

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

NATALIYA KUKHARENKO, )  
)  
Employee, )  
Claimant, )  
)  
v. ) INTERLOCUTORY  
) DECISION AND ORDER  
)  
HOPE COMMUNITY RESOURCES, ) AWCB Case No. 201205101  
)  
Employer, ) AWCB Decision No. 14-0168  
and )  
) Filed with AWCB Juneau, Alaska  
NATIONAL UNION FIRE INSURANCE ) on December 23, 2014  
OF PITTSBURG, )  
)  
Insurer, )  
Defendants. )  
)

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Nataliya Kukharenko's (Employee) August 6, 2014 petition for a second independent medical evaluation (SIME) was heard on December 16, 2014 in Juneau, Alaska, a date selected on September 2, 2014. Non-attorney representative Walt Sisikin appeared and represented Employee. Attorney Krista Schwarting appeared and represented Hope Community Resources and its insurer National Union Fire Insurance of Pittsburg (Employer). Employee appeared and was the only witness. The record closed at the hearing's conclusion on December 16, 2014.

## ISSUE

Employee contends there is a medical dispute between Employee's attending physicians and Employer's medical evaluator (EME) regarding her back, upper and lower extremities, and headaches. She requests an SIME.

Employer contends most of Employee's attending physicians and Employer's EME physician agree Employee's work injury resulted in either no work-related need for medical treatment, or a temporary work-related exacerbation of symptoms, which has long resolved. It contends although Daniel Holt, D.C. opined Employee's need for medical treatment was because of her work injury, this opinion should be given less weight. 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 February 20, 2012, Daniel Holt, D.C., treated Employee for low back pain that began approximately one and a half months prior. (Chart Note, Dr. Holt, February 20, 2012).
- 2) On March 26, 2012, Employee was injured in a vehicle collision while working for Employer. Employee injured her back when a vehicle driven by a third party rear-ended Employee's vehicle. (Chart Note, Bartlett Regional Hospital Emergency Department, March 26, 2012).
- 3) Employee obtained medical treatment for her work injury, and Employee incurred and Employer voluntarily paid temporary total disability (TTD) and temporary partial disability (TPD) benefits and medical costs for treatment arising out of Employee's injury. (Compensation Report, March 4, 2013).
- 4) On May 2, 2012, Dr. Holt treated Employee for low back and left leg pain and neck stiffness. Employee reported having a headache for a couple of hours following her prior chiropractic adjustment. (Chart Note, Dr. Holt, May 2, 2012).
- 5) On May 9, 2012, Dr. Holt treated Employee for low back and left leg pain, and Employee reported also having a headache. (Chart Note, Dr. Holt, May 9, 2012).
- 6) On December 5, 2012, orthopedic surgeon Gordon Bozarth, M.D., at Juneau Bone & Joint Center, treated Employee for low back and lower extremity pain and recommended a lumbar spine magnetic resonance imaging (MRI). (Chart Note, Dr. Bozarth, December 5, 2012).
- 7) On December 10, 2012, a lumbar spine MRI showed: 1) degeneration of the L5-S1 disc with type 1 endplate change, 2) tiny right posterolateral extrusion with cranial migration, 3) minimal impinging upon the right thecal sac, and 4) mild left foraminal stenosis. (Radiologist Report, Jay Kaiser, M.D., December 10, 2012).

8) On December 12, 2012, Dr. Bozarth treated Employee for back and lower extremity pain and opined, “the findings of the degeneration at the L5-S1 disc space could not be previously caused from the motor vehicle accident in March of 2012.” He also opined there was no evidence of neural impingement based on the MRI findings. He recommended physical and massage therapy. (Chart Note, Dr. Bozarth, December 12, 2012).

9) On January 6, 2013, Dr. Holt wrote a letter, which stated:

This letter is to relate some of Ms. Kukharenko’s current status for work-related purposes. Nataliya has had a difficult time after being involved in a motor vehicle accident. Currently she functions at about 30 percent of her pre-injury capacity with very little bending or lifting. She experiences intense lower back pain with flexion, extension and right lateral flexion type movements. She has been referred to Dr. Bozarth for evaluation and treatment. On 12/10/12 she received an MRI of the lumbar spine without contrast. The impression of the MRI was: “degeneration of the L5-S1 disc with type 1 endplate change. Tiny right posterolateral extrusion with cranial migration. Minimal impinging upon the right thecal sac. Mild left foraminal stenosis.”

