ALASKA WORKERS' COMPENSATION BOARD

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

RUBY M. JONES, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201212935
COLASKA, INC., Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	AWCB Decision No. 18-0031
	)	Filed with AWCB Fairbanks, Alaska on March 28, 2018

Colaska's September 11, 2017 petition seeking a second independent medical evaluation (SIME) was heard in Fairbanks, Alaska on January 18, 2018. This hearing date was selected on November 21, 2017. Ruby Jones (Employee) did not appear and the hearing proceeded in her absence. Attorney Martha Tansik appeared and represented Colaska, Inc. and Liberty Insurance Corporation (Employer). There were no witnesses. The record closed at the hearing's conclusion on January 18, 2018.

ISSUES

The day before the hearing, Employee telephoned the Fairbanks workers' compensation office and stated she was leaving for sea duty as a merchant marine the next day and would not be attending her hearing. Employee did not appear for the hearing and Employer contended the hearing should proceed as scheduled. The panel decided to proceed in Employee's absence.

1) Was the panel's decision to proceed in Employee's absence correct?

Employer contends disputes exist between the medical opinions of Employee's treating providers and its medical evaluator such that an SIME should be ordered.

Employee initially agreed to an SIME during a prehearing conference, but refused to sign the SIME form during a subsequent prehearing conference, citing her being subject to last minute call-outs for sea duty as a merchant marine. On the same day as the latter prehearing conference, Employee signed the SIME form, but inserted temporal limitations on when the evaluation could take place. At this point, Employee's position on an SIME is unknown, but it is be presumed she opposes an SIME.

2) Should an SIME be ordered?

Employer contends the SIME should be performed by an orthopedist in Hawaii since other lower extremity specialists on the SIME list are known to have biases for or against one party or the other.

Employee's position is unknown.

3) Should the SIME be performed by an orthopedist selected in accordance with the standard procedure set forth at 8 AAC 45.092(e).

Employer contends, "Employee demonstrates difficulty in timely participating in her claim, complying with discovery orders, or committing to participate at all. She provides disingenuous information in order to avoid having to commit to participating in moving her claim forward." Consequently, Employer contends an order compelling Employee to attend an SIME would assist in case resolution.

Employee's position is unknown, but it is presumed she opposes Employer's request for an order compelling her to attend an SIME.

4) Should Employee be compelled to attend the SIME?

Employer contends SIME procedure, affording a party the opportunity to review and supplement the SIME medical records prior to them being sent to the SIME physician, should be modified in this case since it is unlikely Employee will cooperate by supplementing and verifying the medical records, and thus further delay case progress.

Employee's position is unknown, but it is presumed she opposes Employer's request for modification of the SIME medical record preparation procedure.

5) Should the SIME medical record preparation procedure be modified?

Employer contends claim dismissal sanctions should be applied in the event Employee willfully fails to attend an SIME since sanctions other than dismissal would be an ineffective deterrent to Employee's dilatory behavior.

Employee's position is unknown, but it is presumed she opposes Employer's request for the application of claim dismissal sanctions.

6) Is Employer's request Employee's claims be dismissed as a sanction in the event she fails to attend the SIME ripe for adjudication?

FINDINGS OF FACT

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

1) From July 19, 2012 until August 14, 2012, Employee worked for Employer on a project at the Deadhorse Airport. Employer required employees to compete daily timecards, which included answering a question whether or not they had been injured that day. Employee's timecards indicate she was not injured during the period she worked for Employer. (Tuttle letter, September 2, 2012).

2) On August 20, 2012, Employee sought treatment for left knee pain. She denied any specific injury but mentioned difficulty getting into a F350 truck at work. Left knee x-rays showed no fracture or deformities. Employee's provider released her from work and filed "[a]ppropriate Workmen's Comp paperwork." (Holbrook report, August 20, 2012).

3) On August 21, 2012, Employee reported suffering bilateral knee injuries from climbing in and out of trucks while working for Employer as a Gate Guard. (Report of Occupational Injury of Illness, August 21, 2012).

