ALASKA WORKERS' COMPENSATION BOARD

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

RAFAEL CAMPOS ROMERO, Employee, Claimant, v. CCI INDUSTRIAL SERVICES, LLC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201708474 AWCB Decision No. 18-0086 Filed with AWCB Anchorage, Alaska on August 27, 2018.

Rafael Compos Romero's April 30, 2018 petition for a second independent medical evaluation (SIME) was heard on August 1, 2018 in Anchorage, Alaska. This hearing date was selected on June 28, 2018. Mr. Rafael Campos Romero (Employee) appeared, represented himself, and testified. Attorney Jeffrey Holloway appeared and represented CCI Industrial Services, LLC and American Zurich Insurance Company (Employer). The record closed at the hearing's conclusion on August 1, 2018.

ISSUE

Employee contends there is a dispute between his doctors and Employer's doctor regarding medical stability and an SIME should be ordered. Employer contends there is no significant dispute and an SIME is not warranted.

Should an SIME be ordered?

FINDINGS OF FACT

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

1. Employee worked for Employer as an asbestos abatement technician. On June 17, 2017 Employee stepped over a pipe onto ice, and his left leg plunged through the ice twisting his knee. (Report of Injury, June 22, 2017; Employer's Medical Evaluation (EME) Report, November 30, 2017).
2. Employee lives in Mexico with his wife and three children. English is Employee's second language. (Orthopedic Physicians Alaska (OPA), Impairment Rating, October 23, 2017; Observation).
3. On June 19, 2017, Employee was seen by PA-C Jamie Ash at Beacon Occupational Health. His left knee was still swollen and he had discomfort with movement. (Beacon Occupational Health, Chart Note, June 19, 2017).
4. A June 20, 2017 MRI showed two tears of the medial meniscus. (University Imaging Center, MRI Report, June 20, 2017).
5. On June 27, 2017, Christopher Manion, M.D., performed an arthroscopic repair of the medial meniscus and a partial lateral meniscectomy. (Alpine Surgery Center, Operative Report, June 27, 2017).
6. Employee returned to Dr. Manion on October 4, 2017. Dr. Manion released Employee to return to work on October 6, 2017, but Employee had been terminated. No further treatment was recommended, but Employee was to follow up as needed. (OPA, Chart Note, October 4, 2017).
7. October 19, 2017 while in Mexico, Employee went to orthopedic surgeon, Dr. Rosales Nogueira because of persistent pain. Dr. Rosales Nogueira recommended viscosupplementation with collagen-polyvinylpyrrolidone. (Dr. Rosales Nogueira, Letter, October 19, 2017 (incorrectly dated December 19, 2017)).
8. On October 23, 2017, Employee was seen by Sean Taylor, M.D. at OPA for a permanent partial impairment rating. Dr. Taylor determined Employee had suffered a 5 percent impairment as a result of the June 14, 2017 injury. (OPA, Impairment Rating, October 23, 2017).

9. On October 23, 2017, Employee filed a claim seeking temporary total disability (TTD) and permanent partial impairment (PPI) benefits, medical and transportation costs, and a penalty for late paid compensation. (Claim, October 23, 3017).
10. On November 30, 2017, Employee was seen by Charles Craven, M.D., for an employer's medical evaluation (EME). Dr. Craven's report includes an addendum dated December 17, 2017, in which he addressed a December 1, 2017 MRI that he had requested when examining Employee. Dr. Craven concluded that the substantial cause of Employee's disability and need for medical treatment was the June 17, 2017 injury. Dr. Craven stated Employee was not medically stable, and, while he could be released to light or sedentary work, he was not capable of returning to his job at the time of injury. Based on the MRI, Dr. Craven opined the viscosupplementation recommended by Dr. Rosales Nogueira was not appropriate. Instead, Dr. Craven stated Employee needed repeat arthroscopic surgery. (Dr. Craven, EME Report, November 30, 2017).
11. On December 11, 2017, Employee returned to Dr. Rosales Noguiera. Based on the December 1, 2017 MRI, Dr. Rosales Noguiera also stated the first treatment option was surgery. (Dr. Rosales Noguiera, Chart Note, December 11, 2017).
12. After receiving Dr. Craven's report saying he needed surgery, Employee contacted Employer's adjuster. Employer's adjuster suggested Employee arrange for the surgery in Mexico, but Employee wanted the surgery to be done in the U.S. Employee contacted surgeons in the Los Angeles area, but was unable to find one that would accept an Alaska workers' compensation case. He again spoke to the adjuster who suggested he try to find a surgeon in the Portland or Seattle areas. (Employee).
13. On April 2, 2018, Dr. Craven issued a supplemental report in response to a request from Employer. Employer's March 28, 2018 request is not in the record, but Dr. Craven stated: "In your March 28, 2018 request, you note that the examinee has not undergone surgery nor sought medical treatment. 'He states he has been looking for a physician.'" Dr. Craven concluded that based on the legal definition of medical stability, in the absence of the surgery he had recommended in his November report, Employee would have reached medical stability as of November 30, 2018. Dr. Craven did not indicate Employee's medical condition had changed. (Dr. Craven, Supplemental EME Report, April 2, 2018).

