ALASKA WORKERS' COMPENSATION BOARD

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

MARILOU S. MAHUSAY, Employee, and CHUGACH PHYSICAL THERAPY, Claimant, v. STATE OF ALASKA, Self-insured Employer, Defendant.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201018501 AWCB Decision No. 17-0099 Filed with AWCB Anchorage, Alaska on August 23, 2017

Chugach Physical Therapy's (Chugach) February 7, 2016 claim was heard on August 17, 2017, in Anchorage, Alaska, a date selected on July 27, 2017. Non-attorney representative Lezlie Robinson appeared, represented Chugach and testified on Chugach's behalf. Attorney Robert Rehbock appeared and represented Marilou S. Mahusay (Employee) who appeared and testified on her own behalf. Attorney Daniel Cadra appeared and represented the State of Alaska (Employer). The record closed at the hearing's conclusion on August 17, 2017.

ISSUE

The issue set for hearing was Chugach's claim for $6,153.65 in unpaid physical therapy (PT) bills incurred treating Employee. Chugach contends Employee is responsible for co-pays and non-covered physical therapy she incurred at its facility.

Employer contends Employee is responsible for Chugach's unpaid PT bills because Employer and Employee settled Employee's case through an approved settlement agreement and Employer paid Employee sufficient funds from which to pay the remaining PT bill balances. It further contends the PT is not compensable pursuant to its employer's medical evaluation (EME) opinion.

Employee contends she is not responsible for the PT bills as they were treatment for injury that arose out of and in the course of her work injury with Employer. She further contends she never would have settled her case if she knew the PT bills remained unpaid. Therefore, she contends Employer is liable to Chugach for the outstanding PT bills.

During the hearing, Employer conceded and it became clear from the evidence that there is a medical dispute between Employee's attending physicians and the EME directly affecting Chugach's claim. The panel is considering ordering a second independent medical evaluation (SIME) before deciding Chugach's claim on its merits. However, since an SIME was not a hearing issue, due process requires an opportunity for the parties to address the panel's concerns about the medical dispute.

Should the parties brief the SIME issue?

FINDINGS OF FACT

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

1) On November 30, 2006, Employee injured her left shoulder while working for Employer when a resident suddenly pulled on her arm. M. David Bautista, D.O., diagnosed a left shoulder strain and a "slight separation." Dr. Bautista said Employee was medically stable, had no permanent impairment and could return to work with no overhead lifting greater than 10 pounds with her left upper extremity. (Physician's Report, December 1, 2006).

2) On December 1, 2006, Employee's left shoulder had "at least a low-grade injury to the AC joint and coracoclavicular ligament." (X-ray report, December 1, 2006).

3) On December 26, 2010, Employee reported a pulling-type injury to her left shoulder while lifting a patient while at work for Employer. Timothy Morgan, PA-C, at Firstcare diagnosed a

left shoulder strain. He referred Employee to PT and released her to work without restrictions the following day. (Firstcare report, December 26, 2010).

4) On February 3, 2011, PA-C Morgan referred Employee to Alaska Spine Institute (ASI) for further evaluation. (Physician's report, February 3, 2011).

5) On February 14, 2011, PA-C Morgan said the December 26, 2010 work injury is the substantial cause of Employee's left shoulder symptoms and need for her medical treatment. He opined this injury might be an aggravation of her 2006 left shoulder strain, which was also a work injury with Employer. (Morgan response to January 25, 2011 letter, February 14, 2011; record).

6) On March 21, 2011, Shawn Johnston, M.D., at ASI noted Employee had attended PT and chiropractic treatment "with some modest benefit." Dr. Johnson referred Employee to Adkins Chiropractic for "active release" treatments. (Johnston report, March 21, 2011).

7) On December 5, 2011, Dr. Adkins opined lifting at work was aggravating Employee's symptoms. (Adkins report, December 5, 2011).

