

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

TANA NOE,)	
)	
Employee,)	
Claimant,)	
)	INTERLOCUTORY
v.)	DECISION AND ORDER
)	
BIRCHWOOD CAMP OF ALASKA)	AWCB Case No. 201602570
UNITED METHODIST,)	
)	AWCB Decision No. 18-0025
Employer,)	
)	
and)	Filed with AWCB Anchorage, Alaska
)	on March 12, 2018
CHURCH MUTUAL INSURANCE,)	
)	
Insurer,)	
)	
Defendants.)	

Tana Noe's (Employee) January 31, 2017 claim was scheduled to be heard on February 20, 2018 in Anchorage, Alaska. The hearing date was selected on November 27, 2017. Attorney Colby Smith appeared and represented Birchwood Camp of Alaska (Employer). Attorney Robert Bredesen appeared and represented Employee. Employee appeared in person. No witnesses testified. Employer's October 26, 2017 petition to continue the merits hearing and January 18, 2018 petition for a second independent medical evaluation (SIME) were heard as preliminary matters. The hearing on Employee's claim was continued when the panel orally ordered an SIME. The record closed on February 22, 2018 to allow the parties to agree to the SIME specialty.

ISSUES

Employer contends there are disputes between Employee's treating physician and the employer's medical examiner (EME) concerning causation, medical stability, and permanent impairment. Employer seeks an SIME with either a neurosurgeon or an orthopedic surgeon.

Employee contends any disputes between the medical opinions are of little consequence. Employee contends other than a dispute over a single percentage point of Employee's permanent impairment rating, the medical opinions are essentially in unison. Employee opposes Employer's petition for an SIME. An oral order issued granting Employer's petition for an SIME.

Was the oral order granting Employer's petition for an SIME correct?

Employer objects to this case being heard on its merits at this time. Employee is prepared to proceed and would like a hearing on her claim. After Employer's petition for an SIME was granted, an oral order issued continuing the merits hearing.

Was the oral order continuing the merits hearing correct?

FINDINGS OF FACT

The following is established by a preponderance of the evidence:

- 1) On July 18, 2015, Employee was working for Employer when she lifted a heavy bag of trash, injuring her left shoulder and arm. (First Report of Occupational Injury or Illness, February 19, 2016; Employee's Hearing Evidence, 501-502).
- 2) In May 2016, Employer allegedly denied medical benefits subsequent to excessive physician changes. Employee contends she never received a copy of the May 2016 notice of controversion. Because she was not aware medical benefits had been denied, Employee continued treatment into December 2016, accumulating approximately \$11,000 in medical bills. (Employee's Hearing Brief).
- 3) There is no notice of controversion from May 2016 in the Division's file. (Record).
- 4) On January 27, 2017, Donald Schroeder, M.D., performed an employer's medical examination (EME) and stated the July 18, 2015 work injury is and continues to be the substantial cause of Employee's ongoing symptoms. Dr. Schroeder opines Employee is medically stable as of that date and assigns a six percent permanent impairment rating under the 6th edition of the *AMA Guides*. (Schroeder EME Report, January 27, 2017).
- 5) On January 31, 2017, Employee filed a claim for temporary total disability (TTD), temporary partial disability (TPD), a permanent partial impairment (PPI) rating and benefit, a compensation rate adjustment, a finding of unfair or frivolous controversion, medical and related transportation

costs, penalty, interest, reemployment benefits eligibility review, and an SIME. (Workers' Compensation Claim, January 31, 2017).

6) On February 17, 2017, Employer filed an answer to Employee's January 31, 2017 claim. The answer denied time loss benefits were owed on the basis Employee was a temporary, on-call employee who was released to return to work with a 10 pound lifting restriction on August 7, 2015. The answer states no work release was provided to Employer, who had light duty work available and would have accommodated, and therefore no TTD or TPD were owed. (Answer, February 17, 2017).

