ALASKA WORKERS' COMPENSATION BOARD

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

DAVID DUNHAM, Employee, Claimant, v. ALL AMERICAN OILFIELD, LLC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201911216 AWCB Decision No. 20-0100 Filed with AWCB Anchorage, Alaska on November 3, 2020.

David Dunham's July 24, 2020 Petition for a second independent medical examination (SIME) was heard in Anchorage, Alaska on September 22, 2020, a date selected on August 18, 2020. The hearing request was made at the August 18, 2020 prehearing. Attorney David Grashin appeared and represented David Dunham (Employee). Attorney Michelle Meshke appeared and represented All American Oilfield, LLC and American Zurich Insurance Company (Employer). Witnesses included Employee and physical therapist Joel Everard, for Employee. The record was held open until September 25, 2020 for the receipt of additional evidence ordered by the board. However, board members did not have the opportunity to review the additional evidence and deliberate until October 7, 2020. Therefore the record was reopened for deliberations and then closed on October 7, 2020.

ISSUES

Employee contends physical therapist Joel Everard, Ph.D.'s opinion concerning his left hip pain and disability should be considered sufficient to create a dispute between his attending physician and Employer's physician. Employee argues the definition of "attending physician" under AS 23.30.395 should be expanded to include physical therapists, who are skilled in healing orthopedic injuries. Employee also contends there is in fact a dispute between Employee's physician Dr. Parker and Employer's physician Dr. Youngblood because Dr. Parker opined in his clinic notes the etiology of the left hip pain and disability was "undetermined" and Employee did not have it prior to the work injury. Employee contends Dr. Parker's statement he agreed with Dr. Youngblood's findings and recommendations on a check-the-box form are not meaningful.

Employer contends an SIME should not be ordered as there is no dispute between Employee's physician and Employer's physician on the issues of causation of Employee's left hip pain and disability. Employer maintains physical therapists are not physicians under the Act and their opinions cannot be considered in determining whether a medical dispute exists for the purposes of an SIME.

1) Should an SIME be ordered?

Employer objected to consideration of Employee's September 17, 2020 attorney fee affidavit at this hearing as this issue the August 19, 2020 prehearing conference summary did not list attorney fees as a hearing issue.

Employee submitted his attorney fee affidavit of and presumably wanted it considered at this hearing, but did not argue for a ruling.

2) Shall a ruling be made on Employee's petition for attorney fees?

Employer sought to admit a July 25, 2020 surveillance video to rebut Employee's hearing testimony.

Employee objected to the video's admission as he had never had an opportunity to view it, despite having filed a continuing discovery request, which included any surveillance videos.

3) Was the order admitting Employer's July 25, 2020 surveillance video into evidence correct?

On October 2, 2020, Employee filed "Employee's Response to Employer's Surveillance Report."

Also on October 2, 2020, Employer filed a petition to strike "Employee's Response" as the record closed on September 25, 2020.

4) Shall Employee's October 2, 2020 Response to Employer's Surveillance Report be considered?

FINDINGS OF FACT

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

1) On August 12, 2019, Employee was injured at work on the North Slope when he was on a staircase and its landing collapsed, causing him to fall. In his June 3, 2020 deposition, Employee described the incident leading to the injury as follows: "The landing is probably about…10 feet in the air. When I got to the top of the stairs, walking up, the whole landing come up and flipped up at an angle and dropped down, and I went tumbling down the stairs backwards. It was pretty violent." (Employee Deposition, 6/3/20, pg. 33).
2) Employee said when he fell backwards down the stairs he landed on his back, butt and legs. He did not have a doctor at first, and Employer told him he had to go see one of their doctors. However, Employer did fly him to Anchorage the next day where he was met at the airport by his brother-in-law and sister, who, seeing how much pain he was in, took him to Alaska Regional Hospital. (Deposition, 6/3/20, pgs. 18-19.)
3) On August 13, 2020, Employee was seen at the emergency department (ED) at Alaska Regional Hospital. He was diagnosed with a nondisplaced fracture of the proximal fibular diaphysis. He was also diagnosed with lateral right ankle sprain and soft tissue swelling without evidence of an acute osseous abnormality. His leg was splinted in the ED and he

was fitted with crutches. He was referred to see an orthopedic surgeon. (ED record, 8/13/20.)

