which it had requested, were received. The Board found all of the *Bah* factors had been met and an SIME was appropriate. However, because the dispute hinged on the role, if any, that the military injury played in the employee's current disability, the decision noted the importance of the military records. While the decision did not immediately order the SIME, it held that one be scheduled within 60 days, regardless of whether the military records were received.

AS 23.30.145. Attorney fees.

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the

GREGORY THOMAS GUERRISSI v. STATE OF ALASKA

compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* The board has awarded attorney fees in cases where an employer unsuccessfully resisted an SIME. *See, e.g., Stepanoff v. Bristol Bay Native Corp.*, AWCBC Decision No. 09-0041 (February 26, 2009). *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978); *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993).

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), after a contentious case, the parties reached a settlement of all benefits except the employee's attorney fees. The claimant's attorney sought \$425.00 per hour and submitted an affidavit detailing 277.55 hours of work as well as a list of witness who would testify at a hearing on his fees. At hearing, the claimant was permitted to testify, but the attorney and other witnesses were precluded from testifying. The Board did allow the claimant's attorney to file a declaration stating he had more than 35 years' experience practicing law in multiple states, had represented hundreds of personal injury clients and dozens of workers' compensation clients, including many clients he had assisted pro bono. In reviewing the claimed hourly rate, the Board stated it would review attorney fee awards in other published cases, but did not provide the parties with copies of the decisions or the

names of the cases upon which it relied. The Board reduced claimant's attorney's hourly rate to \$300.00 per hour and the amount for "paralegal tasks" to \$130.00 per hour. In addition, the panel reduced the fee for time spent on tasks on which the claimant did not succeed. The Supreme Court reversed holding the Board should have considered the witnesses' testimony and allowed the parties the opportunity to respond to any cases or other information on which it relied. The Court held that because attorneys are not required to hire paralegals, it was improper to reduce the hourly rate when the work is actually done by the attorney. The Court also held the Board must consider all of an attorney's experience, not just the attorney's compensation experience. The Court held the Board must consider all factors in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee. Those factors are:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
2. the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

The Supreme Court remanded *Rusch* for reconsideration consistent with its decision.

ANALYSIS

1. Should an SIME be ordered?

Bah held there are three requirements before an SIME can be ordered under AS 23.30.095(k). First, there must be a medical dispute between an Employee's attending physician and an EME.

Second, the dispute must be significant. Third, the SIME physician's opinion will assist the board in resolving the dispute.

a) Is there a medical dispute between Employee's attending physician and an EME?

The law provides for an SIME when there is a medical dispute between an employee's attending physician and an EME. AS 23.30.095(k). In his September 7, 2019 report, Dr. Glassman opined none of the diagnoses related to Employee's neck were caused by the work injury. In his October 31, 2019 letter, Dr. Rosenbaum opined the work injury caused Employee's underlying cervical pathology to become irreversibly symptomatic. There is a medical dispute as to whether the work injury was the substantial cause of Employee's disability and the need for medical treatment for his neck.

b) Is the dispute significant?

The doctors disagree on causation which is the threshold issue for benefits under the Act. To receive disability or medical benefits under the Act, Employee must show employment is the substantial cause. Because Employee's entitlement to benefits depends on causation, the dispute is significant.

c) Will an SIME physician's opinion assist in resolving the dispute?

There is a significant disagreement between the parties' doctors. This is not a case where the dispute between the doctors is likely to be resolved by reviewing the underlying facts or the law. The dispute is a fundamental medical disagreement, and an expert medical opinion would aid in resolving the dispute.

Employer contends it would be denied due process if the SIME proceeds before discovery is completed, but that argument misapprehends the purpose of an SIME. While an SIME that considered all of the evidence in a case might be advantageous, that rarely occurs, and 8 AAC 45.092(j) provides a mechanism in which subsequently discovered medical records can be reviewed by the SIME doctor. In this case, Dr. Glassman specifically stated the records provided to him were sufficient to render an opinion to a reasonable degree of medical probability. Given

Dr. Glassman's statement, those records plus any newly produced records should be adequate for an SIME doctor to form an opinion as well. In some circumstances where less important issues are involved, it may be prudent to delay an SIME. Here, however, causation is the threshold issue, and an early SIME opinion on that issue is likely to speed the resolution of the case. An SIME will be ordered.

2. Is Employee entitled to attorney fees and costs?

Employee's attorney successfully obtained the SIME that Employee sought and Employer resisted. In doing so, she expended 11.3 hours of time, and a review of her fee affidavit, and her explanation at hearing of the supplemental work done show that the tasks done and the time spent were reasonable.

In addition to reviewing the work done, *Rusch* requires the Board to look at the eight factors in Alaska Rule of Professional Conduct 1.5(a) in determining a reasonable fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly:

Questions regarding SIMEs are common in workers' compensation cases. They are not particularly difficult, and do not require an unusually high level of skill to perform.

2. The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer:

To some extent, time spent working on any client's case prevents an attorney from spending that time on another client's case. However, in her affidavit, Employee's attorney did not state the work for Employee precluded her from other employment.

3. The fee customarily charged in the locality for similar services:

In her affidavit, Employee's attorney stated she was requesting \$425.00 per hour "pursuant to *Rusch*." However, while the attorney in *Rusch* requested \$425.00 per hour, the Supreme Court did not award him that amount, but remanded for a determination of a reasonable

fee. Neither party provided any evidence as to the hourly rate customarily awarded to employee attorneys in workers' compensation cases in Anchorage. Employee's attorney has previously been awarded \$400.00 per hour.

4. The amount involved and the results obtained:

Employee's attorney was successful in obtaining the SIME. While an SIME does not result in a monetary benefit to an employee, where causation is an issue, it significantly moves the case toward resolution, and the Board has awarded attorney fees in the past.

5. The time limitations imposed by the client or by the circumstances:

In her affidavit, Employee's attorney did not identify any time limitation imposed by the client or the circumstances.

6. The nature and length of the professional relationship with the client;

Employee's attorney has represented him since October 22, 2019. This factor may favor either an increased fee or a decreased fee, depending on the fact of a particular case. In this case neither party has explained how the length of the professional relationship would affect the fee.

7. The experience, reputation and ability of the lawyer or lawyers performing the services:

Employee's attorney has practiced law in Alaska since 1983; she is one of the more experienced workers' compensation attorneys and has significant experience in other areas including litigation.

8. Whether the fee is fixed or contingent:

Virtually all fees for employee attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate.

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of GREGORY THOMAS GUERRISSI, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201902745; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by Certified U.S. Mail, postage prepaid, on March 16, 2020.

_____/s/
Nenita Farmer, Office Assistant