7) On April 12, 2017, Employer took Employee's deposition. Responding to the question whether she had ever previously been deposed, Employee stated she had been deposed after she was involved in a car accident in 2005 or 2006. During that car accident, she was rear-ended by another driver, for which she received medical treatment. She could not recall the provider or type of treatment at the time. (Noe Deposition, p. 6-8, April 12, 2017).

8) On August 23, 2017, Employee's treating physician, Michael Gevaert, M.D., stated Dr. Schroeder's January 27, 2017 EME report incorrectly applied the "modifiers" used in determining permanent impairment under the *Guides*. Dr. Gevaert opines the six percent impairment rating assigned by Dr. Schroeder is of questionable validity, and states:

I agree with Dr. Schroeder to the extent that the patient's present condition is related to the 07/18/2015 occupational injury. In other words, the 7/18/2015 is a substantial cause of the patient's ongoing neck pain and pain referral in the right upper extremity. Since her workers' compensation claim was controverted at a very early stage she did not benefit from a complete and comprehensive treatment plan. Dr. Schroeder admits that the patient has ongoing symptoms but feels that she has reached medical stability. I do not believe that she has reached medical stability as she has not completed a reasonable and necessary treatment plan. (Gevaert Report, August 23, 2017).

9) On October 16, 2017, Employer denied medical treatment after March 9, 2016. (Notice of Controversion, October 16, 2017).

10) On December 29, 2017, Dr. Gevaert examined Employee and stated she has reached medical stability. Dr. Gevaert opined Employee is unable to return to work as a cook, and assigned a seven percent whole person impairment rating. (Gevaert Report, December 29, 2017).

11) On January 2, 2018, Dr. Schroeder issued an addendum EME opinion. Dr. Schroeder stated:

I was provided additional medical records of Ms. Noe since the last EME that I performed on January 27, 2017. I authored an addendum on November 3, 2017 based on the additional medical records, which provided information that the claimant had been treating for her neck since 2001, when she had a motor vehicle accident from being rear ended. She had a second motor vehicle accident in April 2002, resulting in a whiplash. An MRI of her cervical spine obtained on September 28, 2002 demonstrated an annular bulge at C5-6 with a small osteophyte at C5-6.

In response to the question of whether he believes the July 18, 2015 work injury is still the substantial cause of Employee's neck and left shoulder pain and need for treatment, Dr. Schroeder states:

Based on all the information now provided, it appears that the claimant has had intermittent problems with her neck for the past 15 years. I can no longer say that the July 18, 2015 on-the-job injury is still considered the substantial cause of any ongoing discomfort, but rather is more likely related to her fifteen year history of neck pain.

In response to the question of whether he believes the July 18, 2015 work injury was a temporary aggravation of a pre-existing condition which resolved, Dr. Schroeder states:

. . .I believe that the July 18, 2015 injury was a temporary aggravation of a preexisting condition that has now resolved. The claimant has had ongoing steady improvement since the time of the injury, including complete resolution of her left arm discomfort. I believe that any sequelae from the July 18, 2015 injury has now resolved. (Schroeder EME Report, January 2, 2018).

12) On January 18, 2018, Employer filed a petition for an SIME. The petition included a proposed SIME form listing the medical disputes Employer contends merits an SIME. (Petition, January 18, 2018).

13) On February 13, 2018, Employee filed an opposition to Employer's January 18, 2018 petition for SIME and a brief in support. Employee's main contentions in opposition to an SIME are:

- The most recent EME report by Dr. Schroeder reiterates Employee was injured while working for Employer, as do previous EME reports.
- Employer is seeking an SIME in bad faith in that it has neither controverted nor paid TTD benefits since the date of injury, with the only defense asserted is Employee failed to provide a written notice of work restriction.

