

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

PATROCINIO DOMINGO,)
)
Employee,)
Claimant,)
)
v.) INTERLOCUTORY
) DECISION AND ORDER
ALASKA SAUSAGE COMPANY, INC.,)
) AWCB Case No. 201203106
Employer,)
and) AWCB Decision No. 14-0117
)
REPUBLIC INDEMNITY CO. OF) Filed with AWCB Anchorage, Alaska
AMERICA,) on August 19, 2014
)
Insurer,)
Defendants.)
)

Patrocinio Domingo's (Employee) September 25, 2012 claim and Alaska Sausage Company's (Employer) August 4, 2014 petition for a hearing continuance were heard on August 14, 2014, in Anchorage, Alaska, a date selected on June 18, 2014. Attorney Robert Rehbock appeared and represented Employee who also appeared. Attorney Robert Bredesen appeared and represented Employer and its workers' compensation insurer. There were no witnesses. As a preliminary matter, Employer's August 4, 2014 petition requested a hearing continuance, and Employee initially objected. After some discussion, the panel gained the parties' stipulation to continue the hearing. An oral order approved the stipulation and continued the hearing. This decision examines the oral order approving the stipulation continuing the hearing. The record closed at the hearing's conclusion on August 14, 2014.

ISSUE

As a preliminary matter, Employer renewed its prior request for a hearing continuance. It contended Employee had waffled on the issues and, specifically, his inchoate claim for mental health treatment was not ripe for hearing. Employer contended this mental health aspect to Employee's claim was a "new development." It sought an order continuing the hearing.

Employee objected to the continuance request and contended the only issue for hearing was whether his "neck and arm" are compensable injuries. He contended this issue involved both "medical" and "psychiatric" compensability. Employee contended Employer did not present "good cause" under the appropriate regulations to justify a hearing continuance.

After considerable discussion, the parties agreed to a hearing continuance. The panel orally approved the stipulation, and continued the hearing.

Was the oral order approving the parties' stipulation to continue Employee's August 14, 2014 hearing correct?

FINDINGS OF FACT

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

- 1) On March 1, 2012, Employee slipped on ice and fell. He reported an injury to his left shoulder while working for Employer as a food packager (Report of Occupational Injury or Illness, March 1, 2012).
- 2) On August 2, 2012, John Ballard, M.D, saw Employee for an employer's medical evaluation (EME). His relevant opinions are discussed below (Ballard report, August 2, 2012).
- 3) On August 13, 2012, Employer denied Employee's right to temporary total disability, temporary partial disability, permanent total disability, permanent partial impairment over one percent whole person for the left shoulder, and left shoulder surgery. Employer based its denial on EME Dr. Ballard's August 2, 2012 report (Controversion Notice, August 9, 2012).
- 4) On September 28, 2012, Employee through counsel filed a claim for medical benefits, transportation expenses, interest, attorney fees, and litigation costs. Employee checked the "right" and "left" boxes and claimed the injured body parts included: "Left side of body and

neck, upper back, left upper arm and shoulder, right leg pain and numbness” (Workers’ Compensation Claim, September 25, 2012).

5) On October 15, 2012, Employer answered Employee’s claim admitting responsibility for reasonable and necessary medical benefits and related transportation expenses related to Employee’s March 1, 2012 injury. Employer denied Employee’s claims in all other respects (Answer, October 12, 2012).

6) On January 17, 2013, Employee requested a hearing on his September 25, 2012 claim (Affidavit of Readiness for Hearing, January 16, 2013).

7) On February 26, 2013, the parties attended a prehearing conference to review the issues. The parties stipulated to a hearing on May 30, 2013. The issues for this hearing were: Temporary total disability from November 20, 2012 and continuing; “medical costs”; transportation costs; interest; attorney’s fees and costs (Prehearing Conference Summary, February 26, 2013).

8) On April 10, 2013, the parties filed a settlement agreement resolving all their disputes with exception of “past and future medical and related benefits.” Employer reserved all defenses to claims for medical benefits Employee could assert but withdrew any controversions disputing Employee’s left shoulder compensability. Employer agreed a left shoulder injury occurred but did not agree to accept all abnormalities identified or diagnosed within Employee’s left shoulder. Employer retained its controversions and disputed compensability for conditions other than the left shoulder. As Employee was represented by an attorney licensed to practice law in Alaska, and was not waiving medical benefits, the settlement agreement did not require approval, and was effective upon filing (Compromise and Release Agreement, filed April 10, 2013; experience).

