

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

|                                |   |                                   |
|--------------------------------|---|-----------------------------------|
| EDDIE SHIVERS,                 | ) |                                   |
|                                | ) |                                   |
| Employee,                      | ) |                                   |
| Claimant,                      | ) | INTERLOCUTORY                     |
|                                | ) | DECISION AND ORDER                |
| v.                             | ) |                                   |
|                                | ) | AWCB Case No. 201913896           |
| SILVER BAY SEAFOODS, LLC,      | ) |                                   |
|                                | ) | AWCB Decision No. 21-0007         |
| Employer,                      | ) |                                   |
| and                            | ) | Filed with AWCB Anchorage, Alaska |
|                                | ) | on January 26, 2021               |
| LIBERTY INSURANCE CORPORATION, | ) |                                   |
|                                | ) |                                   |
| Insurer,                       | ) |                                   |
| Defendants.                    | ) |                                   |
|                                | ) |                                   |

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An issue related to the Eddie Shivers' June 9, 2020 petition for a second independent medical evaluation (SIME) was heard in Anchorage, Alaska on January 13, 2021, a date selected on November 18, 2020. An October 22, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney Patricia Huna appeared and represented Eddie Shivers (Employee) who appeared and testified. Attorney Jeffrey Holloway appeared and represented Silver Bay Seafoods, LLC and Liberty Insurance Corporation (Employer). There were no other witnesses. The record closed at the hearing's conclusion on January 13, 2021.

## ISSUE

The parties previously agreed to an in-person SIME. Employee contends he is willing to travel to an out-of-state SIME despite the COVID-19 pandemic, and he asks that the SIME be ordered to proceed. Employer states it might be liable if Employee contracted COVID-19 while traveling to

the SIME and the cost of complying with travel restrictions is too high; it contends the risk is too great and asks that the SIME be postponed until the risk has decreased.

*Should an in-person SIME be ordered?*

FINDINGS OF FACT

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

- 1) On October 6, 2019, Employee slipped and fell while working in a freezer. (First Report of Occupational Injury, October 8 2010).
- 2) On June 29, 2020, the parties filed an SIME form, stipulating that there were disagreements between Employee's doctors and Employer's medical evaluator as to the cause and compensability of Employee's disability, the need for medical treatment, and other issues including functional capacity. The parties agreed the SIME should be conducted by an orthopedist. (SIME Form, June 29, 2020).
- 3) Employee lives in Phoenix, Arizona. (Record).
- 4) The Board's list of SIME doctors includes fifteen orthopedists. Six practice in California, five in Hawaii, three in Oregon, and one in Washington. None of the orthopedists on the Board's list of SIME doctors perform evaluations in Arizona. (Bulletin 20-06, November 4, 2020)
- 5) On August 13, 2020, the division issued Bulletin 20-02 (Revised) regarding travel to SIMEs during the COVID-19 pandemic. The bulletin noted the United States Center for Disease Control (CDC) recommended high risk individuals avoid nonessential air travel. The bulletin stated that travel to out-of-state SIMEs was suspended for high risk individuals. The bulletin also stated that if an injured work was not at high risk and all parties agreed, travel to SIMEs could proceed. The bulletin does not address cases in which an injured worker is not at high risk but the parties do not agree on travel to the evaluation. (Bulletin 20-02 (Revised), August 13, 2020).
- 6) At the October 22, 2020 prehearing conference, Employee's attorney stated Employee was willing to accept the additional risk of travel to an SIME during the COVID-19 pandemic. Employer's attorney stated Employer was not willing to accept the additional liability, and the parties were unable to agree to a telemedicine or records-review SIME. (Prehearing Conference Summary, October 22, 2020).

7) On October 22, 2020, Employee filed an affidavit of readiness for hearing on the COVID travel issue. (Affidavit of Readiness for Hearing, October 22, 2020).

8) At the November 18, 2020 prehearing conference, the parties were again unable to agree on travel to the SIME, and a hearing was set for January 13, 2021. (Prehearing Conference Summary, November 11, 2020).

9) Employee testified he is generally in good health and not at high risk for COVID-19. He currently has clients outside of Arizona, and his doctor approved his travel to those locations. He takes appropriate protective measures. (Employee).

10) At the January 13, 2021 hearing, Employee contended the COVID pandemic was likely to lessen before an SIME could be arranged, and while there are currently significant travel restrictions in California, the restrictions in Hawaii are significantly less. Employee would comply with all mandatory restrictions, which will decrease the risk of contracting COVID. Employee preferred an in-person evaluation to a telemedicine evaluation. (Employee, Hearing Representations).

11) Employer contends it should not have to bear the cost of any lodging to comply with any travel mandate, noting that California, Oregon, and Washington all require a 14 day isolation period. Employer contends the future risk is unknown, but at the time of the hearing, there was one COVID death every seven minutes in Southern California. Employer opposed a telemedicine evaluation because the parties had agreed functional capacity was an issue, and it was not feasible to evaluate functional capacity without evaluating Employee in person. (Employer, Hearing Representations.).

12) A physical capacities evaluation (PCE) or functional capacity evaluation, 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 to perform exertional tasks over many hours 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. Physicians do not normally perform PCEs; these are usually done by physical or occupational therapists. (Experience, judgment).

13) At the time of the hearing, COVID-19 vaccines were being administered on a limited basis. Also, new COVID-19 variants had been discovered, but their transmissibility and virulence had yet to be determined. (Observation, Experience).

14) Depending on the SIME physician selected, it can take from a few weeks to a few months for an SIME to be scheduled. (Observation, Experience).

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 at 3 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k). The AWCAC 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).

**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 in-person SIME be ordered?***

Employee contends an out-of-state SIME should proceed because he believes the risk of contracting COVID-19 is acceptable. Employer contends the risk is too high to proceed at this time. It is, however, undisputed that an SIME is needed.

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 and employer’s medical evaluator (EMEJ), an SIME may be ordered. AS 23.30.095(k). The fact-finders also have the discretion to make their 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 lack of an SIME orthopedist in Arizona, (3) the need for a functional capacity evaluation, (4) the inability to predict the severity of the pandemic in the future, (5) to limit Employer’s liability, and (6) to avoid unnecessary delay, an SIME via telemedicine will be ordered following a PCE in or near Phoenix, Arizona.

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. 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. The results of the PCE shall be provided to the SIME physician selected by the board designee to perform a telemedicine evaluation.

CONCLUSION OF LAW

An in-person SIME will not be ordered. The SIME will be conducted by telemedicine following a PCE near Employee's residence.

ORDER

- 1) Employee's SIME will be conducted by telemedicine by a physician chosen by the board designee from the SIME list following 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.

EDDIE SHIVERS v. SILVER BAY SEAFOODS, LLC

Dated in Anchorage, Alaska on January 26, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/

\_\_\_\_\_  
Ronald P. Ringel, Designated Chair

/s/

\_\_\_\_\_  
Sara Faulkner, Member

/s/

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Justin Mack, 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 EDDIE SHIVERS, employee / claimant v. SILVER BAY SEAFOODS, LLC, employer; LIBERTY INSURANCE CORPORATION, insurer / defendants; Case No. 201913896; 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 26, 2021.

/s/

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Kimberly Weaver, Office Assistant