# ALASKA WORKERS' COMPENSATION BOARD

**P.O. Box 115512** **Juneau, Alaska 99811-5512**

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| STEPHAN CRAIG MITCHELL,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>UNITED PARCEL SERVICE,<br><br>Employer,<br>and<br><br>LIBERTY MUTUAL INSURANCE CO.,<br><br>Insurer,<br>Defendants. | ) | INTERLOCUTORY<br>DECISION AND ORDER<br><br>AWCB Case No. 199523875<br><br>AWCB Decision No. 15-0040<br><br>Filed with AWCB Anchorage, Alaska<br>on April 9, 2015 |

United Parcel Service's (Employer) August 27, 2014 petition for a second independent medical evaluation (SIME) was heard and decided in *Mitchell v. United Parcel Service*, AWCB Decision 14-0161 (December 12, 2014) (*Mitchell XI*) on September 10, 2014. Remaining issues related to *Mitchell XI*'s SIME order were heard on March 18, 2015, in Anchorage, Alaska, a date selected on January 28, 2015. Attorney Richard Harren appeared and represented Stephan Craig Mitchell (Employee). Attorney Constance Livsey appeared and represented Employer and Liberty Mutual Insurance Co. Jeanne Mitchell testified for Employee and was the only witness. The record closed at the hearing's conclusion on March 18, 2015.

## ISSUES

Employer contended *Mitchell XI* identified causation, medical treatment, functional capacity, permanent partial impairment (PPI), and the date of Employee's medical stability as medical disputes. Employer contended it did not understand Employee's objection to including all these disputes as part of the SIME process and contended all these issues should be addressed by the SIME physicians.

Employee initially contended *Mitchell XI* decided the only identifiable medical disputes are causation and medical treatment. Therefore, he contended the SIME should go forward on only these two issues. However, upon further discussion at hearing, Employee withdrew his objection and stipulated to include causation, medical stability, degree of impairment, functional capacity, and medical treatment as medical disputes for the SIME.

**1) Should the parties' hearing stipulation on medical disputes to be addressed by the SIME physicians be approved?**

Employee initially contended numerous questions Employer addressed to the SIME physicians were inappropriate. He contended only his questions should be included in the letters to the SIME physicians. However, upon further discussion at hearing, Employee reserved his right to argue later that Employer's questions were improper, inadequate or otherwise ineffective. Employee further contends Employer failed to identify by medical dispute which questions applied to each dispute. He seeks an order requiring Employer to identify its questions by dispute category, and an order limiting the parties' questions to 15 including sub-parts.

Employer contends its questions are taken directly from the Alaska Workers' Compensation Act, and are therefore appropriate. Employer contends it should be allowed to fashion its own questions. However, Employer agreed Employee should get additional time to submit questions addressing the three additional medical disputes he did not previously anticipate would be included. Employer also agreed to identify which questions addressed which medical disputes.

**2) What process should the parties follow in asking SIME questions?**

Employer contends Alan Roth, M.D., was previously selected as the physiatrist SIME physician in this case. It contends the follow-up SIME must include Dr. Roth along with an orthopedic surgeon in close proximity to Dr. Roth's office.

Employee contends his attending physician recently restricted him from travel outside Anchorage, Alaska because travel worsens his symptoms. Therefore, he contends Dr. Roth should not be selected as his physiatrist SIME physician as Dr. Roth sees patients in California. Furthermore, Employee contends Dr. Roth's initial selection as an SIME physician in this case years ago was improper as he was not qualified. Employee contends a pending 2006 petition for modification based upon a factual error has never been heard on its merits and would address the SIME selection process if heard.

**3) How and where should the SIME physicians be selected for the SIME panel?**

Employee contends his supplemental SIME records copied on green paper should be sent to the SIME physicians. He contends the various documents disclose valuable information that would assist the SIME doctors in forming their opinions. Employee contends he should be allowed to reorganize the SIME medical records in chronological order along with his other documents and these should all be sent to the SIME physicians.

Employer contends SIME records should not be copied on colored paper. It also contends documents that are not "medical records" should not be sent to the SIME physicians. Employer further contends Employee's or his wife's handwritten annotations and interlineations on medical records in the supplemental binder are inappropriate. It contends none of these documents should be included in the SIME binders. Employer concedes the previously stricken EME records should be removed from the SIME binders, and medical depositions should be included.

