ALASKA WORKERS' COMPENSATION BOARD

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

DUANE GERLACH, Employee, Claimant, v. LEONARD'S LANDING LODGE, Employer, and AMERICAN FIRE & CASUALTY CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201515667 AWCB Decision No. 16-0078 Filed with AWCB Anchorage, Alaska on August 26, 2016

Duane Gerlach's (Employee) June 10, 2016 petition requesting a second independent medical evaluation (SIME) was heard on August 25, 2016, in Anchorage, Alaska, a date selected on June 22, 2016. Employee appeared and represented himself. Attorney Stacey Stone appeared and represented Leonard's Landing Lodge and its insurer (Employer). There were no witnesses. The record closed at the hearing's conclusion on August 25, 2016.

ISSUES

Employee contends there are significant medical disputes between his attending physician and Employer's medical evaluator (EME). For example, Employee contends he is scheduled for surgery on the area injured while working for Employer. Employee requests an SIME so he can have a fair medical evaluation by another physician.

Employer contends while there may be recommendations for additional medical care, no medical record makes any causal connection between Employee's work injury with Employer and the need for any medical care. Therefore, Employer contends Employee has not demonstrated a medical dispute relevant to his work injury and his request for an SIME should be denied.

Should an SIME be ordered at this time?

FINDINGS OF FACT

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

1) On August 4, 2015, Employee contends he was alone lifting waterlogged boards weighing between 80 and 100 pounds onto a roof on Employer's building to install them when he injured his back. (Employee Report of Occupational Injury or Illness to Employer, August 17, 2015).

2) The employee-employer relationship between the parties was previously in dispute. *Gerlach v. Leonard's Landing Lodge*, AWCB Decision No. 16-0003 (January 5, 2016) (*Gerlach I*) resolved this dispute. Consequently, the Veterans Administration (VA) and TRICARE provided most care Employee has received in this case to date. (*Gerlach I*; observations).

3) Many healthcare providers familiar with workers' compensation cases use the division's "Physician's Report" form to quickly and easily offer causation and other opinions to interested parties, sometimes in a "check-the-box" format. While an attending physician may provide medical evidence in any format, neither party has submitted any "Physician's Reports" in this case, implying none were used. (Experience, observations and inferences from the above).

4) On June 10, 2016, Employee filed a petition requesting an SIME. Attached to Employee's petition were an SIME form and various medical reports. Employee's petition contended there were medical disputes concerning: causation; treatment; and medical stability. He requested an orthopedic expert to perform the SIME. (Petition, June 10, 2016; SIME form, April 18, 2016).

5) On June 22, 2016, the parties attended a prehearing conference at which Employee's SIME petition was discussed. Employee stated his then-recently filed affidavit of readiness for hearing was filed on his June 10, 2016 SIME petition. Employer objected to setting a hearing, citing procedural deficiencies. As Employee stated he was fully prepared and ready to go to hearing on his SIME petition, the board's designee set a procedural hearing for August 25, 2016, limited to whether an SIME should be scheduled. (Prehearing Conference Summary, June 22, 2016).

6) On August 18, 2016, Employer filed its brief and attachments for the SIME hearing. Employer contended an SIME is not warranted because the medical records upon which Employee relies do not state any potential medical dispute is related in any way to his August 14, 2015 injury with Employer. Therefore, Employer contended no actual medical disputes have arisen and Employee's request for an SIME should be denied. (Employer's Hearing Brief for August 25, 2016 Hearing, August 18, 2016).

7) At hearing on August 25, 2016, the designated chair explained to Employee the three basic *Bah* requirements for requesting and obtaining an SIME. The chair repeatedly re-directed Employee's focus and contentions to the relevant issues, particularly encouraging Employee's reference to medical records supporting his SIME request. Specifically, the chair repeatedly asked Employee to cite any medical record linking disability or recommended medical treatment to his work injury with Employer. (Record).

8) At hearing, Employee stated he was representing himself. Employee contended his medical providers recommend more medical treatment and evaluations to address his work injury with Employer. Employee conceded his attending physician declined to provide specific information regarding a causal connection between Employee's current symptoms or need for medical treatment and his work injury stating "it's not his area of expertise." Nonetheless, Employee contended his providers are now recommending surgery and Employee knows all treatment he has received for his lumbar spine results from his work injury with Employer and contended all he wants is "a fair examination from another doctor." (Employee's hearing arguments).

9) At hearing, Employee had difficulty understanding an SIME is based upon written medical records clearly defining work-related medical disputes. (Observations).

10) At hearing, Employer reiterated its arguments from its hearing brief and stated no current medical dispute warranted ordering an SIME. (Employer's hearing arguments).

11) Employee's medical records, though recommending disability and additional medical care, do not expressly or implicitly comment on any connection between Employee's disability or his need for any additional medical care, and his work injury with Employer. (Observations).

12) The medical records upon which an SIME order must be based do not currently demonstrate a work-related medical dispute between Employee's attending physicians and Employer's medical evaluator (EME). (*Id*.).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .

The board may base its decision not only on direct testimony 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. (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
. . . .

