

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

WILLIAM GILLESPIE,)	
Employee,)	
Claimant,)	
)	INTERLOCUTORY
v.)	DECISION AND ORDER
)	
TALKEETNA RIVER GUIDES RAFTERS,)	AWCB Case No. 201212114
Employer,)	
)	AWCB Decision No. 15-0035
and)	
)	Filed with AWCB Anchorage, Alaska
LM INSURANCE CORPORATION,)	on March 23, 2015
Insurer,)	
Defendants.)	
)	

William Gillespie's (Employee) January 2, 2015 petition to limit/redact video surveillance reports and interrogatories was heard in Anchorage, Alaska on March 17, 2015. The hearing date was selected on February 10, 2015. Employee appeared and testified. Attorney Rene Gonzalez appeared and represented Employee. Attorney Martha Tansik appeared and represented Talkeetna River Guides Rafters and its insurer (Employer). There were no other witnesses. The record closed at the conclusion of the hearing on March 17, 2015.

ISSUES

Employee contends video surveillance arranged for and obtained by Employer around the time of Employee's visit to a second independent medical evaluation (SIME) physician is misleading, irrelevant, and non-probative of material issues. Employee contends some of the videos capture a person other than Employee, which may mislead or confuse the SIME physician in his

assessment. Employee seeks an order requiring Employer to redact, or edit out, significant portions of the surveillance video before it is sent to the SIME physician.

Employer contends it has a right to provide relevant evidence, including video surveillance of Employee, to the SIME physician. Employer contends it has a right to send the SIME physician interrogatories, which may reference relevant video surveillance. Employer further contends Employee inappropriately interfered with the SIME process when Employee unilaterally sent a letter to the SIME physician requesting he abstain from responding to any such video and interrogatories. Employer seeks an order denying Employee's January 2, 2015 petition to limit/redact, and directing the SIME physician to respond to Employer's interrogatories in connection with the video surveillance as originally posed.

Should Employer be required to edit or redact video surveillance purportedly taken of Employee prior to submission to the SIME physician for review?

FINDINGS OF FACT

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

- 1) On August 17, 2012, Employee reported an injury to his lower back while working for Employer as a rafting guide in Trapper Creek, Alaska. (Report of Occupational Injury or Illness, August 23, 2012).
- 2) On July 2, 2013, Employee filed a claim seeking review of the Reemployment Benefit Administrator's (RBA) finding of ineligibility for reemployment benefits. The claim stated:

We were at our Ghulitna put-in, unloading rafts. After moving a raft overhead, I felt a small pain in my back. 10 mins later I bent over to pick up some rain pants and my right leg gave out and my lower back was in great pain. My leg went numb. (Workers' Compensation Claim, July 2, 2013).

- 3) On December 6, 2013, Employee attended an Employer's Medical Evaluation conducted by John Ballard, M.D. (Ballard EME Report, December 6, 2013).
- 4) On December 27, 2013, Employee filed a claim for medical costs, penalty, and interest. The claim stated:

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Nature of injury or illness: Large L5-S1 disc extrusion causing pronounced debilitating back pain and right leg pain; including lower extremity weakness and numbness. Recurrent disc herniation. (Workers' Compensation Claim, December 27, 2013).

5) On February 11, 2014, Employer filed a petition for examination by a board-ordered physician under AS 23.30.095(k). (Petition, February 11, 2014).

6) On February 12, 2014, Employer filed a claim for permanent total disability (PTD) from October 2, 2013 through "present," permanent partial impairment (PPI), medical costs, transportation costs, review of RBA decision, compensation rate adjustment, penalty, interest, unfair or frivolous controversion, and attorney's fees and costs. (Workers' Compensation Claim, February 12, 2014). Employee filed an Affidavit of Readiness for Hearing (ARH) contemporaneously. (Affidavit of Readiness for Hearing, February 12, 2014).

