ALASKA WORKERS' COMPENSATION BOARD

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

ANDY JAMES, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201500569
NORTHERN CONSTRUCTION, Employer, and	)	AWCB Decision No. 16-0052 Filed with AWCB Anchorage, Alaska on June 30, 2016
LIBERTY MUTUAL, Insurer, Defendants.	)	

Andy James's (Employee) December 28, 2015 petition, as orally amended at hearing, for a board-ordered second independent medical examination (SIME) was heard on May 24, 2016 in Anchorage, Alaska, a date selected on March 30, 2016. Attorney Eric Croft appeared and represented Employee. Attorney Adam Sadoski appeared and represented Northern Construction and Liberty Mutual (Employer). There were no witnesses. The record was left open for filing of additional legal memoranda, and closed on June 10, 2016.

ISSUE

Employee contends an SIME should be ordered under AS 23.30.095(k) to assist the board to resolve multiple, significant medical disputes, and to best protect Employee's rights. Employer contends there is currently no significant medical dispute to justify ordering an SIME, and an SIME conducted prior to undergoing electrodiagnostic tests recommended by Employer's

physicians would be premature and would not provide enough assistance to the board to justify the high costs of the examination.

Should an SIME be ordered?

FINDINGS OF FACT

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

1) On December 31, 2014, Employee fell approximately eight feet off the back tire of a grader, striking its ripper bar on the way down. (Report of Injury, January 1, 2015.)

2) On January 5, 2015, Employee presented at Steele Memorial Clinic in Salmon, Idaho, with left shoulder, neck and back pain. He subsequently selected chiropractor Lance Ingwersen, DC, as his attending physician. Employee first treated with Dr. Ingwersen on January 13, 2015. (Ingwersen Physician's Report, apparently generated on March 4, 2015; observation.)

3) On February 13, 2015, Employee attended an employer's medical evaluation (EME) with orthopedic surgeon Brian D. Tallerico, DO, who diagnosed (1) left axilla/upper extremity/cervical/shoulder girdle/cervical sprain/strain; (2) possible injury to the left brachial plexus over cervical nerve roots/trunks; and (3) left-sided radiculitis/neuritis; all "substantially caused by the industrial injury of December 31, 2014." Dr. Tallerico opined, "I believe that no further chiropractic treatment is indicated, and it may actually be harmful. He may require some physical therapy after his acute phase resolves, and, hopefully that will occur with the appropriate medication/treatment." (Tallerico EME report, pp. 6, 8; February 13, 2015.)

4) In his Physician's Report apparently generated on March 4, 2015, Dr. Ingwerson's response to the question "Is Condition Work Related?" was, "Yes. Patient's description of injury & onset of symptoms correlate w/ objective assessment." (Ingwersen Physician's Report, apparently generated on March 4, 2015.)

5) On March 12, 2015, Employee was evaluated by neurologist Sherry A. Reid, MD, whose recommendations included "continue chiropractic care." (Reid chart note, March 16, 2015.)

6) On August 22, 2015, Employee attended a panel EME with Dr. Tallerico and neurologist Eugene Wong, MD, who diagnosed possible traction injury to the left brachial plexus, related to

the industrial injury on a more probable than not basis; cervical and left shoulder sprain/strain, related to the industrial injury on a more probable than not basis; unimpressive cervical spine MRI findings, including mild spondylosis; and symptom exaggeration and functional overlay. The EME physicians opined that any treatment outside of the cervical, left shoulder girdle, left upper extremity, would be unrelated to the industrial claim, and "further chiropractic care is once again not indicated as it will not be curative in nature." Regarding further treatment recommendations for the left shoulder, Drs. Tallerico and Wong opined:

> Due to the inconsistency of his physical exam and the prior EMG nerve conduction study, it is this panel's recommendation that the examinee be evaluated at the University of Washington Department of Neurology for consideration of a repeat evaluation and nerve conduction studies. We would also recommend that they facilitate an MR neurogram of the left brachial plexus region.