4) On August 14, 2020, Employee was seen by orthopedic surgeon Jeffry Parker, M.D. at the Rhyneer Caylor Clinic. Employee stated he was at work on a drill rig when a platform collapsed and he fell about 10 feet, then rolled down some stairs. Dr. Parker placed Employee in a CAM walker, a walking boot, to allow partial weight-bearing and stated he should be off work with his right leg elevated to the level of the shoulder for about 10 days. Dr. Parker restricted Employee from working for two weeks and planned to re-evaluate him on September 23, 2019. (Report, 8/14/19).
5) On September 26, 2019, an MRI of Employee's right ankle showed an edge fracture of the posterior malleolus as well as a probable fracture of the posterior process of the talus. (MRI report, 9/26/19).
6) On September 30, 2019, Employee was referred for an initial evaluation at Everard Physical Therapy. He was evaluated by PT Joel Everard, who noted Employee had been injured at work six weeks previously and originally diagnosed with a fibular fracture, but more recently a talar microfracture on the articular surface of the right ankle had been identified. He noted Employee complained of severe pain in the right ankle. PT Everard set goals to decrease Employee's pain level and have him walk without crutches within three weeks. He also set a goal for Employee to walk without a CAM boot in six weeks with a normal range of motion in the right ankle in eight weeks. Employee was to have physical therapy two to three times per week for six to eight weeks. (PT Report, 9/30/19.)
7) On October 25, 2019, Employee complained of left hip pain. (PT Report, 10/25/19).
8) On October 28, 2019, Employee complained his left hip continued to hurt the most. Employee reported he had been trying to put more weight on the right, but his right ankle hurt. (PT Report, 10/28/19).
9) On November 4, 2019, Dr. Parker stated Employee was able to bear partial weight on his right leg in his CAM walker, using one crutch. Dr. Parker noted Employee's right lower extremity injuries were improving slowly, but also there was a new problem of left hip aggravation from crutch walking and physical therapy after his fall. (Report, 11/4/19.)
10) On November 5, 2019, Dr. Parker, in response to Employer's questions, stated Employee had left hip pain and stiffness, with limited and painful internal and external rotation compared to

the opposite hip. Dr. Parker stated these symptoms were of undetermined etiology and Employee had not had this pain prior to the August 12, 2019 work accident. He further noted the left hip x-rays were normal, suggesting an acute process. In addition, Employee had been largely immobile since the accident and the symptoms were present since he had started physical therapy. Dr. Parker planned to perform a left hip cortisone injection. He stated Employee would not be able to return to work without restrictions for three to four months. (Response to Employer's letter, 11/8/19.)

11) On November 6, 2019 Employee underwent a left hip steroid injection. (Report, 11/6/19).

12) On November 8, 2019, Employee reported to PT Everard that the left hip steroid injection had "helped a lot." (PT Report, 11/8/19).

13) On December 9, 2019, Employee continued to complain of right foot and ankle pain as well as recurrent left hip pain. Dr. Parker noted Employee felt undue pressure on the left hip and had started having left hip and groin symptoms and pain in the lateral aspect of the left thigh after his ability to ambulate and get around increased. He also remarked Employee received two weeks of pain-free activity after the left hip cortisone injection, but now his left hip pain had returned worse than ever. The pain has caused him to fall and he was unable to ambulate without crutches due to pain in both the left hip and right ankle. Dr. Parker noted x-rays of the right tibia and fibula showed complete healing. There was no abnormality at the ankle. A pelvis x-ray showed no changes in the left hip from one month prior. Dr. Parker ordered a left MRI. (Report, 12/9/19).

14) On December 10, 2019, Employee's left hip MRI showed a left hip anterior superior labral tear, bilateral superior hip joint space narrowing with cartilage thinning, small os acetabula and lower lumbar partial disc desiccation. There was no muscle edema or tendon tears. (Report, 12/10/19.)