9) On April 17, 2013, the May 30, 2013 hearing was canceled because the case had settled (Order of Approval, April 17, 2013).

10) On June 13, 2013, Susan Klimow, M.D., performed electrodiagnostic testing on Employee’s upper extremities. Nerve conduction velocity (NCV) and electromyography (EMG) studies were normal with no evidence of cervical radiculopathy or peripheral nerve entrapment coming from the cervical spine (Klimow report, June 13, 2013).

11) On July 10, 2013, Employee filed another claim and requested medical benefits and related transportation costs; interest; attorney’s fees; and legal costs. Employee’s reason for filing this claim was the December 12, 2012 and May 13, 2013 controversion notices Employer applied to

Coastal Neurology & Neurosurgery. He sought medical and related transportation costs for his neck (Workers' Compensation Claim, July 10, 2013).

12) On July 31, 2013, Employer answered Employee's claim. Employer admitted responsibility for reasonable and necessary medical benefits and transportation costs related to Employee's March 1, 2012 injury. Employer denied Employee was entitled to any other requested relief (Answer to Employee's Workers' Compensation Claim, July 30, 2013).

13) On or about August 14, 2013, the parties attended a prehearing conference. The parties at a prehearing conference stipulated to a second independent medical examination (SIME) and to the related procedure (Prehearing Conference Summary, August 14, 2013).

14) On September 3, 2013, the parties stipulated the SIME issues included causation and treatment, and stipulated to a neurosurgeon performing the evaluation. The medical disputes were based upon opinions from Doug Vermillion, M.D., who said Employee injured his neck when he fell at work and Susanne Fix, M.D., who opined Employee's cervical disease was markedly exacerbated when he fell. Both attending physicians recommended further diagnostic testing. EME Dr. Ballard, on the other hand, opined no further testing was necessary as, in respect to his neck, Employee suffered nothing more than a cervical strain attributable to his work injury (SIME form, September 3, 2013, and attachments).

15) On December 3, 2013, James Coulter, M.D., saw Employee for an SIME. His opinions are discussed below (Coulter report, December 3, 2013).

16) On January 16, 2014, Employee requested a hearing on his July 10, 2013 claim (Affidavit of Readiness for Hearing, January 15, 2014).

17) On January 27, 2014, Employer objected to the hearing request, stating it had not had adequate time for discovery and needed to schedule the SIME physician's deposition, and possibly other depositions (Affidavit of Opposition, January 24 2014).

18) On February 26, 2014, the parties attended another prehearing conference and discussed SIME Dr. Coulter's recommendation for a psychiatric evaluation for Employee. Employer "verbally" petitioned for a psychiatric SIME examination and Employee opposed both the additional examination and any merit hearing delay. Employer opposed setting a hearing based upon the recommendation for a psychiatric SIME evaluation and Employer's need to "complete discovery." Employee objected to Employer's oral petition requesting further examination and noted the issue "is one of medical compensability." Nevertheless, the parties stipulated to a May

28, 2014 hearing on the following issues: “Medical compensability”; transportation costs; interest; attorney’s fees and costs; and on Employer’s February 26, 2014 “Verbal Petition for a psychological evaluation” (Prehearing Conference Summary, February 26, 2014).

19) On March 18, 2014, Employer filed a petition seeking a psychological SIME and an order continuing the May 28, 2014 merits hearing. Employer argued SIME Dr. Coulter diagnosed a “major neurosis” and recommended a psychiatric evaluation for Employee. Therefore, Employer contended the May 28, 2014 hearing was premature and should be continued until after the psychiatric SIME was completed (Employer’s Petition for a Psychological SIME & Continuance of Merits Hearing, March 17, 2014).

