ALASKA WORKERS' COMPENSATION BOARD

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

STEPHAN CRAIG MITCHELL, Employee, Claimant, v. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER ON MODIFICATION AWCB Case No. 199523875 AWCB Decision No. 15-0085 Filed with AWCB Anchorage, Alaska on July 22, 2015

Stephan Craig Mitchell's (Employee) March 3, 2006 petition requesting modification of *Mitchell v. United Parcel Service*, AWCB Decision 05-0333 (December 20, 2005) (*Mitchell VI*) was heard on July 1, 2015, in Anchorage, Alaska, a date selected on May 8, 2015. Attorney Richard Harren appeared and represented Stephan Craig Mitchell (Employee) who also appeared. Attorney Nora Barlow appeared and represented United Parcel Service and Liberty Mutual Insurance Co. (Employer). There were no witnesses. As a preliminary matter, the parties disputed the issues for hearing. After lengthy discussion, an oral order held Employee to his June 24, 2015 stipulation, which limited the panel's review for any possible factual errors to the record as it existed on November 2, 2005, the date on which *Mitchell VI*'s record closed. The oral order mooted other preliminary issues the parties had raised. However, Employer also contended the SIME ordered from a prior decision should be put on "hold" to determine if Employee still had travel restrictions, which the prior decision had determined limited his access

to SIME physicians. Employee objected as he was not prepared to argue this issue and contended it was not ripe. The panel sustained Employee's objection. Employee then argued his wife should be allowed to testify or alternatively, should offer oral argument. Employer objected. The panel sustained Employer's objection. This decision examines the oral orders and decides Employee's March 3, 2006 petition on its merits. The record closed at the hearing's conclusion on July 1, 2015.

ISSUES

As a preliminary matter, the parties disputed the panel's scope of review of *Mitchell VI*, under Employee's March 3, 2006 petition for modification. Employee contended the panel should consider testimony and evidence he had obtained since the 2005 hearing.

Employer contended the parties stipulated in prior prehearing conferences to limit the panel's review to evidence in the record when *Mitchell VI* was decided. An oral order sustained Employer's objection and limited evidence presentation and this decision's review to November 2, 2005, the date the hearing record closed.

1) Was the oral order limiting modification review to evidence in the record on November 2, 2005 correct?

Employee contended his wife should be allowed to testify at hearing. Alternatively, he contended his wife should offer oral argument in conjunction with Employee's attorney.

Employer objected and contended the hearing record to be reviewed stands on its own, and speaks for itself. It contended Employee's wife had nothing relevant to offer as evidence, and should not be allowed to give oral argument since Employee had retained an attorney. An oral order sustained Employer's objection.

2) Was the oral order restricting Employee's wife's participation at hearing correct?

As another preliminary matter, Employer contended the second independent medical evaluation (SIME) ordered in a prior decision should be put on hold until issues concerning Employee's traveling ability are resolved.

Employee objected and contended the SIME was not an issue for this hearing. An oral order sustained Employee's objection.

3) Was the oral order declining to address the pending SIME correct?

Employee contends *Mitchell VI* failed to consider the DYNESYS surgical procedure recommended by his physician. Alternatively, Employee contends if *Mitchell VI* considered DYNESYS, it erred by failing to require Employer to pay for this procedure.

Employer contends both parties filed evidence and argued about the DYNESYS surgical procedure before, at and after the September 28, 2005 hearing. It contends Employee's March 6, 2006 petition and his hearing arguments failed to meet the legal requirements justifying modification. Employer contends *Mitchell VI* was correct in awarding only conservative care. It seeks an order denying the modification petition.

4) Should *Mitchell VI* be modified to correct an alleged factual mistake?