4) On August 24, 2012, Employee's left knee magnetic resonance imaging study (MRI) was interpreted as normal and Employee's provider assessed bilateral knee strain and left-sided meralgia paresthetica. (Holbrook report, August 24, 2012).

5) On September 27, 2012, Employee began physical therapy and reported left knee hypersensitivity to touch. She stated the covers in her bed were painful. (Chugach Physical Therapy report, September 27, 2012).

6) On September 28, 2012, Employee's provider referred her to an orthopedist. (Holbrook report, September 28, 2012).

7) On October 3, 2012, Raymond Ferrell, PA-C, evaluated Employee for left knee pain. Employee stated she twisted her left knee and lower leg while exiting a truck at work. After reviewing Employee's August 20, 2012 left knee x-rays, PA-C Ferrell assessed, "Bilateral knee pain out of proportion to radiographic findings." PA-C Ferrell referred Employee back to physical therapy. (Ferrell report, October 3, 2012).

8) On November 27, 2012, PA-C Ferrell released Employee back to work with no restrictions. (Ferrell responses, November 27, 2012).

9) On January 2, 3013, Mark Flanum, M.D., evaluated Employee for left knee pain at the request of PA-C Ferrell. Employee reported injuring her knee while getting into an F350 truck at work. Dr. Flanum reviewed Employee's imaging studies, which he interpreted as showing "no significant pathology." Dr. Flanum concluded, Employee has "nothing structurally wrong with her knee," and referred her to back to physical therapy. (Flanum report January 2, 2013).

10) On January 25, 2013, Michael Frasier, M.D., performed an employer's medical evaluation (EME). Employee reported first experiencing left knee pain while getting into truck at work. Dr. Frasier assessed left distal lateral thigh paresthesias with a non-dermatonal distribution, unrelated to the lumbar spine, and bilateral anterior knee pain without radiographic evidence of degenerative changes of the patellofemoral joint or MRI findings of significant intraarticular or extraarticular process. Because Employee did not sustain any significant knee trauma at work, and because both Employee's knees were eventually affected after she reported an injury to only her left knee, Dr. Frasier did not think work was the substantial cause of Employee's bilateral

knee strain. Instead, Dr. Frasier opined anterior knee pain is very common in the general population and may be secondary to mild patellofemoral maltracking, patellar chondromalacia or overall muscular deconditioning. Dr. Frasier did not think Employee was disabled from work or required any further medical care. (Frasier report, January 25, 2013).

11) On February 4, 2013, Dr. Flanum released Employee from his care. (Flanum report, February 4, 2013).

12) The medical record goes silent until early 2015. (Record; observations).

13) On November 14, 2014, Employee claimed an unspecified period of TTD and medical and related transportation costs. (Claim November 12, 2014).

14) On December 1, 2014, Employer denied benefits sought in Employee's November 12, 2014 claim based on Dr. Frasier's January 25, 2013 report. (Employer's Answer, December 1, 2014; Controversion, December 1, 2014).

15) On January 2, 2015, Employee resumed treament with David Mulholland, D.C., for left knee pain and numbness. She reported being injured at work while climbing in and out of trucks, and complained her left knee pain was aggravated by clothes touching her skin. (Muhholland reports, January 2, 2015).

16) On January 27, 2015, Wade Faerber, M.D. evaluated Employee at Dr. Mulholland's request. A left knee injection was administered and Employee was prescribed Lyrica for left knee neuropathic pain. (Faerber report, January 27, 2015; Kile prescription, January 27, 2015).

17) On March 17, 2015, Dr. Mulholland opined Employee's work was the substantial cause of Employee's need for bilateral knee medical treatment. He thought Employee might require future surgical intervention and predicted Employee would incur a permanent impairment. Dr. Mulholland opined Employee was currently "unable to walk enough for work." On the same date, Kris Kile, ANP, also opined Employee's work was the substantial cause of her need for medical treatment but he thought her symptoms could be managed conservatively with physical therapy and medication. (Mulholland questionnaire responses, March 17, 2015; Kline questionnaire responses, March 17, 2015).

