ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

LEAH C. IBALE,	)	
	)	INTERLOCUTORY
Employee,	)	DECISION AND ORDER
Claimant,	)	
	)	AWCB Case Nos. 201204120M, 201209804,
v.	)	201218806. 201301046, 201214174
	)	
STATE OF ALASKA,	)	AWCB Decision No. 13-0136
	)	
Self-Insured Employer,	)	Filed with AWCB Juneau, Alaska,
Defendant.	)	on October 29, 2013
	)	

Leah Ibale's (Employee) March 14, 2013 request for a second independent medical evaluation (SIME) was heard on October 8, 2013, in Juneau, Alaska, a date selected on September 12, 2013. Employee appeared and was the only witness. Attorney Patricia Huna appeared and represented the State of Alaska (Employer). The record closed at the hearing's conclusion on October 8, 2013.

ISSUE

Employee contends there is a medical dispute between Employee's attending physician and Employer's medical evaluator (EME) regarding numerous body parts and conditions. She requests an SIME.

Employer contends Employee's attending physicians and Employer's EME physician agree Employee's work injury resulted in a temporary exacerbation of symptoms but her ongoing disability and need for medical treatment is not work-related. It contends because no medical dispute exists warranting an SIME, one should not be ordered.

Should an SIME be ordered?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On March 27, 2012, Employee was exposed to dust and asbestos when cleaning a forward lounge while working as a cashier for Employer on the M/V Columbia. She reported the exposure caused respiratory symptoms such as coughing, wheezing, shortness of breath, and a tightening chest. (Employee; Report of Injury, March 29, 2012; Claim, April 23, 2012).

2) On March 27, 2012, White Environmental Consultants, Inc., conducted a phase contrast microscopy (PCM) air sampling in the forward lounge where Employee had cleaned. The sampling showed the forward lounge asbestos level was extremely low, and well below acceptable levels. (White Environmental Consultants, Inc., PCM Air Sample, March 27, 2012; Chart Note, Dr. Snyder, April 4, 2012).

3) On March 29, 2012, Jeanne Snyder, M.D., treated Employee for respiratory symptoms and diagnosed: 1) upper respiratory inflammation, rhinitis and bronchitis, likely due to exposure at work, 2) low possibility of asbestos exposure, and 3) incidental finding of quite elevated blood pressure. Dr. Snyder prescribed an Albuterol inhaler and directed Employee to take two inhaler puffs at least three times a day for the next four to seven days. (Chart Note, Dr. Snyder, March 29, 2012).

4) On March 29, 2012, a chest x-ray showed no evidence of acute cardiopulmonary disease. (Radiologist Report, Kevin Ketchum, M.D., March 29, 2012).

5) On March 30, 2012, Dr. Snyder treated Employee for continued cough and breathing difficulties. Dr. Snyder stated, “She feels she is no better, mentions the asbestos again, despite my having told her yesterday at the end of yesterday’s visit about the negative finding of asbestos contamination in that work space.” Dr. Snyder opined, “Dust in the workplace is a likely contributing factor to this illness, but not asbestos exposure.” (Chart Note, Dr. Snyder, March 30, 2012).

6) On April 4, 2012, Dr. Snyder treated Employee in follow up and diagnosed upper respiratory inflammation, rhinitis and bronchitis related to dust exposure at work. Dr. Snyder stated, “She still is talking about asbestos exposure, so I remind (sic) her . . . the asbestos level inside the shrouded area in the ceiling of the area she was working in was extremely low, and well below

acceptable levels. It is not asbestos that caused her this problem, but dust exposure, most likely." Dr. Snyder also stated, "Symptoms better almost resolved. She will not need further follow-up for this problem." (Chart Note, Dr. Snyder, April 4, 2012).

7) On April 4, 2012, Dr. Snyder released Employee to return to her regular work beginning April 6, 2012. (Unfit/Fit for Duty Form, Dr. Snyder, April 4, 2012).