FINDINGS OF FACT

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

1) On or about March 5, 2004, Daniel Schultz, M.D., Director, Office of Device Evaluation, sent a letter to Zimmer Spine, manufacturer of the DYNESYS Spinal System. This letter from Dr. Schultz, a United States Department of Health & Human Services, Food and Drug Administration (FDA) representative, authorized Zimmer Spine to begin marketing the DYNESYS system. However, the FDA expected a "reasonable likelihood" this device would be used for a purpose not identified in the proposed labeling and that such use "could cause harm." Therefore, the FDA required a product warning label, to state: "The safety and effectiveness of

this device for the indication of spinal stabilization without fusion have not been established." Zimmer Spine's initial proposal set forth the device's intended use as:

> When used as a pedicle screw fixation system in skeletally mature patients, the DYNESYS Spinal System is intended to provide immobilization and stabilization of spinal segments as an adjunct to fusion in the treatment of the following acute and chronic instabilities. . . .
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> In addition, when used as a pedicle screw fixation system, the DYNESYS spinal system is indicated for use in patients:
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> a) Who are receiving fusions with autogenous graft only;
> b) Who are having the device fixed or attached to the lumbar or sacral spine; and
> c) Who are having the device removed after the development of a solid fusion mass. (Schultz letter, March 5, 2004; Zimmer Spine 510(k) Summary, May 13, 2003).

2) On August 10, 2005, the parties attended a preliminary hearing. At no time during this hearing did Employee specifically mention the "DYNESYS" procedure. (Transcript of Proceedings, August 10, 2005).

3) On September 21, 2005, Employer filed its hearing brief for the September 28, 2005 hearing. Employee's brief noted:

> The employee saw Dr. Delamarter in July 2005, who concluded after reviewing diagnostic tests, including x-rays and a CT scan, that the employee is not a candidate for further traditional fusion and also is not a candidate for artificial disc replacement. Dr. Delamarter proposed a different procedure, a Dynesys implant, which is experimental and not approved by the FDA. (Employer's Hearing Brief, September 21, 2005, at 4).

Employer's hearing brief also cited deposition testimony from SIME Alan Roth, M.D., in which he said he was familiar with the DYNESYS device and opined Employee had no indications for the implant of any device, particularly "in an experimental stage." Employer further argued the only procedure Rick Delamarter, M.D., had suggested was a DYNESYS implant, which Employer argued was "an experimental device that is <u>not approved</u> by the FDA and is currently still in clinical trials." (*Id*. at 14; emphasis in original).

4) At hearing on September 28, 2005, Employee testified and his wife argued as follows:

> There's a few things I would like tied up here, and -- and I don't know if this is rebuttal or what. Number one, this procedure has been FDA approved. We have paperwork on this. And start out right with Dr. Peterson. The reason we waited a year, he did not want to fuse me, he wanted disc replacement. The reason I was sent Outside is because after the year he decided as a physician up here he will not do these. When I went out and seen Dr. Delamarter, yes, that's true, I am not a candidate for disc replacement because it has been too long now, so now what he wants to do is (indiscernible). I have an unstable . . . spine . . . that has been getting worse. It's not that Dr. Peterson doesn't want surgery. She [attorney Livsey] chose one little sentence. Read the paper, please, and it states in there I was put off the year, first year, and then the second was because he did not do the surgery. That's why I was requested Outside. Delamarter did not say -- she [attorney Livsey] didn't make the whole thing -- yes, not a candidate for disc. Yes, a candidate to stabilize the disc. Okay, I want that, and that's in -- in the paper here.
>
> And . . . you will also see on Dr. Peterson which he says I need nothing, you'll see in his notes also about the recommendation to hold off because it wasn't FDA approved, and now it is. We also have copies of the FDA approval that are in there that she [attorney Livsey] says are not FDA approved. We have it from the spinal clinic. We have it on the 'net. We have gone several different places that have it. It is an approved situation. (Transcript of Proceedings, September 28, 2005, at 50-51).
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> . . . .
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> [Ms. Mitchell]: This surgery has been anticipated. They know that it's going to continue to progress and to degenerate up the spine. A second fusion is only going to accelerate the degeneration. It's going to immobilize the spine, and that is why they have tried their best to take the . . . most conservative approach to relieve his pain and to prolong the duration between surgical intervention. The pain has progressed to the point he cannot tolerate any more.
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> [Chair]: The disc replacement is not an option because of the type of issues with the employee's back, so what kind of surgery. . . .
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> . . . .
>
> [Ms. Mitchell]: By the time we paid for it out of our own pocket and were there in July of 2005 it was too late and degeneration . . . the problems with his facet can no longer support an artificial disc. The alternative is an FDA-approved system called Dynesys, D-y-n-s-e-s [sic] -- s-y-s, I think. Ms. Livsey and Dr. Roth says [sic] that this is not FDA approved and it's experimental. It is FDA approved. I have a copy of the approval with me today. This surgery is necessary. . . . (*Id*. at 59-60).

