

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DIANA GARCIA, )  
Employee, ) INTERLOCUTORY  
Claimant, ) DECISION AND ORDER  
)  
v. ) AWCB Case No(s). 201121461  
)  
TRIDENT SEAFOODS CORP, ) AWCB Decision No. 14-0083  
Employer, )  
) Filed with AWCB Anchorage, Alaska  
and ) On June 16, 2014  
)  
LIBERTY INSURANCE CORPORATION, )  
Insurer, )  
Defendants. )  
)

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Diana Garcia's March 11, 2014 petition for second independent medical evaluation was heard in Anchorage, Alaska on June 4, 2014, a date selected on April 8, 2014. Non-attorney representative Alejandro Rodriguez appeared telephonically and represented Diana Garcia (Employee). Attorney Jeffrey Holloway appeared telephonically and represented Trident Seafoods Corporation and Liberty Insurance Corporation (collectively, "Employer"). As a preliminary matter, Industry Board Member Amy Steele disclosed that Employer's attorney currently represents her employer, Chenega Corporation, in an active workers' compensation case. Ms. Steele stated she has not discussed Employee's case with Mr. Holloway, and expressed her belief she could be fair and impartial. Mr. Rodriguez asked Ms. Steele if her employer had any interest in Trident Seafoods. Ms. Steele replied it did not. Both parties accepted Ms. Steele's participation on the panel. No witnesses were called. The record closed at the hearing's conclusion on June 4, 2014.

ISSUES

Preliminarily, Employer objected to two medical records filed with Employee's hearing brief: an October 9, 2012 Initial Evaluation Report from Crosby Square Chiropractic, and a May 27, 2014 opinion on causation purportedly from Trent Habstritt, D.C. Employer contended it had never before seen either document, the reports were not filed timely, and the Habstritt opinion lacked authenticity. Employee contended the two documents are authentic medical records, were only obtained concurrently with her hearing brief preparation, and both should be considered by the board.

- 1. Should the October 9, 2012 medical record from Crosby Square Chiropractic, titled "Primary Treating Physician's Initial Evaluation Report and Request for Authorization," be considered?*
- 2. Should the May 27, 2014 document titled "Objections to EIME Dr. Craven Report of June 28, 2013," purportedly signed by Trent Habstritt, D.C., be considered?*

Employee contended there is a significant dispute between Employee's attending physician and Employer's medical examiner (EME), and a second independent medical evaluation (SIME) should be ordered. Employer contended the Board should deny Employee's petition for an SIME because no significant dispute exists between an attending physician and the EME physician.

- 3. Should an SIME be ordered?*

Employee contended a chiropractor is the appropriate specialist to conduct an SIME, and objected to an orthopedic surgeon serving in that capacity. Employer contended that either an orthopedic surgeon, physical rehabilitation physician, or occupational disease specialist is an appropriate specialist to conduct the SIME if one is ordered.

- 4. What is the appropriate medical specialty should an SIME be ordered?*

FINDINGS OF FACT

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

1. On or about September 21, 2012, Employee reported injuries to her bilateral wrists, bilateral shoulders, bilateral knees and lumbar spine, alleging these conditions arose from repetitive motion activities while seasonally employed by Employer as a fish processor, working 16 hours per day, seven days per week, for two and one-half months during seven successive years, 2004-2011. (Report of Occupational Injury or Illness (ROI), September 21, 2012).
2. Employee reported her last day of work, August 22, 2011, as the date of injury. (*Id.*).
3. On October 9, 2012, Employee was seen at Crosby Square Chiropractic in Calexico, California. According to its letterhead, Crosby Square Chiropractic is operated by Steven J. Rigler, D.C., Q.M.E. (qualified medical examiner), A.P.C. (a professional corporation), and operates with two practitioners: Dr. Rigler, and Trent Habstritt, D.C. (Primary Treating Physician's Initial Evaluation Report and Request for Authorization, October 9, 2012; record).
4. The October 9, 2012 medical record is a comprehensive 10-page report titled "Primary Treating Physician's Initial Evaluation Report and Request for Authorization," and bears the signatures of both Drs. Rigler and Habstritt. (*Id.* at 10).
5. The Evaluation Report addressed Employee's mechanism of injury, occupational history, job description at time of injury, social history, activities of daily living, past medical history and present complaints. Employee complained of pain in her bilateral shoulders, bilateral wrists, neck, upper and lower back and bilateral knees, right greater than left. Physical examination addressed Employee's shoulders, including range of motion measurement, wrists, including range of motion, and cervical, thoracic and lumbar spine, including range of motion. The diagnoses were bilateral carpal tunnel syndrome, lumbar sprain, unspecified bilateral derangement of shoulder; and bilateral sprain of unspecified site of knee and leg. The attending physician stated Employee's symptoms were consistent with the mechanism of injury Employee described. In the absence of evidence to the contrary, he opined the injury arose out of and occurred during the course of Employee's employment for Employer, and were attributable "entirely, wholly and solely" to her employment. He recommended mechanical traction, electrical stimulation (unattended), chiropractic manipulation twice a week for four weeks, magnetic resonance

imaging (MRI) of shoulders, wrists, knees and lumbar spine, and referral for a pain management consultation. (*Id.* at 2-10).