20) On March 31, 2014, SIME Dr. Coulter testified he is a board-certified neurosurgeon and examined Employee in November 2013, and interviewed him with partial assistance from an interpreter, who arrived near the examination’s conclusion (*id.* at 4, 11). Dr. Coulter noticed “exaggerated symptomatology” which could be voluntary to impress the examiner, or involuntary and “part of a mental condition called a neurosis” (*id.* at 8). Employee complained of severe, left-sided cervical pain on even light touch, which in Dr. Coulter’s opinion is a “severely exaggerated pain response” (*id.* at 10). Some tests were “positive,” meaning they elicited a non-anatomical response (*id.* at 18-20). Employee showed decreased sensitivity in his entire right lower and left upper extremity in a “stocking and glove pattern,” which Dr. Coulter opined was typical of “hysteria, a major neurosis” (*id.* at 23). Dr. Coulter explained:

I did not think that Mr. Domingo was malingering or faking sick here; I believe that this is an unconscious or subconscious condition . . . that I’m seeing here. But it is superimposed on this work injury, and for that reason I recommended that he have a psychiatric consultation. The psychiatrist is much more qualified than I to say whether it’s work-connected or not, because he would spend a full day with his questions and know more about the patient’s previous mental status than . . . I can determine in an hour and a half (*id.* at 23-24).

Dr. Coulter opined Employee’s “Pain Disability Questionnaire” from the AMA *Guides* 6th Edition score above “131” showed an “extreme” pain rating “unexplained by objective findings” (*id.* at 29-30). Dr. Coulter explained the “neurosis” concept. For example, he said some aboriginals will respond to a major trauma with “unconscious brain mechanisms” that allow a compound fracture to be set and stitched without anesthetic. The patients have no pain because they “just block it out,” and this process is not well understood (*id.* at 42). In reference to

Employee's suspected neuroses, a psychiatrist "could sort this out" in Dr. Coulter's view (*id.* at 43). Dr. Coulter disagreed with Dr. Fix's recommendations for future medical treatment because he understood she was not aware Employee had two, negative EMG and NCV tests (*id.* at 47). He did not agree cervical epidural blocks would be helpful either (*id.* at 48). Dr. Coulter opined Employee is truly hurting and "a lot of that can be reversed if a psychiatrist either counsels him . . . or uses some dramatic thing to get him out of . . . that mental condition" (*id.* at 59). Dr. Coulter further opined:

A. And whether the mental condition is directly -- it's superimposed on his injury, but whether or not it's industrial -- industrially connected, I have no way of knowing, and that's why I asked for a psychiatric consultation (*id.* at 59).

Q. So what is it that -- what is it that causes you to relate this to his injury?

A. Because it's common that hysterical symptoms are superimposed upon injuries, car accidents, slip and fall, they're not all industrial related, probably more auto accidents result in patients that are susceptible in a -- in some psychological overlay (*id.* at 60).

In Dr. Coulter's opinion, Employee needs a psychiatric evaluation to see if he has a mental health issue that may need treatment (*id.* at 65). Because based on this recommendation, Dr. Coulter did not believe Employee's condition was "medically stationary" (*id.*). He does not believe Employee's headaches are work-related (*id.* at 67-68). However, his work-related cervical strain aggravated his pre-existing spondylosis but not in an objectively measurable way and did not cause any "permanent objective findings" (*id.* at 68). Forty-five percent of Employee's increased pain, in Dr. Coulter's opinion, is related to hysterical neurosis (*id.* at 69).

21) On April 7, 2014, Employee opposed Employer's petition for a psychological SIME and for an order continuing the May hearing. Employee contended there was no reason to postpone the hearing as the issue was "compensability" of Employee's neck injury, and the SIME report addressed that issue. He also contended SIME Dr. Coulter raised the presumption that a "further mental condition" was caused or aggravated by Employee's work injury. Employee implied this evidence was adequate to raise the presumption, Employer had no evidence to rebut it and a psychiatric SIME would come into play only if there was a future dispute concerning treatment to address Employee's mental health issues. Employee contended any psychiatric SIME should wait until after a decision is rendered on "the substantial cause" of Employee's medical needs

(Partial Conditional Opposition to Employer’s Petition for a Psychological SIME & Continuance on Merits Hearing, April 7, 2014).

22) On April 7, 2014, Employer requested a hearing on its March 19, 2014 Petition (Affidavit of Readiness for Hearing, April 8, 2014).

23) On April 8, 2014, the parties attended a prehearing conference. Employer confirmed with Employee, and the board’s designee noted, Employee has not asserted a claim for a “mental injury.” The parties agreed to a hearing on May 6, 2014 to address Employer’s March 18, 2014 petition for a psychiatric SIME and for a hearing continuance. The issues slated for the May 28, 2014 merits hearing continued to be: “Medical compensability; transportation costs; interest; attorney fees and costs” (Prehearing Conference Summary, April 8, 2014).

