

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CHRISTIAN A. GARCIA AVILA,)	
)	
Employee,)	
Claimant,)	
)	INTERLOCUTORY
v.)	DECISION AND ORDER
)	
SILVER BAY SEAFOODS, LLC,)	AWCB Case No. 201810329
)	
Employer,)	AWCB Decision No. 20-0116
and)	
)	Filed with AWCB Anchorage, Alaska
LIBERTY INSURANCE CORPORATION,)	on December 24, 2020
)	
Insurer,)	
Defendants.)	
)	

An issue related to Christian Garcia Avila's (Employee) May 7, 2020 petition for a second independent medical evaluation (SIME) was heard on December 15, 2020, in Anchorage, Alaska, a date selected on October 21, 2020. An October 2, 2020 hearing request gave rise to this hearing. Attorney Patricia Huna represented Employee who testified. Attorney Jeffrey Holloway represented Silver Bay Seafoods, LLC, and its insurer (collectively, Employer). Alaska Workers' Compensation Division (the division) employee Dani Byers testified at the panel's request. All panel members, parties and witnesses appeared telephonically. At hearing, the parties stipulated to Wayne M. Weil, M.D., proceeding with the SIME by telemedicine. However, they could not agree on whether or not a physical capacity evaluation (PCE), also known as a functional capacity evaluation (FCE), would be included in the SIME. The record closed at the hearing's conclusion on December 15, 2020, but was re-opened on December 17, 2020, for additional briefing, and closed on December 19, 2020.

ISSUE

Employee contends if Dr. Weil does not recommend a PCE, then Employee's treating physician should recommend one, which would become part of the SIME process. The PCE report would then be sent to Dr. Weil for his review.

Employer contends the panel should not order a PCE and Dr. Weil should be allowed to determine whether or not he needs one before he can render his opinions about Employee's functional capacities. It contends if Dr. Weil states he does not need a PCE to render his opinions, then the PCE would not occur.

Should Employee's telemedicine SIME with Dr. Weil include a PCE?

FINDINGS OF FACT

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

- 1) On July 14, 2018, Employee injured his bilateral wrists and hands while lifting heavy, food-laden trays and pushing racks holding frozen fish while he was working for Employer in Naknek, Alaska. (First Report of Injury, July 19, 2018). He later alleged low back and left foot injuries. (Claim for Workers' Compensation Benefits, November 20, 2019).
- 2) Dr. Weil does medical examinations through California Medical Evaluators, which is a referral service with an office in Los Angeles, which explains why the current SIME list shows his mailing address is in Los Angeles. He does SIMEs for the division only in Washington. (Byers).
- 3) On May 7, 2020, Employee asked for an SIME, citing a medical dispute between his attending physician and Employer's medical evaluator (EME). (Petition, May 7, 2020).
- 4) On June 10, 2020, the parties through counsel appeared before a board designee and stipulated to conducting an SIME. The designee directed the parties to sign an SIME form and file it by July 13, 2020. The parties had not yet stipulated to a specialty or physician to perform the SIME. The designee prepared a schedule for the parties to exchange medical records, and provided questions for the eventual SIME physician to address. (Prehearing Conference Summary, June 10, 2020).

- 5) On June 29, 2020, Employer admitted there are medical disputes in this case warranting the requested SIME. (Answer to Employee's Petition for SIME, June 29, 2020).
- 6) On July 9, 2020, the parties stipulated to orthopedist Dr. Weil to perform the SIME. Medical disputes for Dr. Weil to review and report on include causation, treatment, functional capacity and medical stability. (SIME form, July 8 and July 9, 2020).
- 7) On August 13, 2020, the division addressed concerns about injured workers traveling to SIME visits in other states during the COVID-19 pandemic:

In some cases, the Alaska Workers' Compensation Board requires Second Independent Medical Evaluations (SIMEs), which often necessitate air travel outside Alaska. The location of many SIME doctors may result in travel through areas with a higher number of reported COVID-19 cases. The United States Center for Disease Control (CDC) states some individuals are at higher risk of getting very sick from this illness and is recommending that high risk individuals avoid non-essential air travel until further notice (Internet citation omitted).