This is a supine type of MRI and given that her symptoms are much worse in the weight bearing and anterior flexion, it would stand to reason that the foraminal stenosis and posterolateral extrusion are more extensive than seen on the MRI.

Her condition is now chronic and very slow in her healing response. She is not to perform activities of heavy lifting, pushing and pulling or pain producing activities until further notice as her condition is long standing and not progressing very fast at this point in time.

(To Whom It May Concern Letter from Dr. Holt, January 6, 2013).

10) On February 6, 2013, Employee began a physical therapy program but stopped after a few sessions because of pain. (Chart Note, Chris Chiles, PT, February 6, 2013; Chart Note, Chris Chiles, PT, March 14, 2013; Employee Hearing Testimony, December 16, 2014).

11) On March 23, 2013, Dr. Holt treated Employee for back pain, and Employee reported left leg weakness and left foot cramping and numbness. (Chart Note, Dr. Holt, March 23, 2013).

12) On March 27, 2013, Dr. Holt treated Employee for back pain, and Employee reported she had a headache. (Chart Note, Dr. Holt, March 27, 2013).

13) On June 4, 2013, Dr. Holt opined Employee’s, “progress is very minimal and is more at a point of just maintaining a certain level of comfort. She did have some pre-existing lower back pain prior

to the injury, but nothing that would compare to her level of pain and discomfort since the accident. . . . A second opinion is recommended.” Dr. Holt referred Employee to physical medicine and rehabilitation specialist David Yu, M.D., at Virginia Mason Medical Center in Seattle, Washington. (Letter from Dr. Holt to Gail Kretzinger, June 4, 2013).

14) On June 6, 2013, Dr. Yu treated Employee for low back pain and assessed mechanical back pain exacerbated by concerns about Employee’s history of cancer, abnormal movement patterns, general deconditioning, and decreased lower extremity range of motion. Dr. Yu noted Employee was still wearing four inch stiletto heels and recommended Employee avoid use of high heeled stilettos until her pain symptoms improved and gait mechanics returned to normal. He also recommended physical therapy. (Chart Note, Dr. Yu, June 6, 2013).

15) On July 31, 2013, Dr. Holt treated Employee for back pain and stated treatment goals were, “return to preinjury status.” (Chart Note, Dr. Holt, July 31, 2013).

16) On August 2, 2013, Employee began another physical therapy program and made slow but measureable progress. (Chart Note, Katharine Coghill, PT, August 2, 2013; Chart Note, Katharine Coghill, PT, November 14, 2013).

17) On August 2, 2013, PT Coghill evaluated Employee for back pain. Employee reported on rare occasions she gets pain affecting the left buttock and left calf, but the pain is primarily isolated to the lumbar region. (Chart Note, PT Coghill, August 2, 2013).

18) On November 29, 2013, Employee filed a claim for her March 2012 work injury, and requested medical costs relating to her back. (Workers’ Compensation Claim, November 29, 2013).

19) On January 8, 2014, Employee was discharged from physical therapy due to lack of follow up. (Chart Note, Katharine Coghill, PT, November 14, 2013; Chart Note Addendum, Katharine Coghill, PT, January 8, 2014).

20) On January 10, 2014, Employer controverted all benefits, based on Dr. Bozarth’s opinion Employee’s work injury was not the substantial cause of Employee’s need for medical treatment. (Controversion Notice, January 10, 2014).

21) On February 6, 2014, the parties appeared at a prehearing conference. Employee clarified her medical costs claim was for her back, upper and lower extremities, and headaches. (Prehearing Conference Summary, February 6, 2014).

22) On February 27, 2014, physical medicine and rehabilitation specialist Alison Putnam, D.O., at Virginia Mason Medical Center, treated Employee for low back pain and diagnosed: 1) mechanical low back pain with myofascial component on the left and 2) bilateral calf cramping, likely related to the fact that Employee wears high heels on a daily basis and unrelated to her back pain. Dr. Putnam opined Employee no longer needed further physical therapy and recommended Employee continue her home exercise program. At Employee's request, Dr. Putnam referred Employee for acupuncture for her low back pain. (Chart Note, Dr. Putnam, February 27, 2014).

