

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DAVID JACKSON,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201910228
KENAI PENINSULA BOROUGH,)
) AWCB Decision No. 21-0099
Self-insured Employer,)
Defendant.) Filed with AWCB Anchorage, Alaska
) on November 3, 2021.
)
)
_____)

Employee David Jackson's September 3, 2020 petition for a second independent medical evaluation (SIME) was heard on October 12, 2021, in Anchorage, Alaska, a date selected on August 12, 2021. A July 30, 2021 hearing request gave rise to this hearing. Attorney David Grashin appeared telephonically and represented Employee, who appeared telephonically and testified. Attorney Colby Smith appeared in person and represented Employer Kenai Peninsula Borough. The record closed at the hearing's conclusion on October 12, 2021.

ISSUES

Employer did not oppose Employee's request for an SIME. However, it contends he has "high risk conditions" for COVID-19, and consequently, to avoid additional liability, an in-person SIME should be postponed until Employee is fully vaccinated, or a records review SIME should be done.

Employee contends he is entitled to an in-person SIME without releasing Employer from any COVID-19 liability related to the SIME.

1) Should an in-person or records review SIME be ordered?

Employee contends his attorney provided valuable services that will result in an in-person SIME; consequently, he should be awarded attorney fees.

Employer contends it did not resist an SIME; thus, Employee is not entitled to attorney fees.

2) Is Employee entitled to attorney fees?

FINDINGS OF FACT

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

- 1) On July 25, 2019, Employee reported he sustained a back injury on July 24, 2019, while working for Employer. (First Report of Injury, August 1, 2019).
- 2) On September 5, 2019, Jesse Kincaid, M.D., radiologist, opined a magnetic resonance imaging (MRI) showed lower lumbar spine degenerative changes, which were progressed at L4-5 compared to 2013. Upon his review with John Andreshak, M.D., Dr. Kincaid diagnosed “a right foraminal disc extrusion” and “moderate to severe right-sided neural foraminal narrowing” with “associated compression upon the exiting right L4 nerve root.” (Kincaid report, September 5, 2019).
- 3) On September 11, 2019, Dr. Andreshak diagnosed a lumbar herniated disc and recommended surgery. (Andreshak report, September 11, 2019).
- 4) On October 16, 2019, Dr. Andreshak performed a right lateral L4-5 discectomy. (Operative note, October 16, 2019).
- 5) On October 29, 2019, David Bauer, M.D., saw Employee for an employer medical evaluation (EME) and diagnosed (1) slip and fall injury with temporary aggravation of preexisting degenerative changes; (2) morbid obesity; and (3) symptom exaggeration. Dr. Bauer opined Employee’s work injury caused an acute change in symptoms but Employee had preexisting lumbar disc degeneration and related pain, which were caused by age. However, Dr. Bauer indicated the work injury combined with the preexisting condition caused the symptoms, disability, and need for treatment; he opined this would be a temporary aggravation that once

Employee was over the acute surgery, the aggravation of his preexisting condition would be concluded. (Bauer report, October 2019).

6) On February 12, 2020, an MRI showed “interval postoperative change with right hemilaminotomy at L4-5” with “degenerative narrowing similar to 2019.” (Kincaid report, February 12, 2020).

7) On February 13, 2020, Dr. Andreshak opined the February 12, 2020 MRI showed “a recurrent disc herniation L4-5” and recommended revision surgery. (Andreshak report, February 13, 2020).

8) On February 26, 2020, Dr. Andreshak performed a right L4-5 lateral discectomy, facetectomy, posterior lumbar decompression and fusion, and a transforaminal lumbar interbody fusion. (Andreshak report, February 26, 2020).

9) On March 16, 2020, Dr. Bauer conducted a records review EME and diagnosed (1) slip and fall injury with temporary aggravation of preexisting degenerative changes; (2) lumbar hemilaminectomy; (3) multilevel degenerative changes; (4) morbid obesity; and (5) history of symptom exaggeration on the October 29, 2019 examination. He opined the February 12, 2020 MRI did not show “any evidence of a recurrent disk herniation,” and “the aggravation of the pre-existing degenerative condition that occurred on July 24, 2019, was alleviated by the surgical intervention.” Dr. Bauer stated the work injury was not the substantial cause of the need for recurrent surgery; “the asserted need for an L4-5 fusion [was] due to the pre-existing degenerative changes, and not the July 24, 2019 injury or its sequelae.” (Bauer report, March 16, 2020).