- In connection with the above, Employer seeks to delay this case in order in the hope an SIME physician will provide Employer with a medical basis to controvert.
- Dr. Schroeder previously verified the work heavy lifting incident leading to Employee's injury can cause a surgical C6-7 herniation. Dr. Schroeder's fourth EME report in November 2017 concluded that work might have caused the herniation, or maybe not. Dr. Schroeder has not retracted that opinion and his recent addendum EME report offers no competing cause. In any event, Employer has not filed a controversion based on Dr. Schroeder's opinion.
- Dr. Schroeder's opinion indicates Employee's neck strain resolved as of January 2018. Because Employee's claim for TTD ends in January 2017, a year before Dr. Schroeder says the strain resolved, the opinions expressed in his addendum report have no bearing on the instant claim, since it is not retroactive.
- Employee's Rolfing massage treatments occurred in 2016. Employer has defended on the basis these treatments constituted an excessive change of physicians. Dr. Schroeder's opinions have no bearing on this issue. (Opposition, February 13, 2018).

14) On February 15, 2018, Employer denied PPI in excess of six percent. (Notice of Controversion, February 15, 2018).

15) The record was left open until February 22, 2018 at the conclusion of the hearing for the parties to email the hearing chair whether they can agree on the physician specialty to perform the SIME. No email or filing was made concerning the SIME specialty as of the close of the hearing record. (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. . . .

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 23.30.095. Medical treatments, services, and examinations.

....

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

The following general criteria are typically considered when ordering an SIME, though the statute does not expressly so require:

- 1) Is there a medical dispute between the employee’s physician and the employer’s medical examiner?
- 2) Is the dispute significant?
- 3) Will an SIME physician’s opinion assist the Board in resolving the disputes?

DiGangi v. Northwest Airlines, AWCBC Decision No. 10-0028 at 13 (February 9, 2010). AS 23.30.095(k) is procedural and not substantive for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCBC Decision No. 97-0165 at 3 (July 23, 1997). AS 23.30.135 provides the Board with wide discretion under AS 23.30.095(k) to consider any evidence available when the board decides whether to order an SIME to assist in investigating and deciding medical issues in contested claims. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the Board’s authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). *Bah* stated, before ordering an SIME, it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Id.* The law gives discretion to the board to order the specialty to conduct an SIME, and to empanel one or several doctors for an SIME if necessary to ensure “the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost” to Employer. *Mazurenko v. Chugach Alutiiq JV*, AWCBC Decision No. 11-0064 (May 17, 2011).

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 23.30.155. Payment of compensation.

. . . .

(h) The board may upon its own initiative at any time in a case . . . where right to compensation is controverted . . . make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

8 AAC 45.092. Selection of an independent medical examiner.

. . . .

(g) If there exists a medical dispute under 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; . . .

(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

(A) the parties stipulate, in accordance with (1) of this subsection to the contrary and the board determines the evaluation is necessary; or

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

AS 23.30.395. Definitions.

. . . .

(28) 'medical stability' means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. . . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k). . . .

ANALYSIS

1) Was the oral order granting Employer's petition for an SIME correct?

A party must file its petition for an SIME within 60 days after receiving reports evidencing a medical dispute. 8 AAC 45.092. Employer's January 18, 2018 petition was filed 16 days after Employer received the January 2, 2018 report from Dr. Schroeder which Employer contends conflicts with the opinions of Dr. Gevaert. Employer's petition for an SIME was timely. 8 AAC 45.092(g)(2).

Alaska Statute 23.30.095(k) conditions the right to an SIME upon a significant medical dispute between the Employee's and Employer's physician. *Bah.* The Act also grants authority to make investigations and order medical examinations to protect the rights of the parties. AS 23.30.155(h). An SIME is not intended to give parties an additional medical opinion when they simply do not agree with a medical expert's opinion. *Bah.* Rather, an SIME is the Board's expert, used where such an opinion would assist in resolving disputed issues. *Id.*; AS 23.30.001; AS 23.30.095; AS 23.30.135.

