

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JAY JESPERSEN,)	
)	
Employee,)	
Claimant,)	
)	INTERLOCUTORY
v.)	DECISION AND ORDER
)	
TRI-CITY AIR,)	AWCB Case No. 198528817
)	
Employer,)	AWCB Decision No. 20-0048
and)	
)	Filed with AWCB Anchorage, Alaska
ALASKA INSURANCE GUARANTY ASSOCIATION,)	on June 17, 2020
)	
Insurer,)	
Defendants.)	
)	

Jay Jespersen's (Employee) April 10, 2020 petition addressing the second half of his second independent medical evaluation (SIME) ordered in *Jespersen v. Tri-City Air*, AWCB Decision No. 19-0050 (April 16, 2019) (*Jespersen I*) was heard on June 16, 2020, in Anchorage, Alaska, a date selected on May 13, 2020. The parties' May 13, 2020 stipulation gave rise to this hearing. Attorney Richard Harren appeared by telephone and represented Employee who also appeared by telephone and testified. Attorney Vicki Paddock appeared by telephone and represented Tri-City Air (Employer) and its insurer. The record closed at the hearing's conclusion on June 16, 2020.

ISSUES

Employee contends the division's written questions posed to SIME Mark Silver, M.D., should be narrowed. He contends the three panel members hearing this case should compose the questions. Employer contends *Jespersen I* gave the parties until May 7, 2019, to submit questions for the SIME physicians. It objects to Employee's request to narrow the SIME questions, which it contends is his attempt to ask new questions he could have submitted timely over a year ago.

1) Should questions for the SIME endocrinologist be modified?

Employee contends the SIME report from Sidney Levine, M.D., should not be sent to Dr. Silver.

Employer contends Dr. Levine's report is a relevant medical record and Dr. Levine's deposition addresses it. Employer contends that by regulation, they both must be sent to Dr. Silver.

2) Should Dr. Levine's SIME report and deposition transcript be sent to Dr. Silver?

FINDINGS OF FACT

All facts and factual conclusions from *Jespersen I* are incorporated by reference; some are repeated for context. A preponderance of 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 since the work-related 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, Dr. Bauer examined Employee for an employer's medical evaluation (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 work-related lower back fracture. He opined the surgery would have occurred when it did and to the extent it did notwithstanding employment conditions. Dr. Bauer further found the 1985 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. (Bauer report, March 4, 2017).

6) On or about January 9, 2019, Dr. Jensen responded to a September 26, 2017 letter from Employee's lawyer and opined the injuries Employee sustained in his November 16, 1985 plane crash 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 would continue into the foreseeable future. (Jensen responses, January 9, 2019).

7) 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).

8) At the April 4, 2019 hearing, Employee said he thinks there is a "real connection" between his chronic back pain since 1985 and increased blood sugar. He has seen several physicians for treatment he attributes to his work injury and some have not been paid. Employee has not been pain free for years nor has he been able to sleep through the night. His feet throb and his left knee aches; he attributes these symptoms to his 1985 injury. Employee's left leg symptoms have been getting worse over the last year. Until recently, he flew a floatplane seasonally in Bettles, Alaska. Employee typically 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. (Employee, April 4, 2019 hearing).

9) When previously asked if he would rather travel to a doctor by air or driving, Employee said it is "quicker and faster" in a jet, and added, in respect to driving to and from Alaska each year:

When I travel now, I don't, you know -- between here in Alaska, I had to buy a motor home is because I can't sit up for very long. So Judy actually drives a lot, and you know, so for me to sit in a car for 8 hours, it would take me 15 hours, because I drive every hour and a half or two, and then I get up, stop, move around. That's what is nice about a motorhome is you actually have a couch, and we got chairs that recline, too, when you are a passenger. (Deposition of Jay Jespersen, at 31, February 14, 2019).

10) When traveling from Phoenix to Alaska and back each year, Employee's wife Judy does "most of the driving" because Employee has a hard time sitting. (Judy Jespersen, April 4, 2019).

11) On April 16, 2019, *Jespersen I* ordered a panel SIME with an orthopedic surgeon and an endocrinologist, based upon a causation dispute between attending physician Dr. Jensen and EME Dr. Bauer. *Jespersen I* found that while Employee had not yet officially claimed benefits related to diabetes, symptoms from that disease could be relevant to his lower extremity issues, which he does attribute to his 1985 work injury. *Jespersen I* found a panel SIME would assist the fact-finders in ascertaining the parties' respective rights under the law. It gave the parties until May 7, 2019 to file questions for the SIME physicians. (*Jespersen I* at 9-10).

12) Employee did not seek reconsideration or appellate review of *Jespersen I* within 15 days. He did not seek modification within one year of *Jespersen I*. (Agency file).