10) On March 25, 2020, Dr. Bauer conducted another records review EME and opined Employee reached medical stability on January 9, 2020, and “the worsening of his condition thereafter [was] secondary to an unrelated condition and not related to the incident of July 24, 2019.” He stated the work injury was “no longer the substantial cause of [Employee’s] low back-related symptoms,” and “there was no objective change or harm to the body that occurred between the date of medical stability, January 9, 2020, and the decision to proceed with surgical intervention.” Dr. Bauer gave a seven percent permanent partial impairment (PPI) rating for the work injury and stated there was “no objective or physiologic information provided to suggest [Employee] was not capable to return to work” in his job he held at the time of the work injury. (Bauer report, March 25, 2005).

11) On April 4, 2020, Employee claimed temporary total disability and permanent partial impairment benefits, medical costs, and attorney fees and costs. (Claim for Workers' Compensation Benefits, April 24, 2020).

12) On April 9, 2020, Dr. Andreshak wrote:

Numerous documents were reviewed including a Controversion notice sent by the Worker's Compensation claims adjuster dated April 2, 2020, the Controversion notice dated 3/27/2020, and a record review dated 3/16/2020 and a[n] opinion dated March 25 of 2020 performed by R David Bauer M.D. at the request of OMAC.

[. . .] I am somewhat concerned with Dr. Bauer questioning a radiologist and his report, interject teeing, both his personal comments and opinions on the September 5, 2019 MRI as well as the February 12, 2020 exam. In one statement he questions my personal reading of each, then he questions the actual radiologist reading of the disk herniation. I do not see any documentation in his profession to state that he is a board certified radiologist. Instead he is a spine surgeon as I am who typically read our studies and correlate it with a patient's specific symptoms to find if there is any surgical treatment available.

Mr. Jackson underwent his initial surgery for his disc herniation due to his work injury on October 16 of 2019. Unfortunately he did continue to have some symptoms but was able to return to work approximately 4 months after. As he did so he started to have increasing symptoms again which necessitated his subsequent revision surgery. . . . Because of the physical demands of Mr. Jackson's job, he unfortunately had a reherniation which was a direct result of his initial work injury on that disc and not the normal aging / degeneration. But for his initial work injury and disc herniation, he would not have sustained this recurrent herniation.

Dr. Bauer also makes an unnecessary and unprofessional comment about the requirement for a facetectomy / foraminotomy in his review. "A reasonably prudent orthopaedic spine surgeon can decompress the foramen without performing a total facetectomy." He also states that this should have been performed initially. Obviously he did not read the initial operative report which stated a lateral decompression and discectomy which required a resection of both the pars interarticularis, ligamentum flavum and superior articular facet in order to decompress the nerve root. This unfortunately does not allow a discectomy in the subarticular recess medial to the pedicle. Any subsequent revision surgery requires a complete decompression which did necessitate doing a laminotomy and partial medial facetectomy from within the canal which in this case necessitated a complete facetectomy. Therefore there was a requirement for a spinal fusion. . . .

Finally medical stability for any nerve root / nerve decompression requires up to 6 months for the nerve to heal completely. Especially with a lateral disc herniation and its impingement on the dorsal root ganglia, DRG, it sometimes will take up to a year to know if all of the neurologic findings will resolve. At that time someone has reached medical stability / maximal medical improvement. (Andreshak letter, April 9, 2020).

13) On May 11, 2020, Employer denied all claims based on Dr. Bauer's March 25, 2020 opinion. (Controversion Notice, May 11, 2020).

14) 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, an 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).

15) On June 1, 2021, the division terminated Bulletin 20-02 (*REVISED*) and recommended:

During Travel

- Follow all CDC COVID-19 guidelines as they evolve regarding travel, physical distancing, hand hygiene, cleaning and disinfection, and respiratory etiquette.

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- Follow all state and local recommendations and requirements, including mask wearing and social distancing.

After Travel

- Self-monitor for COVID-19 symptoms; isolate and get tested if you develop symptoms.
 - Follow all state and local recommendations or requirements.
- (Alaska Workers' Compensation Division Bulletin 21-03, June 1, 2021).