6. The Evaluation Report was addressed to Liberty Northwest, 2700 Gambell Street, 9950103. No city or state appeared in the address, and the zip code contained an excess number of digits. (*Id.* at 1; observation).
7. On October 24, 2012, an MRI was conducted of Employee's right knee. Tricompartmental osteoarthritic changes, most significant within the patellofemoral compartment; joint effusion; probable nonossifying fibroma in the distal femur, and mild globular increased signal intensity in the posterior horn of the medial meniscus most consistent with mild intrasubstance degeneration were assessed. (MRI Report, Sean Johnston, M.D., October 26, 2012, filed on Employer's Medical Summary, July 19, 2013).
8. An MRI of the left knee revealed tricompartmental osteoarthritic changes; minimal globular increased signal intensity in the posterior horn of the medial meniscus most consistent with minimal intrasubstance degeneration, with a tear not entirely excluded; and a Baker's cyst. (MRI Report, Sean Johnston, M.D., October 26, 2012, filed on Employer's Medical Summary, July 19, 2013).
9. On November 5, 2012, Employee was seen in follow-up at the clinic. The Progress Note bears Dr. Rigler's signature. (Primary Treating Physician's Progress Report, November 5, 2012, filed on Employer's Medical Summary, July 19, 2013).
10. On November 27, 2012, Employee was again seen in follow-up. Viewing the knee MRI reports, Dr. Rigler requested a surgical consult, and continuing pain management. (Primary Treating Physician's Progress Report, November 27, 2012, filed on Employer's Medical Summary, July 19, 2013).
11. On January 15, 2013, Employer filed a Controversion Notice, denying all benefits under AS 23.30.100, asserting Employee failed to report a work injury to her employer within 30 days of injury. (Controversion Notice, filed January 15, 2013).
12. On June 28, 2013, at Employer's request, Employee was seen for an EME by orthopedic surgeon Charles C. Craven, M.D. (EME Report, Dr. Craven, June 28, 2013, filed on Employer's Medical Summary, July 19, 2013).

13. Dr. Craven's report is addressed to Liberty Mutual Insurance Company claims examiner Sherrie Arbuckle, at Liberty's Anchorage post office box address, but in his introductory remarks Dr. Craven clarifies he is responding to a May 30, 2013 cover letter received from Employer's counsel, Jeffrey Holloway. (*Id.* at 2).
14. Dr. Craven described the documents, including medical records, provided for his review. The first document reviewed was Mr. Holloway's May 30, 2013 cover letter. Dr. Craven quoted in part from the letter, then described the letter's remaining contents as "a summary of the provided medical records." The second document Dr. Craven described was the Report of Occupational Injury (ROI). (*Id.* at 2-3).
15. The third document Dr. Craven examined, and first medical record, was Crosby Square Chiropractic's October 9, 2012 "Primary Treating Physician's Initial Evaluation Report and Request for Authorization." Dr. Craven's summary of the comprehensive report comprises an entire page of his EME Report. (*Id.* at 3-4). This October 9, 2012 report is one of the two documents Employer sought to have excluded at hearing, claiming it never saw the report until it appeared attached to Employee's hearing brief. (Observation).
16. In further reviewing the medical records provided, Dr. Craven described the October 24, 2012 MRI reports of Employee's right and left knees, and a November 27, 2012 Progress Report bearing Dr. Rigler's signature. (*Id.* at 4). Dr. Craven did not mention the November 5, 2013 Progress Report, which would later appear on a medical summary. (EME Report, Dr. Craven, June 28, 2013; Employer Medical Summary, filed July 22, 2013).
17. The remaining medical records provided to, reviewed and described by Dr. Craven included (1) a December 21, 2012 prescription and Statement of Medical Necessity for a transcutaneous electrical nerve stimulation unit; (2) a February 7, 2013 left shoulder MRI report; (3) a February 7, 2013 right shoulder MRI report; (4) a February 7, 2013 lumbar spine MRI report; (5) a February 19, 2013 Progress Report bearing Dr. Rigler's signature; and (6) an April 25, 2013 Progress Report authored by both Dr. Rigler and Dr. Hasbritt. (*Id.* at 4-5).
18. Although provided to Dr. Craven with Mr. Holloway's May 30, 2013 letter, neither the October 9, 2012 Initial Evaluation Report, nor the six additional medical records

described in Finding of Fact 17 have ever been filed on a medical summary, and have not been provided for the board's examination. (Record; observation).