7) On February 20, 2014, Employer filed an Affidavit in Opposition to the foregoing ARH. The ARH stated as grounds for opposition additional discovery still needed to be completed and Employer was seeking an SIME. (Affidavit of Martha Tansik, February 20, 2014).

8) On March 21, 2014, a prehearing conference was held. The prehearing conference summary states, "The parties stipulated to an oral hearing to be held on 4/23/2014..." The issue identified for hearing was listed as "Employer's 2/11/2014 Petition for a SIME." (Prehearing Conference Summary, March 21, 2014).

9) On April 18, 2014, the parties filed a stipulation cancelling the April 23, 2014 hearing. (Stipulation, April 18, 2014).

10) On May 21, 2014, a prehearing conference was held. The parties stipulated to an SIME with an orthopedic surgeon. (Prehearing Conference Summary, May 21, 2014).

11) On October 10, 2014, Employee attended an SIME conducted by Edward Tapper, M.D. at Pacific Evaluations in Sacramento, California. (Tapper SIME Report, October 10, 2014).

12) In conjunction with the SIME appointment, Employer arranged for video surveillance to be conducted of Employee by ICS Merrill Investigative Services. The investigative report states Employee was followed and videotaped on seven separate dates: October 9, 10, 11, 24, and November 6, 21, and 22. (ICS Investigative Report, Employer's Hearing Exhibit, filed February 25, 2014).

13) On December 19, 2014, Employer's attorney sent a letter to Dr. Tapper which attached the investigative reports and the video surveillance. The letter requested Dr. Tapper review the

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materials and answer interrogatories concerning Employee's physical capacities, range of motion, etc. The letter asked whether the conclusions and opinions in Dr. Tapper's October 10, 2014 SIME report are changed by a review of the video and reports. (Tansik Letter, December 19, 2014).

14) On January 1, 2015, Employee's attorney sent a letter to Dr. Tapper requested he abstain from viewing and issuing an opinion on the surveillance materials. The letter stated:

... William Gillespie has no objection that you review independently a recording of his conduct and that you respond to the interrogatories submitted by Ms. Tansik on a true factual basis. The material as submitted for your review is simply not a true and accurate factual record of Mr. Gillespie's physical activity. With a proper redaction of the CD, you can have an accurate depiction and record of what Mr. Gillespie's level of physical activity he actually undertook [sic] and does have a proper factual basis [sic] upon which to respond to Ms. Tansik's interrogatories. (Gonzalez Letter, January 1, 2015).

15) On January 2, 2015, Employee filed the instant petition to limit/redact video surveillance report and interrogatories. (Petition, January 2, 2015).

16) On January 9, 2015, Employer's attorney sent Dr. Tapper a letter stating no legal authority exists for Employee to request a stay by the SIME physician from responding to SIME interrogatories and accompanying surveillance materials. The letter stated, "As you have met and examined Mr. Gillespie, you are no doubt capable of reviewing the surveillance records, recognizing that the investigators followed someone not Mr. Gillespie for a period of time and differentiating between Mr. Gillespie and other individuals on the video...." (Tansik Letter, January 9, 2015).

17) Dr. Tapper has not responded the December 19, 2014 surveillance materials sent by Employer's attorney. (Record; Observations).

18) Employee does not object to the surveillance videos from October 9, 10, and 11 being sent to Dr. Tapper. (Employee's Hearing Argument).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a

reasonable cost to the employers who are subject to the provisions of this chapter....

The board may base its decision not only on direct testimony, 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. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. . . .

In workers' compensation proceedings, video and photographic surveillance, and related investigative reports, have long been considered relevant to an employee's physical capacities, and thus clearly within the scope of discoverable evidence. *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158 (Alaska 1996).

AS 23.30.095. Medical treatments, services, and examinations.

....

(k) In the event of a medical dispute regarding determinations of causation . . . 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 cost of an examination and medical report shall be paid by the employer. . . .