13) On May 7, 2019, Employer filed its SIME questions, which did not differentiate between those addressed to Dr. Levine and Dr. Silver. Employer's questions state:

(1) In your opinion, is the 11/16/85 work injury a substantial factor in bringing about Mr. Jespersen's current back condition and any need for medical treatment? Please explain the reasons behind your answer.

(2) Dr. Bauer opined that the work injury resulted in a compression fracture of the superior endplate of L5 and that this fracture did not result in any damage to the L5-S1 disk. He opined that the disk fracture cannot be associated with the fracture [sic]. In Dr. Bauer's opinion, the progression of degeneration noted over the years at L5-S1 is consistent with aging. In Dr. Bauer's opinion, the work injury is not a substantial factor in Mr. Jespersen's need for surgery in 2016. Do you agree with Dr. Bauer? Please explain your answer.

(3) In your opinion, is the 11/16/85 work injury a substantial factor in bringing about Mr. Jespersen's current diabetes and blood sugar levels and any related need for medical treatment? Please explain the reasons behind your answer. (Paddock letter, May 7, 2019).

14) On May 8, 2019, the parties agreed to Employee filing and serving his SIME questions on or before May 24, 2019. (Stipulation for Extension of SIME Deadlines and for Dismissal of Petition Filed May 7, 2019, May 8, 2019).

15) On May 28, 2019, Employee filed his SIME questions, including three for Dr. Silver addressing diabetes, which state:

(1) At SIME page 00164 Dr. Paul L. Jensen, M.D. documented that “[Mr. Jespersen’s] blood sugars fluctuate, but especially with pain like he has had.” In your opinion, can/does chronic pain and its corresponding reactions within the human body aggravate and/or exacerbate the condition of chronic diabetes?

(2) What factors, conditions, or circumstances would you consider to have been “substantial factors” in Mr. Jespersen’s development of diabetes?

(3) Assuming that Mr. Jespersen had unrelenting and continuous chronic pain, such as is described at SIME 00026 through 00029, and, 00034 through 00035 for more than 20 years (1985 through 2008), and, assuming that he has several healthy brothers without diabetic conditions, in your opinion was that unrelenting pain and its corresponding reactions within Mr. Jespersen’s body a substantial factor in his having developed his diabetic illness? (Employee’s Questions for SIME Examiner, May 24, 2019).

16) On June 10, 2019, a board designee scheduled an August 6, 2019 SIME with Dr. Levine, orthopedist, in San Diego, California and an August 8, 2019 SIME with Dr. Silver, endocrinologist, in Edmonds, Washington. (Sue Reishus email, June 10, 2019).

17) On June 17, 2019, a board designee mailed the parties and physicians letters specifying the date, place and time for the SIME with Drs. Levine and Silver. The division’s letter to Dr. Silver included Employee’s and Employer’s questions, above. The designee’s questions state:

(1) Did Jay Jespersen have a back condition/diabetes that pre-existed the 11/16/1985 injury?

(2) If so, did the 11/16/1985 injury aggravate, accelerate, or combine with the pre-existing condition to cause disability or need for treatment?

(3) If so, did the 11/16/1985 aggravation or acceleration of, or combining with, the pre-existing condition produce a temporary or permanent change in the pre-existing condition?

(4) If the 11/16/1985 injury did not aggravate, accelerate, or combine with the pre-existing condition to cause disability or need for treatment, can you rule out the 11/16/1985 injury as a substantial factor in causing disability or need for treatment?

(5) If Jay Jespersen did not have a back condition/diabetes that pre-existed the 11/16/1985 injury, was the 11/16/1985 injury a substantial factor in causing disability or need for treatment?

(6) If you cannot rule out the 11/16/1985 injury as a substantial factor in causing disability or need for treatment, do you have an alternate cause of the disability or need for treatment that excludes the 11/16/1985 injury as a cause of the disability or need for treatment?

(7) If, in your opinion, the 11/16/1985 injury was a substantial factor causing disability, does the work-related disability continue?

(8) If, in your opinion, Jay Jespersen is no longer disabled from the work injury, when did the disability end?

(9) What specific additional treatment, if any, do you recommend to address the 11/16/1985 injury or its consequences?

10) Jay Jespersen has received a course of care requiring continuing and multiple treatments of a similar nature. In your opinion, was or is this type of treatment reasonable and necessary for the injury? That is,

- a) Will the treatment help Jay Jespersen recover from the injury?
- b) Will the treatment relieve chronic, debilitating pain?
- c) Will the treatment promote recovery from individual episodes of pain caused by a chronic condition?
- d) Will the treatment limit or reduce permanent impairment?
- e) Will the treatment enable Jay Jespersen to return to work?
- f) If Jay Jespersen is working, will the treatment enable Jay Jespersen to continue working?
- g) Will the treatment enable Jay Jespersen to continue to participate in an approved reemployment plan?