In light of the CDC recommendation, injured workers who are considered to be at high risk by the CDC, or whose physician has stated they should not travel, will not be required to attend out-of-state SIMEs that require air travel. Travel to these SIMEs will be suspended until the CDC lifts its recommendation against air travel for high risk individuals.

Injured workers who are at high risk or whose doctors have stated they should not travel are encouraged to contact the division as soon as possible.

If an injured worker is not at high risk and all parties agree, a SIME that requires air travel may proceed. Several jurisdictions, including Alaska, and several airlines have imposed restrictions on travelers due to COVID-19. The cost of any testing, layovers, quarantine, or medical treatment due to COVID-19 during or resulting from the SIME travel will be considered part of the cost of the examination under AS 23.30.095(k) that shall be paid by the employer. . . . (Alaska Workers' Compensation Division Bulletin 20-02 (*REVISED*), August 13, 2020).

- 8) Revised Bulletin 20-02 does not address the situation where an injured worker is not "at high risk" and all parties do not agree an "SIME that requires air travel may proceed." (Observations).
- 9) On September 9, 2020, Employer controverted Employee's claim. (Controversion Notice, September 9, 2020).

10) On September 22, 2020, the parties through counsel appeared before a board designee to address the pending SIME and had the following discussion:

Designee confirmed the AWCB's receipt of the necessary SIME Binders and signed SIME Form. Parties discussed AWCB bulletin #20-02 with Employee stating that he was willing to accept the additional risk of traveling on an airplane during the Covid Pandemic. Employer representative advised that his client is unwilling to accept additional liability of Employee's airplane travel during the Covid Pandemic. Designee noted the possibility of a Teleconference or Records Review SIME with Employer representative stating that, given the issues in this case, an in person examination will be necessary. . . . (Prehearing Conference Summary, September 22, 2020).

11) On October 21, 2020, the parties through counsel appeared before a board designee and stipulated to an oral hearing on December 15, 2020, limited to the disagreement on how to proceed with the SIME given Bulletin 20-02. (Prehearing Conference Summary, October 21, 2020).

12) Effective November 4, 2020, the division's current SIME list includes Dr. Weil, with his "Physical Address" now listed in Seattle while his "Mailing Address" remains in Los Angeles. Dr. Weil performs telemedicine SIMEs. (Alaska Workers' Compensation Division Bulletin 20-06, November 4, 2020; Byers).

13) On November 13, 2020, California, Oregon and Washington issued joint travel advisories addressing the COVID-19 pandemic. These three states recommended a 14-day quarantine for interstate travel and asked residents to remain in their own states. California reported surpassing one million COVID-19 cases; Washington reported its COVID-19 cases had doubled in the prior two weeks. The joint travel advisory refers the reader to the Centers for Disease Control (CDC) page on travel risks, for more information. (California, Oregon & Washington Issue Travel Advisories, November 13, 2020).

14) On November 13, 2020, the California Department of Public Health (CDPH) issued its own advisory noting the risk for exposure to COVID-19 could be particularly dangerous for travelers in shared conveyances such as air, bus and rail. The state advised Californians to limit their interactions to their immediate households except for essential travel and to stay home in their regions. The CDPH defined "non-essential travel" to include travel that is considered "tourism or recreational"; "essential travel" included "work and study, critical infrastructure

support, economic services and supply chains, health, immediate medical care, and safety and security.” (CDPH Advisory, November 13, 2020).

15) On December 3, 2020, CDPH issued a “Regional Stay-At-Home Order” citing the “unprecedented rise” in COVID-19 cases in California. The CDPH noted new cases per day had increased by over 112 percent and new hospital admissions had increased from 777 on November 15, 2020, to 1,651 on December 2, 2020. The CDPH also expressed concern about Critical Care Unit bed availability in California due to the rise in cases. Therefore, Erica Pan, M.D., Acting State Public Health Officer for California, ordered tightened restrictions on travel and gatherings. Among these was the requirement, “All individuals living in the Region shall stay home or at their place of residence except as necessary to conduct activities associated with the operation, maintenance, or usage of critical infrastructure, as required by law, or specifically permitted in this order.” This order remains in effect for at least three weeks beginning December 5, 2020, and either continues or is relaxed thereafter depending upon adult intensive care unit hospital bed availability. (Regional Stay at Home Order, December 3, 2020).

