ALASKA WORKERS' COMPENSATION BOARD

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

BART ELLIOTT, Employee, Claimant, v. BEESON PLUMBING, INC., Employer, and ARROWOOD INDEMNITY COMPANY, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER ON RECONSIDERATION AWCB Case No. 200002997 AWCB Decision No. 19-0117 Filed with AWCB Anchorage, Alaska on November 8, 2019

Beeson Plumbing Inc.'s (Employer) October 25, 2019 petition for reconsideration was heard and decided on the written record on November 8, 2019 in Anchorage, Alaska, a date selected on November 8, 2019. Time limits imposed in AS 44.62.540 gave rise to this hearing. Bart Elliott (Employee) represents himself. Attorney Rebecca Holdiman-Miller represents Employer and its insurer. The record closed on November 8, 2019.

ISSUE

Employer contends *Elliott v. Beeson Plumbing, Inc.*, AWCB Decision No. 19-0105 (October 11, 2019) (*Elliott I*), made legal errors involving its defenses under AS 23.30.100, AS 23.30.105 and on Employee's request for a second independent medical evaluation (SIME). Employer requests reconsideration.

Employee's position on the petition for reconsideration is unknown, but presumed in opposition.

Should *Elliott I* be reconsidered?

FINDINGS OF FACT

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

1) On January 23, 2017, Employee sought a referral from his family physician to a surgeon for left hip pain, chronic for the last seven to 10 years. He stated "the pain began in 2000, after a knee injury led to knee surgery. After this he states he had significant knee pain, causing him to put increased stress on his right leg/hip. He then had a back surgery in 2007 which he states, caused further stress to his right hip." (SCHC report, January 23, 2017).

2) On September 19, 2017, Employee told Dr. Ellison he needed a letter to give to his insurance adjuster. In reference to his right hip, Employee "attributes the pain in his bilateral hips to a change in gait with regards to his knee injury." He wanted to move forward with arthroscopic right hip surgery. Dr. Ellison wrote a "to whom it may concern" letter at Employee's request stating:

> Bart Elliott has been a patient under my care over the past year and a half. He has a significant history of right knee pain and [sic] di [sic] result from an injury from a work-related environment more than a decade ago. Patient has undergone several surgeries for his knee pain in the past 20 years. At this point he has most recently undergone a patellofemoral replacement surgery. Because of his substantial knee pain he has walked with a limp for most of his life. In the past few years he has developed pain in both of his hips. He has been diagnosed with bilateral labral tears as well as impingement lesions. He has undergone surgery in the left which was successful for help [sic] treat some of his pain [sic] is currently scheduled to undergo surgery on his right side. With the lack of any other trauma that would explain his hip pain it is reasonable to assume that the injuries that have been diagnosed in his hips are related to his walking with a limp from his knee trauma. Please consider evaluating his hip pathology as a possible result from his Worker's Compensation claim for his work-related knee injury. (Ellison report; letter, September 19, 2017).

3) On October 27, 2017, Charles Craven, M.D., performed a record review employer's medical evaluation (EME). After reviewing Employee's records, which included numerous bilateral hip and low back records, Dr. Craven diagnosed what he said are related to the February 9, 2000 injury: right knee strain; right ankle sprain; and arthroscopy on April 3, 2000. Dr. Craven opined Employee's chronic back pain and lumbosacral fusion at L5-S1, left hip cam-type femoral

acetabular impingement found in February 2017, his left hip arthroscopy and femoroacetabular and labral repair in March 2017, and his right hip pain and related radiographs in April 2017, were unrelated to the work injury. As for the hip "conditions," Dr. Craven opined the work injury did not cause the anatomic condition found in Employee's hips. Dr. Craven found no relationship between Employee's chronic back pain and the work injury. When asked if the work injury was a substantial factor in bringing about "the current conditions and/or disability," Dr. Craven said it was not. In his view, Employee reached medical stability for his accepted right knee injury by March 25, 2000. He gave opinions on medical stability for other conditions but stated none are work-related. Dr. Craven said all treatment Employee received since 2010, has been reasonable and necessary, but not work-related. Only Employee's right hip needs further care, but he opines it is not work-related. (Craven report, October 27, 2017).

4) On December 11, 2017, Employer denied Employee's rights to benefits for any body part other than the right knee, and all benefits for the right knee beyond May 25, 2000. Employer based its denial on: Its contention Employee reported only a right knee injury and any other newly claimed body parts are barred by AS 23.30.100; he failed to file a claim for additional compensation within two years of Employer's last benefits payment in April 2000; and Dr. Craven opined effects from Employee's right knee injury reached medical stability by May 25, 2000, without need for further treatment. Employer served this notice on Employee on the same date. (Controversion Notice, December 11, 2017).