23) On April 11, 2014, orthopedic surgeon Douglas Bald, M.D., examined Employee for an EME. Dr. Bald diagnosed: 1) multilevel lower lumbar degenerative disc disease and minor right L5-S1 disc protrusion, pre-existing, 2) history of lower back pain, under treatment, pre-existing, and 3) lumbar strain, work-related. He opined Employee's March 2012 work injury caused a lumbar strain. He stated the work injury was the substantial cause of Employee's need for low back medical treatment until the date Employee completed her initial physical therapy program, which he believed was approximately April 3, 2013. After this date, the substantial cause of Employee's need for low back medical treatment was her pre-existing degenerative disc disease and chronic low back pain. He opined Employee needed no further work-related medical treatment, and was medically stable as of the date Employee completed her initial physical therapy program. (EME Report, Dr. Bald, April 11, 2014).

24) On August 6, 2014, Employee filed a petition for an SIME. (Petition, August 6, 2014).

25) On September 2, 2014, the parties appeared at a prehearing conference and agreed Employee's SIME petition would be heard on December 16, 2014. (Prehearing Conference Summary, September 2, 2014).

26) On October 16, 2014, Dr. Bozarth was deposed and stated he was unable to opine whether Employee's March 2012 work injury caused her need for low back medical treatment. He opined Employee's small disc protrusion lacked any significance and did not compress any nerve roots. He also opined Employee's L5-S1 degenerative changes were unrelated to her March 2012 work injury. (Bozarth Deposition 10:7-17; 17:12-18:8).

27) Employer acknowledges Dr. Holt relates some of Employee's back symptoms and conditions to her work injury. It contends Dr. Holt's opinion does not create a dispute warranting an SIME because 1) Dr. Holt's opinion does not use the words "the substantial cause," 2) Dr. Holt's opinion was given prior to referring Employee for additional evaluation and Dr. Holt's referral

for a second opinion shows other physicians are more qualified to evaluate and treat Employee, and 3) his opinion does not clarify whether it is addressing objective versus subjective pain. It contends Dr. Holt's opinion should therefore be given less weight. (Employer Hearing Brief, December 9, 2014; Employer Hearing Arguments, December 16, 2014).

28) There is a significant medical dispute between Employee's attending physician and Employer's EME physician. (Experience, judgment, observations).

29) An SIME will assist the decision-makers in this case in making a determination on the legal cause or compensability of Employee's 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).

The Alaska 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." *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

**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. To establish a presumption under AS 23.30.120(a)(1)

that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise 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. . . .

**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*, AWCBC 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*, AWCBC 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 has a pending claim for medical costs and contends there is a medical dispute between her medical providers and the EMEs regarding Employee’s claims for ongoing back, upper and lower extremity, and headache medical treatment. AS 23.30.095(k); 8 AAC 45.092(g)(2). Employer denies liability for these benefits. Employer does not dispute Dr. Holt attributes at least some of Employee’s back conditions, symptoms and need for medical treatment to her work injury. It contends, however, Dr. Holt’s opinion should be given less weight. Employer therefore opposes an SIME on any issues.



*1) Are there medical disputes?*

There are medical disputes among doctors relating to Employee's claim for ongoing low back medical treatment. *Bah.* Dr. Bozarth was unable to opine whether Employee's March 2012 work injury caused her need for low back medical treatment. Dr. Putnam did not provide any opinion regarding the cause of Employee's need for medical treatment. Dr. Yu did not relate it to Employee's work injury. Employer's EME physician, Dr. Bald, opined Employee's work injury was the substantial cause of Employee's need for low back medical treatment until the date Employee completed her initial physical therapy program, which he believed was approximately April 3, 2013.

In contrast, Dr. Holt's January 6, 2013 letter stated, "This letter is to relate some of [Employee's] current status for work related purposes." He then discusses Employee's low back symptoms and conditions. On June 4, 2013, Dr. Holt opined Employee's, "progress is very minimal and is more at a point of just maintaining a certain level of comfort. She did have some pre-existing lower back pain prior to the injury, but nothing that would compare to her level of pain and discomfort since the accident. . . . A second opinion is recommended." Although Dr. Holt did not use the words "the substantial cause," the Alaska 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." *Smith.* Employer acknowledges these letters show Dr. Holt attributed at least some of Employee's ongoing low back conditions and symptoms, including worsened back pain, to her work injury. Dr. Holt continued to treat Employee's low back conditions and symptoms even after Employee's additional evaluation by Dr. Yu. Dr. Holt's referral for a second opinion, or any reliance on subjective versus objective complaints, does not change Dr. Holt's opinion on causation of her ongoing low back conditions and symptoms, including worsened low back pain.

