ALASKA WORKERS' COMPENSATION BOARD

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

JAY JESPERSEN, Employee, Claimant, v. TRI-CITY AIR, Employer, and ALASKA INSURANCE GUARANTY ASSOCIATION, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 198528817 AWCB Decision No. 19-0050 Filed with AWCB Anchorage, Alaska on April 16, 2019

Tri-City Air's (Employer) January 17, 2019 petition for a second independent medical evaluation (SIME), its March 14, 2019 petition to quash a subpoena and Jay Jespersen's (Employee) March 21, 2019 petition to quash a medical deposition notice were heard on April 4, 2019, in Anchorage, Alaska, a date selected on February 27, 2019. Employee's January 11, 2019 hearing request gave rise to this hearing. Attorney Richard Harren appeared and represented Employee who appeared by telephone and testified. Attorney Vicki Paddock appeared and represented Employer and its insurer. Employee's wife Judy Jespersen also testified telephonically on his behalf. As a preliminary matter, an oral order granted Employer's petition to quash a subpoena to require its employer's medical evaluator (EME) to appear and testify at hearing. This decision examines the oral order and addresses the remaining two petitions on their merits. The record closed at the hearing's conclusion on April 4, 2019.

ISSUES

Employer contended its EME's expert testimony is not necessary at a preliminary hearing to decide whether to order an SIME. It sought an order quashing Employee's subpoena for its EME physician to testify at hearing. An oral order quashed the subpoena.

Employee contended he filed a request to cross-examine the EME doctor and he has a fundamental right to present evidence. He contends cross-examining the EME physician may result in the medical dispute disappearing, obviating the need for an SIME.

1) Was the oral order quashing a subpoena to the EME physician correct?

Employer contends there is a medical dispute between Employee's attending physician and its EME doctor. It seeks an order requiring an SIME.

Employee contends the EME physician did not do a very good job. He contends the studies upon which the EME relied are outdated and Employer simply hopes to connect a "Hail Mary" pass and obtain a more supportive opinion from an SIME physician.

2) Should an SIME be ordered?

Employee seeks an order quashing a deposition notice for Employer's EME physician's deposition scheduled to occur in Idaho. He contends the EME physician comes to Anchorage regularly and Employee seeks an order requiring Employer to make him available for his deposition while here, rather than in Idaho, which he contends is too expensive and inconvenient.

Employer contends the EME physician controls his own time, and his Idaho deposition was the only time he had available. Employer contends it scheduled the deposition before the merits hearing was scheduled and does not object to rescheduling based on the physician's availability.

3) Should the Idaho deposition notice for the EME physician be quashed?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On November 16, 1985, Employee at age 22 was in a plane crash while flying in white-out conditions near Quinhagak, Alaska. He initially reported cuts, bruises, and head and back injuries. (Report of Occupational Injury or Illness, November 23, 1985).

2) Ultimately, doctors determined Employee suffered multiple rib fractures, a mild fracture at L4 and a compression fracture at L5. (Charles Helleloid, M.D., report, March 5, 1986).

3) On June 16, 2016, Employee reported "back issues" for over 32 years after an airplane crash, which involved his neck, thoracic and lumbar spine. Paul Jensen, M.D., recommended surgery at L5-S1 with discectomy. (Helena Anderson, M.D., report, June 16, 2016).

4) On July 5, 2016, Dr. Jensen performed an L5-S1 laminectomy on Employee for L5-S1 lumbar spinal canal stenosis secondary to a large disc herniation. (Operative Report, July 5, 2016).

5) On March 4, 2017, Paul Bauer, M.D., examined Employee for an EME and addressed two causation questions. He said the November 16, 1985 injury was not a substantial factor in Employee's need for surgery in 2016 or in any subsequent care. In his opinion, the disc herniation in 2016 was spontaneous and not related to Employee's lower back fracture. Dr. Bauer opined the surgery would have occurred when it did and to the extent it did notwithstanding employment conditions. He further found the injury did not cause a delayed disc herniation. He attributed aging and normal degeneration as the substantial causes for Employee's 2016 surgery and subsequent care. (Dr. Bauer report, March 4, 2017).

