

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JEFFREY L KOLLMAN,)
Employee,) INTERLOCUTORY
Claimant,) DECISION AND ORDER
v.)
ASRC ENERGY SERVICES,) AWCB Case No(s). 201007169
Employer,)
and) AWCB Decision No. 14-0075
ARCTIC SLOPE REGIONAL CORP.,) Filed with AWCB Fairbanks, Alaska
Insurer,) on 30 May 2014
Defendants.)
_____)

The issue of whether additional second independent medical evaluations (SIME) should be ordered was heard on March 13, 2014, in Fairbanks, Alaska. The hearing date was selected on February 12, 2014. Robert Bredesen represented ASRC Energy Services and Arctic Slope Regional Corporation (Employer). Michael Jensen represented Jeffrey Kollman (Employee). The record was held open to receive the deposition transcript of SIME physician Peter Diamond, MD, Employee's supplemental affidavit of attorney's fees and Employer's objection thereto. The board received Dr. Diamond's deposition transcript on April 9, 2014. The record closed after the panel next met and deliberated, on April 24, 2014.

ISSUES

Employer contends Employee should undergo an SIME with an ear, nose and throat (ENT) specialist, as the parties previously stipulated to the SIME and Employee continues to allege work-

related dizziness and imbalance issues. Employee contends no current dispute exists warranting an ENT SIME and requests relief from the parties' stipulation to the SIME.

1) *Should an SIME with an ENT be ordered?*

Employer contends SIME physician Dr. Diamond recommended a referral to either a neurosurgeon or pain management specialist on the question of whether a spinal cord stimulator is reasonable and necessary to treat Employee's headaches, and reiterated that recommendation in his recent deposition. Employer requests an order requiring Employee attend an additional SIME with either a neurosurgeon or pain management specialist, whichever is appropriate. Employee contends an SIME with a neurosurgeon or pain management specialist is unnecessary as there is no current dispute on the issue of whether the spinal cord stimulator is reasonable and necessary treatment for Employee's headaches.

2) *Should an SIME with a neurosurgeon or pain management specialist be ordered?*

FINDINGS OF FACT

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

- 1) On April 27, 2010, Employee injured his neck, back, right shoulder, nose and head when the tow strap of a dozer he was operating failed and struck him on the right side of his face. (Report of Occupational Injury or Illness, undated; Employee's Claim, November 5, 2012).
- 2) On November 9, 2012, Employee filed a workers' compensation claim, seeking reclassification of .41(k) stipend to temporary total disability (TTD) benefits, medical costs, transportation, interest, attorney's fees and costs, and an SIME. (Claim, November 5, 2012).
- 3) On November 27, 2012, Employer filed its answer to Employee's claim, admitting reclassification to TTD and denying all other claimed benefits. (Answer, November 27, 2012).
- 4) On January 2, 2013, David Beal, MD opined Employee likely suffered a right ear fistula and recommended fistula repair surgery. (Dr. Beal report, January 2, 2013).
- 5) On January 22, 2013, Douglas Bald, MD conducted an employer's medical evaluation (EME). He noted:

I do think that an independent medical examination by an ENT specialist regarding the claimant's complaints of vertigo and their potential association with inner ear abnormalities would also be reasonable given the fact that Dr. Beals has apparently recommended surgical treatment for these complaints.

(Dr. Bald EME report, January 22, 2013).

6) On August 28, 2013, otolaryngologist James Rockwell, MD conducted an EME. He disagreed with Dr. Beal's opinion Employee suffered a right ear fistula and opined further treatment was not indicated for Employee's balance and headaches, absent additional testing. (Dr. Rockwell EME report, August 28, 2013).

7) On October 9, 2013, Employer filed a petition for SIME, along with a proposed SIME form, which listed causation and treatment as the disputed issues. Employer contended a dispute existed between Dr. Beal and Dr. Rockwell. Specifically, Employer cited Dr. Beal's January 2, 2013 opinions:

This man was involved in an industrial accident where he received a significant blow to the head and since has had had significant neck trouble and constant state of imbalance. We have documented positive fistula test on induced pressure into the ears where both the right and left have tested positive for the fistula.... He may need bilateral fistula repair, but the right ear has more indications of fistula than the left so will repair the right ear first and see if he gets better with this alone.

Employer also cited Dr. Rockwell's August 28, 2013 opinions:

On a more-probable-than-not-basis, I would state that Mr. Jeffrey Kollman does not have a perilymph fistula. The mechanism of injury is not at all consistent with the development of a perilymph fistula (sic). The vast majority of fistulas when associated with head trauma have other associated injuries, to include facial fractures, skull fractures, and serious brain injury.... This examinee simply does not have that.... Further treatment is not indicated until further diagnostic testing is completed.