5) On March 6, 2019, Employee claimed permanent total disability, a finding Employer made an unfair or frivolous controversion, medical and related transportation costs, a late payment penalty and interest. Employee said, on February 9, 2000, he was told to move several boxes containing plumbing supplies and was pushing a wheelbarrow when he slipped on ice, "did the splits," and his right knee gave out. He filed his claim to get more medical care for his right knee after Employer denied benefits. Although the same claim appears to have been filed twice, this was Employee's first and only claim filed in this case. (Claim for Workers' Compensation Benefits, March 5, 2019; agency record).

6) On March 26, 2019, Employer admitted reasonable and necessary work-related medical costs "specific to" Employee's right knee related to the February 9, 2009 injury. It specifically denied all benefits "related to body parts other than the right knee," and as an affirmative defense

contended AS 23.30.100 barred by law or equity "any other newly claimed body parts." Employer based its denial and affirmative defense under §100 on, among other things, the following:

> Pursuant to the report of orthopedic surgeon, C. Craven, M.D., dated October 27, 2017, the employee's low back, spine, hips, and ongoing knee problems are not related to the February 9, 2000, injury. Dr. Craven opines the effects of the right knee injury reached medical stability by May 25, 2000, without the need for further treatment. No further benefits are due.

Employer further stated:

> Due to the highly complex medical issues involved in this claim, including absence of medical records, the employee must produce evidence supporting the contention that his alleged permanent total disability status is work related, in order to attach the presumption of compensability. (Answer to Employee's Worker's Compensation Claim, March 26, 2019).

7) On April 23, 2019, Employer opposed Employee's request for an SIME, citing among other things, its inability to "accurately identify disputes to be evaluated." (Employer's Opposition to Employee's Petition for Second Independent Medical Evaluation (SIME), April 23, 2019).

8) On June 5, 2019, Employer asked for an order dismissing Employee's claims for all benefits, in accordance with AS 23.30.105. It contended he waited 19 years following his February 9, 2000 work injury to file a claim for benefits. Employer claims prejudice from this late filing. (Petition, June 5, 2019; Addendum A).

9) On September 4, 2019, Employer argued §100 precludes Employee's claims for hip and back conditions. It contended Employee failed to report any hip or back claim. (Employer's Hearing Brief, September 4, 2019).

10) At hearing on September 11, 2019, the designee initially identified the two petitions set for hearing: Employee's SIME petition and Employer's petition to dismiss under AS 23.30.105. The parties agreed these were the only issues for hearing. Employee, when discussing his SIME request, stated his contention that his bilateral hips and low back with the indirect result of his knee injury based on opinions from Dr. Ellison, who referenced years of altered gait, which Dr. Ellison possibly attributed to the work-related knee injury. When asked during the SIME discussion at hearing if it disputed there was a medical dispute regarding Employee's hips between Employee's physician and Dr. Craven, Employer said there was never an injury report or claim filed for the hips. Employer further responded by saying there was no way to connect the problems in 2017 to

the 2000 work injury with Employer. During the hearing discussion regarding Employer's petition to dismiss under §105, the designated chair noted Employer had also argued in its brief a claim bar under §100, and acknowledged Employer had to "raise that" at the first hearing, which was the September 11, 2019 hearing. The designated chair asked Employer if it intended to argue §100. In response, Employer contended Employee's hearing testimony was the first time he had "officially" reported a back and hip injury connected to his knee. Employee immediately objected to that characterization. Employer responded that given Employee's testimony about his hips and back it would "mention it." Given Employer's position on §100, the designated chair explained to Employee the basis for a §100 defense. Thereafter, Employer made its §100 argument for the bilateral hips and back, and its§105 arguments for the knee. (Record).

11) On October 25, 2019, Employer timely filed a petition for reconsideration of *Elliott I*. It offered a host of alleged legal errors and contends *Elliott I* improperly dismissed its §100 notice defense on "additional body parts first claimed at hearing." Employer contends only the right knee was an issue for hearing. It contends the panel did not provide Employer a right to argue its notice defense under §100. It further contends *Elliott I* was in error because Employer did not have an opportunity to discover information to defend Employee's contention that the bilateral hips and low back were a natural consequence of his right knee injury with Employer. Employer further contends the panel in *Elliott I* improperly advocated for Employee. (Employer's Motion for Reconsideration, October 25, 2019).