24) On April 25, 2014, Employer, in preparation for the May 6, 2014 hearing, filed its hearing brief and a continuance request. Employer stated in pertinent part:

The medical evidence in this case involves considerable psychiatric overlay, however, which will cloud the analysis of the compensability of the neck condition, if one actually exists. The SIME neurosurgeon has recommended that the board obtain a psychiatric opinion. The employee wishes to proceed with the merits hearing and not bother with the recommended psychiatric evaluation. Alaska Sausage and Seafood wants a psychiatric SIME to take place. The employer has also tried to take the employee’s deposition, but claimant counsel has suddenly become unavailable. His unavailability further jeopardizes the viability of the merits hearing date. The board should review the current case calendar and order a psychiatric SIME. . . . (Employer’s Brief for 05/06/14 Hearing and Request for Continuance, April 25, 2014, at 2).

...

Both [Drs. Ballard and Coulter] would observe extensive complaints and behaviors by Mr. Domingo that have no physical basis and instead reflect a major psychiatric disturbance.

Possible signs of psychiatric disturbance occur during the first weeks following the incident. Dr. Johnston prescribed Ultram. Mr. Domingo then complained of not just a side effect, but **many (if not all listed)** side effects, all at the same time. . . . (*id.* at 3).

...

However, Dr. Ballard also observed extensive symptom magnification, pain behavior, and functional overlay. . . . (*id.* at 4).

...

[Dr. Coulter] also diagnosed a major neurosis, conversion hysteria, and recommended evaluation by a psychiatrist (*id.* at 6).

...

Here, the parties already stipulated to an SIME and it was partially completed. The question is whether to fully complete the SIME process as the primary SIME physician has recommended. . . .

Mr. Domingo will undoubtedly stress the fact he is not claiming a psychiatric injury. He is not interested, apparently, in psychiatric treatment, even if it is best for him. However, his interests and desires in this case are only half the story.

Alaska Sausage and Seafood has been hailed before the board to address Mr. Domingo's now-global symptoms and complaints. Dr. Coulter makes clear that a psychiatric evaluation will help to determine the nature and extent of Mr. Domingo's physical injuries by better understanding the psychiatric issues which overlay and obscure them. A psychiatric evaluation will also help Mr. Domingo and his physicians determine the best course of action for his medical care (*id.* at 8-9; all emphasis in original).

- 25) Given the above, Employer sought a hearing continuance and a psychiatric SIME (*id.* at 10).
- 26) On April 29, 2014, the parties stipulated to a hearing continuance for the May 6, 2014 and May 28, 2014 hearings citing good cause as Employee's counsel was unavailable for personal reasons and the parties could not timely arrange and complete Employee's deposition (Stipulation to Continue 05/06/14 & 05/28/14 Hearings, April 29, 2014).
- 27) On April 30, 2014, the board approved the stipulation and continued the two hearings (Order of Approval, April 30, 2014).
- 28) On June 18, 2014, the parties attended another prehearing conference. The summary states: "Employer confirmed the withdrawal of the 3/18/2014 Petition [Employer's Petition for a Psychological SIME & Continuance of Merits Hearing, March 17, 2014] and parties agreed to schedule a hearing date on the merits of this case. The parties stipulated to an oral hearing to be held on 8/14/2014, for approximately 4 hours on which date they will be on a trailing calendar. . . . Any request for continuance, postponement, cancellation, or change the hearing date will be reviewed in accordance with 8 AAC 45.074. The issues to be addressed are noted as follows":

Medical compensability
Psychiatric compensability
Transportation costs

Interest

Attorney fees/costs (Prehearing Conference Summary, June 18, 2014; emphasis added).

29) On July 15, 2014, the parties attended a prehearing conference and the same issues were identified for hearing. The summary states: “Parties confirmed witness availability/deposition dates and verified their readiness for the 8/14/2014 hearing” (Prehearing Conference Summary, July 15, 2014).