Employer's objections to an SIME relate to evidence weighing. Evidence is not weighed when determining whether an SIME should be ordered under AS 23.30.095(k). The statute only requires the existence of a medical dispute. Employer can address Employee's physicians' opinions at a hearing on the merits, at which the weight accorded these opinions will be determined.

However, there is no medical dispute among doctors regarding Employee's need for medical treatment for other back conditions and symptoms, or upper and lower extremities and headaches. Other than Employee's low back, no physician has attributed any ongoing need for other back, upper or lower extremity, or headache medical treatment to her work injury.

*2) Are the disputes significant or relevant?*

The disputes relating to Employee's need for low back medical treatment are significant because if Dr. Holt's opinions on the case's merits were to be accepted, Employee may be entitled to workers' compensation benefits under the Act. By contrast, if Dr. Bald's opinions were accepted, Employee may not be entitled to worker's compensation benefits. *Bah.* Whether or not Employee is entitled to any benefits turns on whether her current need for medical care and treatment "arose out of and in the course of the employment," and if her employment is "the substantial cause" of her need for medical treatment. AS 23.30.010(a). The medical disputes created by differences in Dr. Holt and Bald's opinions focus on this salient, causation issue. This creates both a substantial and relevant medical dispute between these medical opinions.

*3) Will an SIME assist in resolving this claim on its merits?*

An SIME will assist in resolving Employee's claims on their merits. *Bah.* An SIME will allow Employee and Employer to provide a detailed, accurate history of Employee's medical situation and work place experience through both Employee's verbal report to the SIME physician, and through her medical records, which will further clarify the history. Employee's medical history since first having low back conditions and symptoms will be particularly important for an SIME physician to review. An SIME will likely provide expert clarification of these issues, and be of great benefit to the fact-finders when they decide this case on its merits.

An SIME will be ordered with regard to Employee's low back conditions and symptoms. AS 23.30.095(k). At least one treating physician and Employer's EME are orthopedic surgeons. An orthopedic surgeon is best suited to perform this SIME, because the medical issues involve low back conditions and symptoms, and the SIME will be ordered with an orthopedic surgeon. If a physician selected by the board's designee believes a referral to some other specialty is warranted, he or she may make that referral and the board's designee will make appropriate arrangements.

The board's designee will be ordered to schedule a prehearing conference within 30 days of this decision's date to promptly continue the SIME process. The designee will use her discretion and the normal SIME process under 8 AAC 45.092 to select the physician. The SIME issues will include at a minimum causation and compensability. The parties may agree to include additional SIME issues such as treatment, medical stability, a determination of Employee's functional capacity, disability and PPI to save time and money. They may also stipulate to including other back conditions and symptoms, or upper and lower extremities and headaches as non-SIME issues even though these are not currently subject to a medical dispute. This will encourage a quicker, more efficient process at a reasonable cost to Employer. AS 23.30.001(1).

### CONCLUSION OF LAW

An SIME will be ordered.

### ORDER

- 1) Employee's August 6, 2014 petition for an SIME is granted.
- 2) An SIME will be conducted with an SIME physician with adequate expertise in orthopedic surgery and as determined by the designee. The board's designee is ordered to advise the selected orthopedic surgeon that he or she may refer Employee to another SIME physician of a different specialty if necessary.
- 3) The board's designee is ordered to schedule a prehearing conference within 30 days of this decision's date to promptly continue the SIME process. The designee will use her discretion and the normal SIME process under 8 AAC 45.092 to select the physician.
- 4) The SIME issues will include at a minimum causation and compensability. The parties may agree to include additional SIME issues such as treatment, medical stability, a determination of Employee's functional capacity, disability and PPI.
- 5) They may also stipulate to including other back conditions and symptoms, or upper and lower extremities and headaches as non-SIME issues even though these are not currently subject to a medical dispute.

Dated in Juneau, Alaska on December 23, 2014.



ALASKA WORKERS' COMPENSATION BOARD

*Marie Marx*

Marie Marx, Designated Chair

*Charles Collins*

Charles Collins, Member

*Bradley Austin*

Bradley Austin, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 NATALIYA KUKHARENKO, employee / claimant v. HOPE COMMUNITY RESOURCES, employer; NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURG, insurer / defendants; Case No. 201205101; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on December 23, 2014.

*Robin Silk*

Robin Silk, Workers' Compensation Technician