8) On December 19, 2011, Dr. Johnston said Employee had not gotten much improvement with her current treatment and recommended cervical traction for her "left trapezius pain." Dr. Johnston referred Employee to Kanady Chiropractic Center (Kanady) for Internal Disc Decompression Therapy (IDD). (Johnston report, December 19, 2011).

9) On January 12, 2012, Trevor Tew, DC, at Kanady stated Employee's condition is related to her December 26, 2010 work injury with Employer. (Physician's Report, January 12, 2012).

10) On February 26, 2013, Dr. Adkins reiterated his opinion that Employee's condition was work-related, "from sitting up residents from bed, dressing and bathing them." (Physician's Report, February 26, 2013).

11) On April 20, 2013, John Ballard, M.D., performed an EME for the December 26, 2010 injury. Employee reportedly told Dr. Ballard her December 26, 2010 work injury occurred while she was using a Maxi-Lift transfer and put a sling underneath a patient. When she pulled the sling under the patient's shoulder to attach it to the machine, Employee felt a sharp pinching "in her left trapezius going up the left side of her neck." Employee told Dr. Johnston chiropractic care and physical therapy "helped." She sees a chiropractor when her pain flares up, and she can go perhaps six weeks without a flare-up. According to Dr. Ballard's report, Employee's worst pain was in her left trapezius and neck area. Her "current symptom" description did not include

left shoulder pain. Dr. Ballard recorded cervical and left shoulder strength and found these equal and "5/5." Her upper extremity measurements were identical. (Ballard report, May 1, 2013).

12) Dr. Ballard opined there was no current orthopedic diagnoses for Employee's left shoulder and cervical spine. The letter to which Dr. Ballard responded asked:

> 2. For each condition diagnosed in question 1, please state whether or not the work injury of December 26, 2010 is the substantial cause. In answering this question please address.
>
> A. All possible causes of Ms. Mahusay's conditions and symptoms;
> B. The relative contribution of the different causes to the conditions or symptoms you have diagnosed; and
> C. Whether, in your opinion, the December 26, 2010 work injury is, among all of the possible causes, the substantial cause.

He responded:

> The possible causes of Ms. Mahusay's current symptoms would be her work related injury of December 26, 2010. The other possible cause would be her age, body habitus, and general physical deconditioning. Another possible cause would be a psychological component causing her continued subjective complaints.
>
> At this time, I do not feel that the work injury objectively is the substantial cause of her ongoing symptoms. . . . (Ballard report, May 1, 2013; emphasis in original).

13) When asked the same question in respect to Employee's November 30, 2006 work injury with Employer, Dr. Ballard wrote:

> The work injury of November 30, 2006, is not a substantial cause of any of her current symptoms. She stated that she had that work injury and those symptoms clinically resolved. The medical records do indicate that she had some treatment after that but at this time that work injury is not playing a role in her current symptoms. (Ballard report, May 1, 2013).

14) Dr. Ballard opined Employee needed no further medical evaluation or treatment for her November 30, 2006 or December 26, 2010 work injuries with Employer and should continue with home exercise and strengthening. He agreed Employee became medically stable when Dr. Johnston performed a permanent impairment rating on October 29, 2012. (Ballard report, May 1, 2013).

15) On April 23, 2013, Dr. Adkins continued to provide chiropractic treatment, continued to state the condition was work-related. (Physician's Report, April 23, 2013).

16) On May 6, 2013, Dr. Johnston suggested Employee "do more stretches and cervical traction" for her work injury. (Johnston report, May 6, 2013).

17) On August 14, 2013, Employee went to Chugach for the first time for her left shoulder on referral from Robert Gieringer, M.D., for her work injury with Employer. On a billing document for this first visit, Chugach stated:

> Pt stopped by clinic 8/12. She had questions about billing for PT. She said this is WC related but that WC claim is controverted. She filed paperwork last week to appeal the controversion requesting that the claim be reopened. She does have health insurance w/ASEA. As of right now we will bill this as a union contract w/ASEA. If WC does reopen the claim we will then bill/resubmit to [sic]. (PT report, August 14, 2013).

