

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GREG WEAVER,)	
Employee,)	INTERLOCUTORY
Claimant,)	DECISION AND ORDER
)	
v.)	AWCB Case No(s). 201320030
)	
ARCTEC ALASKA,)	AWCB Decision No. 15-0050
Employer,)	
)	Filed with AWCB Fairbanks, Alaska
and)	on April 30, 2015
)	
ARCTIC SLOPE REGIONAL CORP.,)	
Insurer,)	
Defendants.)	
)	

Arctec Alaska and Arctic Slope Regional Corp.'s (Employer) February 13, 2015 petition to strike Employee's second independent medical evaluation (SIME) cover letter and questions and to exclude records and Greg Weaver's (Employee) February 26, 2015 petitions to exclude SIME records and to strike Employer's SIME questions were heard on April 2, 2015 in Fairbanks, Alaska, a hearing date selected on March 4, 2015. Attorney Michael Jensen appeared and represented Employee. Attorney Nora Barlow appeared and represented Employer. There were no witnesses. The record closed at the hearing's conclusion on April 2, 2015.

ISSUES

Employee contends a February 5, 2014 letter to Employee from RN Tracy Davis is a medical record and should be included in the binders. Employee also contends his reports of injury are not medical records and should not be submitted to the SIME physician. He contends the job descriptions included in the SIME binders do not accurately reflect Employee's duties, but acknowledged all the

job descriptions are ones being used by the reemployment specialist for determining Employee's reemployment benefit eligibility. Employee requests his reports of injury and job description records be removed from the SIME binders.

Employer contends the letter from RN Tracy Davis should not be included in the binders, because Ms. Davis is not an Employer's Medical Evaluator (EME) as found in *Weaver I* and therefore the letter is not a medical record. Employer contends Employee's reports of injury relating to his low back should be included because they are relevant to the SIME issues. It also contends the job descriptions selected by the rehabilitation specialist and submitted to Joyce Restad, DO, for approval should be included in the SIME binders because functional capacity is an SIME issue.

1) Should the board exclude SIME records, specifically a letter to Employee from RN Tracy Davis, Employee's reports of injury, and job descriptions?

Employer contends Employee's February 6, 2015 letter inappropriately directs conflict of interest questions to the SIME physician that are solely within the board designee's purview for determining whether a conflict of interest exists. Employee contends because a board designee confirmed the SIME physician had no conflicts of interest, this issue is moot.

2) Should the board strike Employee's February 6, 2015 cover letter?

Employer contends Employee's SIME questions contain inappropriate factual statements, misstate Alaska's legal standards of causation and compensability, and are compound and confusing. It also contends Employee's February 26, 2015 petition to strike Employer's SIME questions was untimely filed. Employee contends Employer's SIME questions were untimely filed, consisted of compound and confusing questions, and at least one is outside the scope of the orthopedic SIME.

3) Should the board strike Employer's or Employee's SIME questions?

FINDINGS OF FACT

The facts and factual conclusions from *Weaver v. Arctec Alaska*, AWCB Decision No. 14-0154 (December 2, 2014) (*Weaver I*) are incorporated herein by reference. As to the limited issues raised

in Employer's February 13, 2015 petition and Employee's February 26, 2015 petitions, the following facts and factual conclusions are established by a preponderance of the evidence:

- 1) On December 2, 2014, *Weaver I* was issued and held Employer's nurse case manager Tracy Davis, RN, was not an EME. (*Weaver I* at 13).
- 2) On December 22, 2014, the parties filed an SIME form signed by both parties. (SIME Form, December 22, 2014).
- 3) At a January 21, 2015 prehearing conference, the parties stipulated to an SIME and agreed the issues in dispute were causation, treatment, medical stability, permanent partial impairment, and functional capacity relating to Employee's low back. The prehearing conference summary directed Employer to compile Employee's medical records, "including physician's depositions and a written job description (if there is a dispute regarding the employee's ability to return work) or the written physical demands of the employee's job as described in the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (if there is a dispute regarding functional capacities and the employee's eligibility for reemployment benefits)..." It also stated the parties "may each submit up to 3 questions per medical issue by 02/04/2015 for review by the Board's designee for inclusion in the Board's letter to the SIME physician." The board designee requested the SIME questions be emailed as well as mailed to the board. (Prehearing Conference Summary, January 21, 2015).
- 4) No party objected to the January 21, 2015 prehearing conference summary. (Record).
- 5) On February 4, 2015, Employee reviewed the SIME medical records Employer compiled for inclusion in the binders going to the SIME physician. These included Employee's reports of injury and job descriptions used by the reemployment specialist for determining Employee's reemployment benefit eligibility. (SIME Records #000001-000416, February 6, 2015).
- 6) Reports of injury are not "medical records." (Experience, judgment, observations).
- 7) Also on February 4, 2015, Employee emailed his proposed questions for the SIME physician to the board designee. Employee's questions included a cover letter requesting the board designee confirm the SIME physicians have no conflicts of interest and are "truly independent." (Email from Employee to Board Designee, February 4, 2015).
- 8) On February 6, 2015, Employer emailed its proposed SIME questions to the board designee. (Email from Employer to Board Designee, February 6, 2015).