18) On July 2, 2015, W. Laurence Wickler, M.D., evaluated Employee at Dr. Mulholland's request. X-rays obtained that day showed no loss of joint space or demineralized bone. Dr. Wickler ordered an MRI, which did not show any significant pathology. Dr. Wickler thought Employee suffered from "CRPS/RSD" (complex regional pain syndrome/reflex sympathetic

dystrophy). He prescribed physical therapy and changed Employee's medication from Lyrica to Neurotin. (Wickler chart notes, July 2, 2015 to December 9, 2015).

19) On July 18, 2015, Dr. Frasier re-evaluated Employee on Employer's behalf and assessed bilateral knee pain, worse on the left side, without radiographic evidence of significant degenerative changes or intraarticular abnormalities. He did not think any additional medical treatment was necessary but did recommend the use of over-the-counter anti-inflammatory medication. Dr. Frasier saw no objective basis for limiting Employee's work activities. (Frasier report, July 18, 2015).

20) On July 25, 2015, Dr. Frasier opined any knee treatment after his January 25, 2013 evaluation was not reasonable or necessary. (Frasier letter, July 25, 2015).

21) On February 4, 2016, Employee reported a dramatic increase in her nerve pain without a new injury. Dr. Wickler increased Employee's Neurontin dosage. (Wickler chart notes, February 4, 2016).

22) On October 5, 2016, Dr. Wickler cleared Employee to work as a merchant mariner. (Wickler chart notes, October 5, 2016).

23) Employee now contends she is subject to last minute call-outs to sea duty as a merchant marine, and as a result, she is either reluctant to cooperate in the scheduling of litigation events, or she summarily refuses to do so. (Prehearing Conference Summaries, July 11, 2017; July 24, 2017; November 21, 2017).

24) At a July 11, 2017 prehearing conference, Employee stated she was anxious "to get this over with," referring to the administrative adjudications process, (Prehearing Conference Summary, July 11, 2017).

25) On September 11, 2017, Employer completed an SIME form, setting forth disputed medical opinions from Dr. Mulholland's and nurse practitioner Kile's March 17, 2015 reports, and Dr. Frasier's January 25, 2013 report, on issues, including compensability, treatment, degree of impairment functional capacity and medical stability. (SIME form, September 11, 2017).

26) In this case, administrative procedure has been laborious, and progress toward case resolution slow. (Experience). The parties litigated issues concerning releases for nearly two years. (Employee's Petitions, October 21, 2015; December 1, 2015; March 24, 2017; May 5, 2017; Prehearing Conference Summaries, January 27, 2016; March 17, 2017; April 17, 2017; June 6, 2017; July 11, 2017; July 24, 2017). At times, Employee has agreed to sign releases

then, subsequently refused to do so. (Prehearing Conference Summaries, January 27, 2016; March 17, 2017; April 17, 2017). At other times, Employee has been ordered to sign releases then, subsequently refused to do so. (Prehearing Conference Summaries, June 5, 2017; July 11, 2017). Employee's refusal to sign releases resulted in Employer filing petitions to compel and dismiss, and in a hearing continuance on the merits of Employee's claim. (Employer's Petitions, March 29, 2017; June 27, 2017; Prehearing Conference Summary, July 24, 2017). Employee agreed to participate in an SIME then, subsequently refused to sign the SIME form or cooperate in scheduling the evaluation. (Prehearing Conference Summaries, March 17, 2017; November 21, 2017). Employee's refusal to cooperate in the SIME process resulted in Employer filing its instant petition seeking an SIME and in another hearing continuance on the merits of her claim. (Employer's Petition, September 11, 2017; Prehearing Conference Summary, November 21, 2017).