18) On October 2, 2013, Dr. Gieringer referred Employee for massage therapy. (Gieringer referral, October 2, 2013).

19) On February 7, 2014, Employer controverted Employee's right to "all benefits." (Controversion Notice, February 6, 2014).

20) On May 28, 2014, Dr. Gieringer directed Employee to continue with PT. (Gieringer report, May 28, 2014).

21) On June 20, 2014, Dr. Gieringer testified:

> Okay. Well, she had two injuries that I know of. . . . But to the ones that I know of -- let me see if I can get this straight now. Her most recent injury, in 2010, was when she was applying a hydraulic lift machine and was pulling it in place, and that caused a pull on her shoulder.
>
> But prior to that, she had -- in 2006, she was helping a patient get out of bed. He jerked and pulled on her left shoulder. I think that that was probably the sentinel injury; that would cause -- certainly cause a labral tear, a supralabral tear. Well, I won't say 'certainly,' but it's a likely cause if one was found, and one was found.
>
> Then the -- but she continued to work, so I would consider that 2010 episode as being an aggravation or exacerbation, if you will, of the previous condition. . . .
> . . . .
>
> Well -- you know, as I was saying there, she continued to work after the earlier injury; then she had this second injury in 2010, and that seemed to bring her to

> medical care with me. . . . (Deposition of Robert Gieringer, M.D., June 20, 2014, at 6-7).

Dr. Gieringer opined the work injuries with Employer were "the greater cause than any other cause" of her need for left shoulder surgery. (*Id*. at 9).

22) On July 23, 2014, Dr. Gieringer recommended Employee's therapist begin active range of motion exercises rather than massage therapy. (Gieringer report, July 23, 2014).

23) On April 11, 2016, Chugach filed a claim for $6,153.65 in medical benefits for PT services rendered to Employee following her December 26, 2010 work injury with Employer. The PT bills at issue in this case span from August 14, 2013 through October 29, 2014. (Workers' Compensation Claim, April 7, 2016; Chugach Statement of Account, undated; Robinson).

24) On April 28, 2016, Employer denied Chugach's claim for medical benefits. (Employer's Answer, April 28, 2016).

25) On June 16, 2017, Dr. Ballard testified he did not have orthopedic diagnoses for Employee's shoulder or cervical spine. He further stated:

> Q. Okay. And of the various causes which you have identified, did you form an opinion as to the substantial cause of her cervical condition?
>
> A. I thought the work injury was the substantial cause when she first sought treatment; that and the left trapezius strain.
>
> Q. But those conditions had resolved at the time you examined her?
>
> A. Right. So that was no longer -- I didn't think that was still the substantial cause of her current symptoms.
>
> Q. Okay. And did you have any recommendations for further treatment of her cervical strain or her left trapezius strain?
>
> A. I thought it would be just do a home exercise and strengthening program. . . . (Deposition of John Ballard, M.D., June 16, 2017, at 25).
>
> . . . .
>
> Q. Okay. And any physical therapy which Ms. Mahusay may have received subsequent to the shoulder surgery, would it be your opinion that it would not be related to the work injury?
>
> A. Correct. (*Id*. at 33).

26) At hearing, Employer conceded there was a medical dispute between Employee's attending physicians and its EME. Employer briefly argued against an SIME, but no other party argued the point. (Employer's hearing arguments; record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers; . . . .
> > . . . .
> >
> > (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 board may base its decision not only on direct testimony and other tangible evidence, but also on its "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, . . . 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 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. The AWCAC referred said, referring to AS 23.30.095(k):

> [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.

The AWCAC further stated in *dicta*, that before ordering an SIME the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?
2) Is the dispute significant or relevant? and
3) Will an SIME physician's opinion assist the board in resolving the disputes?