16) It is not clear from the December 3, 2020 order how “Regions” are delimited. Nonetheless, Employer stipulated that Riverside County where Employee resides and San Diego County are in the same “region.” (Observations and inferences drawn from the above; record).

17) Employee lives in Coachella, California, which is about a one and one-half hour drive to San Diego on a major road. Notwithstanding his symptoms, he could drive his personal vehicle to and from San Diego and could stop and rest along the way if necessary. Employer had no objection to the panel looking at the California COVID-19 restriction website. (Employee; record).

18) According to the CDC, people 65 years old and older are at higher risk for severe illness from COVID-19. The CDC also stated people with the following conditions “have an increased risk” for severe illness from COVID-19:

- Cancer
- Chronic kidney disease
- Chronic obstructive pulmonary disease
- Heart conditions including heart failure, coronary artery disease or cardiomyopathies
- Immunocompromised state from solid organ transplant
- Obesity with body mass index of 30 or higher
- Severe obesity with body mass index greater than 40

- Pregnancy
- Sickle cell disease
- Smoking
- Type 2 diabetes mellitus

The CDC further warned that all adults with the following conditions “might be” at an increased risk from severe illness from COVID-19:

- Moderate to severe asthma
- Cerebrovascular disease
- Cystic fibrosis
- High blood pressure
- Immunocompromised state from immunodeficiency’s or use of immune weakening medicines such as corticosteroids
- Neurological conditions like to mention
- Liver disease
- Overweight with body mass index greater than 25
- Pulmonary fibrosis
- Thalassemia (a blood disorder)
- Type 1 diabetes mellitus (CDC.gov/coronavirus/2019).

19) Employee is 38 years old. He answered in the negative for all listed conditions in the first cohort, above, addressing persons with an “increased risk” for severe illness from COVID-19. Employee is 5’4” tall and weighs approximately 170 pounds. If these figures are correct, his body mass index (BMI) is 29.18. (Employee; www.dollartimes.com/calculate/BMI/64/170). As to the second group, above, for people who “might be” at increased risk, Employee with one exception had none of the listed conditions. His BMI exceeds 25, meaning he might be at increased risk for severe illness from COVID-19. (Experience, judgment and inferences drawn from the above).

20) Based on the above, at age 38 and with no comorbidities listed in the first cohort, Employee is not at “higher” or “increased risk” for severe illness resulting from COVID-19; according to the second CDC cohort, he might be at increased risk due to his BMI. (Inferences from the above).

21) Employee initially contended if Dr. Weil does not recommend or refer Employee for a PCE to address functional capacity, Employee’s physician should do so and a PCE should be accomplished before Dr. Weil finalizes his SIME report. (Record).

22) Employer initially contended Bulletin 20-02 states “that for an SIME to proceed, *both* parties must agree” (emphasis in original). Accordingly, it contended Bulletin 20-02 does not

allow the panel to override the bulletin's provisions and force Employer to agree to *any* travel for an SIME to proceed over its objections, including travel in his own car. Employer contended Bulletin 20-02 imposes extreme liability for COVID-19 related issues, including testing, layover, quarantines and medical treatment should Employee contract the disease while traveling for his SIME. Employer is unwilling to assume any heightened liability as a result of COVID-19. Furthermore, it contends any travel in California would violate California's stay-at-home orders. Employer contended an in-person "SIME cannot proceed in this matter at this time." Employer initially contended the functional capacity issue in this case requires a physical examination, which is not possible by a record review or telemedicine. However, later in the hearing the parties agreed to have Dr. Weil perform the SIME through telemedicine, which moots at least the air travel issue. Employer now contends if Dr. Weil determines Employee needs a PCE for Dr. Weil to determine his functional capacities, Dr. Weil can request one and Employer in that event has no objection to the PCE. However, it contends if Dr. Weil says he does not need a PCE to prepare his final report, a PCE will not occur and will not be part of the SIME process. (Hearing Brief of Silver Bay Seafoods, December 7, 2020; record).