27) During a November 21, 2017 prehearing conference, the designee consulted a workers' compensation technician in an attempt to accommodate Employee's concerns regarding SIME scheduling and her work as a merchant mariner. When the designee informed Employee an expedited SIME appointment could be scheduled as soon as early January 2018, Employee contended she was being called out to sea duty in early January 2018 and hung-up her telephone while the parties and designee were still discussing SIME scheduling. While issuing his ruling, the designee noted:

> Experience has now shown, Employee's stubborn reluctance to commit to event scheduling has not only [a]ffected SIME progress, but has also hindered the scheduling of hearings and even prehearing conferences in this case. The scheduled hearing has already been once continued. Although Employee's desire not to forfeit potential, future income is understandable, administrative notice is taken that workers' compensation claimants routinely do choose to miss work in order to attend appointments and move their cases forward in their pursuit of benefits. This choice, of course, is always the claimants, but given the procedural history of *this* case, it is patently unfair for Employee to place Employer's, and the board's, investigation on an indefinite hold while Employee awaits her next *potential* callout to sea. While, it is possible Employee may be called out to sea between the scheduling of an SIME and its completion, based on Employee's descriptions of her work schedule, it is equally likely that an SIME could be scheduled *and* completed *before* her next callout, as well. Relatedly and significantly, it was not until the designee, in an effort to accommodate Employee's scheduling concerns, reported an SIME could likely occur in *early* January that Employee conveniently remembered she already had a January

> callout, which she had failed to mention during the lengthy discussions of her availability leading up to that point. Employee's assertion in this regard is seen as entirely self-serving and disingenuous under the circumstances. Moreover, Employee's premature hang-up during the conference is further reflective of her lack of commitment to case resolution. (Citations omitted; emphasis in original).

That same day, Employee also signed Employer's September 11, 2017 SIME form, indicating she could attend an SIME appointment during the first week of January 2018. (Prehearing Conference Summary, November 21, 2017; SIME form, November 21, 2017).

28) On December 27, 2017, Employee was properly served with notice of the January 18, 2018 hearing. (Hearing Notice, December 27, 2017).

29) The day before the hearing, Employee telephoned the Fairbanks workers' compensation office and stated she was leaving for sea duty as a merchant marine the next day and would not be attending her hearing. (Incident Claims Expense and Reporting System (ICERS) event entry, January 18, 2017).

PRINCIPLES OF LAW

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, 533-34 (Alaska 1987).

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

> **AS 23.30.095. Medical treatments, services, and examinations**.
> . . . .
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> (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 cost of an examination and medical report shall be paid for by the employer. . . .
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> **AS 23.30.110. Procedure on Claims.** (a) . . . the board may hear and determine all questions in respect to the claim.
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> (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. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.
> . . . .

The law has long favored giving a party his "day in court," *e.g. Sandstrom & Sons, Inc. v. State of Alaska,* 843 P2d 645 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits, AS 23.30.001(2). Dismissal should only be imposed in "extreme circumstances," and even then, only if a party's failure to comply with discovery has been willful and when lesser sanctions are insufficient to protect the rights of the adverse party. *Sandstrom,* 843 P2d 645.

Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(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."

The Alaska Workers' Compensation Appeals Commission (Commission) 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) and §110(g). With regard to §095(k), the Commission referred to its decision in *Smith v. Anchorage School District,* AWCAC Decision No. 050 (January 25, 2007), at 8, in which it confirmed:

> [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 further stated in *dicta*, 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 will assist the board in resolving the dispute. *Bah* at 4.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and the SIME is not intended to give employees an additional medical opinion at employers' expense when employees disagree with their own physician's opinion. *Id.* 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?

Deal v. Municipality of Anchorage, AWCB Decision No. 97-0165 (July 23, 1997). Accordingly, an SIME pursuant to §095(k) may be ordered when there is a medical dispute, or under §110(g) when there is a significant gap in the medical or scientific evidence. Further, the Commission held an SIME may be ordered when, because of a lack of understanding of the medical evidence, the parties' rights cannot be ascertained. It stated:

> 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 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.