8) On April 23, 2012, Andrew Pankow, M.D., treated Employee for cough and diagnosed cough, sinus pain, and thyromegaly. He opined, "This is a work related injury," and stated, "I think it is quite unlikely that she had significant exposure to asbestos, however, appears that she very well could have had some dust exposure that has been now complicated by respiratory infection or sinusitis. Dr. Pankow recommended a sinus computerized axial tomography (CT) scan. (Chart Note, Dr. Pankow, April 23, 2012).

9) On April 25, 2012, a sinus CT scan showed: 1) no air fluid levels identified to suggest there is an acute sinusitis, and 2) mild mucosal thickening in the ethmoid air cells and along the maxillary ostia and infundibula bilaterally consistent with a degree of chronic sinusitis. (Radiologist Report, Kevin Ketchum, M.D., April 25, 2012).

10) On May 3, 2012, Dr. Pankow evaluated Employee for a return to work slip and released Employee to her regular work as of May 4, 2012. (Chart Note, Dr. Pankow, May 3, 2012).

11) Employer paid Employee TTD benefits from April 1, 2012 through April 5, 2012 and from April 29, 2012 through May 4, 2012. (Compensation Report, June 26, 2012).

12) On June 4, 2012, Employee saw Victor Van Hee, M.D., with Harborview Medical Center, for a self-referred second opinion regarding her workplace exposure. Dr. Van Hee declined to render an opinion regarding work-relatedness until he had received additional information including Drs. Snyder and Pankow's chart notes. (Chart Note, Dr. Van Hee, June 4, 2012).

13) On June 18, 2012, Employer controverted temporary total disability (TTD), temporary partial disability (TPD), and permanent partial impairment (PPI) benefits relating to Employee's March 27, 2012 work injury, based on Dr. Snyder's opinion Employee was fit for duty as of April 6, 2012. (Controversion Notice, June 18, 2012).

14) On June 22, 2012, Diane Liljegren, M.D., treated Employee for sore throat and ear pain, diagnosed: 1) upper respiratory tract infection with associated wheezing, 2) ongoing wheezing and dyspnea, suspicious for asthma, which may or may not be work-related, 3) multinodular goiter, 4) systolic murmur, 5) sensation of neck fullness, 6) elevated blood pressure, and 7)

possible nasal congestion or allergic rhinitis. Dr. Liljegren stated Employee, "had an occupational exposure to dust. . . . Since that exposure, she has had a persistent cough." Dr. Liljegren prescribed Employee an Albuterol inhaler. An Outpatient Medication Profile comments state it is for "cough" and, "this is an AK Marine Hwy work comp illness." Dr. Liljegren also prescribed Flonase nasal spray to treat Employee's nasal congestion, but did not relate it to any work injury. (Chart Note, Dr. Liljegren, June 22, 2012; Outpatient Medication Profile, June 22, 2012).

15) On July 13, 2012, Employee reported she had shortness of breath while working for Employer on the M/V Columbia. (Employee; Report of Injury, July 13, 2012; Claim, August 17, 2012).

16) On July 17, 2012, Catherine Bjerum, M.D., treated Employee for shortness of breath, and diagnosed allergic rhinitis. Dr. Bjerum stated Employee, "last March has (sic) a dust exposure at work. Since that time, she has been having respiratory complaints." (Chart Note, Dr. Bjerum, July 17, 2012).

17) On July 27, 2012, Dr. Van Hee opined Employee had at least exacerbation of her chronic sinusitis because of dust exposure at work and recommended Employee follow up with her local provider for treatment. (Chart Note, Dr. Van Hee, July 27, 2012).

18) On August 30, 2012, allergy and immunology specialist Emil Bardana, Jr., M.D., examined Employee for an EME. Dr. Bardana diagnosed: 1) documented transient irritational rhinitis and bronchitis, 2) documented changes of chronic sinusitis, 3) possible obstructive sleep apnea, 4) history of dyspepsia, 5) essential hypertension, 6) probable valvular heart disease, 7) pre-diabetes mellitus Type II, 8) documented thyromegaly, 9) exogenous obesity, 10) remote history of dermatographism, and 11) history of adverse reactions to sulfa and Doxycycline. He opined Employee's March 27, 2012 work injury contributed to her initial respiratory symptoms, but opined such symptoms would have been transient, would not have lasted beyond 72 hours. Employee needed no further work-related medical treatment, and had no permanent partial impairment as a result of the work injury. He opined Employee's July 13, 2012 work injury was not the substantial cause of any need for medical treatment. He opined Employee was medically stable and able to return to her original work on the date Dr. Snyder stated she could return. (EME Report, Dr. Bardana, August 30, 2012).

