ALASKA WORKERS' COMPENSATION BOARD

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

DAVID PATCHETT, Employee, Claimant, v. SNUG HARBOR SEAFOODS INC, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201804399 AWCB Decision No. 20-0044 Filed with AWCB Juneau, Alaska on June 8, 2020

David Patchett's (Employee) December 31, 2019 petition for a second independent medical evaluation (SIME) was heard on May 19, 2020, in Juneau, Alaska, a date selected on March 4, 2020. A February 18, 2020 affidavit of readiness for hearing request gave rise to this hearing. Attorney Justin Eppler appeared and represented Employee, who appeared. Attorney Stacey Stone appeared and represented Snug Harbor Seafoods Inc. and Liberty Northwest Insurance Corporation (Employer). There were no witnesses. The record closed at the hearing's conclusion on May 19, 2020.

ISSUES

Employee contends there is a significant medical dispute between his physician and Employer's physician regarding medical stability, his ability to return to work and future medical treatment. He requests an SIME.

Employer contends Employee's request for an SIME is procedurally flawed because he failed to file an SIME form listing the dispute and failed to attach copies of the medical records reflecting the dispute. It contends Alfred Lonser's, M.D., October 31, 2019 letter was obtained solely for the purpose of obtaining a new medical record to restart the 60 day time period to request an SIME. Employer contends there is no significant medical dispute. It requests an order denying Employee's request for an SIME.

Should an SIME be ordered?

FINDINGS OF FACT

The following facts are reiterated from *David Patchett v. Snug Harbor Seafoods, Inc.*, AWCB Decision No. 20-0009 (February 27, 2020) (*Patchett I*) are undisputed or are established by a preponderance of the evidence:

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. (*Patchett I*).

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. (*Id.*).

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. (*Id.*).

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. (*Id.*).

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. (*Id.*)

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." (*Id.*).

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. (*Id.*).

8) On January 17, 2019, Dr. Johans recommended either femoral nerve or spinal cord stimulation (SCS) 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." (*Id.*).

9) On March 6, 2019, James Schwartz, M.D., an orthopedist, 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. (*Id.*).

10) 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. (*Id.*).

11) On May 15, 2019, Employer reported it began paying temporary total disability (TTD) benefits beginning on March 6, 2019. (*Id.*).

12) On June 13, 2019, Employee followed up with R. Lynn Carlson, M.D., for persistent left leg pain. He declined injections in the past because of his previous response to Lyrica. Dr. Carlson encouraged Employee to consult with Dr. Lonser for pain management. (Carlson chart note, June 13, 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. (*Patchett I*).

14) On September 4, 2019, R. David Bauer, M.D., an orthopedist, 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. (*Id.*).

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. (*Id.*).

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 benefits beyond the medical stability date in Dr. Bauer's report which resulted in an overpayment. Employer admitted TTD benefits "as supported by appropriate medical evidence through March 6, 2019," reasonable and necessary medical costs and a one percent PPI rating. (*Id.*).

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

18) On October 7, 2019, Dr. Lonser diagnosed lumbar region spiral stenosis, lumbar intervertebral disc degeneration, sacroiliac joint pain and lower limb mononeuropathy. He performed L4-5 and L5-S1 epidural injections. (Lonser chart note, October 7, 2019).

19) On October 14, 2019, Employee followed up with Dr. Lonser and reported his back felt "a little better" but he still experienced left leg numbness and difficulty walking. Initially he had a 50 percent pain reduction. Dr. Lonser discussed the possible benefit of a repeat epidural injection at a higher level, the diagnostic benefit of a femoral nerve block, the diagnostic and therapeutic benefit of SI injections and intra-articular hip injections and answered Employee's questions about SCS. Employee decided to proceed with injections before considering a SCS and chose to proceed with an ultrasound guided left femoral nerve block next. (Lonser chart note, October 14, 2019).

20) On October 31, 2019, Dr. Lonser 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. He disagreed with a one percent PPI rating because Employee sustained life changing injuries causing him not to be able to maintain his job driving commercial vehicles or sit on a plane and causing erectile dysfunction. (*Patchett I*).

21) On November 13, 2019, Employee filed Dr. Loner's October 31, 2019 letter and the fax transmissal sheet showing Dr. Lonser's office faxed it to Employee on November 3, 2019. (Medical Summary, November 13, 2019).

22) On December 31, 2019, Employee requested an 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. (*Patchett I*).

23) On March 24, 2020, Employee sought TTD, permanent total disability (PTD) and PPI benefits, medical costs, penalty, interest and attorney's fees and costs "to obtain benefits due to [his] work-related injury including past TTD, PPI, ongoing TTD, PTD, medical costs and vocational rehabilitation benefits, penalty, interest, attorney's fees and costs." (Amended Claim for Workers' Compensation Benefits, March 24, 2020).