30) On July 23, 2014, Dr. Ballard testified by deposition and stated he has a private medical practice as an orthopedic surgeon in Oregon, and spends about one-third to one-quarter of his practice performing independent medical evaluations (Deposition of John Ballard, M.D., July 23, 2014, at 5). In Dr. Ballard’s opinion, Employee’s physical examination did not make “anatomical sense” (*id.* at 8). Dr. Ballard’s examination began with palpating areas where Employee stated he had pain. Every place Dr. Ballard pushed, from Employee’s neck all the way down to his belt line Employee reported pain, which is “a little bit unusual” (*id.*). Employee demonstrated “give way weakness” on all muscle testing, which means his arm “just kind of collapses” against the physician’s resistance, which is not a normal response (*id.* at 9). Employee’s impingement test was abnormal and physiologically impossible (*id.* at 10). Employee’s left arm pinwheel test showed his skin sensation was “globally decreased.” According to Dr. Ballard, this is not possible (*id.* At 11). Employee had positive Waddell tests, which are tests designed to not create pain, and a positive test result demonstrated Employee nonetheless felt symptoms (*id.* at 12). Employee demonstrated inconsistent sitting and supine straight leg raising tests, and non-anatomical loss of strength and sensation in his lower extremities (*id.* at 13). Lastly, Dr. Ballard diagnosed “symptom magnification, pain behavior and probable functional overlay.” He agreed with Dr. Coulter that Employee should have a psychiatric evaluation, and made a referral (*id.* at 19-20). Dr. Ballard agreed with Dr. Coulter’s opinion about Employee’s neurosis, and opined it cannot be determined whether the neurosis is intentional or unintentional, without a psychiatric evaluation (*id.* at 22). Dr. Ballard has never seen a miraculous “placebo” response as Dr. Coulter described, and does not offer such treatment in his practice (*id.* at 23). In Dr. Ballard’s opinion, psychiatric evaluation and possible treatment is the best course to treat Employee’s symptoms, which have no objective cause (*id.* at 24). If Employee has a normal psychiatric evaluation but still complained of significant pain, Dr. Ballard would consider reevaluation, possibly repeating the EMG test, and performing diagnostic

injections to locate the pain generating site before considering surgery (*id.* at 28). In Dr. Ballard's opinion, the only real question remaining is what to do medically to get rid of Employee's persistent symptoms that are out of line with objective testing and physical examination (*id.* at 31-32). If Employee is found objectively free from any psychiatric issues, "then you could make the argument that he has had an aggravation of the degenerative changes" through his work injury (*id.* at 36).

31) On August 4, 2014, Employer filed another petition seeking a hearing continuance. Employer noted the July 15, 2014 prehearing conference summary, which listed "compensability of a possible psychiatric injury" as an issue for hearing and stated "this is a new development." Employer stated a psychiatric EME was scheduled for the following day. It contended the psychiatric compensability issue was "completely unripe" and suggested "the entire hearing should be continued." Employer contends it verbally requested a psychiatric SIME as recommended by Dr. Coulter. It avers Employee did not amend his claim to include a mental injury and opposed having a psychiatric SIME. Employer characterized Employee's position on the psychiatric SIME issue as "equivocal." It claims Employee was initially not opposed to a psychiatric SIME, and demanded an SIME with a neuropsychiatrist and a pain specialist, and authorization for a psychiatric evaluation with his own physician. However, Employer contends Employee then asserted he had no claim for a "mental injury." When Employee's counsel became unavailable, the two May 2014 hearings were continued. Employer asserts by the time the next prehearing conference occurred, Employee had not asserted a mental injury and had not received a referral for a psychiatric evaluation. Accordingly, Employer contends it withdrew its petition for a psychiatric SIME. Employer contends Employee thereafter asserted a mental injury for the first time, and rescheduled the merits hearing for August 14, 2014. Employer contends Employee's equivocation is evidenced by his counsel's July 25, 2014 letter to Dr. Fix requesting a psychiatric referral. Consequently, based upon the above, Employer requests a hearing continuance of at least the mental injury compensability issue. Employer cites as grounds for the continuance: Incomplete discovery, surprise, excusable neglect, and possible irreparable harm to Employer should the hearing not be continued at least on the mental health issue. Furthermore, Employer questions whether the merits hearing should occur given that Employee's attending physician recommended surgery but Drs. Coulter and Ballard agree a psychiatric evaluation should occur first. Alternately, Employer seeks an order leaving the

hearing record open to receive the EME psychiatric evaluation and any subsequent deposition as well as supplemental briefing or oral argument on the mental health injury compensability issue (Employer's Petition for Continuance of Merits Hearing Scheduled for 08/14/14, August 4, 2014).

32) On August 7, 2014, Employee filed an opposition to Employer's petition for a hearing continuance. He contends the only issue for hearing is "compensability." Employee states:

The Carrier has controverted on the basis that there is no work related neck injury. There is no claim of psychiatric injury. Instead, the SIME physician, Dr. Coulter, has raised the presumption of compensability for a consequential psychiatric need for care. If the neck injury is not compensable, then the issues raised in the petition for continuance would be moot.