**4) What process should the parties follow in providing SIME records?**

## FINDINGS OF FACT

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

1) On December 12, 2014, *Mitchell XI*, among other things, ordered an SIME. It also identified medical dispute issues including, "but . . . not limited to," whether the 1995 work injury is a substantial factor in Employee's disability or need for medical treatment, and what treatment was and is reasonable and necessary to improve his situation. *Mitchell XI* also said to "save time and expense," the parties could agree to additional medical dispute issues for the SIME physician to address. It also noted an SIME would provide a causation opinion on the need for past and further treatment, an opinion regarding Employee's physical capacities, his permanent impairment, his possibility of returning to work and his medical stability date. *Mitchell XI* ordered the parties to appear at a prehearing conference to begin the SIME process. It ordered a panel SIME with a physiatrist and an orthopedic surgeon. *Mitchell XI* also instructed the designee responsible for selecting SIME physicians to use her discretion and the normal selection process, including the criteria set forth in 8 AAC 45.092(e) when selecting the SIME physicians. (*Mitchell XI* at 18-19).

2) On January 28, 2015, the parties through counsel attended a prehearing conference. The parties could not agree initially on whether SIME issues "above and beyond Causation and Treatment" as stated in *Mitchell XI* would be included for the SIME physicians' review. Consequently, the parties stipulated to a March 18, 2015 procedural hearing to resolve this dispute. The prehearing conference summary identified the issue for the procedural hearing as: "SIME issues above and beyond Causation and Treatment order on page 18 of D&O #14-016" (sic). (Prehearing Conference Summary, January 28, 2015).

3) On March 13, 2015, Employee filed records for inclusion in the binders going to the SIME physicians. These documents were photocopied on green paper. Employer objected to the green paper and to documents that were not medical records. The following documents are not "medical records," based on the panel's experience, judgment and observations:

**Table I**

| Document Date | Description | Bates Stamp Number |
|---|---|---|
| December 4, 1992 | UPS Driver Vehicle Inspection Report | 996 |
| May 30, 2000 | Letter to Employee from Tracy Conrad | 1008 |

| | | |
|---|---|---|
| June 26, 2000 | Letter to Tracy Conrad from Employee | 1011-1012 |
| June 13, 2005 | Facsimile from Employee's Wife to Dr. Delamarter | 1018 |
| August 29, 2005 | Letter from Employee to Dr. Roth | 1021-1022 |
| Various | Materials from The United States FDA; Zimmer Spine; ODE Office; United States Department of H&SS | 1023-1037 |
| October 17, 2005 | Facsimile from Employee's Wife to Dr. Delamarter | 1038 |
| May 18, 2005 | Controversion Notice | 1039 |
| Undated | Employer's Hearing Brief | 1040-1042 |
| October 23, 2005 | Letter to Dr. Delamarter from Employee's Wife | 1043 |
| October 23, 2005 | USPS Track & Confirm Document | 1044 |
| September 21, 2005 | Employer's Hearing Brief | 1045-1060 |
| September 25, 2003 | Controversion Notice | 1061 |
| May 18, 2005 | Controversion Notice | 1062-1063 |
| Undated | Blank Page | 1067 |
| August 29, 2005 | Letter to Dr. Roth from Employee's Wife | 1068-1070 |
| Undated | Blank Page | 1071 |
| Undated | Blank Page | 1074 |
| Undated | Blank Page | 1085 |
| October 31, 2005 | Letter to Dr. Delamarter from Employee's Wife | 1097-1098 |
| October 19, 2005 | Envelope | 1102 |
| October 13, 2005 | Facsimile Cover Sheet and Letter from Rebecca Pauli, Jean Michel and Constance Livsey to Dr. Roth | 1103-1104 |
| January 9, 2006 | Record of Phone Conversation | 1105 |
| January 18, 2006 | Record of Telephone Contact | 1107 |
| May 18, 2006 | Surgery Package Quote Letter | 1115 |
| May 18, 2006 | Surgery Estimation Letter | 1116 |
| May 18, 2006 | Surgical Fees letter | 1117 |
| May 18, 2006 | Surgery Fees Letter | 1118 |
| July 6, 2006 | Record of Phone Conversation | 1120 |
| July 27, 2006 | Facsimile from Employee's Wife to Jessica Carvalho | 1126 |
| July 31, 2006 | Surgery Fees Letter | 1127 |
| **CONTINUED** | **ON NEXT** | **PAGE** |

