

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSE GONZALEZ,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201909943
OCEAN BEAUTY SEAFOODS, LLC,)
) AWCB Decision No. 21-0013
Employer,)
and) Filed with AWCB Anchorage, Alaska
) on February 22, 2021.
LIBERTY INSURANCE CORPORATION,)
)
Insurer,)
Defendants.)

Ocean Beauty Seafoods, LLC's (Employer) October 27, 2020 petition for a second independent medical evaluation (SIME) was heard on January 21, 2021, in Anchorage, Alaska, a date selected on December 1, 2020. A November 17, 2020 hearing request gave rise to this hearing. Attorney Elliot Dennis appeared telephonically and represented Jose Gonzalez (Employee), who appeared telephonically but did not testify. English is Employee's second language; Gabriela Lievano interpreted Spanish for Employee. Attorney Jeffrey Holloway appeared telephonically and represented Employer. Employee reserved attorney fees and costs issue for a future merits decision. The record closed at the hearing's conclusion on January 21, 2021.

ISSUES

At hearing, Employee sought to testify about the prejudice he would suffer if an SIME were ordered. An oral order declined to hear his testimony for this decision.

1) Was the oral order declining to hear Employee's testimony correct?

Employer contends there are significant medical disputes regarding Employee's shoulder injury between his attending physician and Employer's medical evaluator (EME) and requests an SIME to resolve these disputes.

Employee contends there is no medical dispute to warrant an SIME.

2) Should an SIME be ordered?

FINDINGS OF FACT

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

- 1) On July 20, 2019, Employee reported he injured his shoulder while working for Employer. (First Report of Injury, July 26, 2019).
- 2) On July 23, 2019, John Koller, M.D., saw Employee and diagnosed "right arm, shoulder strain, trapezius strain." (Koller report, July 23, 2019).
- 3) On July 24, 2019, an x-ray showed "unremarkable radiographic appearance of the scapula" and "prominent acromioclavicular joint line spurring." However, Wendell Wilmoth, M.D., noted "[g]iven the complex morphology of the scapula and close composition to other structures, if there is high clinical suspicion for injury, CT could provide better evaluation if clinically indicated." (Wilmoth report, July 24, 2019).
- 4) On July 29, 2019, Employee was released to work with no restrictions. Although the release form states "John M. Koller, MD" as the signee, the signature on this form is different from Dr. Koller's signature shown on other documents. (Return to Work/School Release, July 29, 2019; observation; judgment).
- 5) On November 14, 2019, a magnetic resonance imaging (MRI) showed (1) supraspinatus tendinosis and tiny intrasubstance tear, (2) infraspinatus tendinosis with large intrasubstance tear distally, (3) SLAP tear in the superior labrum, (4) multiloculated cyst in the scapular notch, (5) AC joint degenerative hypertrophic change extending inferiorly, contacting the supraspinatus muscle at the musculotendinous junction and mildly displacing it, and (6) type II acromion. (James Bise, D.O., report, November 14, 2019).

6) On November 19, 2019, Employee claimed temporary total disability benefits, compensation rate adjustment, penalty and interest. (Claim for Workers' Compensation Benefits, November 19, 2019).

7) On February 21, 2020, Eric Hofmeister, M.D., saw Employee for an EME and diagnosed him with (1) right posterior shoulder girdle contusion substantially caused by the July 20, 2019 work injury, and (2) right shoulder superior labral tear, multiloculated cyst, acromioclavicular joint hypertrophy, and degenerative acromioclavicular joint and rotator cuff, not substantially caused by the July 20, 2019 work injury. Dr. Hofmeister opined Employee's need for medical treatment ended as of July 29, 2019, "when Dr. Koller released him back to full work without restrictions." Dr. Hofmeister stated Employee's July 20, 2019 work injury reached medical stability, and he could "return to all physical capacities required for the job he held at the time of injury as a fish roe processor." Dr. Hofmeister also opined Employee could "return to the medium-work force" and "be full-time gainfully employed"; his inability to "return to very heavy work would be related to his preexisting right shoulder condition." (Hofmeister report, February, 21, 2020).