19) On September 10, 2012, Employee reported she was injured on September 8, 2012, after suffering an allergic reaction after eating cream cheese bread while working for Employer on the M/V Columbia. She reported the exposure caused stomach upset and left eye swelling. (Employee; Report of Injury, September 10, 2012).

20) On September 9, 2012, Jeffrey Stieglitz, M.D., with the Ketchikan General Hospital Emergency Department, treated Employee for, "generalized allergic reaction of unknown cause." (Chart Note, Dr. Stieglitz, September 9, 2012).

21) On September 13, 2012, cardiologist Kenneth Tye, M.D. evaluated Employee for chest pain and dyspnea, and opined the cause of these conditions "is still not quite clear to me at this point." (Evaluation Report, Dr. Tye, September 13, 2012).

22) On September 28, 2012, Employer controverted all benefits relating to Employee's March 27, 2012 work injury, based on Dr. Bardana's EME report. (Controversion Notice, September 28, 2012).

23) On November 18, 2012, Employee reported she was injured on November 17, 2012 while working for Employer on the M/V Columbia when, after vigorous activity, she suffered blurry vision and right eye floaters. (Employee; Report of Injury, November 18, 2012).

24) On November 18, 2012, Scott Kirchner, M.D., with the Ketchikan General Hospital Emergency Department, treated Employee for eye floaters and decreased vision in right eye. Dr. Kirchner opined her condition was not work-related. (Chart Note, Dr. Kirchner, November 18, 2012; Physician's Report, Dr. Kirchner, November 20, 2012).

25) On November 27, 2012, Susan Lim, M.D., referred Employee to ophthalmologist Peter Chen, M.D. (Referral, Dr. Lim, November 27, 2012).

26) On January 7, 2013, Dr. Chen opined Employee's floaters were benign and she had no retinal holes or tears. (Letter from Dr. Chen to Dr. Lim, January 7, 2013).

27) On January 17, 2013, Dr. Van Hee opined asbestos exposure only causes problems following many years of exposure; a single high level exposure does not cause immediate problems; exposure to dust can cause irritation of the nose, throat, and lungs and can cause asthma-like symptoms in some people, but once exposure ends, the symptoms typically get much better; if symptoms do not get much better, a primary care doctor or lung doctor can treat any conditions which result from dust exposure. (Letter from Dr. Van Hee to Employee, January 17, 2013).

28) On January 30, 2013, Employee reported she was injured on January 29, 2013, after exerting herself climbing up stairs while working for Employer on the M/V Taku. She reported the exertion caused bilateral eye irritation and light flashes, blurred vision, chest pain, shortness of breath, and anxiety. (Employee; Report of Injury, January 30, 2013; Claim, February 27, 2013).

29) On March 11, 2013, Employer controverted all benefits relating to Employee's January 29, 2013 work injury stating, "no medical evidence established to support work-related injury." (Controversion Notice, March 11, 2013).

30) On March 14, 2013, the parties appeared at a prehearing conference. Because Employee had filed numerous petitions and workers' compensation claims from which it was difficult to determine the relief or benefits Employee was requesting, Employee clarified her claims and requested benefits included TTD, PPI, medical and related transportation costs, reemployment benefits, a compensation rate adjustment, penalty, interest, and a finding of unfair or frivolous controversion relating to numerous dates of injury and body parts. Employee also requested an SIME in cases 201204120M, 201209804, 201218806, and 201301046 relating to her eye, respiratory and heart conditions and symptoms. (Prehearing Conference Summary, March 14, 2013).

31) On March 15, 2013, Employer controverted all benefits relating to Employee's November 17, 2012 work injury stating, "no medical evidence established to support work-related injury." (Controversion Notice, March 15, 2013).