15) On December 18, 2019, Dr. Parker opined Employee would have a permanent partial impairment (PPI) rating greater than zero as a result of his work injury and would not have the permanent physical capacity to return to his job at the time injury. (Response to Rehabilitation Specialist Pete Vargas, Jr.'s 12/17/19 letter to Dr. Parker.)

16) On January 11, 2020, Employee was examined by Employer's physician orthopedic surgeon Scot Youngblood, M.D., who opined Employee's right leg and ankle fractures due to the work injury were healed and medically stable with no displacement or instability on

examination. He also evaluated Employee's left hip and opined there was mild arthritis and a probable degenerative anterosuperior labral tear which was preexisting and not substantially or caused or aggravated by the August 12, 2019 industrial injury. Dr. Youngblood stated because Employee's left hip pain did not begin until four to six weeks after the work injury, there could be no significant injury that occurred to the left hip during the work injury. Dr. Youngblood opined the left hip was not medically stable. He opined the right leg and ankle injuries were medically stable as of the date of his examination, which was January 11, 2020. He rated Employee's PPI due to the work in jury at 2%. (EME report, 1/11/20.)

17) On January 21, 2020, Employee was determined eligible for reemployment benefits. (RBA Designee Penny Helgeson's letter, 1/21/20).

18) On January 24, 2020, Dr. Parker stated he concurred with Dr. Youngblood's findings and recommendations in his January 11, 2020 EME report. (Dr. Parker's response to Employer's letter dated 1.24.20.)

19) On January 30, 2020, Employer controverted all benefits related to the left hip, reemployment benefits, TTD after January 29, 2020, and PPI over 2%, based on Scot Youngblood, MD's January 11, 2020 EME report. (Controversion notice, 1/30/20.)

20) On January 31, 2020, Employer requested a review of the RBA's January 31, 2020 eligibility determination. (Petition, 1/31/20).

21) On March 12, 2020, Employee filed his claim for total temporary disability (TTD), permanent total disability (PTD), permanent partial impairment (PPI), past and future medical and transportation costs, and attorney fees. (Claim, 3.12.20).

22) On April 27, 2020, as Dr. Parker was unavailable, Employee was seen at the Rhyneer Caylor Clinic by orthopedic surgeon Mark Caylor, M.D. Dr. Caylor stated he was in agreement with both his colleague Dr. Parker and EME physician Dr. Youngblood that Employee's left hip problems were not related to his right leg and ankle work injury. He agreed with Dr. Youngblood's two percent PPI rating based on the work injury to the right leg and ankle. (Report, 4/27/2020.)

23) On March 3, 2020, Employee reported he was slowly getting stronger but still struggled on stairs and had difficulty walking long distances. He reported being unable to push functional exercise due to left hip pain. PT Everard noted Employee's gait was slow and tentative, consistent with anticipatory pain and he recommended discharging Employee from physical

therapy until his left hip was cleared for treatment. He instructed Employee on proper progression of home exercise and walking programs. (Discharge Summary, 3/3/20).

24) On July 14, 2020 PT Everard, in response to a letter from Employee's attorney, opined the substantial cause of Employee's need for treatment of his left hip was the August 12, 2019 work injury. (PT Everard's opinion, 7/14/20.)

25) PT Everard testified he has both masters and doctorate degrees in physical therapy. He stated he had practiced physical therapy for 18 years in both Alaska and Washington states, primarily working with outpatient orthopedic patients. In regards to his treatment of Employee, PT Everard testified as follows: When he first saw Employee on September 30, 2019, he was in a CAM boot and using bilateral crutches and was under orders not to bear any weight on his right side. He first noted Employee's hip pain on October 25, 2019. He only worked on Employee's ankle as it was only the ankle that was under the plan of care. When Employee's hip pain began to interfere with his ability to progress in physical therapy, he asked that an evaluation of the hip be done. He last saw Employee on March 3, 2020, as his right ankle was fairly stable and any further treatment would require him to put more stress on his left hip, which he wasn't able to tolerate. PT Everard said the extra stress placed on Employee's left hip due to the work injury and the treatment for it was the cause of Employee's left hip pain and disability. PT Everard stated had seen other similar cases. (PT Everard hearing testimony.)