Bah at 8.

The decision to order an SIME rests in the discretion of the board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Decision No. 06-0301 (October 25, 2007) at 6. Although a party has a right to request an SIME, a party does not have a

right to an SIME if the board decides an SIME is not necessary for the board's purposes. *Id*. at 8. An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the board to assist it by providing disinterested information. *Id*. at 15. Moreover, 8 AAC 45.092 does not contain a provision for an employee to protest the inconvenience of attending an SIME. *Id*.

Olafson also explored the issue of SIME bias and found an SIME physician is "obligated to provide, to the best of his or her ability and knowledge, a thorough, professional, informed and impartial evaluation of the examinee and a similarly thorough, professional, impartial, informed and timely report to the board. *Id.* at 19 (citations omitted). An SIME physician owes a duty to disclose potential conflicts in writing to the board, and regulations require the board designee to consider a physician's impartiality prior to appointment. *Id*. at 19, 21 (citing 8 AAC 45.092). The SIME physician is required to serve the board's interests and be impartial. Therefore, once appointed, during the performance of their quasi-official duties, SIME physicians share the same presumption of impartiality applied to other administrative personnel. *Id*. at 21. However, parties retain the right to challenge the weight accorded the physician's opinion, and seek to undermine it as the product of bias, as they may any other evidence, at a hearing on the claim's merits. *Id*. at 23, n.94; 26.

> **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. . . .

The board has broad statutory authority in conducting its investigations and hearings.

> **AS 23.30.155. Payment of compensation.**
> . . . .
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> (h) The board may, upon its own initiative and at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is

controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, 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 45.070. Hearings.

. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing.

. . . .

8 AAC 45.090. Additional examination.

(a) The board will, in its discretion, direct an employee . . . to be examined by an independent medical examiner . . . and direct the independent medical examiner to provide the board and the parties with a complete report of findings, opinions, and recommendations . . . .

(b) . . . the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), of this section. . . .

8 AAC 45.092. Selection of an independent medical examiner.

. . . .

(e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095(k), the board or its designee may select a physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as a second independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:

(1) the nature and extent of the employee's injuries;

(2) the physician's specialty and qualifications;

(3) whether the physician or an associate has previously examined or treated the employee;

(4) the physician's experience in treating injured workers in this state or another state;

(5) the physician's impartiality; and

(6) the proximity of the physician to the employee's geographic location.

. . . .

(h) If the board requires an evaluation under AS 23.30.095(k), the board may direct

(1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder;

(2) the party making the copy to serve the binder of medical records upon the opposing party together with an affidavit verifying that the binder contains copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binder to review the copies of the medical records to determine if the binder contains copies of all the employee's medical records in that party's possession; the party served with the binder must file the binder with the board not later than 10 days after receipt and, if the binder is

(A) complete, the party served with the binder must file the binder upon the board together with an affidavit verifying that the binder contains copies of all the employee's medical records in the party's possession; or

(B) incomplete, the party served with the binder must file the binder upon the board together with a supplemental binder with copies of the medical records in that party's possession that were missing from the binder and an affidavit verifying that the binders contain copies of all medical records in the party's possession; the copies of the medical records in the supplemental binder must be placed in chronological order by date of treatment, with the initial report on top, and numbered consecutively; the party must also serve the party who prepared the first binder with a copy of the supplemental binder together with an affidavit verifying that the binder is identical to the supplemental binder filed with the board;

> (4) the party, who receives additional medical records after the binder has been prepared and filed with the board, to make two copies of the additional medical records, put the copies in two separate binders in chronological order by date of treatment, with the initial report on top, and number the copies consecutively; the party must file one binder with the board not later than seven days after receiving the medical records; the party must serve the other additional binder on the opposing party, together with an affidavit stating the binder is identical to the binder filed with the board, not later than seven days after receiving the medical records;
> . . . .
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> **8 AAC 45.195. Waiver of procedures.**
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> 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.