19. Dr. Craven assessed degenerative changes in Employee's bilateral shoulders; lumbar spondylosis and spinal stenosis; bilateral tricompartmental knee osteoarthritis and bilateral thumb carpometacarpal osteoarthritis. He opined none of Employee's diagnoses or symptoms were related to her employment with Employer, but were the result of the normal aging process. (EME Report at 5, 13, 14, 15, 16, 17, 18, 19, 20).
20. Although opining Employee's symptoms were unrelated to her employment, Dr. Craven concluded Employee was not medically stable, and ongoing treatment for her shoulders, elbows, wrists, thumbs and knee complaints was appropriate. He recommended a comprehensive conservative management program to include use of daily anti-inflammatory medications and a low-impact exercise program. He recommended referral "to an orthopedic surgeon for further diagnostic measures and treatment of her bilateral shoulders, elbows, wrist, thumb, and knee conditions, which are degenerative in nature." (*Id.* at 16).
21. Dr. Craven opined Employee's physical condition precluded her from employment as a crab meat processor, fish cleaner or cannery worker, and limited her to sedentary employment. (*Id.* at 19).
22. On March 22, 2013, Dr. Rigler requested a surgery consultation for Employee's bilateral knees based on the MRI results and "a November 12, 2012 Progress Report." Dr. Rigler's Request for Authorization for Medical Treatment indicated the surgery consult was to be performed by orthopedic surgeon Dr. Israel Rotterman. (Request for Authorization for Medical Treatment, March 22, 2013). Although Dr. Rigler's March 22, 2013 Request for Authorization was filed as Exhibit 6 to Employer's Hearing Brief, Employer has yet to file this document on the required medical summary form. The November 12, 2012 Progress Report has never surfaced, nor any consultation report from Dr. Rotterman. (Observation).
23. On July 22, 2013, based on Dr. Craven's EME Report, Employer filed another Controversion Notice, stating work for Employer has never been a substantial factor in Employee's condition, and denying all benefits. (Controversion Notice, dated July 19, 2013).

24. On July 22, 2013, Employer also filed its first Medical Summary. It contained Dr. Craven's June 28, 2013 EME Report, the October 26, 2012 bilateral knee MRI reports, the November 5, 2012 Progress Report not provided to Dr. Craven, and the November 27, 2012 Progress Report. The Medical Summary omitted seven additional medical records Employer provided to Dr. Craven prior to the June 28, 2013 EME examination, namely (1) The October 9, 2012 Initial Evaluation Report; (2) the December 21, 2012 prescription and Statement of Medical Necessity for a transcutaneous electrical nerve stimulation unit; (3) the February 7, 2013 left shoulder MRI report; (4) the February 7, 2013 right shoulder MRI report; (5) the February 7, 2013 lumbar spine MRI report; (6) a February 19, 2013 Progress Report; and (7) an April 25, 2013 Progress Report authored by both Dr. Rigler and Dr. Hasbriitt. The Medical Summary also omitted the March 22, 2013 request for a surgery consult, Exhibit 6 to Employer's hearing brief but not previously filed on a medical summary. (*Compare* EME Report *with* Employer's Medical Summary, dated July 19, 2013; observation).
25. On October 15, 2013, Employee filed an SIME form identifying both Dr. Rigler and Dr. Habstritt as attending physicians, along with an August 12, 2013 letter from Dr. Habstritt disagreeing with Dr. Craven's EME Report. Dr. Habstritt's letter was not attached to Employee's accompanying Medical Summary, which indicated Employee had no new medical records to file. (Dr. Habstritt opinion letter, August 12, 2013; SIME form, October 15, 2013; Employee Medical Summary).
26. Dr. Habstritt's letter, on plain paper without identifying letterhead, read:

August 12, 2013

Diana Garcia AWCB 20121461

I disagree with Independent Medical Examiner Dr. Charles Craven, M.D. Report of June 28, 2013 for following reasons:

AT Higher Risk. Certain occupations with repeated stressful motions (such as squatting or kneeling with heavy lifting) can contribute to the deterioration of cartilage. People with jobs that require kneeling or squatting for MORE Than an HOUR a Day are at high risk for knee osteoarthritis. Jobs that involve lifting, climbing stairs, or walking also pose some risk.

CERTAIN JOBS make a person more susceptible to aggravating a Preexistng (sic) Condition like Arthritis or Degenerative Disk Disease

People are more Susceptible to Aggravating their Arthritis if they hold jobs that Require them to Perform Repetitive Motions.

ARTHRITIS Develops from Improper Joint Motion or Repetitive movements of a Joint in same movement patterns.

Diana worked Two and one half Months every year for a Total of 1272 Hours each year from 2004 to 2011. .

Dr. Trent Habstritt, D.C.

(signature below typed name)

(Capitalization and punctuation as in original) (Letter, Dr. Habstritt, August 12, 2013).