26) Employee testified his left hip began hurting after one month of using the CAM and crutches, which he started using after they were prescribed for him at the hospital. He had never had problems with his hips prior to this time. He currently used a cane to walk around and he had a bad limp if he did not use the cane. (Employee's hearing testimony.)

27) Employer's July 27, 2020 surveillance video showed a total of about 45 minutes of Employee over three days. It showed him tinkering with his bicycle in a driveway, walking back and forth across the road adjacent to the driveway, and at a parking lot of a store, sometimes with a limp, sometimes not. On one occasion it showed him lifting one object which appeared to be heavier than 25 pounds into the back of a truck. The video also showed him on his bicycle, pedaling a couple of times, but otherwise he appeared to be coasting. It was noted this was consistent with his June 3, 2020 deposition testimony he could not ride his bike, but had put a gas engine on it. The video also showed Employee

stopping at a gas station on his bicycle with a small gas can. (Employer's 7/27/2020 surveillance video.)

28) On June 3, 2020, Employee said deposition testimony he stated he had good and bad days in regards to his hip pain. Some days he could not even get out of bed it hurt so much. (Employee's 6/3/20 Deposition, pg. 36.)

29) Employee's testimony concerning his left hip pain and disability is credible. Employee did testify at hearing he had a bad limp if he did not use a cane. However, he also testified he had good days and bad days, which may well explain the discrepancy between his hearing testimony and his ability to walk without a bad limp at times as seen on the surveillance video. In addition, the surveillance video was made on July 27, 2020, almost two months prior to the hearing. (Experience, judgment. *Rogers & Babler*.)

PRINCIPLES OF LAW

23.30.001. Intent of the legislature and construction of chapter
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. . . .
. . . .

The board may base its decision not only on direct testimony 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 23.30.005. Alaska Workers' Compensation Board.
. . . .

(h) The department shall adopt rules for all panels, and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be a summary and simple as possible. . . .
. . . .

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

> (k) In the event of a medical dispute regarding issues of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, 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 cost of an examination and medical report shall be paid by the employer. . . .

In *Thoeni v. Consumer Elec. Servs*., 151 P.3d 1249 (Alaska 2007), an employee objected to an EME by a psychologist who was not a licensed physician. The employee contended that under AS 23.30.095(e), only a "physician or surgeon," *i.e*. an M.D., could perform an EME. The Court interpreted the statute broadly, noting the list was inclusive, and held the term "physician" should be read to include non-physician specialists, such as psychologists. *Id*. at 1258.

In *Carter v. Anchorage Daily News*, AWCB Decision No. 13-0050 (May 10, 2013), the board found under *Thoeni* "attending physician" in AS 23.30.95(k) must be interpreted to include qualified medical experts other than those listed in AS 23.30.395(3) and found Employee's audiologist's opinion would be considered in determining a dispute between Employee's physician and Employer's EME physician.

> **AS 23.30.155. Payment of compensation.**
> . . . .
>
> (h) The board may upon its own initiative at any time in a case . . . where right to compensation is controverted . . . 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.

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). *See also*, *Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991).

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) and AS 23.30.110(g) 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. 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). Contested benefits' value are considered when determining if a medical dispute is significant. *See e.g. McKenna v. State of Alaska,* AWCB Decision No. 16-0086 (September 26, 2016).
(Contested benefit was permanent total disability benefits.) "[T]he SIME physician is the board's expert." *Bah*, at 5, citing *Olafson v. State, Dep't of Trans. & Pub. Facilities,* AWCAC Decision No. 061, at 23 (October 25, 2007).

Richard v. Fireman's Fund, 384 P.2d 445 (Alaska 1963), was a civil tort case primarily about the insurer's duty to arrange for medical care for an injured worker, as opposed to simply paying for the care pursuant to the Act once the injured employee made his own arrangements. The employee lost sight in one eye from delays in obtaining medical care where both the Board and the insurance carrier

were aware of the urgency of treatment for his injured eye. *Richard* criticized the board for "its failure to promptly advise the appellant on how to proceed" and stated:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law. *Id*., at 449.

AS 23.30.395. Definitions. In this chapter,
. . . .