The IME physician Dr. Ballard is also of the opinion that there may be a psychiatric consequential injury per his deposition testimony taken on July 23, 2014. Both the SIME Coulter and IME Ballard agree that it would be a consequential injury, so if the original injury is not compensable, then the consequential injury is not compensable. Therefore, the only issue to be decided at the 08/14/2014 hearing is whether or not the neck is a compensable injury (Opposition to Employer's Petition for Continuance of the 08/14/2014 Merits Hearing, August 5, 2014).

33) At hearing on August 14, 2014, as a preliminary matter, Employer renewed its request for a hearing continuance. Employee reiterated his opposition. After some detailed questioning and discussion, the panel determined the parties had misunderstood Employee's claim. At hearing, Employee confirmed he was not claiming a "mental-mental" injury but rather, was claiming a "physical-mental" injury. Employer's misunderstanding had resulted in it withdrawing Employer's prior request for a hearing continuance and for completion of the SIME process when Employee confirmed at a prior prehearing conference that he was not claiming a "mental injury." Meanwhile, Employer had obtained a psychiatric EME and filed it just prior to the hearing. Employee objected to the panel considering the psychiatric EME report as it was untimely filed. Since it now had a psychiatric EME report, Employer no longer insisted upon completing a psychiatric SIME. However, the panel could not consider the psychiatric EME at the August 14, 2014 hearing because it was not filed and served at least 20 days prior to the hearing. Furthermore, Employer had agreed to authorize a psychiatric evaluation from a physician chosen by Employee, and Employee had an appointment established in the near future.

The parties agreed Employee’s referral psychiatrist might disagree with the EME psychiatrist, causing a clear basis for a psychiatric SIME. They conceded he might agree with the EME psychiatrist, obviating the need for any further psychiatric opinions. After further discussion, the parties, at the designated chair’s urging, stipulated to continue the merits hearing and revisit calendaring a hearing upon receiving Employee’s psychiatrist’s opinion and reviewing the possible need for a psychiatric SIME (record).

34) Following this hearing discussion, the panel approved the stipulation and continued the hearing (*id.*).

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

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board’s “experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.005. Alaska Workers’ Compensation Board. . . .

. . .

(h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

8 AAC 45.050. Pleadings. . . .

(f) **Stipulations.**

. . .

(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. . . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party. . . .
...

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when
...

(F) a second independent medical evaluation is required under AS 23.30.095(k);
...

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

... or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section
...

(B) for good cause under (1)(K)-(N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request. . . .

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

- (1) the affidavit of readiness is inoperative for purposes of scheduling another hearing;
- (2) the board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and
- (3) a party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

8 AAC 45.120. Evidence. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

. . .

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, 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.

ANALYSIS

Was the oral order approving the parties' stipulation to continue Employee's August 14, 2014 hearing correct?

During the August 14, 2014 hearing, it soon became apparent the parties misunderstood Employee's "mental health" claim. At past prehearings, Employee represented he was not making a "mental claim." Nevertheless, in his pleadings and at later prehearing conferences, Employee stated he was requesting an order for both "medical compensability," and "psychiatric compensability." Employer had filed a March 18, 2014 petition to "complete" the SIME with a psychiatric examination and for a hearing continuance until a psychiatric SIME was done. Based on Employee's representations at a subsequent prehearing conference, Employer withdrew this

petition believing Employee was not claiming any mental aspect to his injury. Employee, on the other hand, believed Employer referred to a “mental-mental” claim when it queried him for clarification, while Employer was actually only referring to a “physical-mental” injury.

Meanwhile, Employer filed its August 4, 2014 petition for continuance, but no longer wanted or needed a psychiatric SIME because it had recently obtained a psychiatric EME. However, Employer’s EME report was not timely filed and could not be considered at the August 14, 2014 hearing. 8 AAC 45.120(f). Furthermore, Employee contends Dr. Coulter’s SIME report raised the presumption that any identifiable psychiatric issues arose out of and in the course of his employment with Employer or resulted naturally from his work injury. But Dr. Coulter’s SIME report on this point is equivocal at best. He implies the “neurosis” he diagnosed arose from Employee’s work injury, but later states he has no idea whether or not the neurosis is “industrially related.” Both he and Dr. Ballard recommended a psychiatric evaluation. Though Employer has now obtained its own psychiatric EME, had the hearing gone forward, this report could not have been considered because it was untimely filed. 8 AAC 45.120(f).