(k) In the event of a medical dispute regarding determinations of causation, medical stability . . . 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 Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under §095(k). The AWCAC referred to its decision in *Smith v. Anchorage School District,* AWCAC Decision No. 050 (January 25, 2007), and said, referring to AS 23.30.095(k):

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The commission in *Bah* stated when deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

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

> **8 AAC 45.082. Medical treatment**. . . .
> . . . .
>
> (b) A physician may be changed as follows:
> . . . .
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> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service
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> (A) at a hospital or an emergency care facility;
>
> (B) from a physician
>
> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
>
> (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

> (iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician.
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> . . . .
>
> (4) regardless of an employee's date of injury, the following is not a change of an attending physician:
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> (A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;
>
> (B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employer thereafter is a substitution of physicians and not a change of attending physicians;
>
> (C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;
>
> (D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

Richard v. Fireman's Fund, 384 P.2d 445 (Alaska 1963), was a civil tort case primarily about the insurer's duty to arrange for medical care for an injured worker, as opposed to simply paying for the care pursuant to the Act once the injured employee made his own arrangements.

> On February 5, 1960, the appellant suffered an injury to his left eye. His employer sent him to Seattle and there provided medical care for him, including an operation on the eye, by Drs. Hicks and Stellwagen. . . . In compliance with doctor's instructions, the appellant . . . underwent an examination of the injured eye by Dr. Leer, an Alaskan eye specialist. . . . This examination disclosed that the appellant had suffered a detachment of the retina and prompted Dr. Leer to recommend to the appellant's hometown physician, Dr. Shuler, by letter dated June 17, 1960, that 'surgery should be done as soon as is feasible because the longer the detachment persists, the less the chances of success.'. . . A copy of the letter was sent to the Board and the insurance carrier. . . . (*Id*. at 446).

Richard lost sight in one eye from delays in obtaining medical care. *Richard* famously criticized the board for "its failure to promptly advise the appellant on how to proceed" and stated:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law. (*Id*. at 449; footnote omitted).

ANALYSIS

Should an SIME be ordered at this time?

When it is shown there is a medical dispute in any one of seven enumerated areas, between an injured worker's attending physician and an EME, an SIME may be ordered. AS 23.30.095(k). Absent an attending physician's testimony at hearing, the question whether a medical dispute exists is resolved by reviewing medical records or depositions. Many attending physicians use a "Physician's Report" form on which to offer brief "check-the-box" opinions linking their recommendations to the work injury. *Rogers & Babler*. There are no "Physician's Reports" filed in Employee's case. Employee's medical care for this injury began when his status as an "employee" working for Employer was still in question. Thus, to this point the VA and TRICARE provided most care Employee received for his work injury with Employer.

Employee's medical records do not expressly or implicitly offer any opinions concerning "causation." In other words, while some medical records state Employee should be off work or "disabled" for a time, and others suggest he needs more medical treatment and referrals to specialists, none even imply these recommendations arose from his work injury with Employer. This may result from Employee's reliance on the VA and TRICARE for payment for his medical care and his providers' belief no workers' compensation paperwork is, therefore, necessary. Employee contended his attending physician declined to offer relevant causation opinions. Nevertheless, as the record currently stands, there is no affirmative statement in any medical record in the agency file suggesting any medical recommendations are necessitated by, or in any way connected to, his work injury. Therefore, the current record demonstrates no medical disputes warranting an SIME, and Employee's request will be denied. *Bah*; *Smith*.

However, this does not mean Employee cannot still develop evidence justifying an SIME. To ensure quick, efficient, and fair delivery of benefits to Employee if he is entitled to them, at a reasonable cost to Employer, and to make this process as summary and simple as possible, Employee is advised to take the EME report to his attending physician and ask his physician to review the medical opinions set forth therein. AS 23.30.001(1); AS 23.30.005(h). Employee should ask his attending physician to prepare a report stating the physician either agrees or disagrees with the EME's opinions. It may be helpful for Employee to show this decision to his attending physician. While causation opinions are not required to be in any particular format, Employee may print off a "Physician's Report" form from the division's website and provide it to his attending physician for his use. If Employee's attending physician agrees with the EME, there will again be no medical disputes warranting an SIME. If Employee's attending physician disagrees in writing with one or more expressed EME opinion, this will form the basis for a medical dispute, and the parties can either stipulate to an SIME or bring the issue back for an additional hearing. *Richard*. If Employee's attending physician steadfastly refuses to offer causation opinions, *i.e*, "refuses to provide services," Employee may change physicians or obtain a "substitution of physicians." AS 23.30.095(a); 8 AAC 45.082(b)(1), (4)(B). Employee is cautioned to avoid making an "unlawful change of physician," as this may result in the bill for the unlawful physician's services going unpaid and the report not being considered as evidence for any purpose. *Richard*; AS 23.30.095(a); 8 AAC 45.082(c). If Employee has any questions, he may contact a Workers' Compensation Technician for additional information.

CONCLUSION OF LAW

An SIME will not be ordered at this time.

ORDER

Employee's June 10, 2016 SIME petition is denied without prejudice, meaning he is free to file a subsequent petition requesting an SIME should he obtain relevant medical evidence.

Dated in Anchorage, Alaska, on August 26, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Dave Kester, 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 Duane Gerlach, employee / claimant v. Leonard's Landing Lodge, employer; American Fire & Casualty Co., insurer / defendants; Case No. 201515667; 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 August 26, 2016.

_____/s/_____
Vera James, Office Assistant I