(Tallerico and Wong EME report, pp. 9, 10; 11; August 22, 2015.)

7) On August 31, 2015, in response to an August 28, 2015 letter from Employee's counsel, Dr. Ingwersen agreed with Dr. Tallerico's February 13, 2015 diagnoses but, unlike the EME physician, Dr. Ingwersen opined that continued chiropractic care was reasonable and necessary for Employee's recovery. (Ingwersen letter, August 31, 2015.)

8) On October 31, 2015, Dr. Ingwersen responded to a series of questions posed by Employee's counsel. Dr. Ingwersen specifically disagreed with Drs. Tallerico and Wong's August 22, 2015 EME opinions that (1) any treatment outside of the cervical, left shoulder girdle, left upper extremity, would be unrelated to the industrial claim, and (2) further chiropractic care was "once again" not indicated as it would not be curative in nature. With regard to the latter opinion, Dr. Ingwersen opined:

> I feel compelled to comment on the above statement given the patient has received conflicting information from other medical professionals including Dr. Sherry Reid who recommended continuing chiropractic care for neck pain. Chiropractic care for neck pain on 3/12/15. The chiropractic care [Employee] is receiving, is and has been, supportive in nature; to date no curative options have been presented to Mr. James. To the best of my knowledge no treatment that [Employee] has been offered has provided more relief then [sic] Chiropractic treatment.

(Ingwersen letter, October 31, 2015.)

9) On December 9, 2015, on referral from Dr. Reid, Employee was evaluated by Vanessa M. Lipp, PA-C, who noted in the history of Employee's neck pain:

> Cspine MRI dated 5/6/15 reveals mild right paracentral disc protrusion at C5/6 which is stable compared to prior study. . . . There is mild bilateral C5-6 neural foraminal stenosis. . . . EMG of the LUE showed evidence of multilevel cervical radiculopathy including C5, C6, C7, and C8-T1. Perhaps early ongoing denervation in a C5 distribution.

PA Lipp opined, "Pending recommendations of Dr. Mack for the neck, we will need to send him for evaluation of the left shoulder. Has been told he has a torn rotator cuff and this will need to be repaired." (Lipp chart note, December 9, 2015.)

10) On December 14, 2015, Employee was evaluated by neurosurgeon Chriss A. Mack, M.D., who opined:

> I am aware that he has shoulder pathology pursuant with the orthopedic impression and will probably need shoulder surgery. He asked whether or not the neck should be done prior to the shoulder and I cannot answer that question. I think that certainly the orthopedic surgeon would certainly like to know that any residual symptoms are not going to be related to the nerve root and the neurosurgeon would like to know that any residual symptoms are not related to the shoulder regardless of who has to proceed first. I think that the benefit of the doubt, given the findings on the studies, the lack of objective physical findings regarding other nerves, the insistent nature of his pain, and the objective abnormalities and the clinical impression of C6, dictates that we offer him a C5-C6 ACDF [anterior cervical discectomy fusion] as his best, most reasonable option to eliminate some of his problems for which I do not believe any further diagnostic studies will be helpful. To that end, I have recommended that we proceed with a C5-C6 ACDF.

(Mack chart note, December 14, 2015.)

11) On December 28, 2015, Employee petitioned for an SIME, contending disputes existed between attending and EME physicians in the areas of causation and treatment. (Petition and SIME form, December 28, 2015.)

12) On January 8, 2016, Employer's counsel wrote, "We believe that his condition is medically stable" since he is refusing to seek any treatment which has a reasonable possibility of improving his condition." (Sadoski letter, January 8, 2016.)

13) On January 22, 2016, Employer opposed Employee's December 28, 2015 petition for an SIME, contending discovery was incomplete. Employer contended an SIME physician would not have the information necessary to render a reliable opinion until after Employee underwent a

repeat electrodiagnostic evaluation as recommended by EME physicians Tallerico and Wong on August 22, 2015. (Opposition to Employee's Petition for SIME, January 22, 2016.)