27. On December 12, 2013, Employer filed its first Opposition to Request for SIME. Employer acknowledged Dr. Habstritt's August 12, 2013 letter, but asserted the petition was not ripe because Employee failed to file a petition for SIME, and the SIME form was not accompanied by documentation from attending physician Dr. Rigler. (Opposition to SIME Request, signed December 6, 2013).
28. Also on December 12, 2013, Employer filed a second Medical Summary form. It contained three medical records, all of which were previously filed with its original July 22, 2013 Medical Summary. Employer's second Medical Summary also omitted the numerous documents, including the October 9, 2012 evaluation report, it sent to Dr. Craven on May 30, 2013. (Medical Summary, signed December 6, 2013; observation).
29. On January 21, 2014, Employee was advised she needed to file a petition for SIME, in addition to the SIME form, to begin the SIME process. (Case Note, AWCB electronic file, January 21, 2014).
30. On February 17, 2014, Employee served a Petition for SIME on Employer's counsel, but failed to file it with the board. (Certificate of Service, Petition for SIME, dated February 17, 2014).
31. On March 7, 2014, Employee's Petition for SIME accompanied by Dr. Habstritt's August 12, 2013 letter, a Request for Conference, and a Medical Summary stating she had no



- new medical records to file, was filed. (Petition for SIME; Request for Conference; Medical Summary).
32. On March 20, 2014, Employer filed a third Medical Summary form, with no records attached, stating it had no new medical records to file. (Employer Medical Summary, signed March 19, 2014)
  33. On March 24, 2014, Employer again objected to an SIME, claiming Employee had failed to provide any documentation from Dr. Rigler. (Employer's second Opposition to Request for SIME, dated March 19, 2014).
  34. On April 8, 2014, a prehearing conference convened to discuss Employee's petition for SIME. Employer objected to setting the petition for hearing "for various reasons (untimely, no WCC filed, failure to provide Dr. Rigler's report)." An oral hearing was scheduled for June 4, 2014. The parties were directed to serve and "file legal memoranda and evidence in accordance with 8 AAC 45.114." (Prehearing conference summary, April 8, 2014).
  35. Neither party objected to the April 8, 2014 prehearing conference summary. (Observation).
  36. On April, 17, 2014, Employee filed a second Petition for SIME, a revised SIME Form 07-6147, and a Medical Summary containing both Dr. Craven's EME Report and Dr. Habstritt's August 12, 2013 letter disagreeing with Dr. Craven's EME report. (Employee Medical Summary dated April 13, 2014, Petition for SIME; revised SIME form).
  37. On April 21, 2014, Employer filed its third Opposition to Request for SIME, and its fourth Medical Summary, with no records attached, again asserting it had no new medical records to file. (Employer Opposition to Request for SIME, Employer Medical Summary, signed April 16, 2014)
  38. A second prehearing conference convened on May 14, 2014. The June 4, 2014 hearing date on Employee's petition for SIME was confirmed "with the original deadlines still in place." (Prehearing conference summary, May 14, 2014).
  39. As exhibits to its hearing brief, Employer appended one additional medical record beyond those previously filed and contained in its July 22, 2013 Medical Summary: a March 22, 2013 Request for Authorization for a surgery consult for Employee's bilateral

knees. (Exhibit 6, Employer's Hearing Brief, Request for Authorization, Dr. Rigler, March 22, 2013).

40. As exhibits to her hearing brief, Employee appended the October 9, 2012 Initial Evaluation Report authored by both Dr. Rigler and Dr. Habstritt, and a new opinion letter, on plain paper, purportedly from Dr. Habstritt, which read:

OBJECTIONS TO  
EIME Dr. Craven Report of June 28, 2013

Page 14 paragraph 2 item 2

I disagree with Dr. Craven, Ms. Garcia's current conditions are a result of the repetitive motions of work over span of 7 years with Trident Seafoods. In my opinion OA [osteoarthritis] comes from lack of joint movement, improper joint movement or repetitive joint movements in the same movement pattern.

Page 15 paragraph 1 item a

I disagree with Dr. Craven. In my opinion OA comes from lack of joint movement, improper joint movement or repetitive joint movements in the same movement pattern. Repetitive use of joints over the years can irritate and Inflammate the cartilage, causing joint pain and swelling.

Page 16 paragraph 2 item 5a

I disagree with Dr. Craven. Osteoarthritis can be accelerated and aggravated by mproper (sic) Joint Motion or Repetitive movements of a Joint in same movement patterns as her work with Trident Seafoods required.

Page 17 paragraph 6, 7 item 6a, 6b

I disagree with Dr. Craven repeating that ms. Garcia's employment of seven years doing repetitive bending, crouching, grasping, gripping, kneeling pulling, pushing, standing, stooping, twisting, turning, walking, and work at or over shoulder level, lifting 40 lbs. constantly throughout 16 hour days 7 days a week. Ms. Garcia was placing hands in and out of water 16 hours a day 7 days a week.