The hearing record could have been left open to receive the EME physician’s deposition post-hearing, but this would have further delayed matters and created more piece-meal litigation. While the parties were arranging for and obtaining the EME physician’s deposition post-hearing, Employee’s psychiatric report from his referral psychiatrist would have been received, and would have either created a medical dispute between the psychiatric EME and Employee’s psychiatrist or, if Employee’s doctor agreed with Employer’s psychiatric EME, obviated the need for any further psychiatric medical information. *Rogers & Babler*.

Holding the August 14, 2014 hearing given the confusion between the parties regarding Employee’s claim, and uncertainty concerning upcoming results from Employee’s own psychiatric evaluation, would not promote “quick, efficient, fair, and predictable delivery of . . . medical benefits” to Employee if he is entitled to them, at a “reasonable cost” to Employer. AS 23.30.001(1). Likewise, given the above problems, proceeding with the August 14, 2014 hearing on Employee’s claim did not create a “summary and simple as possible” process and procedure. AS 23.30.005(h).

With considerable encouragement from the panel, and after much argument and discussion, the parties stipulated to continue the August 14, 2014 hearing. 8 AAC 45.050(f)(2-3). Hearing continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). Another injured worker and his employer seeking due process lost an opportunity for their hearing on August 14, 2014, because this case was scheduled for hearing. Nevertheless, had this matter gone forward on August 14, 2014, it is likely a future hearing docket would have been filled with more than one hearing in this case given the above analysis. Therefore, “good cause” existed supporting the parties’ August 14, 2014 stipulation to continue the hearing. A follow-up psychiatric SIME may be required to complete the SIME process depending upon the opinions offered by Employee’s psychiatrist. 8 AAC 45.074(b)(1)(F). Furthermore, despite the parties’ due diligence in completing discovery and despite their good faith belief they were fully prepared for the hearing, Employer obtained a psychiatric EME after Employee filed his hearing request. Employer offered this psychiatric report at the hearing, and due process requires giving Employee an opportunity to obtain rebuttal evidence through his own psychiatric evaluation, which has already been scheduled. 8 AAC 45.074(b)(1)(K). There was some confusion as to Employee’s mental health claim, and therefore some associated surprise that he was still claiming mental-health related medical benefits. Additional inquiry and discussion at hearing demonstrated more evidence or arguments from both parties are necessary to complete the hearing. 8 AAC 45.074(b)(1)(L). Both parties prepared for hearing with due diligence, but confusion surrounding Employee’s mental health claim required Employer to obtain a late EME, which is not admissible at hearing. On balance, irreparable harm may result to one or both parties from a failure to grant the requested hearing continuance. 8 AAC 45.074(b)(1)(N). Therefore, the oral order approving the parties’ stipulation to continue the hearing was correct.

The parties will be directed to review the report from Employee’s psychiatrist. If a medical dispute arises between Employee’s psychiatrist and Employer’s EME psychiatrist, or if either party wants to pursue a psychiatric SIME, they will be directed to request and attend a prehearing conference so any psychiatric SIME can be agreed to by stipulation, or scheduled for hearing if necessary.

CONCLUSION OF LAW

The oral order approving the parties' stipulation to continue Employee's August 14, 2014 hearing was correct.

ORDER

- 1) The parties are ordered to review Employee's psychiatrist's report when it is received.
- 2) If, after reviewing the report, any party wants a psychiatric SIME, they are directed to request and attend a prehearing conference to discuss the psychiatric SIME issue.
- 3) If the parties do not agree on the psychiatric SIME issue, the designee is directed to schedule a preliminary hearing on the psychiatric SIME issue forthwith.
- 4) If the parties do not require any additional SIME process or procedure, either party may request a hearing on Employee's pending claim on its merits.

Dated in Anchorage, Alaska, on August 19, 2014.

ALASKA WORKERS' COMPENSATION BOARD

William Soule, Designated Chair

Mark Talbert, 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 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.

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.

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 PATROCINIO DOMINGO, employee / claimant v. ALASKA SAUSAGE COMPANY, INC., employer; REPUBLIC INDEMNITY CO. OF AMERICA, insurer / defendants; Case No. 201203106; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 19, 2014.

Pamela Murray, Office Assistant