14) On February 10, 2016, Dr. Tallerico issued an addendum EME report in which he opined, "I cannot state that [Employee] is considered fixed stable since he has not had the evaluation at the University of Washington that I strongly recommended. I have no other [medical] recommendations except the one made previously, an evaluation at the University of Washington Department of Neurology." (Tallerico addendum EME report; February 10, 2016.)

15) At a prehearing on March 30, 2016, a hearing was scheduled for May 24, 2016 on the SIME dispute. (Prehearing Conference Summary, March 30, 2016.)

16) On May 24, 2016, the parties agreed the sole hearing issue was whether the board should order an SIME. At hearing Employee's counsel identified disputes over whether shoulder and/or neck surgery is necessary, and which body part should be treated first. He stated Employee was "conditionally willing" to undergo the additional diagnostic testing recommended by the EME physicians, but the parties had not been unable to agree on the logistics of getting it done. Counsel also noted a dispute regarding continued chiropractic care of Employee's low and mid back pending resolution of the shoulder and neck issues. Attorney Croft stated medical stability was not a disputed issue. (Hearing briefs and record, May 24, 2016.)

17) At hearing Employer's counsel agreed that the case needed to keep moving forward so that Employee could receive any treatment to which he is entitled. However Employer contended currently the only SIME-worthy dispute was the "relatively insubstantial issue" of the reasonableness and necessity of continued chiropractic treatment; moreover, an SIME prior to the additional EMG testing recommended by the EME physicians would be unwarranted and premature, because the testing might lead Drs. Tallerico and Wong to alter their treatment recommendations. Employer's counsel asserted Employee is attempting to employ the SIME process to probe for more favorable medical evidence rather than to settle a disputed medical issue, and while an SIME might be warranted in the future, ordering one at this time would constitute a costly and unnecessary further delay in the case. Attorney Sadoski stated the physicians agreed that Employee's shoulder and cervical conditions were work-related, but that a dispute existed regarding the extent of those injuries and the proper treatment for them. Counsel contended an SIME opinion at this time would not be as helpful to the board as would one

rendered after additional diagnostic testing had taken place and the EME physicians had fully developed their opinions. (Hearing briefs and record, May 24, 2016.)

18) The panel left the record open until June 10, 2016 for Employee to file an updated SIME form indicating all alleged current areas of dispute, and for Employer to respond. (Record, May 24, 2016.)

19) On June 1, 2016, Employee filed a revised, unsigned SIME form contending disputes existed between attending and EME physicians in the areas of causation, compensability, treatment, and medical stability. The form stated that Employee's treating physician and the EME physicians agree that Mr. James is not medically stable, however Employer's counsel expressed a contrary opinion in his January 8, 2016 letter. Employee listed stability, PPI, and "whether the neck or shoulder surgery should be performed first" as non-SIME issues. Employee repeated his request for an SIME with chiropractic, neurosurgery and orthopedic specialists. (Revised SIME form, June 1, 2016.)

20) Employer did not respond to the revised SIME form and the record closed on June 10, 2016. (ICERS computer database.)

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 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.**
> (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . .
>
> (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. . .

An employer must pay for medical treatment that "the nature of injury or process of recovery requires" within the first two years of the injury. AS 23.30.095(a); *Phillip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). When the board reviews an injured worker's claim for medical treatment within two years of injury, its review is limited to whether the treatment sought is reasonable and necessary. *Bockness v. Brown Jug, Inc.*, 980 P.2d 462, 465 (Alaska 1999).

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; emphasis original.

An SIME under §095(k) may be ordered when a medical dispute exists between physicians for the employee and the employer, and 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 §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, prevents 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, AWCB Decision No. 10-0028 (February 9, 2010), citing *Deal v. Municipality of Anchorage,* AWCB Decision No. 97-0165 (July 23, 1997) and *Schmidt v. Beeson Plumbing and Heating*, AWCB 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.*, AWCB 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*, AWCB Decision No. 10-0175 (October 29, 2010) at 18; *Young v. Brown Jug, Inc*., AWCB 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. . . .