Page 18 paragraph 3 item c

I disagree with Dr. Craven, Ms. Garcia did accelerate and aggravate her condition doing repetitive work with her employment with Trident Seafoods.

Page 20 paragraphs 1-7 item b 1, 11, 111

1. I disagree with Dr. Craven, my medical opinion the need of restrictions is not entirely ageing but due to her OA condition and degenerative process.
11. I disagree with Sr. Craven, my medical opinion that employment with Trident Seafoods through November 6, 2005 is a substantial factor in any recommended restrictions to her described job functions.
111. I disagree with Dr. Craven, my medical opinion restoring joint functions and stopping repetitive movements will decrease inflammation which can improve her condition.

*(signed)Trent Habstritt 5-27-14*

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Trent Habstritt, DC

41. Mr. Rodriguez was credible in his assertion he did not receive a copy of the October 9, 2012 Initial Evaluation Report until he was preparing his brief for the June 4, 2014 hearing. It would not have been in Employee's interest to withhold the very document that created a medical dispute that might justify an SIME. (Judgment, experience, facts of the case and inferences therefrom).
42. The signatures contained on the August 12, 2013 and May 27, 2014 medical opinion letters, purportedly those of Trent Habstritt, DC, are consistent with Dr. Habstritt's signature contained on the October 9, 2012, "Primary Treating Physician's Initial Evaluation Report and Request for Authorization," which he signed jointly with Dr. Rigler on Crosby Square Chiropractic letterhead. (Judgment; observation)
43. Employee resides in Calexico, California. (Record).
44. The board's SIME list identifies four orthopedic surgeons in California: Sidney Levine, M.D., in San Diego, California; Marjorie Oda, M.D., in Sacramento, California; Edward Tapper, M.D., in Sacramento, California; and David Slutsky, M.D., in Torrance, California. Dr. Slutsky restricts his evaluations to hands, wrists and elbows only. All of the orthopedic surgeons on the board's list have past or current practical experience treating patients. (AWCB Bulletin 13-06, December 2, 2013; SIME physician curriculum vitae and applications).

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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to . . . this chapter. . . .

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, 533-534 (Alaska 1987).

**AS 23.30.095. Medical treatments, services, and examinations. . . .**

. . .

(h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.

. . .

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

The purpose of an SIME is to have an independent expert provide an opinion to the Board on a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008).

An SIME under AS 23.30.095(k) may be ordered where a medical dispute exists between physicians for the employee and the employer, and the “dispute is significant, or relevant to a pending claim or petition and . . . an SIME would help the board resolve the dispute.” The purpose of an SIME is to assist the board. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073

(February 27, 2008), at 4; *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8.

Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence, or when the board lacks a full understanding of the medical evidence and an independent medical opinion will assist it in ascertaining the rights of the parties. *Bah* at 5.

**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 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g., Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005).

**8 AAC 45.052. Medical summary.** (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim of petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

(b) The party receiving a medical summary and claim or petition shall file with the board an amended summary on form 07-6103 within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's

medical summary form. In addition, the party shall serve the amended medical summary form, together with copies of the reports, upon all parties.

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

...

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

**8 AAC 45.065. Prehearings.** (a) . . . At the prehearing, the board or designee will exercise discretion in making determinations on

...

(12) the closing date for serving and filing of . . . any other documentary evidence; the date must be at least two state working days before the hearing.

...

(c) After the prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made between the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

**8 AAC 45.070. Hearings. . . .**

...

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary. . . governs the issues and the course of the hearing.

**8 AAC 45.082. Medical treatment. . . .**

...

(b) ...

(2) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice,

an opinion, or any type of service from a physician for the injury. If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician.

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

. . .

(e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095 (k), the board or its designee may select a physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as an independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:

- (1) the nature and extent of the employee's injuries;
- (2) the physician's specialty and qualifications;
- (3) whether the physician or an associate has previously examined or treated the employee;
- (4) the physician's experience in treating injured workers in this state or another state;
- (5) the physician's impartiality; and
- (6) the proximity of the physician to the employee's geographic location.

**8 AAC 45.114. Legal memoranda.** Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must:

- (1) be filed and served at least five working days before the hearing . . .

**8 AAC 45.120. Evidence. . . .**

. . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will,

in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

...

(j) Subsections (f) – (i) apply only to objections based on hearsay, and do not limit the parties' right to object to the introduction of document on other grounds.

...

(l) Unless a genuine question is raised as to the authenticity of the original or, in the circumstances, it would be unfair to admit the duplicate in place of the original, a duplicate is admissible in accordance with this section to the same extent as an original.

### **Alaska Rules of Evidence**

#### **Rule 801. Definitions.**

The following definitions apply under this article:

(a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

...

(c) **Hearsay.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

...