(3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
  (A) a licensed medical doctor;
  (B) a licensed doctor of osteopathy;
  (C) a licensed dentist or dental surgeon;
  (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
  (E) a licensed advanced practice registered nurse; or
  (F) a licensed chiropractor;
  . . . .

In *Thoeni v. Consumer Elec. Servs*., 151 P.3d 1249 (Alaska 2007), an employee objected to an EME by a psychologist who was not a licensed physician. The employee contended that under AS 23.30.095(e), only a "physician or surgeon," *i.e*. an M.D., could perform an EME. The Court interpreted the statute broadly and held the term "physician" should be read to include qualified non-physician specialists, such as psychologists. *Id*. at 1258.

Carter v. Anchorage Daily News, AWCB Decision No. 13-0050 (May 10, 2013), found under *Thoeni* "attending physician" in AS 23.30.95(k) must be interpreted to include qualified medical experts other than those listed in AS 23.30.395(3) and Employee's audiologist's opinion was considered in determining a dispute between employee's physician and employer's EME physician. *Carter* reasoned even if an audiologist is not an "attending physician," another medical doctor agreed with the audiologist's letter diagnosing the employee with work-place-induced bilateral hearing loss. Thus Carter concluded there was a dispute between M.D.'s concerning causation.

Title 8. Business and Professions

Chapter 11. Audiololgists and Speech-Language Pathologists
AS 08.11.200. Definitions.
. . . .

(8) "practice of audiology" means the application of principles, methods, and procedures of measurement, testing, appraisal, prediction, consultation, habilitation, rehabilitation, counseling, and instruction related to hearing and hearing impairment for the purpose of modifying communicative disorders involving speech, language, auditory function, including auditory training, speech reading and the recommendation, evaluation, fitting, and sale of hearing aids, including the fitting of ear molds;

Chapter 84. Physical Therapists and Occupational Therapists
AS 08.84.190. Definitions.
. . .

(6) "physical therapy" means the examination, treatment and instruction of human beings to detect, assess, prevent, correct, alleviate and limit physical disability, bodily malfunction, pain from injury, disease and other bodily or mental conditions and includes the administration, interpretation and evaluation of tests and measurements of bodily functions and structures; the planning, administration, evaluation and modification of treatment and instruction including the use of physical measures, activities and devices for preventive and therapeutic purposes; the provision of consultative, educational and other advisory services for the purpose of reducing the incidence and severity of physical disability, bodily malfunction and pain; "physical therapy" does not include the use of roentgen rays and radioactive materials for diagnosis and therapeutic purposes, the use of electricity for surgical purposes, and the diagnosis of disease;…

Chapter 86. Psychologists and Psychological Associates
AS 08.86.230. Definitions.
. . . .
(5) "to practice psychology" means to render or offer to render for a fee to individuals, groups, organizations, or the public for the diagnosis, prevention, treatment, or amelioration of psychological problems and emotional and mental disorders of individuals or groups or for conducting research on human behavior, a psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, including
(A) the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships;
(B) the methods and procedures of interviewing, counseling, psychotherapy, biofeedback, behavior modification, and hypnosis;
(C) constructing, administering and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivation

8 AAC 45.065. Prehearings.

. . . .

(c) the [prehearing] summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .

. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;
(2) to introduce exhibits;
(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;
(4) to impeach any witness regardless of which party first called the witness to testify; and
(5) to rebut contrary evidence.

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening

> the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

> **Alaska Rules of Professional Conduct**
> **Rule 1.8 Conflict of Interest: Current Specific Rules.**
> **Comment**
> **Financial Assistance**
> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Despite there being no prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination, any medical examination would have to comply with AS 23.30.095 and 8 AAC 45.082 regarding an employee's attending physician and changing of attending physician. See *Phillips v. Bilikin Investment Group*, AWCB Dec. No.'s 14-0020 and 14-0032, in which claimant's attorney paid for the medical examination and reports of a physician who was not an attending physician and those reports were excluded from consideration for any purpose in the employee's case.

ANALYSIS

1. *Should an SIME be ordered*?