14. When asked at hearing what information had been sent to Dr. Craven with Employer's March 28, 2018 request for a supplemental opinion, Employer's attorney questioned why the information was relevant and stated the information had not been filed with the Board. He was not sure because he had not spoken to the adjuster and the adjuster had not been called as a witness. (Employer Hearing Representations).
15. On April 12, 2018, Employer filed a controversion notice denying TTD and temporary partial disability (TPD) benefits after November 30, 2017 based on Dr. Craven's April 2, 2018 supplemental report. (Controversion Notice, April 12, 2018).
16. April 23, 2018, Employee was seen by Dr. Ramiro Monroy Vidal, a surgeon in Mexico. Dr. Monroy Vidal stated Employee would need treatment, and he was waiting to refer Employee for a second surgery. (Dr. Monroy Vidal, Chart Note, April 23, 2014).
17. On April 30, 2018, Employee filed a claim seeking TTD, medical costs, interest, and a finding of unfair or frivolous controversion. His reason for filing the claim was that the adjuster had controverted his claim knowing he needed a second surgery in order to get medical clearance and to stop the pain. (Claim, April 27, 2018).
18. Also on April 30, 2018, Employee filed an SIME form on the issue of medical stability. He contended there was a dispute between Dr. Monroy-Vidal's April 23, 2018 opinion and Dr. Craven's April 2, 2018 report. (Petition, April 27, 2018).
19. Employee eventually located a surgeon in Seattle, and as of the date of the hearing the doctor was waiting for authorization for the surgery. Employee's search for a doctor that would take his case was made more difficult by Employer's April 12, 2018 controversion. While Employer continued to pay medical costs, Employee had to pay all transportation and meal costs out-of-pocket and seek reimbursement from Employer. Without TTD benefits, he had no money with which to pay those costs, and had to borrow from friends and family. (Employee).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> (3) this chapter may not be construed by the courts in favor of a party;
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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.

The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). 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).

In *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court instructed the board of its duty with respect to an unrepresented claimant:

> 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.

The board owes a duty to inform an unrepresented claimant how to preserve his claim for benefits. *Bohlmann v. Alaska Const. & Engineering, Inc.*, 205 P.3d 316 (Alaska 2009).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> (h) The department shall adopt rules for all panels, and . . . shall adopt regulations to carry out the provisions of this chapter. The department may by regulation provide for procedural, discovery, or stipulated matters to be heard and decided . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. . . .
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> **AS 23.30.010. Coverage.**

> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> **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. However, if the condition requiring treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
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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 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. . .
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> **AS 23.30.110. Procedure on claims.**
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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.

AS 23.30.095(k) and AS 23.30.110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3;

see also Harvey v. Cook Inlet Pipe Line Co., AWCB Decision No. 98-0076 (March 26, 1998). Wide discretion exists under AS 23.30.110(g) for the board 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." *Hanson v. Municipality of Anchorage*, AWCB Decision No. 10-0175 at 18 (October 29, 2010).

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 AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the AWCAC 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." *Id.* Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an opinion would help the board. *Id.* at 5.

The AWCAC further stated that 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*. at 4. Under either AS 23.30.095(k) or AS 23.03.110(g), the purpose for ordering an SIME is to assist the board. It is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id*.

> **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.**
> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating

> (1) that the right of the employee to compensation is controverted;
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> (2) the name of the employee;
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> (3) the name of the employer;
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> (4) the date of the alleged injury or death; and
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> (5) the type of compensation and all grounds upon which the right to compensation is controverted.

An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Section 155(e) gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized § 155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood*, 53 P.3d 134, 145 (Alaska 2002). If an employer neither controverts employee's right to compensation, nor pays compensation due, § 155 imposes a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp*, 831 P.2d at 358. "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford*, AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits."
Harp, 831 P.2d at 358 (citation omitted). Evidence in Employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to

warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id.* at 359.

