

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MARK R. DONITHAN,	)	
	)	
Employee,	)	
Claimant,	)	
v.	)	INTERLOCUTORY
	)	DECISION AND ORDER
ACCESS ALASKA, INC.,	)	
	)	AWCB Case No. 201304698
Employer,	)	
and	)	AWCB Decision No. 14-0152
	)	
EMPLOYERS INSURANCE OF	)	Filed with AWCB Anchorage, Alaska
WAUSAU,	)	On November 28, 2014
	)	
Insurer,	)	
Defendants.	)	
	)	

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Mark Donithan's (Employee) September 11, 2014 petition requesting a second independent medical evaluation (SIME) was heard on November 25, 2014, in Anchorage, Alaska, a date selected on September 25, 2014. Attorney Elliot Dennis appeared by telephone and represented Employee. Attorney Stacey Stone appeared and represented Access Alaska, Inc., and Employers Insurance of Wausau (Employer). There were no witnesses. At hearing, the parties stated they had circulated and filed a stipulation to continue the hearing because Employee's lawyer had recently entered an appearance, was unfamiliar with the case and was not ready to proceed on Employee's SIME petition. At hearing, the designated chair searched for and found the stipulation. After confirming the terms in the written stipulation, the parties further agreed the SIME petition should be dismissed but without prejudice. This decision examines the oral order canceling the hearing and memorializes the parties' oral stipulation. The record closed at the hearing's conclusion on November 25, 2014.

ISSUE

Employee and Employer stipulated to cancel the SIME hearing because Employee's newly-retained attorney had not had enough time to familiarize himself with the file and the issues. Employee and Employer further stipulated that the SIME hearing should be dismissed without prejudice and Employee could file a new SIME petition if the parties do not otherwise resolve this case. An oral order issued, which cancelled the hearing.

**Was the oral order dismissing Employee's September 12, 2014 SIME petition without prejudice and approving the parties' stipulation to cancel the November 25, 2014 hearing correct?**

FINDINGS OF FACT

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

- 1) On April 5, 2013, Employee hurt himself while working as a personal care attendant. Employee was providing attendance to his wife when their home caught on fire. As Employee rushed into the house to carry his wife to safety, he slipped and injured his left knee and back (Report of Occupational Injury or Illness, April 5, 2013; Emergency Department Note, Mat-Su Regional Medical Center, April 5, 2013).
- 2) On January 14, 2014, Employee filed a claim seeking various benefits (Workers' Compensation Claim, January 10, 2014).
- 3) On May 8, 2014, Steven Henderson, D.C., filed a claim and a petition in Employee's case on Dr. Henderson's behalf seeking \$2,080 for medical benefits and services provided to Employee (Workers' Compensation Claim, May 2, 2014).
- 4) On May 8, 2014, Dr. Henderson also filed a Notice of Appearance entering his appearance as representative for Frontier Chiropractic, which is Dr. Henderson's chiropractic practice. Employee also signed the same document authorizing Dr. Henderson to represent Employee in this case (Notice of Appearance, April 30, 2014 and May 2, 2014; experience, observations).
- 5) Dr. Henderson has not been given notice of any prehearing conferences or hearings in this case and has not been formally joined as a party to Employee's claim (Prehearing Conference Notice, May 20, 2014; observations).
- 6) At a prehearing conference on July 15, 2014, Employee amended his claim to include an SIME (Prehearing Conference Summary, July 15, 2014).

- 7) On September 12, 2014, Employee filed a formal petition requesting an SIME (Petition, September 11, 2014).
- 8) On September 25, 2014, Employee and Employer appeared at a prehearing conference, although Dr. Henderson was not given notice and did not appear. The designee set a hearing on Employee's SIME petition for November 25, 2014, over Employer's objection (Prehearing Conference Summary, September 25, 2014; observations).
- 9) On November 20, 2014, attorney Elliot Dennis entered his appearance as Employee's attorney (Entry of Appearance, November 20, 2014).
- 10) On November 25, 2014, Employee's attorney filed a stipulation to cancel the November 25, 2014 hearing stating all issues currently pending related to the petition for an SIME had been resolved, though the case had not settled and it was possible another petition for an SIME may be re-filed in the future (Stipulation to Cancel Hearing on Petition for SIME, November 24, 2014).
- 11) At hearing on November 25, 2014, Employee and Employer through their attorneys appeared and both agreed to continue the SIME hearing. Furthermore, both parties agreed Employee's petition for an SIME would be dismissed, without prejudice, and Employee reserved his right to file another SIME petition in the future should it become necessary, or if the parties could not settle the case (parties' oral stipulation at hearing).
- 12) The hearing panel issued an oral order dismissing the SIME petition without prejudice and continuing the SIME hearing (oral order at hearing).

