

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DAVID PATCHETT,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201804399
SNUG HARBOR SEAFOODS INC.,)
) AWCB Decision No. 20-0009
Employer,)
and) Filed with AWCB Juneau, Alaska
) on February 27, 2020
LIBERTY NORTHWEST INSURANCE)
CORP,)
)
Insurer,)
Defendants.)

David Patchett's (Employee) November 29, 2019 petition requesting bifurcation of past total temporary disability (TTD) benefits was heard on the written record on January 28, 2020, in Juneau, Alaska, a date selected on January 16, 2020. A January 2, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney Justin Eppler appeared and represented Employee. Attorney Stacey Stone appeared and represented Snug Harbor Seafoods Inc. and Liberty Northwest Insurance Corp. (Employer). The record closed after deliberations on February 11, 2020.

ISSUES

Employee contends Employer failed to deny TTD before March 6, 2019 and failed to pay benefits from November 28, 2017 to March 6, 2019. He contends there is no medical dispute as to his inability to work due to the work injury or medical stability prior to March 6, 2019.

Employee contends the past TTD benefits are substantially independent from the other claimed benefits. He contends past TTD benefits should be adjudicated separately from the other claimed benefits. Employee contends he has not returned to work since November 28, 2017. He contends Employer's pursuit of an overpayment can be adjudicated separately because an order can be issued directing Employer to withhold 20 percent for the alleged overpayment. Employee contends the alleged overpayment is much less than the past due TTD benefits. He contends bifurcating past TTD is consistent with the legislative purpose of the Act. Employee requests his petition seeking bifurcation of past TTD and related penalty, interest and attorney's fees and costs be granted.

Employer contends past TTD is "not at issue" because Employee continued working after the work injury and he is not entitled to TTD when working. It contends Employee failed to provide medical evidence prior to March 6, 2019 restricting his ability to work and evidence showing he was not working prior to March 6, 2019. Employer contends Employee's entitlement to past TTD is not substantially independent of the other claimed benefits. It contends Employee's entitlement to ongoing TTD, the medical stability date and whether Employer is entitled to recoup an overpayment are all interrelated. Employer requests Employee's request to bifurcate past TTD benefits and related penalty, interest and attorney's fees and costs from other issues be denied.

Should Employee's claim seeking past TTD benefits and related penalty, interest and attorney's fees and costs be bifurcated from his remaining claimed benefits?

FINDINGS OF FACT

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

1) On November 2, 2017, Employee reported lower back and left knee pain that began over a month earlier at work. He was driving a large truck and the brake system locked up, causing the truck to lunge forward, raise off the ground three to four feet and slam down. Employee said he felt immediate low back pain radiating down his left leg and his left leg gave out when he attempted to stand. He continued to experience upper thigh pain and numbness extending to his foot. Kent Sandquist, PA-C, ordered an MRI. (Sandquist chart note, November 2, 2017).

- 2) On November 28, 2017, Employee continued to report lumbar pain radiating down his left leg and weakness occasionally causing his left leg to “give out.” PA-C Sandquist diagnosed low back pain and referred Employee to Timothy Johans, M.D. (Sandquist chart note, November 28, 2017).
- 3) On November 30, 2017, Employee reported low back and left leg pain and weakness since the work injury. He said the truck he was driving on a steep incline stalled out on a hill and when he tried to get it going, it jumped significantly. Employee felt immediately low back and left leg pain and his left leg gave out and he lost bladder control when he got out of his truck. He had hot or burning pain in the anterior thigh and a little past the knee medially into the lower medial leg and tingling in the bottom of his left foot under his toes. Dr. Johans diagnosed a left femoral neuropathy secondary to neurotmesis. He said Employee sustained a direct impact left femoral nerve injury during the injury because the lap belt put pressure on his femoral nerve. Dr. Johans prescribed physical therapy and medications for nerve pain. (Johans clinic note, November 3, 2017).
- 4) On March 19, 2018, Employee had progressive pain, tingling, numbness and weakness in his left leg. Dr. Johans recommended an MRI and lumbar x-rays. (Johans clinic note, March 19, 2018).
- 5) On March 22, 2018, Employee’s lumbar spine MRI revealed a L4-5 right paracentral and foraminal disc protrusion abutting both the existing L4 nerve and traversing L5 nerve root, a small disc protrusion indenting the thecal sac at L5-S1 and moderate right and mild left foraminal stenosis. (MRI report, March 22, 2018).
- 6) On March 22, 2018, Dr. Johans opined Employee sustained a femoral nerve injury because Employee’s MRI revealed right-sided lumbar nerve problems but his left side was “absolutely clean.” He concluded surgery was not in Employee’s best interest and said, “I really don’t have anything else to help him.” (Johans clinic note, March 22, 2018).
- 7) On March 23, 2018, Employer filed an employer first report of occupational injury (FROI) stating Employee injured his upper leg while delivering seafood to a facility when he started to move the truck and it lurched forward. (Employer FROI, March 23, 2018).
- 8) On January 17, 2019, Dr. Johans recommended either femoral nerve or spinal cord stimulation because Employee could not handle Cymbalta or gabapentin. He also recommended a formal strength training course for Employee’s left hip flexor and knee extensor. Dr. Johans