> **AS 23.30.185. Compensation for temporary total disability.**
> In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
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> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
> (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;

In *Alyeska Pipeline Service Co. v. DeShong*, 77 P.3d 1227 (2003), the employee's doctor believed employee should have surgery, but mistakenly believed the employer needed to consent to a referral for a second opinion. As a result, the surgery was delayed. During the delay, the employee's doctor found that although not clinically stable, the employee was statutorily stable under the Act because her condition had not improved for 45 days. Noting treatment had been recommended and that the employee had a legitimate reason for the delay, the Supreme Court affirmed the Board's finding that the employee was not medically stable.

ANALYSIS

Should an SIME be ordered?

As the Commission noted in *Bah*, there are three requirements before an SIME can be ordered under AS 23.30.095(k). First, there must be a medical dispute between an Employee's attending physician and an EME. Second, the dispute must be significant. Third, an SIME physician's opinion would assist the board in resolving the dispute.

a) Is there a medical dispute between Employee's attending physician and an EME?

The law provides for an SIME when there is a medical dispute between an employee's attending physician and an EME. AS 23.30.095. Dr. Craven's opinion that Employee was medically stable was based on the legal definition in the Act and the facts given him by the adjuster.

Dr. Craven's opinion on medical stability is a legal opinion, not a medical opinion. Whether Employee sought medical treatment between Dr. Craven's November 30, 2017 report and his April 2, 2018 supplement does not require any specialized medical knowledge. There is no medical dispute. Employee's need for surgery remains unquestioned. Employer's doctor, Dr. Craven, was the first doctor to recommend a second surgery, and Employee's doctors, Dr. Rosales Noguiera and Dr. Monroy Vidal agree a second surgery is necessary.

b) Is the dispute significant?

Although Employer contents the dispute in this case is not significant, Dr. Craven's opinion that Employee was medical stable was the basis on which it controverted Employee's TTD for four months. That is a significant dispute.

c) Will an SIME physician's opinion assist in resolving the dispute?

The dispute here is not whether Employee is clinically stable, but whether he is legally stable. The question of whether Employee was pursuing treatment can as easily be addressed by the Board as by another doctor. An SIME physician's opinion would not assist in resolving the dispute.

Because there is no medical dispute and because an SIME physician's opinion would not aid in addressing the legal dispute, an SIME will not be ordered.

Given the difference in benefits sought in Employee's two claims and given his testimony at the hearing, he may not fully understand the different benefits that may be available to him, as well as his right to discover evidence. Under *Richard* and *Bohlmann*, it is important to educate Employee of his rights and how to pursue them under the Act.

In his first claim, Employee sought a penalty for late-paid compensation, but did not request a finding of unfair or frivolous controversion. In his second claim he sought a finding of an unfair

or frivolous controversion, but no penalty. However, it appears he may be seeking both. While related, these are distinct items. If an employer is found to have frivolously or unfairly controverted a benefit, the employer may be referred to the Division of Insurance for action. In addition, however, when an employer frivolously or unfairly controverts a benefit, the employee may be entitled not only to the benefit owed, but to an additional 25 percent of that amount as a penalty. Employee may wish to file an amended claim listing both, or he may ask that his claim be amended at a prehearing conference.

From his hearing testimony, Employee appears to be unaware of his right to discover evidence related to his claim that Employer may possess. Employee testified he had communicated with Employer's adjuster about his efforts to obtain medical care prior to the adjuster's March 28, 2018 letter to Dr. Craven. Employee has the right to request the adjuster's log or other record of his communications with the adjuster, although some portion of the adjuster's log may be privileged. Employee also has the right to request copies of the adjuster's March 28, 2018 letter and all other materials sent to Dr. Craven. Should Employee request these items from Employer, he should do so in writing. Employee can request a prehearing when desired by calling the Board's office at (907) 269-4980 or toll-free at (877) 783-4980.

CONCLUSION OF LAW

An SIME will not be ordered.

ORDER

Employee's April 30, 2018 petition is denied.

Dated in Anchorage, Alaska on August 27, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/

Linda Murphy, Member

/s/
Nancy Shaw, 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 RAFAEL CAMPOS ROMERO, employee / claimant; v. CCI INDUSTRIAL SERVICES, LLC, employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case No. 201708474; 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 27, 2018.

/s/
Nenita Farmer, Office Assistant