If a significant medical dispute exists between Employee's attending physician and the EME physician and an SIME would assist in resolving the dispute, a party's SIME petition may be granted or one may be ordered on the board's own motion. AS 23.30.095(k); 8 AAC 45.092(g)(2); and (3)(B); *Bah*; *Smith*. In the absence of a medical dispute, an SIME may be ordered if there is a significant gap in the medical or scientific evidence or a lack of understanding of that evidence and the opinion of an independent medical examiner will assist the board in resolving the issues before it. AS 23.30.110(g); *Bah*. This case does not fall into any of these categories.

Employee did clearly define a medical dispute between one of his medical providers, a physical therapist, and Employer's physician. The dispute is whether or not the work injury is the substantial cause of Employee's left hip pain and disability, clearly a significant, relevant dispute. However, Employee was unable to define a dispute between his attending physician and Employer's physician, as required by AS 23.30.095(k). Employee argued his physical therapist, who opined Employee's left hip pain and disability was caused by his work injury and sequelae, should be deemed an "attending physician" under AS 23.30.395(3), by expanding the list to include physical therapists. Employee contended the list of "attending physicians" is not exclusive and has been previously expanded to include licensed psychologists and audiologists, citing *Thoeni* and *Carter*.

This case can be distinguished from both *Thoeni* and *Carter*. Whereas the definition of a physical therapy specifically excludes the diagnosis of disease, the practice of a psychologist under includes diagnosis, prevention, treatment or amelioration of psychological problems and emotional and mental disorders of individuals. AS 08.84.190; AS 08.86.230(5). In *Carter*, an ear, nose and throat specialist, a medical doctor, agreed with the audiologist's letter diagnosing the employee with work-place-induced bilateral hearing loss. In addition, the definition of "the practice of audiology" does not specifically exclude the diagnosis of disease. AS 08.11.200(8). In the present case, Employee's attending physician Dr. Parker and his colleague Dr. Caylor both

agreed with Employer's physician. Only PT Everard opined the work injury and sequelae were the cause of Employee's left hip pain and disability. The evidence does not contain any corroborating opinion from a medical provider qualified as an attending physician. AS 23.30.395(3). Where Employee's attending physicians, both orthopedic surgeons, agree with Employer's physician, also an orthopedic surgeon, that Employee's left hip problems are unrelated to his work injury. a physical therapist's opinion, however excellent the physical therapist's educational credentials and extensive his or her work experience may be, cannot be relied upon to diagnose the cause of Employee's left hip problems to establish a dispute between Employee's attending physician and Employer's physician. *Id.*; *Carter*.

Where there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an SIME opinion will assist to ascertain the parties' rights, and SIME may be ordered. AS 23.30.110(g); *Bah*. The purpose of ordering an SIME, whether the order is pursuant to AS 23.30.095(k) or AS 23.30.110(g) is "to assist the board, not to give employees an additional medical opinion at the expense of the employer when they disagree with their own physicians." *Id*., at 5. Here there is no gap in the medical evidence or lack of understanding of the medical evidence. The medical evidence in the record is clear. The opinions of all three orthopedic surgeons who have treated or examined Employee are not opposed. They agree Employee's work injury is not the cause of his left hip pain and disability. In the absence of opposing medical opinions between Employee and Employer's physicians, there is no medical dispute. *Smith; Bah*. While Employee may not be pleased with his orthopedic surgeons' opinions, an SIME cannot be ordered to provide him an additional opinion at Employer's expense. *Id*.

As there is no dispute between Employee's attending physicians and Employer's physician, nor any significant gap in the medical evidence nor lack of understanding of the medical evidence, an SIME shall not be ordered.

However, this does not mean Employee cannot still develop the evidence necessary to warrant an SIME. Employee may take the EME report to Dr. Parker, the attending physician who actually treated him, and ask him to review the medical opinions of EME physician Dr. Youngblood in

detail, specifically regarding the etiology of Employee's hip pain and disability. Employee may ask his attending physician to prepare a report stating he either agrees or disagrees with the EME's opinions in more detail. If Employee's attending physician does agree with the EME with regard to the cause of his left hip pain and disability, there will again be no medical disputes warranting an SIME. If Employee's attending physician disagrees in writing with one or more of the opinions expressed by Dr. Youngblood relating to the causation of the left hip problems, this will form the basis for a medical dispute, and the parties can either stipulate to an SIME or bring the issue back for an additional hearing. Employee may also ask Dr. Parker to refer him to another physician, for example an orthopedic surgeon specializing in the treatment of hip problems or to a chiropractor. Alternatively, Employee may exercise his right to one change of physician and select another attending physician or other health care provider qualified as an "attending physician" under AS 23.30.395(3). *Richard*.