8) On March 19, 2020, Employer denied TTD benefits beyond February 21, 2020, reemployment benefits, medical and transportation benefits beyond July 29, 2019, based on Dr. Hofmeister's February 21, 2020 opinions. (Controversion Notice, March 19, 2020).

9) On April 21, 2020, Dr. Koller wrote,

"[. . .] [the EME physician] concluded that [Employee] had degenerative arthritis in his shoulder joint and that it was a preexisting condition to his injury and that actually he had met medical stability just in nine days after his injury. He commented that I had given him a full work release at that time but I did not review his chart and did not see anything in there where I had given him a work release. In fact, I was not even in town at the time. He had seen a PA on July 23, 2019. She gave him a light duty release but then on July 25, 2019, she re-sent it and took him back off work. He then continued with physical therapy through until September 2019 at which time he saw Dr. Wood on September 8, 2019, and he continued him on his off duty status. I followed up with him some time shortly after that and after review and discussion with physical therapist here in Kodiak, decided that he should get the MRI and that led to him eventually being referred to OPA. I did not see him for the visit on July 29, 2019, nor did I give him a full work release. It is just not documented in the chart. But in any case after reviewing the IME, I disagree with the evaluation and assessment. It is unclear if the evaluator reviewed his actual MRI images which shows SLAP rotator cuff tear. The patient did not have symptoms of degenerative arthritis of his shoulder prior to the July 20, 2019, injury. On this basis, his claim was controverted. . ."

(Koller report, April 21, 2020).

10) On June 30, 2020, Aaron Humphreys, M.D., conducted a right shoulder arthroscopy with SLAP repair, distal clavicle resection, subacromial decompression, and mini open rotator cuff repair. He diagnosed (1) superior glenoid labrum lesion of right shoulder, (2) right rotator cuff tear, (3) right shoulder rotator cuff syndrome, and (4) osteoarthritis of right acromioclavicular joint. (Humphreys report, June 30, 2020).

11) On September 2, 2020, Dr. Humphreys saw Employee and stated “his range of motion [w]as lacking” and “[p]hysical therapy needs to be significantly more aggressive.” Dr. Humphreys recommended Celebrex and gabapentin for pain control and noted Employee was given hydrocodone and Flexeril by Dr. Koller. (Humphrey report, September 2, 2020).

12) On September 2, 2020, Employee claimed TTD, permanent partial impairment (PPI), medical benefits, transportation costs, attorney fees and costs, and interest. (Amended Claim for Workers’ Compensation Benefits, September 2, 2020).

13) On September 22, 2020, Employer admitted TTD benefits through July 28, 2019, medical and transportation costs incurred prior to July 29, 2019, and denied TTD benefits, medical and transportation costs, from July 30, 2019, forward, PPI benefits, attorney fees and costs, and interest, based on Dr. Hofmeister’s February 21, 2020 EME report. (Answer to Employee’s Amended Workers’ Compensation Claim; Controversion Notice, September 22, 2020).

14) On October 27, 2020, Employer requested an SIME contending there were four medical disputes: (1) treatment, (2) degree of impairment, (3) functional capacity, and (4) medical stability. It listed “Aaron Gary Humphrey, M.D.” and “Chris Hurley, PT” as Employee’s attending physicians and “Eric P. Hofmeister, M.D.” as the EME physician. (Petition; SIME Form, October, 27, 2020).

15) On November 17, 2020, Employee opposed Employer’s request for an SIME contending “no actual dispute exists.” (Employee Opposition to Employer’s Petition for SIME, November 17, 2020).

16) At hearing, Employee sought to testify about the prejudice he would suffer if an SIME were ordered; the panel found his testimony was not needed and issued an order declining to hear it. Employer, in support of its SIME request, contrasted Dr. Koller’s opinions against Dr. Hofmeister’s February 21, 2020 opinion. (Record).