6) On or about January 9, 2019, Dr. Jensen responded to a September 26, 2017 letter Employee's lawyer had written to him. In his response, Dr. Jensen opined the injuries Employee sustained in his November 16, 1985 plane crash at work were a substantial factor in causing the need for surgery he performed on Employee on July 5, 2016. Dr. Jensen also said the plane crash was a substantial factor in causing the need for follow-up medical care since the surgery and additional medical treatment continuing into the foreseeable future. (Dr. Jensen responses, January 9, 2019).

7) On January 11, 2019, Employee requested, in a *Smallwood* objection, his right to cross-examine Dr. Bauer to explore and challenge the foundation for his opinions, determine any biases and query him on relevant facts and law. (Request for Cross-Examination, January 11, 2019).

8) On January 16, 2019, Employer timely asked for an SIME, citing a medical dispute between attending physician Dr. Jensen and EME Dr. Bauer. (Petition, January 16, 2019).

9) On March 13, 2019, the division issued a subpoena to Dr. Bauer to appear and testify at hearing before the board on April 4, 2019. (Subpoena, March 13, 2019).

10) On March 14, 2019, Employer noticed Dr. Bauer's deposition for April 25, 2019, in Boise, Idaho. (Notice of Taking Deposition of R. David Bauer, M.D., March 14, 2019).

11) On March 14, 2019, Employer sought an order quashing a March 13, 2019 subpoena for Dr. Bauer to attend the April 4, 2019 hearing. (Petition, March 14, 2019).

12) On March 18, 2019, Dr. Bauer said he is not available on April 4, 2019 to testify before the board and will not have time available to take a break for a hearing on that date because he will be performing examinations in Austin, Texas. (Affidavit of R. David Bauer, M.D., March 18, 2019).

13) On March 21, 2019, Employee sought an order quashing a deposition notice Employer filed to depose Dr. Bauer in Boise, Idaho reportedly without seeking Employee's lawyer's availability or consent. Employee contends the cost for his attorney to attend in person is an economic burden exceeding $12,000 and Employer can depose Dr. Bauer in Anchorage where he visits regularly. He contends it could cost Employer $9,000 to depose Dr. Bauer. (Petition, March 21, 2019).

14) More recently, Employee received treatment including physical therapy. While he never tried to relate his diabetes to his plane crash, Employee thinks there is a connection between back pain and increased blood sugar. Employee has seen several physicians for treatment he attributes to his work injury and some have not been paid. He has not been pain free for years nor has he been able to sleep through the night. Employee's feet throb, his left knee aches and he attributes these symptoms to his back injury. Employee's symptoms have been getting worse over the last few months. He flies a floatplane seasonally in Bettles, Alaska. Flying this year was put off until June 1, 2019, because it took longer to get things "up and running." He saw Dr. Bauer for an EME in Seattle and thinks it was not a thorough examination. Employee spends seven months in Bettles usually from mid-April through mid-October and then returns to Minnesota to visit family before wintering in Arizona for two to three months. He plans to see his mother in Minnesota within 30 days because she fell, broke her hip, needs a heart valve and her health is declining. He may have to help his mother find appropriate assisted living. Employee can no longer drive back and forth between Alaska and the Lower 48 because his low back symptoms are too painful. He plans on personally attending the May 7, 2019 hearing on his case's merits and contends going to an SIME now would be the "perfect wrong time." (Employee).

15) Employee's wife Judy Jespersen testified Employee owes over $20,000 in unpaid, work-related medical bills. He struggled to get medical care and his health insurance does not cover his work-related injury. She affirms sitting and driving in a motor vehicle is difficult for Employee and she wants "him to see somebody." She and her husband are worried about his lower extremity numbness, which in her view "is getting worse." (Judy Jespersen).