The designated chair summarized Employee's argument, including his claim that "surgery at this point is a reasonable and necessary option. . . ." (*Id*. at 62).

5) The only surgery recommended for Employee as of the September 28, 2005 hearing was the DYNESYS procedure. (Judgment, observations and inferences drawn from all the above).

6) The "indiscernible" word in Employee's above-referenced testimony was DYNESYS. (*Id.*).

7) On October 28, 2005, Employer filed its post-hearing submission at the board's request. Included in its documents was Dr. Delamarter's July 13, 2005 report recommending the DYNESYS non-fusion technology and implant at L4-5. (Employer's Post-Hearing Submission of Medical Records Relied Upon, October 28, 2005).

8) On October 28, 2005, Employee filed his post-hearing materials in accordance with the board's request. Employee's wife, his non-attorney representative at the time, provided a cover letter, exhibit list, and exhibits with various highlighting and hand-written annotations. Among other things, Employee's representative stated, "I trust this will simplify the board[']s ability to confirm the employee[']s medical instability and need for surgery as claimed." Though DYNESYS is mentioned in the same, attached, July 13, 2005 medical record from Dr. Delamarter that Employer had attached to its post-hearing submission, Employee does not expressly mention DYNESYS in her post-hearing cover letter as the "surgery" requested. (Employee's letter with attachments, October 28, 2005).

9) The "surgery" to which Employee's representative referred in her post-hearing letter was the DYNESYS procedure. (Judgment, observations and inferences drawn from all the above).

10) On December 20, 2005, *Mitchell VI* expressly addressed Employee's request for ongoing medical care and discussed "disc replacement surgery as a treatment option." (*Id*. at 7). *Mitchell VI* also referenced an attending physician's referral to Dr. Delamarter to discuss whether or not Employee was a candidate for disc replacement surgery. (*Id*. at 8). Dr. Delamarter evaluated Employee and stated his severe facet arthritis excluded Employee as a candidate for artificial disc replacement. However, Dr. Delamarter opined Employee "was a good candidate for non-fusion decompression." (*Id*. at 10). *Mitchell VI* further discussed opinions from the board's SIME, Dr. Roth, who reviewed medical literature and opined Employee was not a good candidate for "further fusion" or "disc replacement surgery." Dr. Roth recommended "stretching, strengthening, pool therapy and anti-inflammatory medications" along with a physically appropriate job. (*Id*. at 10-11). *Mitchell VI* set forth Employee's arguments as follows:

> The employee argues that the employee's need for surgery at L4-L5 is work-related and hence compensable. The employee asserts that the L5-S1 fusion surgeries are a substantial factor in the instability and resultant surgery at L4-L5. The employee argues that he is not medically stable and is entitled TTD benefits. (*Id*. at 11).

11) *Mitchell VI* in its factual finding and legal conclusion section stated, "The employee now seeks medical benefits for procedures and treatment associated with his L4-L5 vertebra." The decision further stated:

