

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

SANDY TRAVIS,	)	INTERLOCUTORY
Employee,	)	DECISION AND ORDER
Respondent,	)	
	)	AWCB Case No. 200323518M
v.	)	
	)	AWCB Decision No. 16-0024
STATE OF ALASKA,	)	
Self-insured Employer,	)	Filed with AWCB Anchorage, Alaska
Petitioner.	)	on March 24, 2016
	)	

---

The State of Alaska's (Employer) February 2, 2015 Petition for a Second Independent Medical Examination (SIME) was heard on February 2, 2016 in Anchorage, Alaska. The hearing date was selected on December 16, 2015. Attorney David Rhodes appeared and represented Employer. Sandy Travis (Employee) appeared, represented herself and testified. There were no other witnesses. The record was held open to receive additional medical records from the parties. The record closed after the panel next met and deliberated, on March 3, 2016.

## ISSUES

Employer contends an SIME is warranted because conflicting medical opinions exist between Employee's attending physicians and the Employer Medical Examiner (EME). Employer argues an SIME will assist the board in determining the rights of the parties.

Employee contends the EME report was based on incomplete or faulty information, and an SIME should not be granted.

**Should Employer's Petition for SIME be granted?**

FINDINGS OF FACT

1) Employee was employed by the State of Alaska, Department of Health and Social Services, Division of Behavioral Health, Alaska Psychiatric Institute (API) when she filed two reports of work-related injury. On November 19, 2002, Employee claimed injury to her back and neck caused by extended sitting. On December 21, 2003, Employee was attacked by patients at API, and reported injury to her throat, neck, and back. The workers' compensation cases for these injuries involve the same employer, insurer, and adjuster, and have been administratively joined for simplicity in recordkeeping. The parties have taken no action to unjoin the cases. (ROI, November 22, 2002; ROI, December 21, 2003; Prehearing Conference Summary, December 2, 2014; Record).

2) On August 9, 2007, August 23, 2007, and September 24, 2007, Russell Cherry, MD evaluated Employee on referral from Judith Dean, MD, Employee's former attending therapist. Dr. Cherry concluded that Employee's psychological symptoms of "recurrent intrusive thoughts, flashbacks, nightmares, intense psychological distress and physiological reactivity to cues, a pattern of avoidance of places, diminished interest in activities, difficulty concentrating, hypervigilance, and an exaggerated startle response ... appear to be chronic in nature." Dr. Cherry diagnosed Employee with the following: Posttraumatic Stress Disorder [PTSD], Pain Disorder, Adjustment Disorder, Depressed Mood, Somatoform Disorder NOS, and Major Depressive Disorder: single episode, severe. Dr. Cherry specified that diagnoses for somatoform disorder NOS and Major Depressive Disorder were provisional, and added that Employee's actual pain level was unclear due to her "prominent symptom exaggeration and somatization..." Dr. Cherry opined that some of the pain issues were likely genuine, but many were the product of exaggeration and somatization, and "may also reflect a desire to not return to work with her former employer." Dr. Cherry also stated Employee's actual level of depression was unclear due to symptom exaggeration and somatization. Dr. Cherry stated that the somatoform diagnosis NOS was not formally diagnosed due to "the lack of medical records that would likely reflect incongruence between [Employee's] complaints and objective medical findings," related to Employee's "widespread pattern of cognitive and physical problems and pain complaints that do not appear consistent with any known medical disorder and also to not appear consistent with her injuries incurred from her assault, with the patient's complaints and presentation evidencing

elements of both Conversion Disorder and Undifferentiated Somatoform Disorder...” Dr. Cherry further stated that he recommended vocational training if Employee’s trauma and depression issues were better resolved. (Cherry Report at 17-19, August 9, 2007).

3) On December 4, 2014, Employee was evaluated by Dr. Jan Kiele, MD, at Good Samaritan Counseling Center. Dr. Kiele issued a letter confirming Employee’s prescriptions and stating the medications were necessary for Employee “to maintain health and stability.” The prescriptions were: Provigil, 200mg daily; Lexapro, 10mg daily; Rozerem, 8mg at bedtime; Klonopin, 0.5mg twice daily and two tablets at bedtime; and Wellbutrin XL, 300mg daily. (Kiele Report, December 4, 2014).

4) Dr. Kiele kept regular progress reports of her counseling sessions with Employee from 2008 through 2015, indicating consistent diagnoses of PTSD and Major Depressive Disorder, sometimes noted as “MDD.” (Kiele Progress Notes, 2008-2015).

5) On 1/12/2016, Employee attended an Employer’s Medical Evaluation (EME) with Kehill Sheorn, MD. Dr. Sheorn opined that Employee’s work with Employer was not a substantial factor in bringing about, aggravating, or accelerating the condition or symptoms she had diagnosed. Dr. Sheorn stated Employee’s December 21, 2003 injury was not a substantial factor in the need for the recommended treatment and/or proposed testing. Dr. Sheorn opined Employee’s injury was not a substantial factor in Employee’s disability, and that “any psychological difficulty [Employee] was having was due to her inability to cope with her frustration with getting and keeping benefits and privileges she feels she is owed.” Dr. Sheorn stated no further diagnostic testing was necessary, and recommended Employee continue supportive counseling electively if she found it helpful. When asked if there were recommended restrictions in Employee’s activity due to the injury, Dr. Sheorn answered “NA,” indicating that she believed no restrictions were necessary. Dr. Sheorn diagnosed adjustment disorder with Cluster B character traits caused by an inability to adjust or cope with a return to work status when Employee’s back pain resolved. (Sheorn Report, January 12, 2015).