16) Surgery necessitated by a decades-old injury is not unprecedented but is relatively rare in these cases. It is also unusual for symptoms arising from a work injury to affect other systemic conditions such as diabetes. Peripheral neuropathy is a known consequence from poorly controlled diabetes. (Experience, judgment).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony and other tangible evidence, but also on its "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**. . . .
> . . . .
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> (k) In the event of a medical dispute regarding determinations of causation . . . 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 Alaska Workers' Compensation Appeals Commission in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), said an SIME under AS 23.30.095(k) is to assist the board, not to give employees an additional medical opinion at the employer's expense when employees disagree with their physician's opinion. *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) held AS 23.30.095(k) is procedural, not substantive:

> Before AS 23.30.095(k) was revised in 1995 (footnote omitted), it stated in part: "In the event of a medical dispute regarding a determination of causation, . . . degree of impairment . . . a second independent medical evaluation [SIME] shall be conducted by a physician or physicians selected by the board. . . ." In 1994, the Alaska Supreme Court held: "[I]n every case the Board is required to give the parties notice of their

> right to request . . . an SIME . . . and if a party requests an SIME, the Board must order [one]." *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114, 1119 (Alaska 1996). Employer argues that, under *Dwight*, we must grant its request for a subsection 95(k) evaluation.
>
> First, we find the pre-1995 version of subsection 95(k), and therefore *Dwight*, is not applicable to this claim. In 1995, subsection 95(k) was amended to allow the Board to exercise its discretion on the issue of whether to order an SIME. AS 23.30.095(k) now states in relevant part: "In the event of a medical dispute . . . the board *may* require that a second independent medical evaluation be conducted. . . ." (Emphasis added). Procedural rules and statutes are not like substantive laws unless they are substantive in character. (Citation omitted). "Where a change in a procedural statute significantly alters the legal consequences of the events giving rise to a cause of action, it is treated as substantive. . . . [Specifically,] a procedural rule is substantive in character where the change makes it appear to one just starting down the road to vindication of his cause that the road has become more difficult to travel or the goal less to be desired." (Citation omitted).
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> Because neither party can claim that an SIME benefits either party, we find the 1995 revision to subsection 95(k) does not make the road for either an employee or an employer more difficult to travel or, for an employee, the goal of obtaining any type of benefit under the Act less desirable. Consequently, we find subsection 95(k) is procedural in nature, not substantive. Therefore, we conclude the revised version of subsection 95(k) is applicable here where the request for an SIME was made after the statute was amended. Accordingly, we find we have the discretion to decide whether we should order an SIME. (*Deal* at 2-3).

"The composition of an SIME panel is a matter of sound discretion." *Thompson v. Fred Meyer Stores, Inc.*, AWCB Decision No. 10-0167 (October 4, 2010) at 7.

> **AS 23.30.115. Attendance and fees of witnesses**. (a) A person is not required to attend as a witness in a proceeding before the board at a place more than 100 miles from the person's place of residence, unless the person's lawful mileage and fee for one day's attendance is first paid or tendered to the person; but the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure.
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> (b) A witness summoned in a proceeding before the board or whose deposition is taken shall receive the same fees and mileage as a witness in the Superior Court.
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> **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. . . .

> **8 AAC 45.900. Definitions**. (a) In this chapter. . . .
> . . . .
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> (11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976). . . .

ANALYSIS

1) Was the oral order quashing a subpoena to the EME physician correct?

Employee subpoenaed the EME physician to hearing because he wanted to question him about his EME report. Employer contended there is no law supporting Employee's contention that he has a right to question an EME physician before a decision and order decides whether to require an SIME. It contended no weight is accorded a medical expert's opinion when considering whether to order an SIME. Employer contended the substantial factor test is not applied at this stage because deciding whether to order an SIME is procedural. Employer contended *Smallwood* objections do not apply in all instances, and particularly not in determining whether to require an SIME. Lastly, Dr. Bauer presented an affidavit stating he was simply not available to testify on April 4, 2019. Employee contended his *Smallwood* objection requires Employer to produce its EME physician for questioning before a decision and order considers whether an SIME is warranted. He further contended he has a fundamental right to present evidence, which includes questioning the EME physician before a decision and order considers requiring an SIME.