> Based on our review of the testimony and the documentary record, we find Dr. Smith's opinion, when viewed in isolation, is substantial evidence to rebut the presumption of compensability. Accordingly, we find the employer has presented substantial evidence that the employee's claim for benefits is not work related.
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> Because the employer has rebutted the presumption with substantial evidence, we review the record as [a] whole to determine whether the employee has proved his claim, by a preponderance of the evidence. . . . We find by a preponderance of the evidence that the need for medical treatment associated with the instability at L4-L5 bears a causal relationship to the treatment at L5-S1.
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> We find Drs. Stinson, Peterson, and Delamarter are in agreement that the need for treatment at L4-L5 is directly related to the employee's L5-S1 fusion. They concur that the L5-S1 fusion has put increased stress on the L4-L5 level precipitating degeneration. . . .
> . . . .
>
> We find that on September 16, 2003, Dr. Peterson developed a conservative treatment plan to avoid surgery at L4-L5 since he believed that surgery at L4-L5 could lead to negative impact on higher lumbar levels. We find it is reasonable for Dr. Peterson to develop a treatment plan consisting of conservative treatment first, and then, if necessary, more aggressive treatment. . . .
> . . . .
>
> In our review of the record of this case, we find disc replacement surgery is contraindicated for the employee. We disagree with the employee that, but for the controversion, he would have been a candidate. Dr. Delamarter opined that severe facet arthritis excluded the employee as a candidate for disc replacement. Therefore, we find disc replacement surgery neither reasonable nor necessary under the facts presented.
>
> We further find that the only reasonable and necessary treatment presented in the record at this time is for conservative care. Therefore, we retain jurisdiction to resolve any future dispute regarding whether future treatments are reasonable, necessary and within the realm of acceptable medical practice. (*Id*. at 12-15).

12) On December 20, 2005, *Mitchell VI* awarded Employee specified medical benefits including "reasonable and necessary conservative medical treatment," for his low back "through the date of this decision and order," and left the hearing record open until the panel deliberated after the parties submitted additional post-hearing evidence. *Mitchell VI* said the hearing record closed on November 2, 2005, when the panel met to deliberate. (*Mitchell VI* at 1; 20).

13) *Mitchell VI* did not specifically mention the DYNESYS procedure by name. (*Id.*).

14) On January 20, 2006, Employee, through former attorney Chancy Croft, filed a claim specifically asking the board to "authorize Dynesys Spinal System surgery on L4 L5 vertebrae to stabilize movement without fusion. . . ." (Workers' Compensation Claim, November 19, 2006).

15) On March 6, 2006, Employee's former attorney filed a petition seeking modification of *Mitchell VI* based on a "mistake of fact." In his petition, Employee argued in the alternative that *Mitchell VI* did not address DYNESYS or, if *Mitchell VI* addressed and intended to deny the DYNESYS procedure, it erred as a factual matter and the alleged mistake should be corrected. (Petition For Modification If There Has Been A Mistake Of Fact, March 3, 2006).

16) On May 8, 2015, the parties appeared at a prehearing conference where Employee's current attorney stated the "mistake of fact" issue from prior counsel's May 3, 2006 modification petition "has been ripe and ready to proceed to hearing since 2006." (Prehearing Conference Summary, May 8, 2015).

17) On June 24, 2015, the parties appeared at a prehearing conference where they discussed the issues for the July 1, 2015 hearing. Employer objected to Employee offering arguments or evidence not in the record at the time *Mitchell VI* was decided in 2005. The parties agreed to bifurcate hearing issues given "Employee's assertion that arguments would be based on the record as it stood in December of 2005." (Prehearing Conference Summary, June 24, 2015).

18) The parties entered into a binding stipulation on June 24, 2015, at the prehearing conference. In exchange for a bifurcated hearing, Employee agreed to limit his modification petition to evidence available to the board in the hearing record when the record closed and the board decided *Mitchell VI*. (Experience, judgment and inferences drawn from the above).

19) On June 29, 2015, the parties appeared at another prehearing conference at which the designee stated, "This case is set for hearing on July 1, 2015 on Employee's March 6, 2006 petition regarding whether *Mitchell VI* made a mistake of fact." (Prehearing Conference Summary, June 29, 2015).