6) On February 2, 2015, Employer filed a Petition for an SIME. Employer submitted medical records and a complete SIME form listing disputed issues. Employer’s form gave the date of injury as 11/19/2002, but the board finds that this was inadvertent error due to the joined cases, and the error is harmless. (Petition, February 2, 2015; SIME Request Form, February 2, 2015).

- 7) Employer asserted that disputes exist between medical reports and diagnoses of the Employee's attending physicians, Drs. Cherry and Kiele, and Employer's EME physician, Dr. Sheorn. Employer noted distinctions between the doctors' opinions on issues of causation, treatment, functional capacity, and diagnosis. Employer requested a psychiatric SIME. (SIME Request Form, February 2, 2015).
- 8) On September 14, 2015, Employer took Dr. Sheorn's deposition. Dr. Sheorn discussed the basis for her medical conclusions and diagnoses. Dr. Sheorn declined to amend any statements in her January 21, 2015 EME report, reaffirmed the diagnosis of Adjustment Disorder, and opined Employee did not suffer from Post-Traumatic Stress Disorder. (Id).
- 9) At the February 2, 2016 hearing Employee testified about her work injury and explained why she objects to an SIME in this case. Employee stated that Dr. Sheorn's diagnosis was only effective for 6 months, and there was no medical dispute after the expiration of the 6 month period. Employee testified that Dr. Sheorn had been provided with inaccurate or incomplete medical records, and her diagnosis was therefore invalid. (Record).
- 10) At the February 2, 2016 hearing, the hearing officer held the record open until February 12 so that the parties could submit supplemental information, and gave until February 26 to respond to any submissions. Employee did not file supplemental information within the allotted time. (Record).

#### 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;
- (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

The board may base its decisions not only on direct testimony 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, 533-534 (Alaska 1987). An adjudicative

body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

**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 . . . or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer...

The purpose of an SIME is to have an independent expert provide an opinion to the board about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). An SIME is intended to assist the board, not to give employees an additional medical opinion at the expense of the employer when they disagree with their own physicians. The SIME physician is the *board's expert*, not the employee's or employer's expert. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 5 (emph. in original).

An SIME under AS 23.30.095(k) may be ordered when a medical dispute exists between an employee's and an employer's physicians, the "dispute is significant or relevant to a pending claim or petition and ... an SIME would help the board resolve the dispute.... In the absence of opposing medical opinions between employer and employee physicians, there cannot be a medical dispute." *Bah* at 4; *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007) at 8. Under AS 23.30.110(g) the board has discretion to order an SIME when there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence, preventing the board from ascertaining the parties' rights, and an SIME opinion would help the factfinders. *Bah* at 5. "Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in the evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the

parties in the dispute before the board.” *Id.*

The following criteria are typically considered when deciding whether to order an SIME:

- 1) Is there a medical dispute between Employee’s physician and an EME physician?
- 2) Is the dispute significant?
- 3) Will an SIME physician's opinion assist the board in resolving the dispute?

*See, e.g., DiGangi v. Northwest Airlines*, AWCBC Decision No. 10-0028 (February 9, 2010), citing *Deal v. Municipality of Anchorage*, AWCBC Decision No. 97-0165 (July 23, 1997) and *Schmidt v. Beeson Plumbing and Heating*, AWCBC Decision No. 91-0128 (May 2, 1991).

Sections 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal*; *see also, Harvey v. Cook Inlet Pipe Line Co.*, AWCBC Decision No. 98-0076 (March 26, 1998). Wide discretion exists under §095(k) and §110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best “protect the rights of the parties.” *See, e.g., Hanson v. Municipality of Anchorage*, AWCBC Decision No. 10-0175 (October 29, 2010) at 18; *Young v. Brown Jug, Inc.*, AWCBC Decision. No. 02-0223 (October 28, 2002) at 3; AS 23.30.135(a); AS 23.30.155(h).

**AS 23.30.110. Procedure on claims.**

....

(g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.

**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.**

....

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

....

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a

dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

....

(B) the board on its own motion determines an evaluation is necessary.

The division's SIME form (Form 07-6147) requires parties to provide detailed information justifying the need for an SIME under AS 23.30.095(k). Information to be specified includes dispute(s)/issue(s), attending and EME physician names, and conflicting medical opinions identified by report date, page, and item/paragraph number. By regulation the form must be accompanied by copies of medical records reflecting the dispute.