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|---|---|---|
| April 10, 2007 | Letter to Dr. Delamarter from Disability Law Center | 1132 |
| April 10, 2007 | Letter to Dr. Delamarter from Disability Law Center | 1136 |
| March 17, 2009 | Social Security Decision | 1141-1145 |
| March 17, 2009 | Social Security Notice of Decision | 1146-1148 |
| March 17, 2009 | Order of Administrative Law Judge | 1149-1150 |
| March 4, 2003 | Photocopy of CD | 1156 |
| July 13, 2005 | Photocopy of CD | 1157 |

4) The following documents are medical records in the above-referenced supplemental documents, but they contain inappropriate, third-party, hand-written annotations or interlineations, based on the panel's experience, judgment and observations:

**Table II**

| Document Date | Description | Bates Stamp Number |
|---|---|---|
| June 12, 2001 | Physician's report | 1014 |
| August 3, 2005 | Dr. Roth Supplemental SIME report | 1072-1073 |
| December 10, 2003 | Dr. Roth SIME report | 1075-1084 |
| On or about January 18, 2006 | Dr. Delamarter Surgery Checklist | 1106 |
| June 8, 2006 | Dr. Delamarter Prescription | 1119 |
| July 26, 2006 | Surgical Instructions from the Spine Institute | 1122-1123 |
| September 12, 2006 | Dr. Delamarter Prescription | 1129 |
| September 1, 2008 | Physician's Report | 1137 |
| September 1, 2008 | Physician's Report | 1138 |
| Various | Patient Appointment Report | 1152 |

5) On March 13, 2015, Employee filed his hearing brief for the March 18, 2015 hearing. Employee's brief included issues not raised at the January 20, 2015 prehearing conference. These included: issues concerning SIME questions; identity of the SIME panel examiners; the appropriateness of records to be submitted to the SIME physicians; the formatting or sequencing of SIME records; and a request the SIME be conducted in Alaska. (Employee's Procedural Hearing Brief for March 18, 2015 Hearing, March 13, 2015).

6) On March 13, 2015, Employer filed its hearing brief. It addressed two issues: the scope of medical disputes; and the appropriate SIME physiatrist. (Employer's Hearing Memorandum on Scope of Board SIME, March 13, 2015).

7) On March 16, 2015, Lawrence Stinson, M.D., with Advanced Pain Centers of Alaska wrote and signed a prescription referencing Employee: "All future SIME/studies/medical evaluation/treatment should be performed in Anchorage, Alaska as travel worsens his symptoms." (Prescription, March 16, 2015).

8) At hearing on March 18, 2015, the parties' agreed to have the panel hear and decide the additional issues raised in the parties' hearing briefs. (Parties' hearing stipulation).

9) At hearing, after lengthy discussion and explanation from the designated chair, the parties agreed to the following SIME issues: functional capacity; PPI; medical stability; causation and medical treatment. (Parties' hearing stipulation).

10) Employee also objected to Employer not allocating its SIME questions to a particular issue. He could not determine, for example, if the employer had six questions directed to one issue and none to another issue. Employer stipulated to resubmitting its questions and identifying which questions pertained to which SIME dispute. (Employee's hearing arguments; Employer's hearing stipulation).

11) The parties stipulated to filing their additional SIME questions by March 25, 2015. (*Id*.).

12) Given this decision's result, this was an inadequate time for the parties to submit their SIME questions. (Experience, judgment and inferences drawn from the above).

13) Employer contended Dr. Roth, who practices in California, was the board's selected SIME physiatrist, was still on the board's list, and must be selected for this case. Otherwise, the parties have not been able to agree to an orthopedic surgeon. (SIME list; Parties' hearing arguments).

14) Employee contended Dr. Roth was inappropriately selected in the past because he had no experience with back surgery. Employee's wife Jeanne Mitchell testified decision AWCB Decision No. 02-0195 required the SIME in this case to be performed by a physiatrist experienced in orthopedic surgery to the back. Further, Employee contended a later decision in this case found Dr. Roth not credible. He contended there was an open issue as to alleged factual mistake concerning Dr. Roth still pending from a previous decision. More importantly, Employee presented a March 16, 2015 "travel ban" form signed by Dr. Stinson. (Mitchell; Medical Summary, March 18, 2015).

15) Employer objected to Employee suggesting in 2015 that Dr. Roth's 2002 selection as the SIME physician was inappropriate. It contended Dr. Roth's reports and deposition demonstrate his expertise in back conditions. This includes knowledge of and experience with artificial disc replacement surgeries. Employer contended Dr. Roth has been on the board's SIME list for about 15 years and "remains" the board-selected SIME physiatrist in this case. Employer contended Dr. Stinson's recent travel ban is a ruse created by Employee because up until now Employee has been able to travel throughout the country without any apparent issue. Employer contended Employee's medical records demonstrate his symptoms have actually improved and the recent travel ban should be "seen for what it is," which is simply Employee's desire not to see Dr. Roth again because he did not like Dr. Roth's opinions. Employer suggested the panel review Employee's medical records and decide whether or not Employee is capable of traveling. Alternately, Employer argued the board could have a sort of pre-SIME, records review SIME, limited to the issue of whether or not Employee could travel for a full SIME. (Employer's arguments).