32) On April 10, 2013, Maria Faylona, M.D., treated Employee for chronic obstructive pulmonary disease and stated, "In order to avoid aggravation of [Employee's] medical conditions, it is advised that she be excused from work for three months for her medical treatments." Dr. Faylona did not relate Employee's disability to any work injury. (Chart Note, Dr. Faylona, April 10, 2013; Letter from Dr. Faylona, April 10, 2013).

33) On May 24, 2013, ophthalmologist Ted Zollman, M.D., examined Employee for an EME. Dr. Zollman diagnosed: 1) ocular irritation, 2) floaters, 3) cataracts, and 4) refractive error. He opined Employee's work injury was the substantial cause of her ocular irritation, but not the substantial cause of her other eye conditions. He recommended Employee treat her work-related condition with hot compresses and artificial tears. He opined silicone punctal plugs may be helpful to promote healing and also recommended a course of anti-inflammatory eye drops to help reduce irritation. He opined Employee was not medically stable, but stated her ocular irritation is mild to

moderate in degree and is not a substantial cause of any disability. He opined Employee could return to full duty work without restrictions. (EME Report, Dr. Zollman, May 24, 2013).

34) On May 28, 2013, Employer controverted all benefits relating to Employee's September 8, 2012 work injury on the basis Employee failed to timely report the injury and also because there was no medical evidence supporting a work-related injury. (Controversion Notice, May 28, 2013).

35) On August 5, 2013, Employer controverted all benefits relating to Employee's September 8, 2012 work injury, except for ocular irritation medical benefits. (Controversion Notice, August 5, 2013).

36) August 5, 2013, Employer controverted all benefits relating to Employee's March 27, 2012 work injury, except for ocular irritation medical benefits. (Controversion Notice, August 5, 2013).

37) On September 5, 2013, Maureen Northway, FNP, with Creekside Family Health Clinic, referred Employee to ear, nose and throat specialist James Rockwell, M.D., for evaluation of a lump on the roof of Employee's mouth and chronic sinusitis. Ms. Northway restricted Employee from working until September 19, 2013. Ms. Northway did not relate Employee's need for medical treatment or disability to any work injury. (Patient Referral Request, FNP Northway, September 5, 2013; Unfit/Fit for Duty Form, September 5, 2013).

38) On September 12, 2013, the parties appeared at a prehearing conference, agreed to join case file 201214174 to Employee's other cases and include it in her SIME request, and agreed Employee's SIME request relating to all her cases would be heard on October 8, 2013. (Prehearing Conference Summary, September 12, 2013).

39) On October 7, 2013, Employee filed a workers' compensation claim for her September 8, 2012 work injury, and requested medical and related transportation costs, penalty, interest, and a finding of unfair or frivolous controversion. (Workers' Compensation Claim, October 7, 2013).

40) At hearing on October 8, 2013, because Employee alleged all her injuries were connected to the March 27, 2012 dust and asbestos exposure, the parties agreed the hearing issue was whether an SIME was warranted for the following claims, dates of injury, and body parts:

Case No.	**Date of Injury**	**Date Claims Filed**	**Body Parts Injured**
201204120M	March 27, 2012	April 23, 2012; May 31, 2012; July 10, 2012	Respiratory symptoms; eye; ear; nose; throat; ocular irritation; floaters; posterior vitreous detachment (PVD)
201209804	July 13, 2012	August 20, 2012	Respiratory symptoms; heart
201214174	September 8, 2012	October 7, 2013	Left eye; right arm; chest; back;

			face; legs
201218806	November 17, 2012	January 24, 2013	Right eye
201301046	January 29, 2013	February 27, 2013	Right eye; anxiety

(Employee; Huna).

41) There is not a significant medical dispute between Employee's attending physicians and Employer's EME physicians. (Experience, judgment, observations).

42) An SIME can be very costly to Employer who must pay all SIME-related costs. (*Id.*).

43) An SIME will not assist the decision-makers in this case in making a determination on the legal cause or compensability of Employee's disability or need for medical treatment relating to her work injuries. (Experience, judgment, and inferences drawn from all the above facts).

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. . . .