The purpose of an SIME is to have an independent expert provide an opinion to the board about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). The SIME physician is the *board's expert*, not the employee's or employer's expert. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 5; (emphasis original). An SIME is not intended to give the parties an additional medical opinion or bolster their position. *Id.* at 4-5. See also *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-

0165 at 3 (July 23, 1997). See also *Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991).

Regarding discovery generally, the Alaska Supreme Court encourages “liberal and wide-ranging discovery under the Rules of Civil Procedure.” *Schwab V. Hooper Electric*, AWCB Decision No. 87-0322 at 4, n.2 (December 11, 1987); citing *United Services Automobile Association v. Werley*, 526 P.2d 28, 31 (Alaska 1974); see also *Venables v. Alaska Builders Cache*, AWCB Decision No. 94-0115 (May 12, 1994).

AS 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

AS 23.30.155. Payment of compensation.

. . . .

(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take further action which it considers will properly protect the rights of all parties. . . .

8 AAC 45.092. Selection of an independent medical examiner.

. . . .

(h) If the board requires an evaluation under AS 23.30.095 (k), the board will, in its discretion, direct

(1) a party to make two copies of all medical records, including medical providers’ depositions, regarding the employee in the party’s possession, put the copies in chronological order by date of treatment with the initial report on top and the most recent report at the end, number the copies consecutively, and put the copies in two separate binders;

- (2) the party making the copies to serve the two binders of medical records upon the opposing party together with an affidavit verifying that the binders contain copies of all the medical reports relating to the employee in the party's possession;
 - (3) the party served with the binders to review the copies of the medical records to determine if the binders contain copies of all the employee's medical records in that party's possession. . . .
- (j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants an opportunity to
- (1) submit interrogatories or depose the examiner, the party must
 - (A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or served interrogatories. . . .
 - (2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board. . . .
- (k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at hearing and may not consider it in connection with an agreed settlement.

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. . . .

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Relevant evidence is admissible. Evidence is relevant if it has any tendency to make a question at issue in the case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999) at 6, 8.

The board's record should be open to all evidence "relative" to a claim. That is, all evidence relevant or necessary to the resolution of the claim. This evidence is then winnowed in the adversarial process of cross-examination and weighing in a hearing before the board. *Rockstad v. Chugach Eareckson Support Services*, AWCB Decision No. 08-0028 (February 22, 2008) citing AS 23.30.135(a), AS 23.30.155(h). The relevance and admissibility of surveillance video in particular has been addressed by both the board and the Commission. The board has long held surveillance videotapes and related reports are relevant to an employee's physical capacities, and thus within the scope of discoverable evidence. *Id.*

Addressing the admissibility of surveillance videos in *Geister v. Kid's Corps, Inc.*, AWCAC Decision No. 45 (June 6, 2007), the Commission likened surveillance videotapes to a witness' observations. In the case of surveillance videos, the observations would be those of the videographer. Because videotapes are subject to manipulation, however, which can render the recording an inaccurate representation of a declarant's conduct, the recording witness must lay a foundation for admission of the video. *Geister* at 21.

Where the videographer testified credibly he made no alterations in the video recordings, and deleted only scenes in which the claimant was not visible, a sufficient foundation had been laid for admission of surveillance videos. *Barker v. Fred Meyer Stores, Inc.*, AWCB Decision No. 12-0062 (March 30, 2012).

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

Alaska Rules of Evidence. Rule 401. Definition of Relevant Evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Alaska Rules of Evidence. Rule 402. Relevant Evidence Admissible - Exceptions - Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme court. Evidence which is not relevant is not admissible.

ANALYSIS

Should Employer be required to edit or redact video surveillance purportedly taken of Employee prior to submission to the SIME physician for review?

The board may make its investigation or inquiry in the manner by which it may best ascertain the rights of the parties. AS 23.30.135. While the Alaska Supreme Court encourages “liberal and wide-ranging discovery under the Rules of Civil Procedure,” the board is generally not bound by the technical rules of evidence, and the standard for relevancy is generally more broad than under the civil rules. *Schwab; Granus*; 8 AAC 45.120(e).