16) Employee's wife Jeanne testified her husband had not traveled anywhere by air in the last six months. Reviewing her notes, Employee's wife testified June 28, 2011 was the last time Employee flew anywhere, which was for his mother's funeral. She testified the trip "tore him up" and he was in "agony" both physically and emotionally during the trip. (Mitchell).

17) Employee contended Dr. Roth has a "record to defend" and behaved in a prejudicial manner by suggesting previously unseen medical records did not affect his medical opinions already given in this case. (Employee's arguments).

18) Employer disputed Employee's account of Dr. Roth's review of medical records in the previous SIME. Employer contended it deposed Dr. Roth who testified he had reviewed all medical records and responded to all questions. (Employer's arguments).

19) Though the parties could not agree on an orthopedic surgeon to perform the SIME, Employee agreed the workers' compensation officer who selects SIME physicians should make the choice. (Employee's arguments).

20) Employer agreed the original reports from its previous employer's medical evaluation (EME) that were stricken from the record by a prior decision should be removed. It also conceded Dr. Roth's deposition should be added to the SIME records. (Employer's arguments).

21) Employee objected to the SIME medical records' sequencing. Employee wanted an order requiring or allowing a party to take the medical records apart and put the supplemental medical records in proper, chronological order. (Employee's arguments).

22) Employer, on the other hand, objected to Employee's supplemental SIME medical documents. It objected to the green paper upon which the documents were copied, to the supplemental documents that were not "medical records," and to the "sometimes snarky" comments written upon some documents by Employee or by his wife. However, Employer had no objection to reorganizing the SIME records to put the medical records in chronological order. Employer suggested the board determine which documents in Employee's supplemental stack were "medical records" that should go to the SIME physicians. (Employer's arguments).

23) Employee contended letters to a physician from Employer's nurse case manager are medical records inasmuch as they may have influenced the doctors' opinions. Employer contended such letters were not medical records. (Parties' arguments).

24) Employee contended he has a distinct disadvantage in this case because he cannot afford to send his attorney throughout the United States to depose EME or SIME physicians. He contended Employer, on the other hand, can afford expensive deposition trips giving it an advantage with in-person attendance at medical depositions. Employee suggested an order restricting parties from traveling to out-of-state medical depositions. Alternately, he argued an order should require Employer to pay for Employee's lawyer to travel to such depositions, or require Employer to depose Dr. Stinson so his opinions and detailed testimony are available to the SIME physicians. (Employee's arguments).

25) Employee contended a petition for modification of a factual dispute was filed in 2006, but has never been heard on its merits. He contended the factual errors addressed therein have been "perpetuated with false information" in medical reports given to EME and SIME physicians. The designated chair suggested Employee's attorney identify the modification petition and file an affidavit requesting a hearing. (Mitchell; Employee's argument; designated chair's statements).

26) Employers are typically ordered to prepare the first SIME binders. (Experience and observations).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 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**. . . .
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> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> > (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute. (*Id*.; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link." "Minimal" evidence is required to raise the presumption. *Id*. For injuries occurring before

November 7, 2005, the employer may rebut the presumption at the second stage with substantial evidence to the contrary. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.135. Procedure before the board.** (a) . . . 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. . . .
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> **8 AAC 45.050. Pleadings.** . . .
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> (f) **Stipulations**.
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> (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 the hearing or a prehearing. . . .
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> **8 AAC 45.092. Selection of an independent medical examiner**. (a) The board will maintain a list of physicians' names for second independent medical evaluations. The names will be listed in categories based on the physician's designation of his or her specialty or particular type of practice and the geographic location of the physician's practice. . . .
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> (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:
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> (1) the nature and extent of the employee's injuries;
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> (2) the physician's specialty and qualifications;
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> (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.

(f) If the board or its designee determines that the list of independent medical examiner's does not include an impartial physician with the specialty, qualifications, and experience to examine the employee, the board or its designee will notify the employee and employer that a physician not named on the list will be selected to perform the examination. The notice will state the board's preferred physician's specialty to examine the employee. Within 10 days after notice by the board or its designee, the employer and employee may each submit the names, addresses, and curriculum vitae of no more than three physicians. If both the employee and the employer recommend the same physician, that physician will be selected to perform the examination. If no names are recommended by the employer or employee or if the employee and employer do not recommend the same physician, the board or its designee will select a physician, but the selection need not be from the recommendations by the employee or employer.