said Employee did not need to see him anymore but he was not at “medical maximum regarding pain management.” (Johans clinic note, January 17, 2019).

9) On February 19, 2019, on a “Claim History Questionnaire” asking Employee to “Give all dates you have missed work due to this work injury” he wrote, “No work” and “Driving truck since injury.” (Employee Claim History Questionnaire, February 18, 2019).

10) On March 6, 2019, James Schwartz, M.D., performed an employer medical evaluation (EME) and diagnosed left hip degenerative joint disease and diabetes. He recommended hip x-rays, electrodiagnostic studies of both lower extremities and a diagnostic left hip joint anesthetic injection because he felt Employee did not have an adequate workup for his complaints. Dr. Schwartz stated Employee’s symptoms began with the work injury and the work injury is the substantial cause of Employee’s need for medical treatment. He concluded Employee had not reached medical stability and restricted Employee to sedentary work. (Schwartz EME report, March 6, 2019).

11) On April 16, 2019, PA-C Sandquist opined Employee was not able to operate a commercial vehicle safely at the time of his November 28, 2017 appointment with Sandquist and should not be operating a commercial vehicle while his symptoms, including radicular weakness and decreased sensation persist, which impede his ability to safely operate the equipment. (Sandquist Letter, April 16, 2019).

12) On May 15, 2019, Employer reported it began paying TTD benefits beginning on March 6, 2019. (Secondary Report of Injury (SROI), May 15, 2019).

13) On August 20, 2019, Employee sought TTD, permanent partial impairment (PPI) benefits, medical costs, rehabilitation benefits, penalty, interest and attorney’s fees and costs. (Claim for Workers’ Compensation Benefits, August 20, 2019).

14) On September 4, 2019, R. David Bauer, M.D., performed an EME and diagnosed an entrapment neuropathy or contusion of Employee’s lateral femoral cutaneous nerve. He stated the work injury was the substantial cause of Employee’s neuropathy and anterior thigh dysesthesias. Dr. Bauer opined no additional medical treatment was reasonable or necessary because the only treatment is medications Employee has been prescribed. He opined Employee was medically stable as of March 6, 2019, because there had been no objective change since Dr. Schwartz’s EME. Dr. Bauer assessed a one percent PPI. He said there was “no objective physiologic condition” preventing Employee from returning to the job he held at the time of the

work injury. Dr. Bauer opined Employee was capable of medium or heavy physical duty work prior to the work injury and he remained capable of such work. (Bauer EME report, September 4, 2019).

15) On September 10, 2019, Employer denied all benefits based upon Dr. Bauer's September 4, 2019 EME report. It contended there was no medical evidence that time loss was related to the work injury. (Controversion Notice, September 10, 2019).

16) On September 13, 2019, Employer denied TTD benefits after March 6, 2019, PPI benefits in excess of one percent, medical costs not reasonably related to the work injury, attorney's fees and costs, penalty, interest and rehabilitation benefits based upon Dr. Bauer's September 4, 2019 EME report. It contended it paid TTD beyond the medical stability date in Dr. Bauer's report which resulted in an overpayment. (Controversion Notice, September 13, 2019). Employer admitted TTD "as supported by appropriate medical evidence through March 6, 2019", reasonable and necessary medical costs and a one percent PPI rating. (Answer, September 13, 2019).

17) On September 16, 2019, Employer reported it paid TTD through September 9, 2019. (SROI, September 26, 2019).

18) On October 31, 2019, Alfred Lonser, M.D., opined the substantial cause of Employee's leg and back symptoms was the work injury and Employee had not reached "maximum medical stability." He did not believe Employee would be able to operate a commercial vehicle again due to his inability to sit for long periods. Dr. Lonser predicted Employee will need epidural injections, nerve blocks, medication management and possibly surgical interventions. (Lonser miscellaneous report, October 31, 2019).

19) On November 29, 2019, Employee requested past TTD and related penalty, interest, finding of unfair and frivolous controversion and attorney's fees and costs be bifurcated from the other claimed benefits. (Petition, November 29, 2019).