The purpose of an SIME is to have an independent expert provide an opinion about a contested issue. *Seybert*. It is well-established the SIME physician is the board’s expert, not the employee’s or employer’s expert. *Bah*. The parties’ communications with an SIME physician are set forth in 8 AAC 45.092. Prior to an SIME, the regulations establish procedures for compiling and sending medical records to the SIME physician or physicians, including medical records binders. 8 AAC 45.092(h). Subsequent to receiving the examiner’s report, a party has a right to submit interrogatories or depose the examiner, so long as those communications are in compliance with the regulations. 8 AAC 45.092(j). Following the issuance of the SIME report, a party may send an SIME physician interrogatories which reference video surveillance or other media, so long as the test for relevancy is met. *Id.*; *Schwab; Granus*; AS 23.30.005; AS 23.30.155; 8 AAC 45.120(e).

Employee's reliance on *Aikens v. Browning Timber of Alaska*, AWCB No. 95-0310 (November 13, 1995) is misplaced. *Aikens* concerned a dispute over surveillance videos being sent to the examiner *prior* to the occurrence of a board-ordered SIME. In *Aikens*, as here, the employee contested the authenticity of surveillance videos obtained by the employer. However, distinguished from the case at bar, the board in *Aikens* concurred with the stipulation of the parties that the surveillance videos would not be sent to the SIME examiner at that time. Citing AS 23.30.110(d), the board in *Aikens* held it would hold an evidentiary hearing prior to hearing on the merits of employee's claim to consider the surveillance videos. *Aikens* did not address post-SIME communications under 8 AAC 45.092 and therefore is inapplicable.

The board has long held surveillance videotapes and related reports are relevant to an employee's physical capacities. *Rockstad*. Further, video and photographic surveillance, and related investigative reports, may be significantly relevant to Employee's physical and functional capacities, and thus helpful to the SIME physician in rendering an opinion, so long as the test for relevance is met. Alaska R. Evid. 401, 402; AS 23.30.095; *Sulkosky*. Employee's concerns over misidentification of the individuals in the surveillance videos are unfounded. Dr. Tapper, having personally examined Employee, is familiar with Employee's physical appearance. The investigative reports accompanying the video state when the investigator has recorded an individual other than Employee. Employee's photograph appears in the medical records. The risk of genuine misidentification by Dr. Tapper is minimal. The relevance and potential evidentiary value of the surveillance materials may be significant. Therefore, Employee's January 2, 2015 petition to limit/redact video surveillance report and interrogatories will be denied. Dr. Tapper will be permitted to respond to the December 19, 2014 letter and interrogatories from Employer's attorney, including the accompanying unedited surveillance videos and investigative reports in their entirety.

Finally, this decision does not decide the probative value nor assign particular evidentiary weight to the surveillance materials at issue. Employee may still object to all or portions of the SIME reports, including the factual bases for those reports, at a hearing on the merits of his claim, if he so chooses. Employee may also send his own interrogatories or depose Dr. Tapper in connection with the surveillance materials as part of post-SIME discovery.

CONCLUSION OF LAW

Employer will not be required to edit or redact video surveillance purportedly taken of Employee prior to submission to the SIME physician for review.

ORDER

- 1) Employee's January 2, 2015 petition to limit/redact video surveillance report and interrogatories is denied.
- 2) Dr. Tapper may respond to the December 19, 2014 letter and interrogatories from Employer's attorney, including the accompanying unedited surveillance videos.

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Dated in Anchorage, Alaska on March 23, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Matthew Slodowy, Designated Chair

Amy Steele, Member

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 WILLIAM GILLESPIE, employee / claimant; v. TALKEETNA RIVER GUIDES RAFTERS, employer; LM INSURANCE CORPORATION, insurer / defendants; Case

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No. 201212114; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 23, 2015.

Elizabeth Pleitez, Office Assistant