Employee presented no statutory, regulatory or decisional law to support his primary contention, which was that he has a fundamental due process right to question an EME physician before fact-finders can decide to order an SIME based on the EME physician's opinion. An SIME order simply requires finding a medical dispute, in one or more of seven specified areas, between Employee's attending physician and Employer's doctor. AS 23.30.095(k). The applicable statute does not require weighing the relevant medical opinions in this process. Absent law to support Employee's position, the EME physician's testimony was simply not necessary in determining whether to order an SIME, and the oral order quashing the subpoena was correct. *Deal*.

Nothing in the oral order or in this decision should be construed to imply Employee does not have a right to depose Employer's EME physician at any mutually convenient time, under the Rules of Civil Procedure. The Act expressly allows parties to depose witnesses. AS 23.30.115(a), (b). Here, the EME's deposition is simply unnecessary to decide the SIME issue.

2) Should an SIME be ordered?

On March 4, 2017, EME Dr. Bauer opined the work injury was not a substantial factor in the disc herniation Employee had in 2016 and is not related to his lower back fracture sustained in the work accident. He stated the disc herniation would have occurred regardless of the employment conditions and the work injury did not cause a delayed disc herniation. Dr. Bauer also said the work injury was not a substantial factor in the need for any recent medical care. Rather, he opined aging and degeneration are the causes for Employee's 2016 surgery and subsequent treatment.

By contrast, on January 9, 2019, in response to Employee's lawyer's letter, attending physician Dr. Jensen stated the injuries Employee sustained in his November 16, 1985 airplane crash, including a transverse fracture at the L5 vertebra, were substantial factors in causing the need for the surgery he performed on Employee on July 5, 2016. Dr. Jensen also stated the work-related crash was a substantial factor in causing the need for follow-up medical care Employee required after the surgery including care which will continue into the foreseeable future. AS 23.30.095(k).

These diametrically opposed opinions create a medical dispute between EME Dr. Bauer and attending physician Dr. Jensen. On January 16, 2019, Employer timely petitioned for an SIME.

The medical dispute based on these records is "causation," because the EME physician said Employee's 1985 work injury was not a substantial factor causing the need for his 2016 medical care and continuing treatment, while the attending physician said it was. AS 23.30.095(k). The dispute is significant because if the 1985 plane crash is a substantial factor in Employee's need for medical treatments before and in 2016, and continuing, the benefits at issue are costly. *Bah*. For example, Employer may be liable for medical bills leading up to and including the 2016 surgery. It may also be liable for other past and continuing medical benefits totaling approximately $20,000

according to Employee's wife. Lastly, at hearing Employee also said symptoms from his work injury affect his underlying diabetes and disrupt his blood sugar levels. While the need for surgical treatment decades after a work injury is not without precedent, it is relatively unusual in these cases. Similarly, any interplay between symptoms from a work injury and increased diabetes and its related symptoms is also relatively rare. *Rogers & Babler*.

Even though he has not made a claim for increased blood sugar levels or worsened diabetes symptoms, Employee said pain from his work injury causes his blood sugar levels to spike. He also said his feet throb and his left knee aches. His wife is concerned about worsening numbness in his legs. Employee attributes these symptoms to his work injury. Peripheral neuropathy is a known consequence from poorly controlled diabetes. *Id*. Though Employee has made no diabetes-related claims to date, diabetes may be relevant to his current leg symptoms. The lengthy period between the 1985 injury and 2016 when Employee had spinal surgery, in conjunction with any role diabetes may play in Employee's lower extremity symptoms makes this case somewhat complicated. An SIME would assist the fact-finders in determining the role, if any, the 1985 work injury had on Employee's lumbar spine symptoms and treatment since that date. It would also assist in determining the role, if any, symptoms from the work injury play in disrupting Employee's blood sugar levels and causing symptoms in his legs. *Bah*. Therefore, Employer's petition for an SIME will be granted. The SIME panel will include an orthopedic surgeon and an endocrinologist. *Thompson*. The orthopedic surgeon can address spinal issues and the endocrinologists can answer questions about how the work injury affects Employee's diabetes and vice-versa.