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041 but the compensation may not be discounted for any present value considerations.
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

Permanent partial impairment (PPI) ratings must be for an impairment that is partial in character and permanent in quality, and calculated under the AMA *Guides*. PPI ratings are made when an injured worker attains medical stability: "Impairment ratings are to be performed when an individual is at a state of permanency." AMA *Guides* 6th Edition at 27 (2008).

ANALYSIS

Should an SIME be ordered?

The board may grant a party's SIME petition where a significant medical dispute exists between an employee's attending physician and the EME physician, and the factfinders determine an SIME would help them resolve that dispute. AS 23.30.095(k); *Bah; Smith.*

Here at least three medical disputes exist between Employee's attending physicians and the EME physicians. Employee's medical team, consisting of Drs. Ingwersen, Mack and Reid plus PA-C Lipp, have recommended surgery for a torn rotator cuff, and a cervical discectomy with fusion; whereas EME Drs. Tallerico and Wong have diagnosed a cervical and left shoulder sprain/strain. The attending doctors recommend continued chiropractic treatment of Employee's low and mid-back pending resolution of his shoulder and neck issues; the EME physicians believe no further chiropractic care is indicated, and may actually be harmful. Dr. Mack does not believe any further

diagnostic studies would be helpful; Drs. Tallerico and Wong recommend repeat nerve conduction studies.

The first two disputes are particularly significant. Whether Employee undergoes surgical interventions or merely conservative care for his shoulder and neck, and whether continued chiropractic care is reasonable and necessary, or may actually be harmful, are serious disagreements, with direct bearing on Employee's treatment and recovery. An SIME with neurosurgery, orthopedic and chiropractic specialists will help the factfinders resolve these disputes, and will be ordered.

The third dispute, whether additional testing should be done, would not in isolation be significant enough to warrant ordering an SIME, particularly since Employee has indicated he is "conditionally willing" to undergo such testing. Employer's argument that an SIME should be postponed until additional diagnostic results are obtained is unpersuasive. The decision to order an SIME is properly based on current medical evidence, and the process should not be delayed because future evidence might cause physicians to alter their opinions. If the issue has not been rendered moot by the time of the SIME, the parties are entitled to ask the SIME physicians about the need for additional testing, and their opinions would help resolve the dispute. Likewise, if the SIME physicians recommend both shoulder and cervical spine surgeries, they may be asked to render an opinion as to which should be done first.

Although at hearing Employee's counsel stated medical stability is not a disputed issue, the revised SIME form unpersuasively includes it as one. The form notes that the treating and EME physicians agree Employee is not medically stable, but defense counsel stated he believes otherwise in a January 8, 2016 letter. Under AS 23.30.095(k), a board-ordered SIME is predicated upon the existence of a medical dispute "between the employee's attending physician and the employer's independent medical evaluation." In the absence of supporting medical evidence, an attorney's opinion regarding medical stability is not sufficient to establish a dispute warranting an SIME. Furthermore, because no physician has yet opined Employee is medically stable, Employee's request that SIME physicians address the PPI issue is misguided and premature.

CONCLUSION OF LAW

An SIME should be ordered.

ORDER

1) Employee's December 28, 2015 petition, as orally amended at hearing, for an SIME with neurosurgery, orthopedic and chiropractic specialists is granted.

2) Employee is directed to request a prehearing conference to address deadlines and instructions for compilation of SIME binders.

3) Jurisdiction over Employee's claim is retained, pending receipt of the SIME reports.

Dated in Anchorage, Alaska on June 30, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Margaret Scott, Designated Chair

/s/ _____
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 ANDY JAMES, employee / claimant; v. NORTHERN CONSTRUCTION AND, employer; LIBERTY NORTHWEST INSURANCE CORP, insurer / defendants; Case No. 201500569; 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 June 30, 2016.

/s/ _____
Vera James, Office Assistant