

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

SYLVIA BRUGGER,)
Employee,)
Claimant,)
v.) INTERLOCUTORY
) DECISION AND ORDER
)
WHITE MOUNTAIN SHARED) AWCB Case No. 201911844
SERVICES,)
) AWCB Decision No. 21-0001
Employer,)
and) Filed with AWCB Anchorage, Alaska
) on January 6, 2021.
ALASKA NATIONAL INSURANCE CO.)
and)
)
LIBERTY MUTUAL INSURANCE CO.,)
)
Insurers,)
Defendants.)
)

Sylvia Brugger's (Employee) March 25, 2020 petition for a second independent medical evaluation (SIME) was heard on December 9, 2020, in Anchorage, Alaska, a date selected on October 8, 2020. An October 8, 2020 hearing request gave rise to this hearing. Attorney Robert Bredesen appeared telephonically and represented Employee. Attorney Adam Sadoski appeared telephonically and represented White Mountain Shared Services (Employer, formerly Emerald Shared Services and K & L Distributors) and Liberty Mutual Insurance Company (Liberty). Attorney Jeffrey Holloway appeared telephonically and represented Employer and Alaska National Insurance Company (Alaska National). The panel issued an oral order continuing the hearing; this decision examines the continuance order.

ISSUE

As a preliminary matter, Alaska National contended it was not part of the SIME process because no claim has been filed for Employee's 2012 injury. Alaska National contended before it gets involved in any SIME process, it needs to be put on notice as to the benefits sought and afforded time to investigate, including an employer medical evaluation (EME).

Liberty contended an SIME should be ordered and its costs should be shared by Liberty and Alaska National. Employee expressed her intention to file a claim for her 2012 injury.

Was the oral order continuing the hearing correct?

FINDINGS OF FACT

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

- 1) On December 5, 2012, Employee reported she injured her back while working for Employer under the Alaska Workers Compensation Board (AWCB) case 201218265. (Report of Occupational Injury or Illness, December 19, 2012).
- 2) On August 13, 2013, Employee reported she injured her back while working for Employer under AWCB case 201320705. (Report of Occupational Injury or Illness, August 23, 2013).
- 3) On March 23, 2016, Employee reported she injured her back while working for Employer under AWCB case 201604648. (First Report of Injury, March 24, 2016).
- 4) On July 17, 2019, Employee reported she injured her low back while working for Employer under AWCB case 201911844. (Employee Report of Occupational Injury or Illness to Employer, July 18, 2019).
- 5) On July 18, 2019, Employee filed a "petition to combine claims" stating, "SINCE 2012 I HAVE RECEIVED TREATMENT FOR LOW BACK PAIN & INJURIES ON MULTIPLE OCCASIONS. THESE INJURIES HAVE ALL BEEN RELATED AND CAUSED BY HEAVY LIFTING / PRODUCT HANDLING." (Petition, July 18, 2019).
- 6) On December 30, 2019, Employee claimed medical costs, attorney fees and costs, and a finding of unfair or frivolous controversion for her 2019 injury. (Claim for Workers' Compensation Benefits, December 30, 2019).
- 7) On March 25, 2020, Employee asked for an SIME. (Petition, March 25, 2020).

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8) On April 22, 2020, Employee and Liberty agreed to administratively join cases 201218265, 201320705, 201604648 and 201911844, with 201911844 being the master case. (Prehearing Conference Summary, April 22, 2020). Employer, operating as Emerald Shared Services, was insured by Alaska National for the 2012 injury, but was insured by Liberty for 2013, 2016, and 2019 injuries. (ICERS; record).

9) On September 17, 2020, Employee and Liberty agreed to an SIME. (SIME Form, September 17, 2020).

10) No claim has been filed for Employee's 2012, 2013 or 2016 injuries. (ICERS, record).

11) On December 9, 2020, Bredesen began representing Employee. (Entry of Appearance, December 9, 2020).

12) At the hearing on December 9, 2020, Bredesen stated that he was not familiar with Employee's case yet due to his recent representation. Alaska National contended it was never put on notice about any benefits sought with regard to the 2012 injury and needed time to investigate and obtain an EME report. Liberty asked for an SIME order contending its costs should be shared by Liberty and Alaska National, but it did not provide any legal basis. (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. . . .

. . . .

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

AS 23.30.095. Medical treatments, services, and examinations.

. . . .

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board,

submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. . . .

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. . . .

8 AAC 45.050. Pleadings. . . .

. . . .

(b) Claims and petitions. . . .

. . . .

(5) A separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case. . . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Alcan Elec. and Eng'g, Inc. v. Redi Elec., Inc. and Hope*, AWCAC Decision No. 112 (July 1, 2009), held 8 AAC 45.050 clearly requires a claim to be filed for every injury for which benefits are claimed.

ANALYSIS

Was the oral order continuing the hearing correct?

Employee contends her 2012, 2013, 2016 and 2019 injuries "have all been related." However, she did not file a claim for the 2012 injury. Consequently, Alaska National neither was put on

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notice that benefits were sought for the 2012 injury nor had an opportunity to develop any defenses. The relevant regulation expressly states that “[a] separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case.” 8 AAC 45.050(b)(5). Therefore, Employee should have filed a claim for her 2012 injury to put Alaska National on notice that benefits were sought for it. *Alcan*. Employee represented at hearing that she intends to file a claim for her 2012 injury; if so, Alaska National should be afforded time to investigate and obtain an EME report as well. AS 23.30.095(e). Also, Bredesen began representing Employee recently and said he was not familiar with her case yet. Therefore, the December 9, 2020 hearing should be continued to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to Employee at a reasonable cost, and for the parties to be afforded due process. AS 23.30.001(1); (4); AS 23.30.135(a).

CONCLUSION OF LAW

The oral order continuing the hearing was correct.

ORDERS

- 1) The December 9, 2020 hearing shall be continued to March 10, 2020.
- 2) Employee is directed to file her 2012 claim on or before December 11, 2020.
- 3) Alaska National is directed to conduct an EME and file an EME report on or before February 15, 2021.
- 4) Evidence and hearing briefs shall be due on or before March 1, 2021.

Dated in Anchorage, Alaska on January 6, 2021.

ALASKA WORKERS’ COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Robert Weel, 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 Sylvia Brugger, employee / claimant v. White Mountain Shared Services, employer; Alaska National Insurance Co. and Liberty Mutual Insurance Co., insurers / defendants; Case No. 201911844; 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 January 6, 2021.

/s/

Kimberly Weaver, Office Assistant II