- 17) An SIME is a lengthy and costly process that may prejudice either or both parties. (Observation).
- 18) There are sufficient medical opinions in this case for the fact-finders to weigh in and make credibility findings to issue a merits decision. (Observation).

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.

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. Bah* further stated when deciding whether to order an SIME, the board considers the following questions, though the statute does not require it:

- (1) Is there a medical dispute between Employee’s physician and an EME?
- (2) Is the dispute significant?
- (3) Will an SIME physician’s opinion assist the board in resolving the disputes?

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

1) Was the oral order declining to hear Employee’s testimony correct?

An SIME is a lengthy and costly process that may prejudice either or both parties. *Rogers & Babler*. However, its purpose is to assist the fact-finders; prejudice to Employee may not be considered to order an SIME. *Bah*. Thus, the oral order declining to hear Employee’s testimony for this decision was correct. AS 23.30.135(a).

2) Should an SIME be ordered?

Employer asks for an SIME. AS 23.30.095(k). 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). There are three requirements before an SIME can be ordered. *Bah*.

First, there must be a medical dispute between an Employee’s attending physician and an EME. Drs. Koller and Humphreys opined Employee has right shoulder limitations preventing him to return to work. On the other hand, EME Dr. Hofmeister opined Employee’s need for medical treatment ended as of July 29, 2019, “when Dr. Koller released him back to full work without restrictions.” A completed release form issued on July 29, 2019, by Dr. Koller’s office shows

“John M. Koller, MD” as the signee but with an unknown signature different from Dr. Koller’s signature. Dr. Koller disputed the release stating “I did not see him for the visit on July 29, 2019, nor did I give him a full work release.”

Dr. Koller also disagreed with Dr. Hofmeister stating, “[i]t is unclear if the evaluator reviewed his actual MRI images which shows SLAP rotator cuff tear. The patient did not have symptoms of degenerative arthritis of his shoulder prior to the July 20, 2019, injury.” Dr. Hofmeister opined Employee’s July 20, 2019 work injury reached medical stability, and he could “return to all physical capacities required for the job he held at the time of injury as a fish roe processor.” He stated Employee could “return to the medium-work force” and “be full-time gainfully employed”; his inability to “return to very heavy work would be related to his preexisting right shoulder condition.”

Employee contends there is no medical dispute since Dr. Hofmeister’s opinion was given prior to Employee’s June 30, 2020 shoulder surgery. This is incorrect. In contrast to Drs. Koller and Humphreys’ opinions recommending ongoing medical treatment, Dr. Hofmeister unequivocally stated Employee’s work injury resolved by July 29, 2019, and he needed no further treatment. Thus, there is a medical dispute between Employee’s attending physicians and the EME physician.

Second, the dispute must be significant. Employee seeks disability and medical benefits. Because Employee’s entitlement to those benefits depends on whether he is medically stable, can return to work, or needs further treatment, the dispute is significant. *Rogers & Babler*.

Third, an SIME physician’s opinion would assist the factfinders in resolving the dispute. Although the parties’ physicians are not in agreement on the above described medical issues, there are sufficient medical opinions for the fact-finders to weigh in and make credibility findings to issue a merits decision. *Rogers & Babler*. In short, an additional medical opinion would not aid the fact-finders in resolving the disputes; an SIME would unnecessarily delay this case. AS 23.30.001(1); (4); AS 23.30.095(k); *Bah*; *Rogers & Babler*. Therefore, an SIME will not be ordered. AS 23.30.095(k).

CONCLUSIONS OF LAW

- 1) The oral order declining to hear Employee's testimony was correct.
- 2) An SIME should not be ordered.

ORDERS

- 1) Employee's testimony will not be considered in this decision.
- 2) Employer's October 27, 2020 SIME petition is denied.

Dated in Anchorage, Alaska on February 22, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Randy Beltz, Member

Unavailable for signature
Pam Cline, 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