20) At hearing on July 1, 2015, the parties disagreed on what evidence the panel could review as it considered modifying *Mitchell VI*. The panel issued an oral order limiting its review to evidence in the board's file as of November 2, 2005, the date the hearing record closed for the September 28, 2005 hearing. The panel based its oral order on the following: 1) Employee's May 8, 2015 representation that the modification petition had been ripe and ready to proceed to hearing since 2006; 2) the parties' binding stipulation to limit the board's review of *Mitchell VI* to the evidence in the board's file when the original hearing record closed; 3) an appeals commission decision, which limited the board's consideration to evidence filed before the record closed; and 4) the March 3, 2006 petition, which set forth an alleged "mistake of fact," based on the existing evidence. On this last point, the panel decided it would not be proper for a party to file a modification petition and wait nine years before requesting a hearing and expect to admit nine years' worth of allegedly "new evidence" to support a nine-year-old petition. As for Employer's contention the SIME ordered from a prior decision should be put on "hold" to determine if Employee still had travel restrictions, the panel sustained Employee's objection as it was not an issue previously scheduled to be heard. On Employee's contention his wife should be allowed to testify or offer oral argument at the hearing, the panel sustained Employer's objection because Employee had an attorney to speak for him, and there was nothing relevant Employee's wife could say about the prior, existing record, which speaks for itself. (Hearing record).

21) Employee contends "the most important record" in this case is SIME record 0583. In this July 13, 2005 report, Dr. Delamarter said Employee is not a candidate for artificial disc replacement. Employee agrees with this assessment. Employee also agrees Dr. Delamarter said he was not a candidate for fusion either. However, Dr. Delamarter's report said Employee was a candidate for the DYNESYS non-fusion procedure, which Dr. Delamarter opined had a good chance of helping Employee recover. Employee contends when Dr. Delamarter referenced "the appropriate surgery" he meant the DYNESYS procedure. Employee contends he went back to the insurer, and asked for the surgical procedure, and the insurer refused, because Davis Peterson, M.D., had previously said Employee was not a surgical candidate. (Employee's hearing arguments).

22) Employee contends the second most important record in this case is SIME record 0571, a January 5, 2005 letter from Dr. Peterson to Dr. Delamarter. Dr. Peterson noted Employee had

failed all conservative treatment and wanted to be considered for disc replacement surgery, if Dr. Delamarter thought this was appropriate. (*Id.*).

23) Employee also relies on SIME record 0574 dated April 19, 2005, a letter from Dr. Peterson to the insurer. This letter states Employee had, to date, failed all conservative treatment to relieve his low back pain. Dr. Peterson opined a "disc procedure," was the only reasonable option and stated Dr. Delamarter agreed "disc replacement surgery" was indicated. (*Id.*).

24) Employee contends *Mitchell VI* made many mistakes, including making a finding he had a surgical fusion in 2003. Employee raised this error only to show how "befuddled" the *Mitchell VI* panel was in its decision. Employee primarily contends *Mitchell VI* made a factual error by confusing disc replacement surgery with the DYNESYS procedure. He contends his claim before the 2005 board was for the DYNESYS procedure, which he argues no physician disputed as a reasonable surgical option. Employee contends *Mitchell VI* never addressed the "hyper-technical" arguments Employer now makes concerning the off-label DYNESYS device. Employee further contends SIME Dr. Roth said "people running the clinical trial would have to determine whether or not he was an appropriate candidate for the DYNESYS procedure." Employee contends had *Mitchell VI* not made a factual error and had instead realized that Dr. Delamarter's DYNESYS option was different than his disc replacement opinion, and was not contradicted by any other medical evidence, Employee could have and would have obtained DYNESYS surgery sooner and would not have had to pay for it himself. (*Id.*).

25) At hearing on July 1, 2015, the designated chair advised Employee that the panel had no authority, under a modification petition, to entertain an alleged legal error arising in 2005. (*Id.*).

26) Employee at the July 1, 2015 hearing did not provide good cause to relieve him from his June 24, 2015 stipulation. (Experience, judgment and inferences drawn from the above).