20) On December 19, 2019, Employer opposed Employee's November 29, 2019 petition. It contended Employee completed a form on February 19, 2019, indicating he did not miss any work and had been driving truck since the injury and claims adjuster journals confirm there was no time loss claim. (Opposition to Petition to Bifurcate, December 19, 2019). Attached as an exhibit to the opposition were claims' adjuster journal entries which included the following:

- a. On March 22, 2018, the claims adjuster sent an email to Paul Dale, Employee's supervisor, asking whether there was lost time and medical bills.
- b. On March 23, 2018, Mr. Dale stated Employee sought medical attention last fall and again on Monday, March 19, 2018. He thought Employee paid for the visits himself. Employee had no lost time.
- c. On January 2, 2019, a claims adjuster entry stated upper left leg strain, left hip strain and lumbar strain were "accepted conditions" and a claim for compensation "is presumed compensable, in the absence of substantial evidence to the contrary."
- d. On January 18, 2019, a claims adjuster journal entry said Employee called and stated he saw Dr. Johans the day before and Dr. Johans told him he could not do anything more for him and "to have an IME done to see how much disability he has & recommendations for future treatment."
- e. On May 22, 2019, a claims adjuster journal entry stated, "No additional work status note have been received, so we are using the [EME] report for the work status which dates time loss to 3/6/19."
- f. On July 17, 2019, a claims adjuster journal entry stated, "Released to sedentary work. It appears that [Employee] continued to work for a period of time and this was a no loss claim. Eventually [Employee] went off work. . . ." (Exhibit, claims' adjuster journal entries, December 19, 2019).

21) On December 27, 2019, Employee replied to Employer's December 19, 2019 opposition. He contended Employer was notified he had not worked since the work injury on February 19, 2019, and it had a duty to further investigate and inform him of his right to benefits but failed to do so. (Employee's Reply to Employer's Opposition to Employee's Petition to Bifurcate, December 27, 2019).

22) On December 31, 2019, Employee requested a second independent medical evaluation (SIME) for disputes between his treating physician and the EME regarding medical stability, ability to return to work, future medical treatment and a PPI rating. (Petition, December 31, 2019).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. 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;

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AS 23.30.005. Alaska Workers' Compensation Board.

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(h) Process and procedure under this chapter shall be as summary and simple as possible. . . .

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 the 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. . . .

(o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. . . .

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. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

Bifurcation is appropriate where a party has raised a potentially dispositive issue and the relevant law and facts were substantially independent of the other issues to be considered separately. *Nelson v. Klukwan, Inc.*, AWCB Decision No. 09-0071 (April 13, 2019).

AS 23.30.155. Payment of Compensation. . . .

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(h) The board may upon its own initiative 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.

....

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

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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.

AS 23.30.395. Definitions. In this chapter,

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(16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

....

(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;

....

(29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical

condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;

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ANALYSIS

Should Employee's claim seeking past TTD benefits and related penalty, interest and attorney's fees and costs be bifurcated from his remaining claimed benefits?

Employer paid TTD benefits from March 6, 2019 through September 9, 2019. It began paying TTD benefits after Dr. Schwartz opined Employee had not reached medical stability and limited him to sedentary duty in the March 6, 2019 report. Employer controverted TTD benefits after Dr. Bauer opined Employee reached medical stability on March 6, 2019, in his September 4, 2019 report, and contended it overpaid benefits. Employee contends his entitlement to TTD from November 28, 2017, the work injury date, through March 5, 2019, should be bifurcated from his remaining claimed benefits, including TTD after March 6, 2019 and continuing.

AS 23.30.135 provides authority to bifurcate a hearing. Bifurcation is only appropriate when it is likely to further the goals of a summary and simple process, it is quick, efficient and fair at a reasonable cost and it will properly protect the rights of all parties. AS 23.30.001(1); AS 23.30.005(h); AS 23.30.155(h). In the past an issue has been bifurcated when it is a potentially dispositive issue and the relevant law and facts were substantially independent of the other issues to be considered separately. *Nelson*.

Employee contends his entitlement to TTD benefits before March 6, 2019 is dependent solely on whether he was disabled because Employer has admitted March 6, 2019, as the date he reached medical stability. He argues that because Employer did not formally controvert the past TTD benefits or pay it, it should be bifurcated from the other claimed benefits at issue. Employee's entitlement to TTD benefits is contingent upon whether he is disabled and his medical stability date. AS 23.30.185; AS 23.30.395(16), (28). There is clearly a dispute regarding whether Employee was disabled because he contends his February 19, 2019 response to Employer's question indicates he had not worked since the work injury due to the work injury and Employer contends his February 19, 2019 response indicates he drove truck since the injury and did not