23) Ultimately, while the parties at hearing agreed to have Dr. Weil do the SIME through telemedicine, they could not agree on whether or not a PCE should occur. Employer offered that if Dr. Weil says a PCE is necessary for him to render opinions about Employee's functional capacity, Dr. Weil could make a recommendation for a PCE; but if Dr. Weil says "he doesn't have any specific recommendations," then the attending physician can make a recommendation for one near Employee's home. "If Dr. Weil feels like he can render his opinions without a functional capacity evaluation, then the SIME would be concluded and we would expect a report." The designated chair restated Employer's position and said this meant if Dr. Weil said he did not need a PCE, there would not be a PCE. Employee, through counsel, agreed with that process. (Record).

24) Both parties at hearing contended Bulletin 20-02 has no authority to impose limitations or liabilities related to an SIME on the parties. (Record).

25) A PCE, usually by a physical or occupational therapist, is useful in determining an injured worker's objective physical capabilities and, in the past, PCEs have greatly aided fact-finders in resolving claims. Many physical therapists have the credential DPT, which stands for Doctor of Physical Therapy. PCE providers typically require examinees over many hours to perform

exertional tasks while the provider monitors subjective and objective signs and symptoms. Many such providers use databases to compare the examinee's results with prior examinees with similar demographic information. A PCE is helpful to discern full effort. (Experience, judgment).

26) After deliberating on December 17, 2020, the panel re-opened the hearing record to allow the parties to weigh in directly on the question of whether the panel could and should order a PCE, regardless of Dr. Weil's preferences or the parties' positions on the PCE issue, to assist the panel in best ascertaining the parties' rights. They were given until December 19, 2020, to file short briefs addressing this issue. (Soule email, December 17, 2020).

27) On December 19, 2020, Employee noted Alaska Supreme Court and commission precedent stating the board has discretion to order an SIME as it is "the board's doctor." He conceded the board is not bound by the parties' stipulations in respect to an SIME. Employee also conceded the board could order a PCE as part of the SIME process, in its discretion. He renewed his request for an SIME in San Diego, where a physical examination could occur. Nevertheless, Employee contended the parties "agreed to a process"; however, the process set forth in Employee's reply brief is not the process the parties stipulated to at the hearing as stated above in factual finding 22:

That stipulation is for Dr. Weil to perform a telemedicine appointment and if he recommends a PCE, the parties agreed to the process. Dr. Weil was to make a recommendation for a physical therapist in Mr. Garcia Avila's area but if Dr. Weil did not have any suggestions, then the parties would go with the recommendation of Mr. Garcia Avila's treating physician.

Employee contended the board could ask Dr. Weil for a referral for a PCE but, "If the SIME physician does not grant a referral, the board can be assured that a PCA [sic] is not necessary in this case." (Employee's Post Hearing Brief, December 19, 2020).

28) On December 19, 2020, Employer contended the decision of whether or not to order a PCE should rest with the SIME physician. It states, "It would be inappropriate for the board to order an FCE when it is unknown if the SIME physician requires one as part of the examination." (Supplemental Hearing Brief of Silver Bay Seafoods, December 19, 2020).

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. . . .

AS 23.30.005. Alaska Workers' Compensation Board. . . .

. . . .

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

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

. . . .

(k) In the event of a medical dispute . . . 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 *Anderson v. Municipality of Anchorage*, AWCB Decision No. 99-0091 (April 23, 1999), (*Anderson I*) Anderson's physician referred him for a PCE, which a physical therapist performed. A few months later, the parties stipulated to an SIME that included as an issue Anderson's functional capacity. His employer tried to send Anderson to another PCE with the employer's non-physician specialist, a physical therapist. Anderson refused, citing §095(e), which limited the employer's right to send him for an evaluation to only a "physician or surgeon" of the employer's choosing. Since the medical provider performing the PCE was neither a physician nor a surgeon, Anderson declined to attend, though he had no objection to attending a PCE that was part of the SIME process. In resolving this dispute in the employer's favor, the board stated:

If the employer's physician so refers the employee, we find the employee must submit to a physical capacities evaluation by a specialist in that field. We base our decision on several factors. First, AS 23.30.095(e) clearly authorizes an employer's physician to refer an employee to "specialists." We find the term "specialist" is not limited to only physicians or surgeons as the employee argues. Second, we find it is medically appropriate for new diagnostic data to be

developed; it has been over four months since the employee's January PCE, and Ms. Dowler's report anticipated improvement in the employee's physical capacities. Third, we find employers enjoy a presumption that examinations (or evaluations) every 60 days are reasonable. In this case, we find that it is. Finally, we find a physician's ability to collect and analyze diagnostic data, from a variety of sources and specialties -- technicians, psychologists, and physical therapists -- is exactly what physicians are trained for. To require an employer's physician to personally perform every aspect of an evaluation would defy common sense and be incongruous with the requirement for procedures to be as summary and simple as possible. AS 23.30.005(h) (footnote omitted [citing to current AS 23.30.001(1)]). It would certainly not be cost effective to require a physician or surgeon to perform every aspect of an employer's examination.

Anderson petitioned the superior court to review the board's decision; the superior court's *Anderson* decision on petition for review is missing from the division's superior court decision file. (*Anderson II*). However, in *Municipality of Anchorage v. Anderson*, 37 P.3d 420 (Alaska 2001) (*Anderson III*), which was the employer's appeal from the superior court's attorney fee award to Anderson, the Alaska Supreme Court cited from *Anderson II* and said the superior court ultimately concluded that an employer may, under certain circumstances, require an employee to undergo a PCE with a non-physician specialist. (*Anderson III* at 421).

In *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007), the Alaska Supreme Court heard an injured worker's objection to her employer sending her to a psychologist for an EME. *Thoeni* stated:

Alaska Statute 23.30.095(e) provides that "the employee shall . . . submit to an examination by a *physician or surgeon* . . . authorized to practice medicine under the laws of the jurisdiction in which the examination occurs." (Emphasis added). *Thoeni* argues that the plain language of this section indicates that only an M.D. may conduct an EIME. Plain language is only the starting point of the statutory inquiry, however. We interpret Alaska statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." (Footnote omitted). We have held that "unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage." (Footnote omitted).

[Former] Alaska Statute 23.30.395(31) [now renumbered §395(32)] states that "'physician' includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists." Because the legislature chose to use the word "includes" rather than more exclusive terms, we interpret the definition as a non-exclusive list. (Footnote omitted). Accordingly, the term "physician" should be

read to include psychologists such as Dr. Barth. This interpretation is consistent with the legislature's intent that "AS 23.30 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." (Footnote omitted). Mental health specialists such as psychologists are in the best position to ensure effective treatment of mental injuries such as those suffered by Thoeni. Her claim involves a mental injury, so it is reasonable that a doctor skilled in healing mental illness -- whether a Ph.D., Psy.D. or M.D. -- would be qualified to conduct the inquiry into her mental health. We have consistently credited the testimony of psychologists in worker's compensation cases and are of the firm belief that continuing to do so is the proper course. (Footnote omitted).

Bah v. Trident Seafoods Corp., AWCAC Decision No. 073 at 3 (February 27, 2008), stated:

Moreover, we note that the purpose of ordering an SIME under either AS 23.30.095(k) or AS 23.30.110(g) is to assist the board. . . . "[T]he SIME physician is the *board's expert*," not the employee's or employer's expert (emphasis in original).

Tobar v. Remington Holdings, LP, 447 P.3d 747, 757 (Alaska 2019), said the Act authorizes the board to order an SIME when requested under §095(k) and AS 23.30.110(g); 8 AAC 45.092(g) allows it to order one on its own motion. *Tobar* cited with approval from the commission's *Bah* decision, which said the board can 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." (*Tobar*; emphasis added).

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 . . . which it considers will properly protect the rights of all parties.

8 AAC 45.090. Additional examination. . . .

. . . .

(b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k). . . .

ANALYSIS

Should Employee's telemedicine SIME with Dr. Weil include a PCE?

On June 10, 2020, the parties stipulated orally to an SIME. By July 9, 2020, the parties filed a signed SIME form stipulating to Dr. Weil performing the examination in person. Issues arose thereafter concerning COVID-19 travel restrictions, particularly relating to Employee's home state, California. After some discussion at hearing on December 15, 2020, the parties stipulated to Dr. Weil performing the SIME using telemedicine. However, after some additional attempted stipulations, the parties did not ultimately agree on whether or not a PCE would be included as part of the SIME process.