#### 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 45.040. Parties. . . .**

. . .

(c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party. . . .

**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

. . .

(J) the parties agree that the issues set for hearing has been resolved without settlement and the parties filed a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.074(f)(1).

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

. . .

(g) If there exists a medical dispute under in AS 23.30.095(k),

. . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

ANALYSIS

**Was the oral order dismissing Employee's September 12, 2014 SIME petition without prejudice and approving the parties' stipulation to cancel the November 25, 2014 hearing correct?**

Employee and Employer both agreed to cancel the November 25, 2014 SIME hearing. Employee recently obtained counsel who did not have adequate time to familiarize himself with the case. However, their written stipulation did not include a provision dismissing Employee's SIME petition, as required by 8 AAC 45.074(b)(1)(J). Therefore, at hearing, Employee and Employer orally stipulated that Employee's September 12, 2014 petition requesting an SIME would be dismissed, but without prejudice. Employer further agreed Employee reserved his right to file another SIME petition should the need arise. Based upon these stipulations, the board panel issued an oral order dismissing the September 12, 2014 SIME petition without prejudice, and canceling the November 25, 2014 hearing.

Proceeding in this manner helped "ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits" to Employee if he is entitled to them "at a reasonable cost" to employer, by giving Employee's new attorney time to review the case and by eliminating a possibly unnecessary hearing. AS 23.30.001(1). Furthermore, the oral order dismissing the SIME petition without prejudice and canceling the hearing also created a more summary and simple adjudication process. AS 23.30.005(h). Because the hearing was cancelled, this decision does not decide the current SIME dispute. The parties may ultimately agree there is or is not currently a medical dispute adequate to require an SIME. Or, the facts may change sufficient for the parties to stipulate to an SIME. However, even if the medical records currently reflect a medical dispute, Employee will not be bound by the 60 day SIME request and waiver provision

given the parties' stipulations and the resultant dismissal "without prejudice," should he resurrect his pending SIME petition following his attorney's review. 8 AAC 45.092(g)(2).

Lastly, there remains an unaddressed question whether Dr. Henderson also represents Employee, or whether he simply represents himself doing business as Frontier Chiropractic. Dr. Henderson's notice of appearance on its face states he represents himself and Employee. This also begs the question whether Dr. Henderson and his pending claim and petition should be joined to Employee's claim, so all issues in this case concerning Employee's medical bills can be resolved in one hearing and one decision. 8 AAC 45.040(c). This potential joinder issue needs to be addressed at a prehearing conference or through further stipulation among the current parties and Dr. Henderson.

For all these reasons, the oral order dismissing Employee's September 12, 2014 SIME petition without prejudice and canceling the November 25, 2014 hearing was correct.

#### CONCLUSION OF LAW

The oral order dismissing Employee's September 12, 2014 SIME petition without prejudice and approving the parties' stipulation to cancel the November 25, 2014 hearing was correct.

#### ORDER

- 1) Employee September 12, 2014 SIME petition is dismissed, without prejudice.
- 2) Employee, Employer and Dr. Henderson will be directed to appear at a prehearing conference to consider joining Dr. Henderson and his pending claim and petition to Employee's pending claim.

Dated in Anchorage, Alaska on November 28, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Linda Hutchings, Member

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Stacy Allen, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in 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 MARK R. DONITHAN, employee / claimant v. ACCESS ALASKA, INC., employer; EMPLOYERS INSURANCE OF WAUSAU, insurer / defendants; Case No. 201304698; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on November 28, 2014.

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Pam Murray, Office Assistant