Employee contends an SIME will delay his ability to receive treatment and interfere with his seasonal employment as a pilot and contends it would be a "tremendous inconvenience." Nevertheless, Employee also said his piloting employment in Alaska has been delayed until June 1, 2019, because it took longer to get things "up and running" than normal. There is no question an SIME will delay a hearing on Employee's claim and thus may affect his ability to obtain medical treatment paid for by Employer, should he prevail. Employee also said he would probably visit his mother within 30 days because her health is failing. While it is always unfortunate when medical examinations interfere with a working claimant's job or other responsibilities, in this instance an SIME outweighs Employee's inconvenience and is likely to help best ascertain the

parties' respective rights. AS 23.30.135. Since Employee planned on being physically present at the May 7, 2019 hearing, he already budgeted time on that date and the designee will be directed to make efforts to schedule some or all of the SIME appointments on that date if possible.

3) Should the Idaho deposition notice for the EME physician be quashed?

Employer scheduled Dr. Bauer's deposition in Boise, Idaho on April 25, 2019. It scheduled this deposition to address Employee's *Smallwood* objection, prior to the May 7, 2019 scheduled merits hearing. However, Employer recognized Dr. Bauer's deposition timing could be a moot issue if an SIME is required and the May 7, 2019 hearing on the merits is continued.

Employee contends Dr. Bauer is in Alaska regularly to perform EMEs and queries why he could not give his deposition while here, rather than in Idaho or elsewhere. He contends traveling to attend Dr. Bauer's deposition outside could cost Employee $12,000 and Employer $9,000 or more in travel and attorney fees. Alternately, Employee contends he is willing to stipulate with Employer that both attorneys will participate in Dr. Bauer's deposition telephonically.

Employee cited no law supporting his position that Employer cannot take Dr. Bauer's deposition wherever Dr. Bauer is able to make himself available. A party can take a witness's testimony by deposition according to the Rules of Civil Procedure. AS 23.30.115(a). Employee has not demonstrated any Alaska Civil Rule prohibits Employer noticing Dr. Bauer's deposition in Idaho. Similarly, he has not shown any legal requirement that Employer agree to attend its expert's deposition telephonically or requiring Employer to limit its own expenses in deposing its witness. If Employee prevails on his case's merits, he may be entitled to attorney fees and costs for traveling to a deposition outside Alaska. Therefore, Employee's petition on those grounds will be denied.

Lastly, and unfortunately, it is unlikely Employee's SIME can be arranged, completed and the physicians' reports received before May 7, 2019. The May 7, 2019 hearing will be continued and rescheduled later. This renders Employee's petition also moot as a practical matter.

CONCLUSIONS OF LAW

1) The oral order quashing a subpoena to the EME physician was correct.
2) An SIME will be ordered.
3) The Idaho deposition notice for the EME physician will not be quashed.

ORDER

1) Employer's January 17, 2019 petition for an SIME is granted.
2) An SIME panel including an orthopedic surgeon and an endocrinologist will examine Employee.
3) The designee responsible for obtaining SIME physicians will select appropriate physicians from the authorized SIME list, and will try to obtain one or both SIME physicians available on May 7, 2019, to coincide with Employee's availability. If the designee cannot find an orthopedic surgeon or endocrinologist available on May 7, 2019, the designee will follow the normal procedure for identifying two physicians with these specialties to perform the SIME as soon as possible.
4) Employer is directed to follow the procedure in 8 AAC 45.092(h)(1) and (2) and provide Employee's attorney with three binders, within 10 days from this decision and order's date.
5) Employee's attorney is directed to follow the procedure in 8 AAC 45.092(h)(3) and (4).
6) By no later than May 7, 2019, each party may submit to the designee no more than three questions regarding orthopedic causation issues and three questions addressing the effects, if any, Employee's injury has on his diabetes and vice versa.
7) Employee's March 21, 2019 petition for an order quashing Dr. Bauer's deposition in Boise, Idaho, is denied.

Dated in Anchorage, Alaska on April 16, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Justin Mack, 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 Jay Jespersen, employee / claimant v. Tri-City Air, employer; Alaska Insurance Guaranty Association, insurer / defendants; Case No. 198528817; 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 April 16, 2019.

/s/
Nenita Farmer, Office Assistant