> **AS 23.30.110. Procedure on claims**. . (a) . . . the board may hear and determine all questions in respect to the claim. . . .
> . . . .
>
> (g) An injured employee claiming . . . compensation shall submit to the physical examination by a duly qualified physician [,] which the board may require. . . .

The Alaska Supreme Court stated the language "all questions" is limited to questions raised by the parties or those questions the agency raises upon notice duly given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252 (Alaska 1981). In *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009), the Alaska Supreme Court held the trial court was entitled to cite Alaska law in its decision and the trial court must base its decisions on the law. It was "entirely appropriate" for the court to cite a statute that controlled a disputed issue even though the parties had not, so long as the parties had a full opportunity to brief the dispute. (*Id*. at 1003-04.).

> **AS 23.30.135. Procedure before the board**. (a) . . . The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **AS 23.30.155. Payment of compensation**. . . .
> . . . .
>
> (h) The board may, upon its own initiative and at any time in a case in which . . . the right to compensation is controverted, or when payments of compensation have been . . . terminated . . . 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. . . .

In *Williams v. Safeway Stores*, 525 P.2d 1087, 1089 n. 6 (Alaska 1974), the Alaska Supreme Court referring to the word "compensation" as used in the Alaska Workers' Compensation Act stated, "the only reasonable reading of the word would include medical benefits."

> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

ANALYSIS

Should the parties brief the SIME issue?

When there is a medical dispute on one or more statutorily enumerated issues between an injured worker's attending physician and an EME, or an injured worker claims "compensation," or an employer controverted a party's right to "compensation," the law provides for a medical examination sometimes called an SIME. AS 23.30.095(k); AS 23.30.110(g); AS 23.30.155(h). Before an SIME is ordered, the fact-finders usually consider (1) is there a medical dispute between an attending physician and an EME; (2) is the medical dispute significant or relevant; and (3) will an SIME help the panel resolve the dispute. *Bah*. At hearing, Employer conceded there is a medical dispute between Employee's attending physicians and EME Dr. Ballard. AS 23.30.095(k). Chugach filed a claim for medical benefits. "Compensation" includes medical benefits. *Williams*.

However, the SIME issue was not set for hearing and while Employer briefly argued against an SIME, all three parties did not fully argue the issue on August 17, 2017. AS 23.30.110(a); *Simon*. Therefore, to afford all parties a fair hearing, this decision will reopen the hearing record and will direct the parties to brief whether there should be an order requiring an SIME, at Employer's expense. AS 23.30.010(1), (4); *Barlow*; 8 AAC 45.120(m). This briefing process will best protect the rights of all parties. The parties may file and serve optional briefing on the need for an SIME by no later than August 31, 2017. If a party chooses not to file an SIME brief, the panel will reconvene and decide on the written record whether to order an SIME notwithstanding any party's nonparticipation in the additional briefing opportunity. AS 23.30.135(a); *Rogers & Babler*.

CONCLUSION OF LAW

The parties should brief the SIME issue.

ORDER

1) The parties shall file optional SIME briefs by no later than August 31, 2017.

2) The parties' optional SIME briefs should address (1) is there a medical dispute between an attending physician and an EME; (2) is the medical dispute significant or relevant; and (3) will an SIME help the panel resolve the dispute over Chugach's PT bills.

3) If a party chooses not to file an SIME brief, the panel will reconvene and decide the SIME issue on the written record.

4) Chugach's non-attorney representative may file a letter addressing the above-referenced SIME considerations, rather than a formal "brief."

Dated in Anchorage, Alaska on August 23, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Amy Steele, Member

/s/
Rick Traini, 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 accord 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 accord 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 Marilou S. Mahusay, employee and Chugach Physical Therapy, claimant v. State of Alaska, employer / insurer, defendant; Case No. 201018501; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 23, 2017.

/s/
Elizabeth Pleitez, Office Assistant