27) Employer contends and concedes the DYNESYS procedure was FDA approved by the time Employee requested it in 2005. However, Employer contends DYNESYS was limited in its FDA approval and was approved to function only as an "adjunct" to fusion. In other words, Employer contends Dr. Delamarter was suggesting an "off-label" use for the DYNESYS procedure in Employee's case, because all physicians, including Dr. Delamarter, agreed Employee was not a candidate for another fusion. Therefore, the FDA required the manufacturer to have a warning label stating that off-label use of this device could cause harm. Employer contends the clinical trial spoken of was to determine whether or not the DYNESYS procedure

would function properly and safely without an associated lumbar fusion. Employer contends the evidence shows Dr. Delamarter was participating in the clinical trial. Employer further contends *Mitchell VI* reviewed all this evidence, considered it, and found Employer did not have to pay for a clinical trial. Employer contends, while *Mitchell VI* did not make specific findings, it is reasonable to assume the panel considered the evidence Employee filed concerning limitations on the DYNESYS system. In summary, Employer contends there are no credibility issues involving Employee's modification petition. It contends there is simply no evidence *Mitchell VI* neglected any evidence or made a factual error in 2005. (Employer's hearing arguments).

28) On or about August 10, 2006, Employee obtained the DYNESYS surgery and paid for it himself. (Employee's hearing arguments).

PRINCIPLES OF LAW

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 23.30.110. Procedure on claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability . . . and the board may hear and determine all questions in respect to the claim. . . .

The language "all questions" is limited to questions raised by the parties or the agency upon proper notice to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of . . . a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

In the case of a factual mistake or a change in condition, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation

payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). A "mistake" allegation should not serve as "a back-door route to retrying a case because one party thinks he can make a better showing on a second attempt." *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 169 (Alaska 1974).

> **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. . . .

> **8 AAC 45.050. Pleadings.** . . .
> . . . .
>
> (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;
> (3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

> **8 AAC 45.150. Rehearings and modification of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
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> (b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.
> . . . .
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> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
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> (1) the facts upon which the original award was based;
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

ANALYSIS

1) Was the oral order limiting modification review to evidence in the record on November 2, 2005, correct?

At a prehearing conference on June 24, 2015, Employee's attorney stipulated that arguments on his pending *Mitchell VI* modification petition "would be based on the record as it stood in December 2005." Employer agreed to bifurcate hearing issues based upon this stipulation. The law allows parties to make binding stipulations. 8 AAC 45.050(f). Experience shows stipulations aid in promptly administering hearings in workers' compensation cases. *Rogers & Babler*. Such stipulations are binding and have the effect of an order unless a party for "good cause" is relieved from the terms of the stipulation. 8 AAC 45.050(f)(3).

Employee is represented by a competent attorney who had previously said the March 3, 2006 modification petition had been ripe and ready for decision since it was filed. If the petition has been ripe for nine years, there is no reason to consider evidence obtained after the petition had been filed. Second, the parties had a binding stipulation upon which Employer had relied in bifurcating hearing issues, and Employee provided no good cause to relieve him from the stipulation. Third, Alaska Workers' Compensation Appeals Commission decisions have uniformly held it is reversible error for fact-finders to consider evidence submitted after a hearing record had closed. Lastly, the March 3, 2006 petition upon which the July 1, 2015 hearing was based expressly stated the alleged factual mistake existed when the record closed in November 2005. The panel determined it would not be proper for a party to file a modification petition and, for whatever reason, wait nine years before requesting a hearing on it and expect to admit nine years' worth of "newly discovered evidence." Employee did not provide evidence of "good cause" to relieve him from his June 24, 2015 stipulation. 8 AAC 45.050(f)(3).

As it turned out, *Mitchell VI* stated the hearing record closed on November 2, 2005, not in December 2005. As both parties submitted post-hearing documentation by October 28, 2005, the difference between November 2, 2005, when the hearing record actually closed, and "December

2005," is immaterial. Therefore, as the parties agreed to limit review on Employee's March 3, 2006 petition to the *Mitchell VI* record as it existed when the hearing record closed after the September 28, 2005 hearing, the oral order holding Employee to his stipulation was correct.