Finally, if Employee is indigent and without health insurance, under Alaska Rules of Professional Conduct, Rule 1.8, Comments on Financial Assistance, an attorney may lend a client certain expenses, including the expenses of a medical examination. However, if the medical reports from such an examination are to be considered in an employee's workers' compensation case, the examination and reports must be from an actual attending physician who is or will be treating the employee. *Richard*; *Phillips*.

2. *Shall a ruling be made on Employee's petition for attorney's fees*?

Prehearing conference summaries will limit the issues for hearing to those that are in dispute at the end of the prehearing. 8 AAC 45.065(c). Unless the prehearing summary is modified, the summary governs the issues and the course of the hearing. *Id*. In this case, the sole hearing issue was identified in the August 18, 2020 prehearing conference summary was Employee's July 24, 2020 petition for SIME. Employer objected to Employee's attorney fee petition being heard and Employee did not offer any arguments it should be heard. Therefore, the decision to decline to hear this issue at today's hearing was correct. *Id*.

3. *Was the order admitting Employer's July 25, 2020 surveillance video into evidence and correct?*

Each party has the right to rebut contrary evidence at hearing. 8 AAC 120(c)(5). Employer requested permission to submit its surveillance video to rebut Employee's testimony at hearing. Employee objected because he had never had an opportunity to view the video, despite having filed a continuing request for discovery. Although Employer should have provided Employee with the surveillance video in response to his continuing discovery request, that it did not do so does not prevent it from being admitted into evidence for the purpose of rebutting contrary evidence. 8 AAC 45.120(c) and (e). Relevant evidence, meaning evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, is admissible. *Granus.* The credibility of this witness' testimony regarding his injury and disability is important to the disposition of his case. The surveillance video is relevant to an assessment of Employee's credibility, and it was correct to admit it into evidence and consider it for this purpose.

4. *Shall Employee's October 2, 2020 Response to Employer's Surveillance Report be considered?*

Evidence or legal memoranda filed after the board closes the hearing record will not be considered unless the board, upon its own motion, determines the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. 8 AAC 45.120(m). Here the record was held open until September 25, 2020 for the receipt of the surveillance recording to rebut Employee's testimony at hearing. The record was reopened on the board's own motion on October 7, 2020 solely for deliberations on Employer's surveillance video. The parties were not notified because the record was not reopened to receive additional evidence or legal memoranda; it was reopened to give the panel an opportunity to deliberate on the rebuttal evidence already submitted. Therefore, neither "Employee's Response" nor Employer's petition to strike "Employee's Response" shall be considered at this hearing. However, even if they were, the decision to review the surveillance video as rebuttal evidence would stand.

CONCLUSIONS OF LAW

1) An SIME shall not be ordered.
2) A ruling shall not be made on Employee's attorney's fee petition.
3) The order admitting Employer's surveillance tape into evidence was correct.

4) Employee's October 2, 2020 response to Employer's surveillance report will not be considered.

ORDER

1) Employee's July 24, 2020 SIME petition is denied without prejudice.
2) Employee may file a subsequent petition requesting an SIME should he obtain relevant medical evidence from a qualified medical expert.
3) Consideration of Employee's September 17, 2020 affidavit of attorney's fees is denied without prejudice.
4) Employer's June 3, 2020 surveillance tape is admitted into evidence.

Dated in Anchorage, Alaska on November 3, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/ Judith DeMarsh
Judith A DeMarsh, Designated Chair

/s/ Sara Faulkner
Sara Faulkner, Member

/s/ Bronson Frye
Bronson Frye, 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 DUNHAM, employee / claimant v. ALL AMERICAN OILFIELD LLC, employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case

No. 201911216; 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 November 3, 2020.

/s/
Nenita Farmer, Office Assistant