The panel deliberated and decided it wanted a PCE as part of Employee's SIME. The panel reopened the record to allow the parties to offer a position on whether or not the panel could and should require a PCE for Employee's SIME regardless of whether or not the parties or Dr. Weil thought one was necessary before Dr. Weil offered opinions about Employee's functional capacity.

Employer contends it is inappropriate for the panel to order a PCE unless Dr. Weil requests one. It contends the division should ask Dr. Weil if a PCE is necessary for him to render his opinions about Employee's functional capacities. Employer contends if Dr. Weil says he does not need a PCE, one will not occur, the telemedicine SIME will be completed and he can write his report.

Employee changed his position somewhat; he acknowledges this panel has latitude and discretion to conduct the SIME however it chooses. He renewed his request that he abandoned at hearing that the panel send him to San Diego for an in-person SIME. Nevertheless, Employee contends the parties stipulated to an SIME process at hearing and this decision could simply enforce it; he also agrees that if Dr. Weil says he does not need a PCE to offer his opinions, the panel can "rest assured" a PCE is not necessary. While not dispositive of this PCE question, the stipulation Employee cites in his post-hearing brief is not the stipulation the parties made at hearing.

One issue for the SIME to address is Employee's physical capacities. Fact-finders are often better aided in their task by reviewing objective rather than subjective medical evidence. While Dr. Weil could conceivably use his experience with patients to estimate Employee's physical capacities, his estimate would necessarily be somewhat subjective after examining and observing Employee for probably less than an hour. Telemedicine further restricts Dr. Weil's ability to examine and observe Employee even more. Physicians do not normally perform PCEs; these are usually done by physical or occupational therapists. *Anderson I; Rogers & Babler.*

A PCE by comparison to a physician's estimate while still not perfect is more objective; the specialist performing the PCE will ordinarily observe the patient for several hours while putting him through various physical tasks all the while recording the patient's subjective reactions and comparing them to his objective measurements like heart rate, respirations, perspiration, and signs such as palpable muscle spasms that may follow physical exertion. This process is often useful in determining whether the patient was putting forth his best effort. Many PCE providers also have extensive databases with which they compare the present patient's efforts and results with prior patients with similar demographic factors. *Rogers & Babler.*

In short, the panel determined it wants a PCE in this case regardless of whether or not Dr. Weil believes he needs one to offer his opinions. Employer contends or at least implies the panel lacks authority to order a PCE; Employee contends it has the authority. At first glance, AS 23.30.095(k) would seem to support Employer's contention. It allows a panel, in the event of a medical dispute between the EME and attending physician, to send Employee to a "physician or physicians" the panel or its designee selects from the division's SIME list. However, the Alaska Supreme Court has already addressed a similar argument in the EME context.

In *Thoeni*, an injured worker objected to her employer sending her to a psychologist for an EME. She cited §095(k)'s plain and unambiguous language, which says the employee shall submit to examination by a "physician or surgeon" of the employer's choosing. The injured worker noted the Act's definition of "physician" was specific and did not include psychologists. However, the Alaska Supreme Court found the legislature chose to use the word "includes" in its definition, making the "physician or surgeon" list "non-exclusive." Consequently, the court included

psychologists in that statutory list. *Thoeni* based its decision in large measure on the legislative intent to interpret the Act to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost. *Thoeni*; AS 23.30.001(1). The *Thoeni* court's reasoning would apply equally well to an SIME situation.

Thoeni involved a mental health issue; the court reasoned that psychologists "are in the best position" to ensure effective treatment for such injuries. *Thoeni* found it "reasonable that a doctor skilled in healing mental illness" would be "qualified to conduct the inquiry into her mental health." Further, *Thoeni* said it consistently credited testimony from psychologists in workers' compensation cases and offered its "firm belief" that continuing to do so is the proper course. One SIME issue in the instant case is Employee's functional capacity. Physical therapists, often holding the credential DPT, are similarly "in the best position" to objectively measure Employee's functional capacities. PCEs and therapists who provide them have often been credited as valuable evidence in workers' compensation cases. *Rogers & Babler*. The *Thoeni* court's reasoning would again apply equally well to the PCE issue in an SIME setting.