The board may base its decision not only on direct testimony, medical findings, 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).

> **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. . . .

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. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .

AS 23.30.155. Payment of compensation. . . .
. . .

(h) The board may upon its own initiative at any time in a case . . . where right to compensation is controverted . . . make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

8 AAC 45.092. Selection of an independent medical examiner. . . .
. . .

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

(2) a party may petition the board to order an evaluation… 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.

The following, general criteria are typically considered when ordering an SIME, though the statute does not expressly so require:

1) Is there a medical dispute between Employee's physician and Employer's EIME?
2) Is the dispute "significant"?

3) Will an SIME physician's opinion assist the board in resolving the disputes?

DiGangi v. Northwest Airlines, AWCB Decision No. 10-0028 at 13 (February 9, 2010). AS 23.30.095(k) is procedural and not substantive for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 at 3 (July 23, 1997). AS 23.30.135 provides the board with wide discretion under AS 23.30.095(k) to consider any evidence available when the board decides whether to order an SIME to assist in investigating and deciding medical issues in contested claims. *Bah v. Trident Seafoods Corp.,* Alaska Workers' Comp. App. Comm'n Dec. 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 stated:

> [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. at 4. *Bah* stated, 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.*

ANALYSIS

Should an SIME be ordered?

The law provides for an SIME when there is a medical dispute between the employee's attending physician and the employer's EME. Employee alleges all her injuries, set forth below, are connected to the March 27, 2012 dust and asbestos exposure:

Case No.	Date of Injury	Date Claims Filed	Body Parts Injured
201204120M	March 27, 2012	April 23, 2012; May 31, 2012; July 10, 2012	Respiratory symptoms; eye; ear; nose; throat; ocular irritation; floaters; posterior vitreous detachment (PVD)
201209804	July 13, 2012	August 20, 2012	Respiratory symptoms; heart
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201218806	November 17, 2012	January 24, 2013	Right eye
201301046	January 29, 2013	February 27, 2013	Right eye; anxiety

Here, there is no dispute Employee was injured while working for Employer and this injury resulted in some disability and need for medical treatment. Employee's treating physicians and Employer's EME physician agree work-related dust exposure caused some initial respiratory symptoms and gave rise to some work-related disability and need for medical treatment. Employer paid Employee TTD through May 4, 2012, and paid for her dust exposure-related medical benefits until it controverted them on September 28, 2012.

There is no medical dispute among doctors regarding Employee's ongoing disability and need for medical treatment for any of the above-referenced injuries. Similarly, a review of the entire record evidences no medical dispute as to causation or compensability of Employee's claims. Employer has accepted Employee's ocular irritation claim as compensable. Employer paid the medical and disability benefits Employee's treating physicians opined were work-related. No physician has opined dust or asbestos exposure, or any other work-related injury, caused any disability after May 4, 2012. Although Employee has sought medical treatment for many conditions after September 2012, no physician has stated the work injuries are the substantial cause of the additional medical treatment. No physician has opined Employee needs additional work-related respiratory medical treatment or has a "work-related" need for any other eye, ear, nose, throat, respiratory, arm, chest, back, face, legs, heart or anxiety medical treatment.

As there are no significant medical disputes among the relevant doctors, an SIME will not assist the decision-makers in making a determination on the legal cause or compensability of Employee's disability or need for medical treatment. AS 23.30.095(k); *Bah*. Furthermore, an SIME can be very expensive. Under these facts, an SIME is not a reasonable expense to impose upon Employer. AS 23.30.001(1). Employee's March 14, 2013 request for an SIME will be denied.

CONCLUSION OF LAW

An SIME will not be ordered.

ORDER

Employee's March 14, 2013 request for an SIME is denied.

Dated in Juneau, Alaska, on October 29, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Marie Y. Marx, Designated Chair

Bradley S. Austin, Member

Charles M. Collins, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 LEAH C. IBALE, employee / applicant v. STATE OF ALASKA, self-insured employer; Case Nos. 201204120, 201209804, 201218806, 201301046, and 201214174; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, on October 29, 2013.

Sue Reishus-O'Brien, Workers' Compensation Officer