. . . .

(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. The party served with the binders must file the two binders with the board within 10 days of receipt and, if the binders are

(A) complete, the party served with the binders must file the two sets of binders upon the board together with an affidavit verifying that the binders contain copies of all the employee's medical records in the party's possession; or

(B) incomplete, the party served with the binders must file the two binders upon the board together with two supplemental binders with copies of the medical records in that party's possession that were missing from the binders and an affidavit verifying that the binders contain copies of all medical records in the party's possession. The copies of the medical records in the supplemental binders must be placed in chronological order by date of treatment and numbered consecutively. The party must also serve the party who prepared the first set of binders with a copy of the supplemental binder together with an affidavit verifying that the binder is identical to the supplemental binders filed with the board;

(4) the party, who receives additional medical records after the two binders have been prepared and filed with the board, to make three copies of the additional medical records, put the copies in three separate binders in chronological order by date of treatment, and number the copies consecutively. The party must file two of the additional binders with the board within seven days after receiving the medical records. The party must serve one of the additional binders on the opposing party, together with an affidavit stating the binder is identical to the binders filed with the board, within seven days after receiving the medical records;

(5) that, within 10 days after a party's filing of verification that the binders are complete, each party may submit to the board designee up to three questions per medical issue in dispute under AS 23.30.095(k), as identified by the parties, the board designee, or the board, as follows:

(A) if all parties are represented by counsel, the board designee shall submit to the physician all questions submitted by the parties in addition to and at the same time as the questions developed by the board designee;

(B) if any party is not represented by counsel, only questions developed by the board designee shall be submitted to the physician; however, the board designee may consider and include questions submitted by the parties;

(C) if any party objects to any questions submitted to the physician, that party shall file a petition with the board and serve all other parties within 10 days after receipt of the questions; the objection must be preserved in the record for consideration by the board at a hearing on the merits of the claim, or, upon the petition of any party objecting to the questions, at the next available procedural hearing day; failure by a party to file and serve an objection does not result in waiver of that party's right to later argue the questions were improper, inadequate, or otherwise ineffective;

(D) any questions submitted for purposes of this paragraph must be prepared in accordance with 8 AAC 45.114(3) and (4).

> (i) . . . Until the parties receive the second independent medical examiner's written report, communications by and with the second independent medical examiner are limited, as follows:
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> . . . .
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> (2) the employee and the examiner may communicate as necessary to complete the examination. . . .
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> (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 the opportunity to
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> (1) submit interrogatories or depose the examiner, the party must
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> (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 serves interrogatories; and
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> (B) initially pay the examiner's charges to respond to the interrogatories or for being deposed; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155 (d), the charges may be awarded as costs to the prevailing party;
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> (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; or
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> (3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155 (d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.
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> (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 a hearing and may not consider it in connection with an agreed settlement.

*Wilson v. Eastside Carpet Co.*, AWCB Decision No. 09-0029 (February 10, 2009), addressed and decided the question of what constitutes a "medical record." *Wilson* stated:

> Cognizant of our authority 'to formulate [our] policy [and] interpret [our] regulations,' (citation omitted) and in order to clarify our policy, we conclude that 'medical records,' as that term is intended under 8 AAC 45.092(h), are those records maintained in the regular course of business by a physician or other medical provider which the medical provider has prepared, or which has been generated at the direction of the physician or other medical provider, for the purpose of providing medical diagnosis or treatment on behalf of the patient. We include in the definition of 'medical records' the reports of physicians prepared at the employer's direction in accordance with AS 23.30.095(e). Under this definition of the term, the employee's "1/18-1/23/08" letter to Dr. Hagen is not a "medical record" which must be included in the SIME by regulation. We note, however, that while requiring the inclusion of 'all medical records, including medical providers' depositions' in the SIME binder, 8 AAC 45.092(h) does not prohibit the inclusion of 'non-medical' records. (*Id*. at 5).