#### **Rule 802. Hearsay Rule.**

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.

#### **Rule 803. Hearsay Exceptions – Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Statements for the Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or



general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis or treatment.

...

**Alaska Rules of Evidence. Rule 901. Requirement of Authentication or Identification.**

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims . . .

ANALYSIS

***1. Should the October 9, 2012 medical record from Crosby Square Chiropractic, titled “Primary Treating Physician’s Initial Evaluation Report and Request for Authorization,” be considered?***

Employer objected to the October 9, 2012 Crosby Square Chiropractic evaluation report attached to Employee’s hearing brief, contending it had never before seen the report, had not had time to review it, the report was never filed on the required medical summary, and it was untimely filed just days before hearing. Employer’s assertions it had never seen the report before receiving Employee’s hearing brief, and had not had time to review it, are not credible. Employer was in possession of the October 9, 2012 report since at least May 30, 2013, when it transmitted it, along with several other medical records, to EME physician Dr. Craven in advance of the June 28, 2013 EME.

According to Dr. Craven, Employer’s May 30, 2013 cover letter not only identified the medical records enclosed for his review, but even summarized their contents. First among the medical records provided and described to Dr. Craven was the October 9, 2012 evaluation. Indeed, Dr. Craven spent a full page in his own report relating the contents of the October 9, 2012 report, noting it was authored by both Drs. Rigler and Habstritt, and even quoting from it:

. . . Therefore, it is my medical opinion that the injury arose out of and occurred during the course of Ms. Garcia’s normal employment. The examinee’s problems can be attributed entirely, wholly, and solely to the injury on August 22, 2011. (EME Report at 4, quoting Drs. Rigler and Habstritt).

Employer’s assertion it was unfairly surprised by Employee’s last minute filing of the October 9, 2012 report is wholly without merit.

Employer's contention the report should be excluded because it was not filed 20 days before hearing pursuant to 8 AAC 45.120(f), nor, as 8 AAC 45.052 requires, filed on a medical summary, is both unpersuasive, and under the circumstances, disingenuous. Despite Employer's protestation to the contrary, the evidence reveals Employer had the October 9, 2012 report at least as early as May 30, 2013. It was required to file it on a medical summary once a claim or petition was filed yet failed repeatedly to do so. Employee's non-attorney representative credibly contended he only obtained the report while preparing his hearing brief. Since the October 9, 2012 report attributes Employee's symptoms to her work for Employer, thereby differing from Dr. Craven's opinion and setting up the medical dispute necessary for an SIME, it was not in Employee's interest to withhold the report if she had it earlier. On the other hand, to circumvent an SIME, or perhaps assert at some future time Employee's evidence failed to raise the presumption of compensability, it would serve Employer's interest to withhold the October 9, 2012 report. Employer failed to file the report on at least the four occasions it filed medical summaries and omitted it. Indeed, Employer has yet to file on a medical summary most of the medical records it provided Dr. Craven more than a year ago.

Furthermore, the April 8, 2014 prehearing conference summary establishing the hearing date and filing deadlines specifically directed the parties to serve and file "legal memoranda and evidence" together, "in accordance with 8 AAC 45.114." It did not require filing evidence 20 days before hearing pursuant to 8 AAC 45.120(f). Neither party objected to the contents of the prehearing summary. The prehearing summary governed the course of the hearing. 8 AAC 45.065(a)(12) and (c). Employee filed the October 9, 2012 report timely. The report contains evidence relevant to the issues for hearing, and is admissible as a statement made for the purpose of medical diagnosis and treatment. Alaska R. Evid. 803(1). The October 9, 2012 "Primary Treating Physician's Initial Evaluation Report" will be considered in deciding the underlying SIME issues.

Finally, the board has an obligation to assist claimants "by advising them of the important facts of their case and instructing them how to pursue their right to compensation." *Bohlmann v. Alaska Const. & Engineering, Inc.*, 205 P.3d 316, 319 (Alaska 2009), citing *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963). Under AS 23.30.105, an injured worker must file

a formal claim for benefits “within two years after the employee has knowledge of the nature of the employee’s disability and its relation to the employment and after disablement.” Employee has not yet filed a formal claim for benefits in this case. A formal claim form is available at the Alaska Workers’ Compensation Board website: [http://labor.state.ak.us/wc/pdf\\_list.htm](http://labor.state.ak.us/wc/pdf_list.htm), or can be obtained by calling the board at toll free 1-877-783-4980. Employee’s Report of Injury was signed on September 21, 2012, establishing a date Employee indicated knowledge of the nature of her disability and its relation to her employment. It is unknown whether she knew the nature of her disability and its relation to her employment earlier than September 21, 2012. To avoid dismissal of her case under AS 23.30.105(a), Employee is advised she may wish to file a claim at the earliest possible date, and no later than September 21, 2014.