9) Also on February 6, 2015, Employee filed supplemental SIME records which included a February 5, 2014 letter to Employee from RN Tracy Davis. The purpose of the letter was to inform Employee that Ms. Davis was closing Employee's file because Employee had been deemed medically stable. (SIME Record #425, February 6, 2015).

10) On February 13, 2015, Employer filed a petition objecting to Employee's SIME cover letter and SIME questions. Employer also requested the board exclude SIME record # 425 consisting of the letter to Employee from RN Tracy Davis. Employer contended Employee's questions contain inappropriate factual statements and misstate Alaska's legal standards of causation and compensability. (Employer Petition, February 13, 2015).

11) Also on February 13, 2015, a board designee confirmed the SIME physician had no conflicts of interest. (Email from Sue Reishus-O'Brien to Nicole Hansen and from Nicole Hansen to Employer and Employee, February 13, 2015).

12) On February 26, 2015, Employee filed a petition to exclude SIME records # 66, 98-100, 103, 106, 131, 136, 331, 396-400, 404-415, consisting of Employee's reports of injury and job descriptions. (Employee Petition, February 26, 2015).

13) Also on February 26, 2015, Employee filed a petition objecting to Employer's SIME questions. Employee contended Employer's questions consisted of compound and confusing questions and at least one was outside the scope of the orthopedic SIME. (Employee Petition, February 26, 2015).

14) At a March 4, 2015 prehearing conference, Employer's February 13, 2015 petition and Employee's February 26, 2015 petitions were scheduled to be heard on April 2, 2015. (Prehearing Conference Summary, March 4, 2015).

15) On March 26, 2015, Employer filed its hearing brief and contended Employee's February 26, 2015 petition to strike Employer's SIME questions was untimely filed. It also contended Employee's SIME questions are compound and confusing. (Employer's Hearing Brief, March 26, 2015).

16) On March 27, 2015, Employee filed its hearing brief and contended Employer's SIME questions were untimely filed. He also contended Employer's SIME questions are compound and confusing. (Employee's Hearing Brief, March 27, 2015).

17) At hearing on April 2, 2015, Employee contended the job descriptions do not accurately reflect Employee's duties but acknowledged all the job descriptions are ones being used by the

rehabilitation specialist for determining Employee's reemployment benefit eligibility. (Employee Hearing Representations).

18) Both parties are represented by competent workers' compensation counsel. (Experience, judgment).

19) Employer's objection to Employee's SIME cover letter is moot. (Experience, judgment, observations).

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

AS 23.30.095. Medical treatments, services, and examinations.

....

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

report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded ...

....

The purpose of an SIME is to have an independent expert provide an opinion to assist the board in deciding a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). The SIME physician is the board's expert. *Church v. Arctic Fire and Safety*, AWCAC Decision No. 126 (December 31, 2009) at 13; *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 3. An SIME is not intended to give the parties an additional medical opinion. *Bah* at 5.

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. ...

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

....

(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).

ANALYSIS

1) Should the board exclude SIME records, specifically a letter to Employee from RN Tracy Davis, Employee's reports of injury, and job descriptions?

The SIME medical records Employee compiled for inclusion in the SIME binders contained a February 5, 2014 letter to Employee from RN Tracy Davis. The SIME medical records Employer compiled included Employee's reports of injury and job descriptions the reemployment specialist used for purposes of determining Employee's reemployment benefit eligibility. Employee objected to inclusion of the reports of injury and job descriptions. Employer objected to inclusion of Ms. Davis' letter.

A) February 5, 2014 letter to Employee from RN Davis.

The purpose of the February 5, 2014 letter to Employee from RN Tracy Davis was to inform Employee that Ms. Davis was closing Employee's file because Employee had been deemed medically stable. Employee contends this letter is a medical record but *Weaver I* found Ms. Davis is not an EME. Ms. Davis is not a medical provider and the letter was not generated for the purpose of diagnosis or treatment. The letter is not a medical record and will not be included in the SIME binders.

B) Employee's Reports of Injury.

Employer contends the reports of injury relating to Employee's low back should be included in the SIME binders because they are relevant to the SIME issues. Employee requests his reports of injury be removed from the binders, contending they are not medical records. Employee's reports of

injury were not generated for the purpose of diagnosis or treatment, are not medical records, and will not be included in the SIME binders.

C) Employee's Job Descriptions.