## ANALYSIS

**1) Should the parties' hearing stipulation on medical disputes to be addressed by the SIME physicians be approved?**

The law identifies seven medical disputes that could arise between an injured worker's attending physician and an employer's medical evaluator. These include medical disputes 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, and compensability." AS 23.30.095(k). *Mitchell XI* identified and discussed several of these potential disputes. However, the parties disagree on their respective interpretations of *Mitchell XI* in this regard. Employee contends *Mitchell XI* limited the SIME to only two medical disputes, while Employer contends *Mitchell XI* identified several. At hearing after lengthy discussion, Employee withdrew his objection to having the SIME physicians address all medical disputes. The parties' positions on this issue were reconciled and they stipulated to the medical disputes for the SIME physicians to address.

The parties' hearing stipulation will be approved. 8 AAC 45.050(f). The SIME panel will consider and address the following medical disputes: causation, medical stability, degree of impairment, functional capacity, and the amount and efficacy of the continuance of or necessity for treatment. AS 23.30.095(k). On the "functional capacity" issue, if an SIME physician opines Employee needs a formal physical capacity evaluation to determine his physical capacities, the

physician may recommend one and Employer will be directed to pay for it. This will help the litigation process move forward at a reasonable cost to Employer, will help make this SIME process and procedure as summary and simple as possible and will help the fact-finders best ascertain the parties' rights. AS 23.30.001(1); AS 23.30.005(h); AS 23.30.135.

**2) What process should the parties follow in asking SIME questions?**

Employee initially objected to Employer's SIME questions. Employer defended its questions. After lengthy discussion at hearing, and following the designated chair's citation to the applicable regulation, Employee preserved his objection to Employer's SIME questions. As both parties are represented by counsel, all their SIME questions will be submitted to the SIME physicians in addition to and at the same time as questions developed by the assigned designee. 8 AAC 45.092(h)(5)(A). Any timely objections will be preserved in the record for consideration at a subsequent hearing. If a party fails to file and serve an objection, they do not waive their right to later argue the questions were improper, inadequate or otherwise ineffective. 8 AAC 45.092(h)(5)(C). In short, the parties are directed to follow the process set forth in 8 AAC 45.092(h)(5) in respect to posing SIME questions.

Additionally, the parties are directed to allocate their three-questions-per-medical-dispute to a particular medical dispute, using appropriate headings such as "medical stability, "PPI" and so forth. The parties are directed to identify to which medical dispute each set of three questions pertains. As there are five medical disputes identified in this case, the parties have the right to ask 15 questions total, with three questions addressing each disputed issue. 8 AAC 45.092(h)(5). At hearing, the parties were directed to submit their 15 SIME questions within seven days. However, in fairness the parties are directed to submit their questions no later than seven days from this decision's date. To avoid further conflict, the parties are also directed to count any question's sub-parts as separate questions. For example, question "1" followed by sub-parts "(a), (b), and (c)" or any similar permutations equals an inappropriate four questions for that SIME medical dispute. This process will help ensure fairness. AS 23.30.001(1).

**3) How and where should the SIME physicians be selected for the SIME panel?**

Employer contends Dr. Roth is the predetermined physiatrist SIME physician, as a previous decision ordered him to perform an SIME in this case. Employee contends his attending physician has restricted his travel and therefore he cannot fly to California to see Dr. Roth. Employer counters with a suggestion the panel review medical records, or this decision order a pre-SIME based solely on written medical records, to determine whether Employee can travel to the actual SIME in another state. Furthermore, while the parties have not been able to agree on an orthopedic surgeon to perform the SIME, Employee maintains he still cannot travel outside Anchorage for the SIME.

Whether Employee can travel outside Anchorage for an SIME raises a factual dispute to which the statutory presumption of compensability applies. *Meek*; AS 23.30.120. Employee raises the presumption with his March 16, 2015 note from his attending physician stating all future SIME and other evaluations or treatment should be performed in Anchorage, Alaska, as travel worsens Employee's symptoms. *Meek.* This shifts the burden of production to Employer who must rebut the raised presumption with substantial evidence to the contrary. *Tolbert*. Employer suggests the panel's medical record review would disclose Employee could travel, as his medical records state his functionality has improved over the years. But past medical records do not address Employee's current physical limitations as prescribed by his attending physician. Employer has not cited a contemporaneous medical record disputing Dr. Stinson's March 16, 2015 travel restriction. Therefore, Employer has not rebutted the raised presumption on this factual dispute. Furthermore, even had Employer rebutted the raised presumption, this decision would not second-guess Employee's attending physician and require him to travel outside Anchorage to an SIME. *Saxton*.