***2. Should the document titled “Objections to EIME Dr. Craven Report of June 28, 2013,” purportedly signed by Trent Habstritt, D.C. and dated May 27, 2014, be considered?***

Employer objected to the May 27, 2014 medical opinion letter signed by Trent Habstritt, D.C., contending it lacks guarantees of untrustworthiness because Dr. Habstritt’s signature was different from his signatures on other reports, it was typed on plain paper rather than professional letterhead, was not filed on a medical summary, and was untimely.

Because the October 9, 2012 evaluation report, authored by both Drs. Rigler and Habstritt, establishes the significant dispute necessary to order an SIME, Employer’s objection to this document’s consideration for that purpose is moot and will not be reached. However, a few comments are in order. First, the document was not untimely filed. It is dated May 27, 2014, and was filed with Employee’s May 28, 2014 hearing brief, within five days of Employee obtaining it. Employee is instructed, nevertheless, that medical opinion letters, not just physician chart notes or lab or imaging reports, are considered medical records that must be filed on a medical summary form. Neither Dr. Habstritt’s August 12, 2013, or his May 27, 2014 opinion letters were properly filed on a medical summary and should be.

Second, contrary to Employer’s contention, Dr. Habstritt’s original signature on the May 27, 2014 letter is consistent with his signature on his August 12, 2013 letter, which Employer filed as Exhibit 8 to its brief, and with his signature on the October 9, 2012 evaluation report. Like

Exhibit 8 to Employer's brief, the May 27, 2014 opinion letter is not on the provider's professional letterhead. It appears as though the letters may have been prepared by Employee's non-attorney representative, and then signed off on by Dr. Habstritt, a practice not dissimilar to defense counsel preparation of opinion letters soliciting check-the-box responses and a physician signature, often contained on defense counsel's stationary rather than the physician's. Employee is advised, however, that statements from providers on their professional letterhead provide greater guarantees of trustworthiness, and less chance of being challenged, excluded, or accorded little or no weight, than those on plain paper bearing no indication of their source.

### ***3. Should an SIME be ordered?***

The purpose of an SIME is to have an independent expert provide an opinion to the Board on contested issues. An SIME under AS 23.30.095(k) may be ordered where a medical dispute exists between physicians for the employee and the employer, the dispute is significant or relevant to a pending claim or petition, and an SIME will help the board resolve the dispute.

Both Dr. Rigler and Dr. Habstritt, practice partners at Crosby Square Chiropractic, are Employee's attending physicians. 8 AAC 45.082(b). In their joint October 9, 2012 Initial Evaluation Report they concluded Employee's injury arose "entirely, wholly and solely" out of and during the course of Employee's employment as a fish processor for Employer. They recommended traction therapy, electrical stimulation therapy, chiropractic manipulative therapy, a pain management consultation to address medication, and MRIs of Employee's bilateral shoulders, wrists, knees and lumbar spine. Ultimately they requested a surgical consult. Although Employee has yet to file a formal claim for benefits, she has had medical care recommended, has requested medical care be authorized, and Employer has denied all benefits. Her doctors anticipate once medical stability is attained she will have a degree of permanent disability, need continuing medical care, and perhaps vocational rehabilitation. EME Dr. Craven concluded Employee's work for Employer bore no causal relationship to her current symptoms, which he related entirely to the aging process.

The dispute between Drs. Rigler and Habstritt, and Dr. Craven, is one of causation and compensability. Its resolution determines whether or not Employee is entitled to benefits of any kind under the Alaska Workers' Compensation Act. The dispute is thus significant, and an SIME

will assist the board in resolving the issue of causation, and concomitantly may provide helpful recommendations concerning future medical care, medical stability, permanent impairment, and functional capacity. An SIME will be ordered to address these issues.

**4. What is the appropriate specialty for the SIME physician should an SIME be ordered?**

Employee contended a chiropractor be appointed the SIME physician, and opposed appointing an orthopedic surgeon. Employer opposed appointing a chiropractor, and recommended an orthopedic surgeon, physiatrist or occupational medicine specialist.

Employee's reported injuries are to her bilateral shoulders, bilateral wrists, bilateral knees and spine. After viewing the MRI reports of Employee's knees, Dr. Rigler sought authorization for a surgical consultation with orthopedic surgeon Dr. Israel Rotterman. After viewing MRI reports of Employee's knees, shoulders and spine, which revealed, *inter alia*, a possible meniscal tear in the left knee, a probable nonossifying fibroma in the distal femur on the right, a probable tear in the supraspinatus tendon in the right shoulder, an annular tear at L5-S1, and tendinitis and bursitis in addition to osteoarthritis, Dr. Craven also recommended referral to an orthopedic surgeon.

Given the nature and extent of Employee's symptoms in her knees, shoulders, wrists and back, the objective evidence compatible with her reports of pain to these body parts, and because Employee's attending chiropractor and the EME both recommend referral to an orthopedic surgeon, an orthopedic surgeon is the most appropriate specialist and will be appointed as the SIME physician.