This was the last letter from the division to Dr. Silver concerning this SIME. (Harvey Pullen letters, June 17, 2019; agency file).

(18) On June 20, 2019, the parties discussed Employee's SIME appointments and stipulated to delaying them until October 2019 so he could wrap up his family business during its busy season. (Prehearing Conference Summary, June 20, 2019).

(19) On July 5, 2019, a board designee re-noticed Employee's SIME appointments for October 1 and October 3, 2019. (Pullen letters, July 5, 2019).

(20) On July 17, 2019, Employee's attorney emailed designee Reishus asking her to again reschedule the SIME examinations because Employee could not attend them until a date between November 15 and December 15, 2019, for various reasons including his mother's failing health and his need to deal with business issues. (Harren email, July 17, 2019).

(21) On August 2, 2019, a board designee re-noticed Employee's SIME appointments for November 21 and November 22, 2019. (Pullen letters, August 2, 2019).

(22) On October 23, 2019, the parties again discussed Employee's SIME and he advised he was unable to travel for the November 2019 appointments. The parties stipulated to "cancel/postpone" the appointments and possibly turn them into "records reviews only." (Prehearing Conference Summary, October 23, 2019).

(23) On November 21, 2019, the parties again discussed Employee's SIME and Employer suggested that, instead of following the process outlined in the October 23, 2019 meeting, the parties stipulate to allowing Dr. Levine to conduct a physical examination while Dr. Silver conduct a records review only. (Prehearing Conference Summary, November 21, 2019).

(24) On January 14, 2020, the designated chair signed the parties' stipulation that Employee's attorney and Employer's lawyer had signed on January 10, 2020 and January 13, 2020, respectively. Summarizing, the parties stipulated to an SIME "process as follows":

- (1) *Jespersen I* selected Drs. Levine and Silver to perform the SIME.
- (2) Both physicians will be provided with SIME binders and questions from the parties and the board.
- (3) Employee will see Dr. Levine in-person.
- (4) "Dr. Silver's SIME report will be based on Dr. Levine's examination findings, the telephonic oral history taken with the employee by Dr. Silver, and, Dr. Silver's review of the medical records."
- (5) The board's designee can proceed with scheduling the appointments and providing records and questions. (Stipulation to SIME Process, January 13, 2020).

(25) On January 17, 2020, a board designee re-noticed Employee's SIME with Dr. Levine for March 5, 2020. (Pullen letters, January 17, 2020).

(26) On March 5, 2020, Dr. Levine examined Employee. (Levine report, March 5, 2020).

(27) On April 10, 2020, Employee sought an order narrowing questions to Dr. Silver, withholding Dr. Levine's report from Dr. Silver and postponing his SIME with Dr. Silver "until employee has exercised his right to cross-examine Dr. Bauer and Dr. Levine." (Petition, April 10, 2020).

(28) On April 27, 2020, Employer and Employee participated in Dr. Levine’s deposition. (Videoconference Deposition of Sidney H. Levine, M.D., April 27, 2020).

(29) On May 13, 2020, Employee suggested “dispensing with Dr. Silver’s SIME records review may be appropriate given the costs associated with the same.” The designee scheduled a June 16, 2020 hearing on the April 10, 2020 petition. (Prehearing Conference Summary, May 13, 2020).

(30) At hearing, Employee said he had underlying co-morbidities for COVID-19, including diabetes and a respiratory issue. Fears related to the pandemic prompted him to stipulate to a record-review SIME with Dr. Silver to reduce travel and possible COVID-19 exposure. He has regular hemoglobin A1C tests when he sees his physician Outside and Employee assumes these records have been filed with the board and available for Dr. Silver’s review. (Employee).

(31) Employee contended Dr. Levine’s SIME examination was inadequate. Notwithstanding his January 13, 2020 stipulation, Employee said Dr. Silver should be able to obtain additional tests or perform a “hands-on” examination if he deems it necessary. (Record).

(32) Employee dropped his request to delay Dr. Silver’s SIME. He also modified his request to “narrow” questions sent to Dr. Silver; instead, Employee contended the panel members, rather than a prehearing designee, should compose the questions submitted to Dr. Silver. (Record).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers. . . .

AS 23.30.135. Procedure before the board. (a) . . . 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 45.050. Pleadings. . . .

. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or maybe made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.092. Second independent medical evaluation. . . .

. . . .

(h) In an evaluation under AS 23.30.095(k), the board or the board's designee will identify the medical disputes at issue and prepare and submit questions addressing the medical disputes to the medical examiners selected under this section. The board may direct

(1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder; . . .

. . . .

(4) the party, who receives additional medical records after the binder has been prepared and filed with the board, to make two copies of the additional medical records, put the copies in two separate binders in chronological order by date of treatment, with the initial report on top, and number the copies consecutively; the party must file one binder with the board not later than seven days after receiving the medical records; the party must serve the other additional binder on the opposing party, together with an affidavit stating the binder is identical to the binder filed with the board, not later than seven days after receiving the medical records;

. . . .

