

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

BARBARA JACKSON,)	
)	
Employee,)	
Claimant,)	INTERLOCUTORY
)	DECISION AND ORDER
v.)	
)	AWCB Case No. 201808968
SOUTH PENINSULA HOSPITAL, INC.,)	
)	AWCB Decision No. 20-0119
Employer,)	
and)	Filed with AWCB Anchorage, Alaska
)	on December 31, 2020.
ALASKA NATIONAL INSURANCE,)	
)	
Insurer,)	
Defendants.)	
)	

An issue related to Barbara Jackson's (Employee) September 30, 2020 petition for a second independent medical evaluation (SIME) was heard on December 3, 2020, in Anchorage, Alaska, a date selected on October 27, 2020. An October 27, 2020 hearing request gave rise to this hearing. Attorney Michael Flanigan appeared telephonically and represented Employee. Attorney Martha Tansik appeared telephonically and represented South Peninsula Hospital, Inc., and Alaska National Insurance (collectively, Employer). The record closed at the hearing's conclusion on December 3, 2020.

ISSUE

Employer did not oppose Employee's request for an SIME. However, it contends the SIME should be done via telemedicine to limit Employee's COVID-19 exposure and avoid additional liability.

Employee contends she will accept the additional risk of the SIME travel and asks for an in-person SIME.

Should an SIME be done in-person or via telemedicine?

FINDINGS OF FACT

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

- 1) On June 22, 2018, Employee reported she sustained respiratory injuries when she was inhaled smoke from burning lithium batteries while working for Employer. (First Report of Injury, June 27, 2018).
- 2) 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).

- 3) 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." No statute,

regulation or case law supports that Revised Bulletin 20-02 has the force of law. (Knowledge; observations).

4) On September 30, 2020, Employee asked for an SIME, citing a medical dispute between her attending physicians and Employer's medical evaluator (EME). Employee listed her attending physicians' diagnoses "Mild work-related asthma associated with reactive airways dysfunction" and "Positive Methacholine Test, suggestive of Asthma" to support her SIME request. (Petition, September 30, 2020; SIME Form, September 11, 2020).

5) On October 20, 2020, Employer did not oppose Employee's September 30, 2020 SIME request. However, it did not agree to an out-of-state in-person SIME due to potential COVID-19 exposure. (Employer's Non-opposition to Employee's Petition for SIME, October 20, 2020).

6) On October 27, 2020, the parties through counsel appeared before a board designee to address the pending SIME and had the following discussion:

Employee representative confirmed that his client is willing to accept the additional risk of SIME travel during the Covid Pandemic. Employer representative confirmed that her client is unwilling to accept the additional liability of SIME travel during the Covid Pandemic. Parties were unable to agree a possible Telemedicine or Records Review SIME. (Prehearing Conference Summary, October 27, 2020).

7) According to the CDC people 65 years old and older are at higher risk for severe illness from COVID-19. The CDC also states 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 warns 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).

8) At the hearing on December 3, 2020, Employer offered to pay a functional capacity evaluation (FCE) and any other tests that may assist the SIME physician. Both parties noted Revised Bulletin 20-02 has no legal effect. (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 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 decisions 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 23.30.095. Medical treatments, services, and examinations.

. . . .

(k) In the event of a medical dispute regarding determinations 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. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k). The AWCAC confirmed "[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." *Id.*

AS 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

ANALYSIS

Should an SIME be done in-person or via telemedicine?

It is undisputed that an SIME should be ordered. Employee contends an out-of-state SIME should proceed because Revised Bulletin 20-02 states, "[i]f an injured worker is not at high risk and all parties agree, a SIME that requires air travel may proceed[,]" and she "does not consider herself 'high risk.'" However, as the parties noted at hearing, no statute, regulation or case law supports that Revised Bulletin 20-02 has the force of law. *Rogers & Babler*. Even if it did, Employer agreed to a telemedicine SIME but unequivocally disagreed to an out-of-state SIME; there was no agreement for an out-of-state SIME. Also, Employee's work injury at issue is asthma, which the CDC warns it might increase risk of severe illness from COVID-19; more likely than not, she belongs to the high-risk group. *Id.*

Employee further contends as a nurse, she is "exposed to the COVID-19 virus on a routine basis"; thus, an in-person SIME would not cause more exposure. Yet, this is irrelevant; if Employee became infected with COVID-19 while working, such would be a separate work injury unrelated to this case.

The purpose of an SIME is not to assist any party but to assist the fact-finders. *Bah.* When there is a medical dispute between an injured worker’s attending physician and an EME physician, an SIME may be ordered. AS 23.30.095(k). The fact-finders also have the discretion to make its investigation or inquiry “in the manner by which it may best ascertain the rights of the parties.” AS 23.30.135(a). Therefore, this panel is not bound by the parties’ intention or the manner in which an SIME should be conducted. Considering (1) the CDC’s warning, (2) the nature of Employee’s alleged work injury, (3) Employer’s willingness to pay a FCE or any other tests that may assist the SIME physician, (4) to avoid unnecessary delay, and (5) to limit Employer’s liability, an SIME via telemedicine will be ordered. AS 23.30.001(1); AS 23.30.135(a); AS 23.30.095(k).

CONCLUSIONS OF LAW

An SIME should be done via telemedicine.

ORDER

- 1) A telemedicine SIME is ordered. Employee’s telemedicine SIME will include a FCE performed by an appropriate FCE provider near Employee’s residence.
- 2) The parties are ordered to contact the SIME physician prior to the telemedicine SIME and obtain a list of tests needed for an accurate SIME. The results of those tests will be included in the SIME.
- 3) The parties are directed to appear at a mutually convenient prehearing conference so the designee can administer the SIME process.

Dated in Anchorage, Alaska on December 31, 2020.

ALASKA WORKERS’ COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, 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 Barbara Jackson, employee / claimant v. South Peninsula Hospital, Inc., employer; Alaska National Insurance, insurer / defendants; Case No. 201808968; 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 31, 2020.

/s/ Charlotte Corriveau

Workers' Compensation Technician