**8 AAC 45.195. Waiver of procedures.**

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

ANALYSIS

Where parties do not stipulate to an SIME, one may be ordered under three circumstances. If a significant medical dispute exists between the employee's attending physician and the EME physician, and the factfinders determine an SIME would help them resolve the dispute, the board may grant a party's SIME petition or order an SIME upon its own motion. AS 23.30.095(k); 8 AAC 45.092(g)(2); 8 AAC 45.092(g)(3)(b); *Bah; Smith*. Additionally, an SIME may be ordered in the absence of a medical dispute if there is a significant gap in the medical evidence, or a lack of understanding of that evidence, and an opinion by an independent medical examiner will help the board in resolving the issue before it. AS 23.30.110(g); *Bah*. In this case, Employer has properly submitted a petition for an SIME.

Employer's petition indicates a number of points on which Employee's attending physicians have come to conclusions conflicting with those of the EME physician, most notably on the specifics of causation, treatment, functional capacity, and diagnosis.

Regarding causation, Dr. Cherry's report recites a list of symptoms he found related to Employee's work injury and supported his diagnosis of PTSD, indicating the symptoms appeared chronic in nature. In contrast, EME Dr. Sheorn opined the work injury was not a substantial factor in the need for treatment for any conditions or symptoms she diagnosed nor in Employee's disability.

Dr. Cherry and Dr. Sheorn also disagree on Employee's ability to work. Dr. Cherry opined Employee did not appear capable of work, but should be able to return to work with retraining, once her trauma issues and severe depression improved. Dr. Sheorn placed no restrictions on Employee's activity due to the work injury, and further stated "[t]here were strong indicators that [Employee] would still be psychologically fit to work with that population and that she would be emotionally capable of the work itself."

Regarding diagnosis, Dr. Cherry diagnosed Employee with PTSD, Pain Disorder, Adjustment Disorder with Depressed Mood, Somatoform Disorder NOS, and Major Depressive Disorder. Dr. Kiele diagnosed Major Depressive Disorder and PTSD, as indicated in her regular Medical Progress Notes and assessments dating from as early as July 2007 to as recent as June 2015. In contrast, Dr. Sheorn diagnosed only Adjustment Disorder and discussed at length, in her report, her addendum report, and her deposition, various reasons for *not* diagnosing PTSD and other ailments diagnosed by Employee's treating physicians.

Regarding treatment, Dr. Kiele has prescribed a number of medications she opines are "necessary for [Employee] to maintain health and stability." However, Dr. Sheorn opined no additional treatment or diagnostic testing other than elective counseling was necessary.

Employee did not file or present at hearing evidence or argument supporting a finding the opinions of her attending physicians are consistent with those of Dr. Sheorn. Employee presented numerous arguments attacking the credibility of Dr. Sheorn's report but did not contend there was not a "medical dispute," between her treating physicians and Dr. Sheorn. Employee argued repeatedly that Dr. Sheorn's report was too old for valid diagnosis and was based on incomplete or faulty information, and therefore should not be relied upon. While these arguments are relevant to the weight and credibility that should be given to Dr. Sheorn's opinions at a hearing on the merits of Employee's claims, they are not relevant to the issue here: whether a medical dispute exists warranting an SIME. In addition, Employer's Petition for SIME based on Dr. Sheorn's report was filed shortly after the report, and will not be discarded due to a delay in addressing it. At hearing, Employee stated that she disagreed with the opinions of Drs. Sheorn, Cherry, and Lipscomb, and that her current attending providers would also disagree with their opinions.

The medical disputes in this case are clear: Employee's physicians have concluded that Employee has PTSD caused by the work-related injury, is not able to work due to the PTSD, and requires continuing treatment for PTSD through counseling and medication. Employer's EME physician opined Employee's symptoms are caused primarily by conflict with the workers' compensation process and stress brought on by being expected to return to work, that the work injury has long since resolved, and no further treatment or restriction is needed for work-related psychological issues. The board finds that these disputes significant. Clarification of these conflicting medical opinions will assist the board in determining the rights of the parties in this case and resolving disputed issues. An SIME with a psychiatrist will be ordered.

#### CONCLUSION OF LAW

Employer's Petition for SIME should be granted.

#### ORDER

- 1) Employer's February 2, 2015 Petition for SIME is granted.
- 2) Employee is ordered to attend an SIME in accordance with the Workers' Compensation Act.

SANDY TRAVIS v. STATE OF ALASKA

- 3) An SIME will be performed by a psychiatrist selected by the appropriate workers' compensation officer in accordance with the Alaska Workers' Compensation Act, applicable regulations, and normal internal processes and procedures.
- 4) The medical disputes listed on Employer's February 2, 2015 SIME form will be those considered by the SIME psychiatrist.
- 5) A prehearing conference will be scheduled for the purpose of setting deadlines for the SIME.

Dated in Anchorage, Alaska on March 24, 2016

ALASKA WORKERS' COMPENSATION BOARD



---

Amanda Eklund, Designated Chair

---

Donna Phillips, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 SANDY TRAVIS, employee / respondent; v. STATE OF ALASKA, employer / petitioner; Case No. 200323518M; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March, 24 2006

---

Elizabeth Pleitez, Office Assistant