(j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to

(1) submit written questions or depose the examiner, the party must

(A) file with the board and serve upon the examiner and all parties, not later than 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the written questions; if notice or the written questions are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party

gives timely notice of scheduling a deposition or serves a written questions; and

(B) initially pay the examiner's charges to respond to the written questions or for being deposed. . . .

(2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or

(3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying. . . .

(k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing. . . .

ANALYSIS

1) Should questions for the SIME endocrinologist be modified?

On April 16, 2019, *Jespersen I* gave the parties until May 7, 2019, to submit questions to the designee for both SIME physicians. Although Employer agreed to extend the time for Employee to file his questions to May 24, 2019, he filed them four days late on May 28, 2019. Employee included three questions addressing diabetes and "chronic pain" issues. The division's June 17, 2019 letter to Dr. Silver included Employee's three questions and the designee's questions, including one asking if Employee had a preexisting "back condition/diabetes." The designee's other questions are body-part-neutral and could address either Employee's back or diabetes. The division's letter also included Employer's three questions: one asked about causation for Employee's current back condition; one asked if surgery was reasonable and necessary; one asked about any causal relationship between the work injury and Employee's diabetes.

The June 17, 2019 letter was the last letter the division sent to Dr. Silver; the panel is satisfied with the division's questions as set forth in the letter. Employee has not shown any reason to narrow, add to or change the questions in the designee's June 17, 2019 letter to Dr. Silver, who can address any question he feels comfortable answering or defer questions to the orthopedic expert. If Employee does not like Dr. Silver's answers, or seeks clarification, he can submit

written questions to him or depose him in accordance with 8 AAC 45.092(j). Employee's request to narrow, add to or change the SIME questions to Dr. Silver will be denied.

2) Should Dr. Levine's SIME report and deposition transcript be sent to Dr. Silver?

Dr. Levine saw Employee and issued a report, which became an "additional medical record" that by regulation must be sent to SIME Silver as a supplemental SIME record. 8 AAC 45.092(h)(4). Furthermore, on January 13, 2020, the parties stipulated Dr. Silver's SIME report "will be based on Dr. Levine's examination findings." 8 AAC 45.050(f)(2)(3). It is difficult to understand why Employee would stipulate to Dr. Silver's report being based on Dr. Levine's examination findings, and then object to Dr. Levine's report containing those findings going to Dr. Silver. Employee may have presumed Dr. Levine's examination would be more thorough than he contends it was; at hearing he implied the examination was deficient. Nonetheless, he stipulated to this process primarily to protect himself from COVID-19 exposure; he has not provided good cause to relieve him from his stipulation. 8 AAC 45.050(f)(3). It has been 14 months since *Jespersen I* ordered an SIME and it is still not completed. The SIME process has not been quick, efficient or a reasonable cost to Employer. AS 23.30.001(1). Employee stated he does not want Dr. Silver's examination delayed. Therefore, the division will send Dr. Levine's report to Dr. Silver for his review. Dr. Levine has now been deposed; his deposition transcript will also be sent to Dr. Silver as required by law. AS 23.30.135; 8 AAC 45.092(h)(1). At hearing, Employee dropped other issues raised in his April 10, 2020 petition and in the controlling prehearing conference summary.

CONCLUSIONS OF LAW

- 1) Questions for the SIME endocrinologist will not modified.
- 2) Dr. Levine's SIME report and deposition transcript will be sent to Dr. Silver.

ORDER

- 1) Employee's April 10, 2020 petition is denied.
- 2) Upon scheduling the telephonic interview with Dr. Silver for a record-review SIME, the designee will use only and all the same questions posited in the June 17, 2019 letter to Dr. Silver.

- 3) The designee will send Dr. Levine’s SIME report and deposition transcript to Dr. Silver.
- 4) The designee will also send Dr. Silver all supplemented SIME records.
- 5) The designee is to contact Dr. Silver’s office immediately to obtain the next available date for him to conduct a telephonic interview with Employee and complete his record-review SIME.
- 6) Since Dr. Silver will be performing a record-review examination only, the designee is directed to delete from the SIME letter the sentence, “Jay Jespersen was asked to hand carry all x-rays and film studies taken for this injury.” The designee will also delete the sentence, “If additional radiographic studies will assist your examination, you may take x-rays if the employee agrees to submit to the procedure. If you want to perform any other studies, please contact me first.”

Dated in Anchorage, Alaska on June 17, 2020.

ALASKA WORKERS’ COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Sara Faulkner, 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 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 certified U.S. Mail, postage prepaid, on June 17, 2020.

/s/
Nenita Farmer, Office Assistant