The law requires appointment of an SIME physician from the board's vetted list of independent medical examiners. 8 AAC 45.092(f). In selecting the SIME physician, the board must consider six factors in the following order:

- (1) the nature and extent of the employee's injuries;
- (2) the physician's specialty and qualifications;
- (3) whether the physician or an associate has previously examined or treated the employee;

- (4) the physician's experience in treating injured workers in this state or another state;
- (5) the physician's impartiality; and
- (6) the proximity of the physician to the employee's geographic location.

Factors (1) and (2) were considered in the panel's selection of an orthopedic surgeon, as more fully discussed above. All of the orthopedic surgeons on the board's list have past or current practical experience treating patients, thereby satisfying factor (4). Factors (3) and (5), addressing the proposed physician's impartiality, will be determined by the Workers' Compensation Officer upon selection. The final determination in selecting the SIME physician is factor (6), the physician's proximity to the employee's geographic location. *See also* AS 23.30.110(g).

Employee resides in Calexico, California. Calexico is in southern California near the Mexico border. The board's SIME list identifies four orthopedic surgeons in California: Sidney Levine, M.D., in San Diego, California; Marjorie Oda, M.D., in Sacramento, California; Edward Tapper, M.D., in Sacramento, California; and David Slutsky, M.D., in Torrance, California. Dr. Slutsky is excluded from consideration because he restricts his evaluations to hands, wrists and elbows only. Dr. Oda and Dr. Tapper are in Sacramento, nearly 600 miles north of Employee in Calexico. Travel from Calexico would undoubtedly require Employee to drive first to San Diego in order to fly to Sacramento. Dr. Sidney Levine, in San Diego, is the closest to Employee's location in Calexico, and a mere car ride away. Orthopedic surgeon Dr. Sidney Levine will be appointed as the SIME physician, subject to confirmation of his impartiality by the board's designated Workers' Compensation Officer.

#### CONCLUSIONS OF LAW

1. The document from Crosby Square Chiropractic, dated October 9, 2012, will be considered.
2. The document titled "Objections to EIME Dr. Craven Report of June 28, 2013," signed by Trent Habstritt, D.C., and dated May 27, 2014, need not be considered.
3. A significant dispute exists between Employee's attending physician and Employer's EME physician on the issues of causation, compensability and need for and type of future

medical care. An SIME will be ordered on these issues as well as on medical stability, degree of impairment, and functional capacity.

4. An orthopedic surgeon is the appropriate specialty for the SIME physician.
5. A prehearing conference will be scheduled to address deadlines and instructions for compilation of the SIME binder.

ORDER

1. The petition for SIME is granted in part.
2. Orthopedic Surgeon Dr. Sidney Levine is within the most convenient geographical proximity to Employee, and is appointed as the SIME in this case, subject to Worker's Compensation Officer Sue Reishus-O'Brien's inquiry to ensure Dr. Levine's availability and eliminate any potential conflict of interest.
3. Within 10 days of the date of this order, Employer shall file on a medical summary every medical record in its possession or control not previously filed on a medical summary, including but not limited to:
  - (a) the December 21, 2012 prescription and Statement of Medical Necessity for a transcutaneous electrical nerve stimulation unit;
  - (b) the February 7, 2013 left shoulder MRI report;
  - (c) the February 7, 2013 right shoulder MRI report;
  - (d) the February 7, 2013 lumbar spine MRI report;
  - (e) the February 19, 2013 Progress Report bearing Dr. Rigler's signature;
  - (f) Dr. Rigler's March 22, 2013 Request for Authorization;
  - (g) the April 25, 2013 Progress Report authored by both Dr. Rigler and Dr. Hasbriitt;
  - (h) a November 12, 2012 Progress Report from Crosby Square Chiropractic;
  - (i) a consultation report from Dr. Israel Rotterman, if any.
  - (j) a copy of all medical and other releases on which it has obtained Employee's signature.
4. Within 10 days of the date of this order, Employee shall file on a medical summary every medical record in her possession or control not previously filed on a medical summary, or ordered filed by Employer, including but not limited to:
  - (a) Dr. Habstritt's August 12, 2013 statement;

(b) Dr. Habstritt's May 27, 2014 statement.

5. A prehearing conference to address deadlines and instructions for compilation of the SIME binder is scheduled for July 10, 2014, at 10:00 a.m.



Dated in Anchorage, Alaska on June 16, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Linda M. Cerro, Designated Chair

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Amy Steele, Member

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Mark Talbert, 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 DIANA GARCIA, employee / claimant; v. TRIDENT SEAFOODS CORP, employer; LIBERTY INSURANCE CORPORATION, insurer / defendants; Case No. 201121461; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 16, 2014.

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Kimberly Weaver, Office Assistant