Therefore, given his attending physician's current travel restrictions, Employee will not be ordered to travel outside the Anchorage, Alaska area for his *Mitchell XI* SIME. Dr. Roth practices in California and is therefore, disqualified from this SIME unless he travels to Anchorage. In accordance with *Mitchell XI*, the workers' compensation officer tasked with obtaining specific SIME physicians will be directed to select a physiatrist and an orthopedic surgeon from the approved SIME list who either practice here or will travel to Anchorage to

perform the SIME. The SIME physician selection process will occur in conformance with the division's internal policy and in compliance with 8 AAC 45.092(e). If the designee is unable to select a physiatrist and an orthopedic surgeon in the Anchorage, Alaska area from the approved SIME list using the criteria set forth in 8 AAC 45.092(e)(1-5), the appropriate designee will follow the procedures set forth in 8 AAC 45.092(f) for selecting the SIME physicians.

**4) What process should the parties follow in providing SIME records?**

Employee provided supplemental SIME documents copied on green paper. He contends these documents should go to the SIME physicians, as they contain information useful to the physicians in making their determinations. Employee also contends he should be allowed to reorganize the SIME records to put them in chronological order. Employer objects to the green paper. It further objects to SIME documents that are not "medical records" and to medical records containing Employee's or his wife's annotations or interlineations. Additionally, Employer volunteered to reorganize the SIME medical records in chronological order.

The applicable regulation sets forth the method by which parties submit medical records to SIME physicians. 8 AAC 45.092(h). The same regulation allows an opposing party to submit supplemental binders containing medical records in its possession not already included in the binders provided by the other party. Unfortunately, if the opposing party has additional medical records, they typically do not fall within chronological order and are filed and given to the SIME physicians in separate binders. This necessitates some additional effort on the SIME physicians' part to review any supplemental records and place them in context within the main SIME medical records. Nevertheless, the parties have agreed to reorganize the SIME records. They disagree on who should perform this task; both parties distrust the other, apparently.

Traditionally, employers are asked to prepare the primary SIME medical binders. *Rogers & Babler*. Normally, these are sent to employees who review them and prepare any supplemental binders. At this point, both parties should have all available medical records and there should be no surprises in the SIME binders. Therefore, Employer will be directed to reorganize the SIME binders in conformance with 8 AAC 45.092(h) and serve them on an Employee's counsel, who will have an opportunity to review them for completeness and follow the procedure also set forth

in 8 AAC 45.092(h). If, perchance, there are a few medical records not already included in Employer's binders, the SIME physicians will be able to review such additional medical records Employee provides in supplemental binders even if they are not in chronological order. This is to be accomplished within seven days from this decision's date.

Only white paper will be used to copy the medical records. This will avoid having special attention drawn to any particular medical records sent to the SIME physicians. The regulation specifically says "all medical records, including medical providers' depositions regarding the employee in the party's possession" will be sent to the SIME physicians. 8 AAC 45.092(h)(1). Therefore, any medical providers' depositions will also be included but these need not be placed in chronological order amidst the medical records. Depositions should be placed at the end of the binders.

Neither the statute nor the regulations contain a definition of "medical record." A serious dispute over what constitutes a "medical record" is not common in these cases. Therefore, there is little law on the topic. However, a prior decision in another case stated the term "medical records," as intended under 8 AAC 45.092(h) are "those records maintained in the regular course of business by a physician or other medical provider which the medical provider has prepared, or which has been generated at the direction of the physician or other medical provider, for the purpose of providing medical diagnosis or treatment on behalf of the patient." Included in the definition of "medical records" are reports from physicians, prepared at the employer's direction. *Wilson.*

The only documents in this case arguably on the cusp of being medical records are the documents prepared by Employer's nurse case manager. Those documents are not prepared for purposes of providing a medical diagnosis or treatment on Employee's behalf. They are simply letters to a physician from Employer's agent, who happens to also be a registered nurse. Using *Wilson's* fairly simple and straightforward definition reveals the documents identified in Table I, above, are not "medical records." Therefore, they will not be included in the SIME binders. While some or all these documents may be relevant to Employee's claim or to Employer's defenses, they are not medical records. These non-medical documents, though excluded from the SIME process, may still be admissible at hearing so long as they are relevant, and timely

filed and served. These documents may also be used as the basis for any follow-up questions to the SIME physicians after the SIME reports are received, or at an SIME physician's deposition.