Dr. Schroeder's January 27, 2017 EME report stated Employee was medically stable as of that date and assigned a six percent permanent impairment rating. In contrast, Dr. Gevaert's August 23, 2017 report stated Employee was not yet medically stable, as she had not yet completed a treatment plan. Not until his December 29, 2017 report did Dr. Gevaert state Employee has reached medical stability, and is unable to return to work as a cook. Dr. Gevaert assigned a seven percent permanent impairment rating at that time.

In addition to the requirement the medical dispute warranting an SIME be significant, the SIME must assist the Board in resolving the dispute. *Bah.* Although there is only a one percent difference in the degree of Employee's permanent impairment assigned by Drs. Schroeder and Gevaert, there is a difference of ten months and 11 days in the medical stability dates. This difference is a substantial amount of time which could ultimately affect the amount of time loss benefits Employee is owed. *Rogers & Babler.* Additionally, relying on newly-provided medical evidence, Dr. Schroeder's January 2, 2018 addendum EME notes Employee has had intermittent problems with her neck for the last 15 years, including a history of car accidents which involved

possibly serious whiplash injury to the neck. Dr. Schroeder states he can no longer say the July 18, 2015 work injury is still the substantial cause of Employee's ongoing condition or need for treatment, but instead is more likely related to a 15 year history of neck conditions. Dr. Schroeder's January 2, 2018 addendum EME therefore significantly clouds analysis as to the origin and possible causes of Employee's disability and need for treatment. An SIME physician's opinion would assist in clarifying the issues of causation and medical stability, over which there is currently significant dispute.

This decision does not decide whether Employee excessively changed physicians. Regardless of whether certain records are subsequently excluded from consideration, the record contains disputed medical opinions on the issues of causation, pre-existing conditions, course of treatment, degree of impairment and medical stability. The body parts likely to be addressed at a hearing on the merits include Employee's neck, back, and musculoskeletal system. Likely defenses to Employee's claim will raise issues with how those systems interact, age, experience trauma, and recover from damage. Therefore, an SIME with an orthopedic surgeon will be ordered. *Id.*; *Rogers & Babler*. The parties will be allowed to stipulate to an alternative SIME specialty, if they so agree.

2) Was the oral order continuing the merits hearing correct?

Continuances and cancellations of hearings are not favored, and are not routinely granted, except for good cause. 8 AAC 45.074(b)(1). Good cause exists where an SIME is required. *Id.* This decision finds the oral order granting Employer's January 18, 2018 petition for an SIME was correct. The oral order granting Employer's October 26, 2017 petition to continue the merits hearing on the basis an SIME is required was correct. *Id.*

CONCLUSIONS OF LAW

- 1) The oral order granting Employer's petition for an SIME was correct.
- 2) The oral order continuing the merits hearing was correct.

ORDER

- 1) Employer's October 26, 2017 petition to continue the merits hearing is granted because an SIME is necessary.
- 2) Employer's January 18, 2018 petition for a second independent medical evaluation is granted.
- 3) An SIME is ordered.
- 2) The SIME shall be performed by an orthopedic surgeon selected from the approved SIME list, or with such specialist as the parties stipulate.
- 3) The SIME shall address the following medical disputes: causation, medical stability, degree of impairment, functional capacity, and the amount and efficacy of the continuance of or necessity for treatment.
- 4) The parties are directed to attend a prehearing conference if they need further assistance in arranging for or completing the SIME process.

Dated in Anchorage, Alaska on March 12, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Matthew Slodowy, Designated Chair

/s/

Dave Kester, Member

/s/

Rick Traini, 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 TANA NOE, employee / claimant; v. BIRCHWOOD CAMP OF ALASKA UNITED METHODIST, employer; CHURCH MUTUAL INSURANCE, insurer / defendants; Case No. 201602570; 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 12, 2018.

/s/

Elizabeth Pleitez, Office Assistant