- 16) On August 25, 2020, Employee claimed interest and a finding of unfair or frivolous controversion. (Claim for Workers' Compensation Benefits, August 25, 2020).
- 17) On September 3, 2020, Employee asked for an SIME. (Petition, September 3, 2020).
- 18) On September 11, 2020, Employer denied all claims based on Dr. Bauer's March 25, 2020 opinion. (Controversion Notice, September 11, 2020).
- 19) On September 22, 2020, Susan Reed, PA-C, released Employee to light duty work but indicated "[i]f light duty is not available, he is to remain off work until his 1 year postop, 2/26/2021, when he will have reached his [maximal medical improvement]." (Reed letter, September 22, 2020).
- 20) On September 24, 2020, the parties stipulated to an SIME. (Prehearing Conference Summary, September 24, 2020).
- 21) On May 4, 2021, Steven Humphreys, M.D., gave a 14 percent PPI rating. He noted Employee's weight was 137.60 kg with a body mass index (BMI) of 44.13. (Humphreys report, May 4, 2021).
- 22) Employee received his first dose of Pfizer COVID-19 vaccine on October 4, 2021, but will wait eight to twelve weeks before getting his second dose because he heard "it's better to wait longer from someone." (Employee).
- 23) The CDC recommends getting fully vaccinated before traveling domestically or internationally. Domestic travelers who are not fully vaccinated and have not recovered from COVID-19 in the past three months are recommended to have a post-arrival test three to five days after arrival at their destination, combined with self-monitoring and a seven-day period of staying home (or in a comparable location) or otherwise self-quarantining. The seven-day period should be completed even if the test is negative. In the absence of testing, this period should be

extended to 10 days. Also, 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 (CDC.gov/coronavirus/2019-ncov).

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.* It 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. . . .

AS 23.30.145. Attorney Fees. (a). Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries. . . .

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Harnish Group, Inc. v. Moore, 160 P.3d 146 (Alaska 2007), explained how and under which statute attorney fees may be awarded in workers' compensation cases. A controversy, actual or in fact, is required for an award of fees. AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Harnish* at 152. Reasonable fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* at 152-153. *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993), held because the employer had delayed disability payments, attorney fees and costs were also awardable because his attorney's efforts were necessary to induce the employer to finally pay the benefits.

ANALYSIS

1) Should an in-person or records review SIME be ordered?

It is undisputed that an SIME should be ordered. Employee contends an in-person SIME should proceed because Bulletin 21-03 terminated Revised Bulletin 20-02, which required "both parties to agree to an in-person SIME and the only alternative if one side did not agree to an in-person SIME, was to conduct a records review or postpone the SIME." He contends under Bulletin 21-03 "[t]he only criteria for the in-person SIME is that the employee has to follow CDC COVID-19 guidelines 'regarding travel, physical distancing, hand hygiene, cleaning and disinfection, and respiratory etiquette' and '[f]ollow all state and local recommendations or requirements.'" However, these Bulletins are recommendations and have no force of law. If they did, however, Employee would be subject to a post-arrival COVID-19 test three to five days after arrival at his destination, combined with self-monitoring and a seven-day self-quarantining because he has not been fully vaccinated and the CDC recommends such measures for "not fully vaccinated" travelers. Also, with a BMI of 44.13, he would "have an increased risk" for severe illness from COVID-19. Employer contends absent the inherent risk of traveling for an unvaccinated person that belongs to a "high risk group," an in-person SIME would be preferable; alternatively, it agrees to a records review SIME.

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 main question is which form of an SIME would assist the fact-finders and ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to Employee at a reasonable cost to Employer. AS 23.30.001(1); *Bah*. The fact-finders 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); *Bah*. Therefore, this panel is not bound by the parties’ intention or the manner in which an SIME should be conducted.

A records review SIME will allow the SIME to move forward promptly; because Employee has undergone surgical treatments, reached medical stability and was rated for PPI, a physical examination is not essential. Given the medical evidence already in the file, the SIME physician may formulate his opinion without a physical examination. AS 23.30.001(1); AS 23.30.135(a); AS 23.30.095(k). Therefore, a records review SIME will be ordered.

2) Is Employee entitled to attorney fees?

Employer did not resist a records review SIME; therefore, Employee is not entitled to attorney fees related to his request for an in-person SIME. AS 23.30.145(a); (b); *Childs; Moore*.

CONCLUSIONS OF LAW

- 1) A records review SIME will be ordered.
- 2) Employee is not entitled to attorney fees.

ORDER

- 1) A records review SIME is ordered.
- 2) Employee’s requests for an in-person SIME and related attorney fees are denied.
- 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 November 3, 2021.

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 David Jackson, employee / claimant v. Kenai Peninsula Borough, self-insured employer / defendant; Case No. 201910228; 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 November 3, 2021.

_____/s/
Nenita Farmer, Office Assistant