In *Bah*, the commission held the SIME is intended to assist the fact-fighters, not the parties. The panel in this case believes a PCE would aid both Dr. Weil and the fact-finders in determining Employee's objective functional capacities. In *Tobar*, the Alaska Supreme Court cited with approval from *Bah* and said a significant gap in medical or "scientific evidence" warrants "an opinion by an independent medical examiner or other scientific examination" to help the fact-finders resolve the issues before them. *Tobar*. The record in the instant case discloses no existing PCE, which is necessary "scientific evidence"; there is therefore a gap in this evidence.

In an analogous situation, an agency panel said an EME could refer an injured worker to a non-physician physical therapist for a PCE. *Anderson I*. That panel found "specialists" in the EME setting were not limited to only physicians and surgeons and found it medically appropriate to get "new diagnostic data," a PCE, since it had been four months since the injured worker's last PCE. *Anderson I* further found a physician's ability to collect and analyze diagnostic data from various specialties, including physical therapists, is "exactly what physicians are trained for." *Anderson I* suggested it would "defy common sense" and be "incongruous with the requirement

for procedures in these cases to be as “summary and simple as possible,” to require an EME physician to personally perform every aspect of an evaluation, in that case a PCE. On appeal, the superior court affirmed. *Anderson II*. The Alaska Supreme Court on appeal of an unrelated issue in the same case cited the superior court’s decision concluding under certain circumstances, an employer may require an injured worker to undergo a PCE with a non-physician “specialist.” *Anderson III*.

It is hard to understand why an employer could require a claimant to undergo a PCE as part of the employer’s EME but this panel would lack discretion to order a PCE as part of an SIME. Furthermore, Employer controverted Employee’s claim; this decision on its own initiative in such circumstance can cause “medical examinations to be made.” Requiring a PCE as part of Employee’s SIME will help “properly protect the rights of all parties” by providing Dr. Weil and the panel with objective evidence of Employee’s physical capacities. AS 23.30.155(h). For all the reasons cited above, Employee will undergo a PCE with an appropriate provider prior to his telemedicine SIME with Dr. Weil. The PCE will occur promptly, close to Employee’s residence, at Employer’s expense as part of the SIME process. AS 23.30.095(k); 8 AAC 45.090(b).

It matters little to the panel how the PCE provider is determined. However, time is of the essence and the parties are encouraged to work together to identify an appropriate PCE provider near Employee’s residence. AS 23.30.001(1); AS 23.30.005(h). Nevertheless, in the event the parties cannot work together promptly to find a PCE provider, Employer may ask its EME and Employee may ask his attending physician for a referral to a PCE provider in Employee’s local area, including San Diego. To make this process and procedure as summary and simple as possible, Employee will get the PCE from the first provider identified by either Employer’s EME or Employee’s attending physician in a written referral for a PCE near Employee’s residence, filed and served on a medical summary. AS 23.30.005(h). The only risk factor Employee has is his weight, which according to the CDC only makes him possibly at higher risk for serious illness from COVID-19. There is no reason Employee cannot drive alone in his car to and from a PCE in his region. “Health” is an exception to California’s current stay-at-home orders; further, this decision and order places a legal obligation on Employee to obtain a PCE and for

Employer to pay for it. Therefore, it is unlikely local authorities in California will find Employee in violation of current state health mandates.

CONCLUSION OF LAW

Employee's telemedicine SIME with Dr. Weil will include a PCE.

ORDER

- 1) Employee's telemedicine SIME with Dr. Weil will include a PCE performed by an appropriate PCE provider near Employee's home in accordance with this decision.
- 2) The parties are directed to work together to identify an appropriate PCE provider in Employee's local region.
- 3) In the event the parties cannot agree on a PCE provider, Employer may obtain a written referral for a PCE from its EME and Employee may obtain one from his attending physician; Employee will obtain a PCE from the first PCE provider identified by a party through a written referral from the party's physician, filed with the division and served on a medical summary.

Dated in Anchorage, Alaska on December 24, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s
Nancy Shaw, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 Christian A. Garcia Avila, employee / claimant v. Silver Bay Seafoods, LLC, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201810329; 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 December 24, 2020.

/s/

Kimberly Weaver, Office Assistant