2) Was the oral order restricting Employee's wife's participation at hearing correct?

Employee was represented at hearing by a competent attorney. The Act and related regulations do not expressly address whether more than one person can participate on a party's behalf at a hearing. Generally, technical and formal procedural rules do not apply in these hearings. Hearings are conducted in a manner by which all parties' rights may be best ascertained. AS 23.30.135. Employee, his wife and Employee's attorney could have met and deliberated at length prior to hearing to develop strategy and arguments and to identify evidence attorney Harren could use at hearing. Since Employee was represented by competent counsel, there was no need for Employee's wife to participate in oral argument.

Similarly, as the parties stipulated to limiting the *Mitchell VI* review to evidence as it existed when the record closed in 2005, Employee's wife's testimony at the July 1, 2015 hearing was not relevant. The September 2005 hearing transcript and all other documents are available for review. The transcript and Employee's records all speak for themselves. Therefore, the oral order disallowing Employee's wife's testimony was also correct. AS 23.30.135.

3) Was the oral order declining to address the pending SIME correct?

Employer raised a preliminary issue regarding the pending SIME, not previously set for hearing. The panel's ability to hear and decide issues is limited to questions raised by the parties or agency upon proper notice to all parties. AS 23.30.110(a); *Simon*. As the SIME issue was not properly raised for the July 1, 2015 hearing, the oral order declining to address it was correct.

4) Should *Mitchell VI* be modified to correct an alleged factual mistake?

Employee's former counsel timely filed a modification petition on March 6, 2006. AS 23.30.130; 8 AAC 45.150. Although he did not comply precisely with the applicable regulation, Employee claimed *Mitchell VI* made a factual error by either not addressing the

DYNESYS procedure, or alternatively, mistakenly not requiring Employer to pay for it. The record shows otherwise.

a) *Mitchell VI* considered and addressed the DYNESYS procedure.

At the August 10, 2005 hearing, Employee did not specifically mention DYNESYS. However, prior to the September 28, 2005 hearing, Employer's hearing brief specifically referenced Dr. Delamarter's DYNESYS implant procedure, and argued it was not FDA approved. Employer's brief also cited SIME Dr. Roth's testimony stating he was familiar with the DYNESYS device and opined Employee had no indications for any surgery, especially implanting something "still in clinical trials." Employee's representative, at the September 28, 2005 hearing, referenced, filed and hand-served FDA information concerning the DYNESYS procedure. Employee testified at the September 28, 2005 hearing about the DYNESYS procedure Dr. Delamarter had recommended. Though a key phrase in the hearing transcript is unfortunately "indiscernible," in context, Employee was referring to the DYNESYS procedure as the surgery he was requesting. *Rogers & Babler*. The parties all agree the DYNESYS system was the only surgery recommended by any physician at the time.

In October 2005, Employer filed its post-hearing submissions including Dr. Delamarter's July 13, 2013 report recommending the DYNESYS non-fusion technology for the L4-5 level. Employee filed the same document, post-hearing. Though Employee's post-hearing cover letter does not mention DYNESYS by name, it was the only recommended surgical procedure and is the procedure to which Employee referred in his post-hearing document. *Mitchell VI* addressed Employee's request for ongoing medical care and discounted "disc replacement surgery" as an option. *Mitchell VI* did not confuse "disc replacement surgery" and the DYNESYS procedure but expressly noted Dr. Delamarter's opinion stating Employee "was a good candidate for non-fusion decompression." The evidence shows "non-fusion decompression" refers to the DYNESYS procedure. Most importantly, at hearing on September 28, 2005, Employee's non-attorney representative specifically stated Dr. Delamarter's treatment in lieu of fusion or disc replacement surgery was an FDA-approved system called "Dynesys," and even spelled the name for the record. The designated chair summarized Employee's argument including his claim surgery was a reasonable and necessary option. As stated above, there was only one

recommended surgery. Thus, there is no question *Mitchell VI* understood Employee's surgical request was for the DYNESYS procedure, and had ample evidence about it to consider.