At a January 21, 2015 prehearing conference, the parties stipulated to an SIME. The prehearing conference summary directed Employer to compile Employee's medical records, "including physician's depositions and a written job description (if there is a dispute regarding the employee's ability to return work) or the written physical demands of the employee's job as described in the United States Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (if there is a dispute regarding functional capacities and the employee's eligibility for reemployment benefits)..." Because functional capacity and medical stability are SIME issues, it is appropriate for Employee's job descriptions to be included in the SIME binders. It is also appropriate for the included job descriptions to be those the rehabilitation specialist selected to submit to Employee's treating physician for purposes of determining Employee's reemployment benefit eligibility. Employee's remedy if he disagrees with the rehabilitation specialist's job description selections is for him to address the issue through the reemployment benefits process. Employee's job descriptions the rehabilitation specialist selected to submit to Employee's treating physician for purposes of determining Employee's reemployment benefit eligibility will be included in the SIME binders.

2) Should the board strike Employee's cover letter?

Employer contends Employee's February 6, 2015 letter inappropriately directs questions to the SIME physician that are solely within the board designee's purview for determining a whether a conflict of interest exists. Employee contends because a board designee confirmed the SIME physician had no conflicts of interest, this issue is moot.

On February 6, 2015, Employee requested the board designee confirm the SIME physicians have no conflicts of interest and are "truly independent. On February 13, 2015, a board designee confirmed the SIME physician had no conflicts of interest. Employee is not requesting the board designee take any further action on its request, there is no current dispute regarding the board

designee's determination the SIME physician has no conflicts of interest in this case, and the issue is now moot. Employee's February 6, 2015 cover letter will not be stricken.

3) Should the board strike Employer's or Employee's SIME questions?

Employer contends Employee's SIME questions contain inappropriate factual statements, misstate Alaska's legal standards of causation and compensability, and are compound and confusing. It also contends Employee's February 26, 2015 petition to strike Employer's SIME questions was untimely filed. Employee contends Employer's questions were untimely filed, consist of compound and confusing questions, and at least one is outside the scope of the orthopedic SIME.

At a January 21, 2015 prehearing conference, the parties stipulated to an SIME. The prehearing conference summary stated the parties "may each submit up to 3 questions per medical issue by 02/04/2015 for review by the Board's designee for inclusion in the Board's letter to the SIME physician." (Prehearing Conference Summary, January 21, 2015). Employee and Employer, both competent workers' compensation attorneys, vigorously and zealously argued over the form and substance of each other's questions. Both submitted compound and confusing SIME questions.

Because both parties' questions are compound and confusing, neither Employee's nor Employer's SIME questions shall be submitted to the SIME physician. Only the board designee's SIME questions shall be sent to the SIME physician. After a party receives the SIME physician's report, the party may submit interrogatories or depose the SIME physician in accordance with 8 AAC 45.092.

CONCLUSIONS OF LAW

- 1) Employer's February 13, 2015 petition will be granted in part and denied in part.
- 2) Employee's February 26, 2015 petitions will be granted in part and denied in part.
- 3) The February 5, 2014 letter to Employee from RN Tracy Davis will not be included in the SIME binders.
- 4) Employee's reports of injury will not be included in the SIME binders.

- 5) Employee's job descriptions the rehabilitation specialist selected to submit to Employee's treating physician for purposes of determining Employee's reemployment benefit eligibility will be included in the SIME binders.
- 6) Employee's February 6, 2015 cover letter will not be stricken because the conflict of interest issue is moot.
- 7) Employee's and Employer's proposed SIME questions shall not be submitted to the SIME physician. Only the board designee's SIME questions shall be sent to the SIME physician. After a party receives the SIME physician's report, the party may submit interrogatories or depose the SIME physician in accordance with 8 AAC 45.092.

ORDER

- 1) Employer's February 13, 2015 petition is granted in part and denied in part.
- 2) Employee's February 26, 2015 petitions are granted in part and denied in part.
- 3) The board designee is directed to remove the February 5, 2014 letter to Employee from RN Tracy Davis from the SIME binders.
- 4) The board designee is directed to remove Employee's reports of injury from the SIME binders.
- 5) The board designee is directed to include in the SIME binders the job descriptions the rehabilitation specialist selected to submit to Employee's treating physician for purposes of determining Employee's reemployment benefit eligibility.
- 6) Employee's February 6, 2015 cover letter will not be stricken because the conflict of interest issue is moot.
- 7) The board designee is directed not to submit Employee's and Employer's proposed SIME questions to the SIME physician. Only the board designee's SIME questions shall be sent to the SIME physician. After a party receives the SIME physician's report, the party may submit interrogatories or depose the SIME physician in accordance with 8 AAC 45.092.

Dated in Fairbanks, Alaska on April 30, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Amanda Eklund, Designated Chair

/s/ _____
Jacob Howdeshell, 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 GREG WEAVER, employee / claimant; v. ARCTEC ALASKA, employer; ARCTIC SLOPE REGIONAL CORP., insurer / defendants; Case No. 201320030; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on April 30, 2015.

/s/ _____
Darren Lawson, Office Assistant II