"Manifest injustice" is defined as a direct, obvious, and observable error in a trial court. Black's Law Dictionary 1048 (9th ed. 2009).

ANALYSIS

1) Was the panel's decision to proceed in Employee's absence correct?

Employee received proper hearing notice. 8 AAC 45.070(f). The day before hearing, Employee gave notice she was leaving for sea duty as a merchant marine the next day and would not be attending her hearing. Employee did not appear for the hearing and Employer contended the hearing should proceed as scheduled. The panel decided to proceed in Employee's absence.

The regulations instruct, in order of priority, how to proceed when a party is not present for a hearing. 8 AAC 45.070(f). The preferred course-of-action is to proceed in the party's absence and decide the issues presented. 8 AAC 45.070(f)(1). Since this was how the panel proceeded, its decision was correct. *Id*.

2) Should an SIME be ordered?

Employer seeks an SIME, to which Employee initially agreed during a prehearing conference, but then refused to sign the SIME form because she was subject to last minute call-outs for sea duty as a merchant marine. Employer contends an SIME should be ordered. The statute, AS 23.30.095(k), permits an SIME when there is a medical dispute between Employee's physician and Employer's physician, or under AS 23.30.110(g), when there is a significant gap in the medical evidence. *Bah*.

Employer's September 11, 2017, SIME form sets forth disputed medical opinions between Employee's providers, Dr. Mulholland and ANP Kile, and Employer's medical evaluator, Dr. Frasier. The disputed issues include compensability, treatment, degree of impairment, functional capacity and medical stability. These disputes are significant and central to Employee's entitlement to benefits, and since an SIME will assist in ascertaining the parties' rights, an evaluation is warranted under § 095(k). *Smith*; *Deal*. Therefore, an SIME should be ordered. *Bah*.

3) Should the SIME be performed by an orthopedist selected in accordance with the standard procedure set forth at 8 AAC 45.092(e)?

Employer contends the SIME should be performed by an orthopedist in Hawaii since other lower extremity specialists on the SIME list are known to have biases for or against one party or the other. However, for reasons explained in considerable detail in *Olafson*, SIME physicians are presumed to be impartial and Employer presented no evidence to support its claim of partiality by other orthopedists on the SIME list. Employee's position is unknown, and while she may or may not oppose an Employer-paid trip to Hawaii, absent her stipulation, there is no basis for ordering the SIME to be performed by a physician in Hawaii. The SIME will be performed by an orthopedist selected in accordance with the standard procedure set forth at 8 AAC 45.092(e), which could result in an SIME physician from Hawaii being selected.

4) Should Employee be compelled to attend the SIME?

Employer contends an order compelling Employee to attend an SIME would assist in case resolution. Given Employee's contentions regarding being subject to last minute call-outs for sea duty as a merchant marine, it is presumed she opposes an order compelling her to attend the

SIME. The board may hear and determine all questions in respect to a workers' compensation claim and it is afforded broad statutory authority in undertaking its investigations. AS 23.30.110(a); AS 23.30.135(a). Action may also be undertaken to protect a party's rights. AS 23.30.155(h).

In this case, administrative procedure has been laborious and progress toward case resolution slow, contrary to the Act's intent. AS 23.30.001(1); *Rogers & Babler*. The parties litigated issues concerning releases for nearly two years. Employee has agreed to sign releases then, subsequently refused to do so. Employee has been ordered to sign releases then, subsequently refused to do so. Employee's refusal to sign releases resulted in Employer filing petitions to compel and dismiss, and a hearing continuance on the merits of Employee's claim. Employee agreed to participate in an SIME then, subsequently refused to sign the SIME form or cooperate in scheduling the evaluation. Employee's refusal to cooperate in the SIME process resulted in Employer filing its instant petition seeking an SIME and second hearing continuance on the merits of Employee's claim. Employee's dilatory behavior is discussed at length in the November 21, 2017, prehearing conference summary, where her premature hang-up while the parties were discussing SIME scheduling was also found to be "further reflective of her lack of commitment to case resolution." Employee is not granted a legal right to protest the inconvenience of attending an SIME. *Olafson*. Given all these considerations, and Employee's stubborn reluctance to commit to even routine event scheduling, an order compelling Employee's attendance at the SIME will facilitate case resolution, and protect both Employer's and Employee's rights. *Id*.; AS 23.30.110(a); AS 23.30.135(a); AS 23.30.155(h).