24) On May 14, 2020, Employee filed an amended petition seeking an 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. (Amended Petition, May 14, 2020). He filed an SIME form listing disputes between Drs. Lonser and Bauer and Dr. Schwartz on medical treatment, degree of impairment, functional capacity and medical stability. Employee attached Dr. Lonser's October 31, 2019 letter and Dr. Bauer's March 6, 2019 report and Dr. Schwartz's September 4, 2019 report. He contended an orthopedic, pain specialist and "neurology" are the required specialties. (SIME form, May 14, 2020).

PRINCIPLES OF LAW

AS 23.30.095. Medical treatments, services, and examinations.
. . . .

> (k) In the event of a medical dispute regarding determinations of causation . . . 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 following, general criteria are typically considered when ordering an SIME, though the statute does not expressly so require:

(1) Is there a medical dispute between Employee's physician and Employer's EME?

(2) Is the dispute "significant"?

(3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal v. Municipality of Anchorage (ATU), AWCB Decision No. 97-0165 at 3 (July 23, 1997). Considering the broad procedural discretion granted in AS 23.30.135(a) and AS 23.30.155(h), wide discretion exists under AS 23.30.095(k) to consider any evidence available when deciding whether to order an SIME.

The Alaska Workers' Compensation Appeals Commission (commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), addressed the authority to

order an SIME under AS 23.30.095(k), when there is a medical dispute, and AS 23.30.110(g), when there is a gap in the medical evidence. The commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Id. at 5.

With regard to AS 23.30.095(k), the commission referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 073 (February 27, 2008), at 8, in which it said:

> [t]he statute clearly conditions the Employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the Employee and the employer.

The commission further noted that before ordering an SIME, the board traditionally finds the medical dispute "significant or relevant" to a pending claim or petition, and the SIME will assist in resolving the dispute. *Bah*, at 4. Under either AS 23.30.095(k) or AS 23.30.110(g), the commission noted an SIME's purpose is to assist the board in resolving a significant medical dispute; it is not intended to give Employee an additional medical opinion at Employer's expense when Employee disagrees with his own physician's opinion. (*Id*.). The purpose of an SIME is to have an independent expert provide an opinion about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008).

> **8 AAC 45.092. Second independent medical evaluation.**
> . . . .
>
> (g) If there exists a medical dispute under AS 23.30.095(k), (1) the parties may file a
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> . . . .

> (2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;
>
> (A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and
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> (B) copies of the medical records reflecting the dispute; or
>
> (3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if
> . . . .
>
> (B) the board on its own motion determines an evaluation is necessary.

ANALYSIS

Should an SIME be ordered?

Employee received Dr. Lonser's October 31, 2019 letter on November 3, 2019. He timely filed a petition requesting an SIME on December 31, 2019 (November 3, 2019 + 60 days = January 2, 2019). 8 AAC 45.092(g)(2). However, Employee failed to timely file a completed SIME form and copies of the medical records reflecting the disputes with the December 31, 2019 petition. *Id*. Nonetheless, an SIME may be ordered if the evaluation is found necessary. 8 AAC 45.092(g)(3).

Bah provided three requirements before an SIME can be ordered. 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 fact-finders in resolving the dispute. Employee seeks past and continuing disability benefits, medical treatment and a higher PPI rating. Employer disputes his entitlement to those benefits based upon Dr. Bauer's report. Dr. Lonser, Employee's physician, opined Employee was not medically stable, he could not perform his job at the time of his injury and he needed future medical treatment including epidural injections, nerve blocks and possibly surgical interventions in his December 31, 2019 letter. He also disagreed with a one percent PPI rating. Dr. Bauer concluded Employee was medically stable, there was "no objective physiologic condition preventing him from return to his

job at the time of the injury," he only required future medical treatment included medications and he had a one percent PPI rating. There are significant disputes between Dr. Lonser's October 31, 2019 letter and Dr. Bauer's September 4, 2019 report regarding medical treatment, degree of impairment, functional capacity and medical stability, the medical disputes are significant and relevant to Employee's pending claims. *Bah*. An SIME is necessary because it would assist the fact-finders in resolving the disputes by providing an independent expert opinion about the disputed issues. *Seybert*. An SIME should be ordered. AS 23.30.095(k); 8 AAC 45.092(g)(3).

CONCLUSIONS OF LAW

An SIME shall be ordered.

ORDER

1) Employee's December 31, 2019 petition for an SIME is granted.
2) Employee is ordered to attend an SIME in accordance with the Act.
3) An SIME will be performed by an orthopedist, pain management specialist and neurologist selected from the Division's SIME list by the appropriate workers' compensation officer for disputes on medical treatment, degree of impairment, functional capacity and medical stability.
4) The parties shall schedule a prehearing to set SIME filing deadlines and address any other arrangements necessary to complete the SIME examination.

Dated in Juneau, Alaska on June 8, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 DAVID PATCHETT, employee / claimant v. SNUG HARBOR SEAFOODS INC., employer; LIBERTY NORTHWEST INSURANCE CORP., insurer / defendants; Case No. 201804399; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on June 8, 2020.

/s/
Dani Byers, WC Officer II