Similarly, the documents identified in Table II, above, while medical records, contain annotations and interlineations made by Employee or his wife. It is unfair to send these documents to the SIME physicians as Employer does not have a similar opportunity to express its views of the annotated records. AS 23.30.001((1). The parties will be directed to use unadulterated copies of these medical records in the SIME binders. Employee already has a unique opportunity, not shared by Employer, to meet and interact with the SIME physicians face to face during the examination. Employee and the examiners "may communicate as necessary to complete the examination." 8 AAC 45.092(i)(2). Undoubtedly, the SIME physicians will ask Employee for a medical history. If Employee disagrees with medical histories or other facts set forth in prior examiners' reports, he is free to bring these discrepancies to the doctors' attention during the examination. However, Employee is cautioned that he is to bring no documents with him to show or give to the SIME physicians during their evaluations. Compact discs containing radiographic type images should be provided and will be sent to the SIME physicians along with the records. Furthermore, once the SIME reports are received, both parties have equal rights in respect to subsequently communicating with and questioning the SIME examiners, at which time any disputes can be further explored. 8 AAC 45.092(j). Lastly, at a merits hearing if Employee can prove facts upon which a physician relied are incorrect, he can argue the fact-finders should give lesser weight to those physicians' opinions.

Employee raised other issues concerning, for example, orders limiting parties' rights to travel to SIME physicians' depositions in other states. As this decision limits Employee's SIME to physicians in Anchorage, it need not address this contention. Employee contended Employer should be ordered to depose Dr. Stinson so his deposition may be included in the documents sent to the SIME physicians. As Employee cited no legal basis for this request it will be denied.

## CONCLUSIONS OF LAW

1) The parties' hearing stipulation on medical disputes to be addressed by the SIME physicians will be approved.
2) The parties will follow the normal regulatory process in asking SIME questions as modified by this decision.
3) The SIME will occur in Anchorage but in accordance with the normal regulatory process.
4) The parties will follow the normal regulatory process in providing SIME records as modified by this decision.

## ORDER

1) The parties' stipulation on medical disputes to be addressed by the SIME physicians is approved.
2) The SIME physicians will consider and address the following medical disputes: causation, medical stability, degree of impairment, functional capacity, and the amount and efficacy of the continuance of or necessity for treatment.
3) If an SIME physician believes a physical capacity evaluation is necessary to determine Employee's functional capacity, he or she may order one and Employer is ordered to pay for it as an SIME cost.
4) The parties are ordered to follow the procedures set forth in 8 AAC 45.092(h)(5) for submitting SIME questions and medical records including radiographic type images on compact discs. The parties are authorized to submit up to 15 non-compound questions total, with three questions maximum for each of the five identified medical disputes, identified by an appropriate heading. All SIME records will be copied on white paper only.
5) The documents identified in Table I, above, will not be included in the SIME binders. The medical records identified in Table II, above, will not be included in the SIME binders; however, "clean copies" of the medical records identified in Table II without annotations or interlineations will be included the SIME binders.
6) The SIME ordered in *Mitchell XI* will occur in Anchorage, Alaska. The appropriate designee is ordered to select a physiatrist and an orthopedic surgeon, who either practice in Anchorage or travel to Anchorage, for Employee's SIME. The designee is directed to follow the division's internal policy and requirements set forth in 8 AAC 45.092(e)(1-6) when selecting the physiatrist

and orthopedic surgeon for Employee's SIME from the authorized list. If the designee for any reason cannot select a physiatrist or an orthopedic surgeon from the authorized list, the designee is directed to follow procedures set forth in 8 AAC 45.092(f).

7) EME records stricken by prior decisions will not be included in the SIME medical records.

8) The parties are directed to include medical depositions in the SIME binders. Employee's requests for orders prohibiting a party from traveling to a doctor's deposition, requiring Employer to pay for Employee's lawyer's travel to out-of-state depositions and requiring Employer to depose Dr. Stinson are denied.

9) The parties are directed to submit their 15 SIME questions, including sub-parts, within seven days of this decision's date.

10) Employer is directed to make and serve **four** copies of all medical records, including medical providers' depositions in accordance with 8 AAC 45.092(h)(1-4). Employer is directed to make and serve the medical binders within seven days of this decision's date.

11) Employee is directed to review the medical binders in accordance with 8 AAC 45.092(h)(1-4). Employee is directed to accomplish this review within 10 days after receiving the binders. Employee should retain one copy of the binders.

12) Employer and Employee, as appropriate, are directed to file **three** copies of the SIME binders and any supplemental binders within 10 days of determining they are complete.

Dated in Anchorage, Alaska on April 9, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

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Ron Nalikak, 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 Stephan Craig Mitchell, employee / claimant v. United Parcel Service, employer; Liberty Mutual Insurance Co., insurer / defendants; Case No. 199523875; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 9, 2015.

_____
Elizabeth Pleitez, Office Assistant