(Employer's Petition for SIME, October 9, 2013).

11) On October 15, 2013, the parties stipulated to a SIME with an ENT. (PHC Summary, October 15, 2013).

12) On November 6, 2013, on Dr. Rockwell's referral, audiologist James Wuth performed a videonystagmography test, which was clearly negative for fistula. (Wuth report, December 10, 2013).

13) On January 10, 2014, Dr. Rockwell issued his addendum report, finding no evidence of perilymph fistula. (Dr. Rockwell EME report, January 10, 2014).

14) On January 24, 2014, Employee's counsel wrote a letter to Dr. Beal, attaching Audiologist Wuth's November 6, 2013 report and requesting his opinion. Dr. Beal responded with a hand-

written note stating “No evidence of a fistula at this time. I agree.” (Dr. Beal hand-written note, undated).

15) On January 28, 2014, Employee’s counsel advised Employer’s counsel that Employee no longer wished to pursue the fistula surgery previously recommended by Dr. Beal and would therefore request the ENT SIME be cancelled. (M. Jensen letter to R. Bredesen, January 28, 2014).

16) On February 12, 2014, Employer’s counsel responded:

You indicated that Mr. Kollman is no longer interested in surgical treatment for the asserted fistula, and that Dr. Beal agrees that surgery is not indicated. However, this leaves uncertain whether Mr. Kollman now agrees with Dr. Rockwell’s opinions, or whether it is his position that disputes of medical opinion still remain but are not significant enough (in his opinion) to make an SIME worthwhile.

We would require a partial compromise and release before we would agree to cancel an ENT SIME, in order to clarify and resolve certain issues. My client will agree to rescind the stipulation for an SIME, if you and your client will agree to the following alternative stipulations:

1. Mr. Kollman did not sustain a vestibular injury as a result of his employment with the employer.
2. Mr. Kollman’s subjective complaints of dizziness, vertigo, etc. are (1) unsupported by objective findings, and (2) otherwise unrelated to his employment with the employer.
3. Mr. Kollman’s complaints of dizziness, vertigo, etc., do not affect his ability to work, or his ability to participate in the reemployment process.
4. Claimant counsel’s efforts to establish a vestibular injury and need for surgery were unsuccessful and this should be reflected in any future award of attorney’s fees and costs.

Please let me know if these terms will be acceptable to you and your client. If not, then I presume your client will contend there are vestibular issues which were caused by the employment with the employer, and which materially affect his claims for past and future benefits. If so, then we believe the ENT SIME should proceed.

17) On February 12, 2014, the parties attended a prehearing conference:

1. EE’s atty does not believe that an ENT SIME is necessary since EE’s physician is no longer relating fistula surgery to the work injury. It is ER’s position that the ENT SIME was agreed to and that it should move forward.

2. It is ER's position that another SIME should take place with a neurosurgeon and/or pain management specialist in order to determine if a spinal cord stimulator is necessary. (page 115 of Dr. Dimond's (sic) report)

(PHC Summary, February 12, 2014).

18) On March 7, 2014, the parties took Dr. Diamond's deposition.

Q. With respect to question number 34, you indicated that a neurosurgeon and/or chronic pain specialist would be recommended to address the spinal cord stimulator question?

A. Right.

Q. Can you explain to the board why would you recommend those specialties?

A. As a general rule, orthopedic surgeons, unless they have a subspecialty interest in spine surgery, do not place spinal stimulators. I went through his records, and I don't think he really has a spinal cord stimulator. I think what they put in, reading the operative note, is they're using a spinal cord stimulator, but they're not stimulating the spinal cord. They're stimulating the occipital nerve. They're using it as an occipital nerve modulator, specifically for the headaches, which make a lot more sense to me than a spinal cord stimulator for this patient. The instrument that is being utilized to modulate the occipital nerve headaches is a spinal cord stimulator. It's one use – I think it's a Boston Scientific instrument. That and Medtronic are the two companies that make these things. But I have no experience at all in placing these or in utilizing them in my practice, so that's why I deferred to the neurosurgeon.... [The spinal cord stimulator has] been effective from – according to the patient.

Q. According to the patient?

A. Yeah.

Q. Okay. But in order to determine whether that was reasonable or necessary, you'd still recommend an evaluation by a neurosurgeon or chronic pain specialist?

A. Yeah, yeah.

Q. [By Mr. Jensen] Did you say a chronic pain specialist? I thought you said neurosurgeon.

A. No, I did say neurosurgeon and/or chronic pain specialist.

Q. Okay.

A. Again, I just don't know who's putting these in. In this community, they're put in by neurosurgeons. It's conceivable that an anesthesiologist might be involved in putting it in. But I don't think so. I think they're all pretty much put in by neurosurgeons.