It would have been better had *Mitchell VI* specifically named DYNESYS and rejected it. Nonetheless, *Mitchell VI* specifically found and held "the only reasonable and necessary treatment presented in the record at this time is for conservative care." Therefore, Employee's contention that *Mitchell VI* did not consider DYNESYS or confused it as "disc replacement surgery," is not supported by the record and is merely a "bare allegation." 8 AAC 45.150(e).

b) Employee has not shown *Mitchell VI* erred factually by denying the DYNESYS procedure.

Employee's alternative argument is that *Mitchell VI* considered the DYNESYS procedure but erred by not ordering Employer to pay for it. Employee contends *Mitchell VI* erred because it was confused about two different medical procedures. But *Mitchell VI* considered opinions from several physicians and relied upon, among others, Employee's attending physician, Dr. Peterson who developed "a conservative treatment plan to avoid surgery" at L4-5. There is no reason to suspect *Mitchell VI* did not also consider the FDA information concerning the DYNESYS system. Though the parties concede the DYNESYS procedure was FDA approved when Employee requested it, when used in conjunction with a lumbar fusion, the record also shows the off-label use Dr. Delamarter suggested was not FDA approved and was in clinical trials. In other words, though the DYNESYS system was FDA approved for some things, it was not approved for this use. All physicians agreed Employee was not a candidate for fusion, and were not going to perform fusion surgery on him. Thus, there was no possible way the DYNESYS system could have been used as FDA approved, in this case.

Furthermore, to the extent Employee contended at hearing that Employer did not rebut Dr. Delamarter's DYNESYS evidence, his legal argument is about nine years too late. This is a petition for modification based upon alleged factual errors, not a petition for reconsideration alleging legal mistakes. AS 23.30.130; *Lindekugel*. *Mitchell VI* considered the available evidence and decided to rely upon medical opinions with which Employee disagrees. *Mitchell VI* decided conservative treatment was the only indicated medical care Employee needed at least

in September 2005. There is substantial evidence in the record demonstrating Dr. Delamarter's off-label use of the Dynesys system was not FDA approved, was in clinical trials and if used for a non-approved purpose could cause harm. In short, Employee's argument is simply that *Mitchell VI* made a factual mistake because it did not agree with his position; Employee also disagrees with *Mitchell VI*'s legal conclusions. Without the benefit of any additional evidence, by definition, Employee simply seeks to retry the September 28, 2005 hearing hoping to get a better result the second time. *Rodgers*. It cannot be said on the September 28, 2005 hearing record that *Mitchell VI* was factually compelled to order Employer to authorize the DYNESYS system in September 2005, and erred by failing or refusing to do so. Employee has demonstrated no factual mistake. Therefore, Employee's March 3, 2006 petition for modification of *Mitchell VI* under AS 23.30.130 will be denied.

Notably, on or about August 10, 2006, Employee underwent DYNESYS surgery and paid for it himself. *Mitchell VI* expressly retained jurisdiction to "resolve any future dispute regarding whether future treatments are reasonable, necessary and within the realm of acceptable medical practice." On January 20, 2006, Employee through former counsel filed a claim specifically asking for an order requiring Employer to authorize the DYNESYS Spinal System. Thus, there remains a question, not to be decided in this decision, whether or not Employee has a valid, pending claim for reimbursement for his subsequently obtained DYNESYS procedure, and any related benefits, or if this medical procedure is barred for any reason.

CONCLUSIONS OF LAW

1) The oral order limiting modification review to evidence in the record on November 2, 2005, was correct.
2) The oral order restricting Employee's wife's participation at hearing was correct.
3) The oral order declining to address the pending SIME was correct.
4) *Mitchell VI* will not be modified to correct an alleged factual mistake.

ORDER

Employee's March 3, 2006 petition for modification is denied.

Dated in Anchorage, Alaska on July 22, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Pamela Cline, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

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 final Decision and Order on Modification 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 July 22, 2015.

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Elizabeth Pleitez, Office Assistant