12) *Elliott I* did not decide Employee's claim for benefits related to his back, bilateral hips or knee on its merits. Therefore, Employer's alleged inability to argue whether his back or bilateral hip conditions or symptoms were a "direct and natural result of his right knee injury," or caused by some other intervening cause, was irrelevant to the §100, §105 and SIME issues decided at that hearing. (Experience; judgment; Employer's Motion for Reconsideration, October 25, 2019).

13) The panel did not "refuse[] to hear the employer's arguments" under §100; rather, the panel raised the §100 notice defense on its own motion and heard Employer's oral arguments. (Record and inferences drawn from the above).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of

the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .

Roberge v. ASRC Construction Holding Co., AWCAC Decision No. 269 (September 24, 2019), addressed a case arising under AS 23.30.110(c), the statute requiring a claimant to request a hearing within two years of the date an employer controverts a claim. In reversing the board's decision dismissing a claim based on an untimely hearing request, *Roberge* stated:

> Yet the idea of a hearing not being held on the merits of a claim is strongly disfavored by the Court and the Board has an obligation to determine if there is a way around the running of the .110(c) defense. *Id*. at 15.

ANALYSIS

Should *Elliott I* be reconsidered?

Employer seeks reconsideration of *Elliott I* based on a host of alleged legal errors. AS 44.62.540. Employee has never contended his February 9, 2000 work injury with Employer directly injured his bilateral hips or low back on that date. *Rogers & Babler.* Rather, he contends an altered gait arising from his undisputed February 9, 2000 right knee injury eventually made his bilateral hips and low back symptomatic. Employer has yet to provide legal authority for its contention that Employee had to file multiple Report of Occupational Injury or Illness forms, to give Employer notice that he claimed benefits related to subsequent consequences from his original work injury.

Employer's own pleadings and the record shows Employer was well aware Employee claimed benefits for his bilateral hips and low back based on his theory that his altered gait from his right knee injury made these body parts symptomatic. It did not find out about his claims for the first time at hearing; Employer has known about these claims for at least two years. *Rogers & Babler*. Medical records contained in a packet Employer sent to Dr. Craven in October 2017, include those for Employee's bilateral hips and low back. Dr. Craven had no difficulty whatsoever opining that

Employee's chronic back pain, and right and left hip conditions and pain were not related to the work injury. Employer has not demonstrated how the *Elliott I* hearing deprived it of its right to investigate Employee's bilateral hip and low back claims as they pertain to its §100 notice defense or its §105 claim defense. Dr. Craven gave an opinion that goes to the case's merits. His opinion is irrelevant to the §100 and §105 defenses other than to show Employer knew about the claims. Further, Employee filed a claim for benefits related to his right knee injury. Employer knew Employee claimed his bilateral hips and low back were indirectly related to his right knee injury.

It is not accurate for Employer to contend it did not have an opportunity to argue its §100 notice defense at hearing. The record is clear that Employer argued this defense at hearing, and in its brief. Employer's petition was based solely on its §105 defense. By regulation, the §100 defense was not an issue set for hearing; consequently, Employee had no notice he should be prepared to address that issue. 8 AAC 45.065(c). Nevertheless, recognizing that Employer had to "raise" the issue at the first hearing to avoid waiver, the panel expressly allowed Employer to argue its §100 defense at hearing. There was no error in *Elliott I* finding the §100 notice defense was not ripe because it had not been properly noticed as an issue for hearing. Nevertheless, in the alternative, based on Employer's written and oral arguments, and based on the record, *Elliott I* determined Employee's claims for his knee, bilateral hips and back were not barred by §100. That is all *Elliott I* decided on this point; it did not decide the merits on Employee's claims.

The *Elliott I* panel did not improperly advocate for Employee. It applied the commission's rationale and direction from *Roberge*. Since there were clearly medical disputes between Employee's attending physician about his knee, bilateral hips and low back, and Employer's EME Dr. Craven, *Elliott I* made no legal error in including all three body parts in its SIME order. For these reasons, Employer's October 25, 2019 petition will be denied.

CONCLUSION OF LAW

Elliott I will not be reconsidered.

ORDER

Employer's October 25, 2019 petition for reconsideration is denied.

Dated in Anchorage, Alaska on November 8, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Bart Elliott, employee / claimant v. Beeson Plumbing, Inc., employer; Arrowood Indemnity Company, insurer / defendants; Case No. 200002997; 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 November 8, 2019.

/s/
Nenita Framer, Office Assistant