5) Should the SIME medical record preparation procedure be modified?

Employer contends SIME procedure, affording a party the opportunity to review and supplement the SIME medical records prior to them being sent to the SIME physician, should be modified in this case since it is unlikely Employee will supplement and verify the SIME medical records, thus resulting in additional case delays. For the reasons discussed above, Employer's point is well-taken.

The process affording parties an opportunity to review and supplement SIME medical records is purely discretionary. 8 AAC 45.092(h). Additionally, regulatory procedure may be modified to avoid manifest injustice. 8 AAC 45.195. "Manifest injustice" is defined as a direct, obvious, and observable error in a trial court. Given the record is now replete with Employee's dilatory behavior, which demonstrates future such behavior on her behalf is a highly likely, Employer's proposal would provide some assurance of it not being subject to continuing litigation abuses at Employee's hands. AS 23.30.155(h). To not accept Employer's modest proposal at this point would be an obvious error in failing to protect its due process and property rights. AS 23.30.001(1), (4). Therefore, SIME procedure will be modified. Employer will be ordered to make the initial medical record copies and serve them with an affidavit verifying all records relative to Employee in Employer's possession have been served. 8 AAC 45.092(h)(1), (2).

Employee will be afforded an opportunity to review and supplement SIME medical records in accordance with 8 AAC 45.092(h)(3). However, if Employee does not comply with § 092(h)(3)(A) or (B) within the prescribed ten days, Employer may then file the SIME medical records with the board in accordance with § 092(h)(4) so that the SIME may be scheduled without further delay. AS 23.30.001; 8 AAC 45.195.

6) Is Employer's request Employee's claims be dismissed as a sanction in the event she fails to attend the SIME ripe for adjudication?

Employer requests a claim dismissal sanction in the event Employee willfully fails to attend the SIME. As the SIME has yet to be scheduled, prior to ordering Employee's claim dismissed, a determination must be made her failure to attend was willful. This issue is clearly not ripe for adjudication and Employer's request will be denied. Employee will, however, be reminded her claim may be dismissed for willfully failing to attend the SIME. *Sandstrom*.

CONCLUSIONS OF LAW

1) The panel's decision to proceed in Employee's absence was correct.
2) An SIME should be ordered.
3) The SIME should be performed by an orthopedist selected in accordance with the standard procedure set forth at 8 AAC 45.092(e).

4) Employee should be compelled to attend the SIME.
5) SIME medical record preparation procedures should be modified.
6) Employer's request Employee's claim be dismissed as a sanction in the event she fails to attend the SIME not ripe for adjudication.

ORDERS

1) Employer's September 11, 2017 petition seeking an SIME is granted.
2) The SIME shall be performed by an orthopedist appointed in accordance with the standard procedure set forth at 8 AAC 45.092(e).
3) Employee shall attend the SIME.
4) The SIME medical record shall be prepared in accordance with this decision.
5) Employee is reminded, willful failure to attend the SIME may result in dismissal of her claim.

Dated in Fairbanks, Alaska on March 28, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, 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 RUBY M. JONES, employee / claimant; v. COLASKA, INC., employer; LIBERTY INSURANCE CORPORATION, insurer / defendants; Case No. 201212935; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March 28, 2018.

/s/
Ronald C. Heselton, Office Assistant II