(Dr. Diamond deposition, March 7, 2014, at 59-60).

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.

....

The board may base its decision 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, 533-534 (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 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. 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. . . .

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 45.050. Pleadings.

...

(f) **Stipulations.**

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts.

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.

(4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

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; the petition must be filed with 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.

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 EME?
- 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)(citations omitted)).

Section 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)). Section 135 provides the board wide discretion pursuant to §095(k) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims. AS 23.30.155(h) also allows for board-ordered medical evaluations in controverted cases.

In *Bah v. Trident Seafood Corp.*, AWCAC Decision No. 07-0134 (February 27, 2008), the Commission outlined the board's authority to order an SIME under AS 23.30.110(g):

[T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it.... Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Bah, at 5.

Previous board decisions have denied a party's request to set aside a stipulation absent a showing of good cause. *See, e.g., Olson v. Federal Express*, AWCB Decision No. 08-0199 (October 29, 2008); *Greer v. State of Alaska*, AWCB Decision No. 10-0190 (November 26, 2010); *Brown v. Icicle Seafoods, Inc.*, AWCB Decision No. 12-0005 (January 6, 2012). While good cause has not been specifically defined, in *Smith v. Alaska United Drilling*, the board agreed with the employer's contention "a stipulation should not be set aside in the absence of fraud, overreaching, misrepresentation or good cause shown to modify the stipulation." *Smith* noted no fraud, overreaching or misrepresentation occurred in that case, but nonetheless relieved the employee from the parties' stipulated compensation rate because the employee was under financial pressure due to his wife's health condition and was not represented by an attorney when he signed the stipulation. *Smith*, 1985 WL50515 (October 25, 1985). In *Olson*, the board denied an employer's petition to set aside the parties' prior stipulation for an SIME, finding an SIME would assist the board in resolving the parties' disputes. *Olson*.

ANALYSIS

1) Should an SIME with an ENT be ordered?

Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. The law provides for an SIME when there is a medical dispute between the employee's attending physician and the employer's EME. The board may also order an SIME under AS 23.30.110(g) when a gap in the medical record exists related to an issue relevant to the employee's injury and an additional opinion will assist the board in ascertaining the rights of the parties. Employee contends he should be relieved of the October 15, 2013 stipulation to an ENT

SIME because Dr. Beal now agrees no fistula exists and Employee no longer seeks surgery. However, Employee continues to suffer vestibular problems and frequent headaches, the source of which is unclear. An SIME with an ENT will assist the board in determining the source of Employee's dizziness and headache symptoms and what treatment, if any, will alleviate them. Employee has not demonstrated good cause to relieve him of the October 15, 2013 stipulation. An ENT SIME will be ordered.

2) Should an SIME with a neurosurgeon or pain management specialist be ordered?

Employee did not present written briefing on the issue of whether an SIME with a neurosurgeon or chronic pain specialist should be ordered, but briefly clarified at hearing he opposes an additional SIME with because there is no pending dispute related to the spinal cord stimulator. However, as Dr. Diamond testified at his recent deposition, he has no experience with placing spinal cord stimulators and could not render an opinion on whether a spinal cord stimulator is reasonable or necessary treatment for Employee's headaches, an agreed-upon question presented to the SIME. Dr. Diamond reiterated his recommendation Employee be referred to a neurosurgeon or chronic pain specialist, whichever has more experience in placing spinal cord stimulators. An SIME physician with experience in placing spinal cord stimulators will assist the board in determining whether a spinal cord stimulator is reasonable and necessary treatment for Employee's headaches. A prehearing officer will be instructed to determine which of the two specialties is most appropriate to determine this issue.

CONCLUSIONS OF LAW

- 1) An SIME with an ENT will be ordered pursuant to AS 23.30.095(k).
- 2) An SIME with either a neurosurgeon or chronic pain specialist will be ordered pursuant to AS 23.30.095(k).

ORDER

- 1) Employer's Petition for an SIME is granted.
- 2) Employee shall attend an SIME with an ENT and either a neurosurgeon or chronic pain specialist.

3) To expedite the process, worker's compensation officer Melody Kokrine is directed to conduct a prehearing conference with the parties within 30 days of the date of this decision for the purpose of selecting the SIME physicians and setting deadlines for preparing the medical record for the physicians, per the appropriate regulations.

Dated in Fairbanks, Alaska on May 30, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Amanda K. Eklund,
Designated Chair

/s/ _____
Sarah Lefebvre, Member

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.

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.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JEFFREY KOLLMAN, Employee/applicant v. ASRC ENERGY SERVICES, INC., and ARCTIC SLOPE REGIONAL CORPORATION, Self-Insured Employer/defendant; Case No. 201007169; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, on May 30, 2014.

/s/ _____
Darren Lawson
Office Assistant II