

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

FRANK J. MAITA,)
)
Employee,)
Claimant,)
)
v.) INTERLOCUTORY
) DECISION AND ORDER
)
STATE OF ALASKA,) AWCB Case No. 201817973
)
Self-Insured Employer,) AWCB Decision No. 22-0016
Defendant.)
) Filed with AWCB Anchorage, Alaska
) on March 3, 2022.

The State of Alaska's (Employer) December 2, 2021 petition to bar third-party involvement was heard on the written record on February 23, 2022 in Anchorage, Alaska, a date selected on February 7, 2022. Employer's Affidavit of Readiness for Hearing gave rise to this hearing. Attorney Lee Goodman represented Frank J. Maita (Employee). Assistant Attorney General Kim Stone represented Employer. The record closed after the hearing's conclusion on February 25, 2022.

ISSUE

Employer asserts an unrelated third party identified as "Steven Kline" accompanied Employee to medical appointments in this and other workers' compensation cases, and has compromised the examinations. Employer seeks an order prohibiting the third party from being involved or present in any employer's medical evaluation (EME) or second independent medical evaluation (SIME).

Employee did not file a brief; it is assumed he opposes Employer's petition.

Shall third party Steven Kline be prohibited from being involved in or present at any EME or SIME in this case?

FINDINGS OF FACT

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

- 1) On August 31, 2020, Employee was examined by Edwin D. Vhymeister, M.D. of Kenai Peninsula Orthopaedics. A wrist arthroscopy was recommended; Employee was to follow-up in two weeks to determine future treatment. Scribing services were used “through remote viewing and all parties consented to conducting the visit in this manner.” (Vhymeister record, August 31, 2020).
- 2) On September 15, 2020, Employee asserted there were “some serious inaccuracies” in the medical chart notes. Employee attached revised chart notes with a request to have Dr. Vyhmeister’s staff make the noted corrections. (Maita correspondence to Vhymeister, September 15, 2020).
- 3) On September 16, 2020, Employee was accompanied by his friend “Steven Cline” to his follow-up appointment with Dr. Vhymeister. Employee handed someone identified as “JN” “some paperwork and said there were changes that needed to be made to his initial visit on 08/20/2020.” “Steven” requested JN make the changes before the doctor entered the room; JN advised “I was unable to make any changes. He said that it was incorrect and it was my job to make the changes they requested.” They were advised they would have to speak with Dr. Vhymeister regarding any changes. Dr. Vhymeister noted the initial record of the patient’s visit was already locked, and stated

The patient and his friend, Mr. Cline both assured me face-to-face that this left wrist issue is not job-related, but yet they wanted me to change the records stating that the left wrist pain started after a fall on the MV Aurora Marine Highway system fairy [sic] . . . multiple other changes that were administrative in nature were recommended and I informed them that no changes can be made to my record, but I am more than happy to accept their letter and attach it to the medical records

Dr. Vhymeister informed Employee and his friend he did not feel comfortable participating in his case due to administrative anomalies and recommended Employee be seen in Anchorage. The record indicated “Mr. Cline stated that this was an unethical approach to the patient’s care and unethical behavior from me and I felt that this was unfortunate, but I believe my intent on helping

the patient was just averted by perhaps misinformation from the patient's friend perhaps." The chart note indicated Employee advised that he no longer wished to be under Dr. Vhymeister's care. A scribe was used through remote viewing. (Vhymeister record, September 16, 2020).

4) The name of the third party at issue is spelled in a variety of ways throughout the agency files, including "Stephen" or "Steven" and the surname of "Cline," "Kline," and "Klein." (Agency file).

5) On March 16, 2021, Jared Wallace, PA-C, noted Employee had been treated regarding "neck and low back injuries that are the result of a work place injury." PA-C Wallace stated Employee had an upcoming EME out of state, and "it would be best if he were to have an escort with him to aid in his travel." (Wallace travel note, March 16, 2021).

6) On April 6, 2021, Employee testified he attributed his wrist pain to a fall in December 2018; he did not seek any medical treatment near the time of injury, but iced and heated his wrist with the purser helping him. The swelling went down in a "couple of days" and the pain went away "within a couple of weeks." Employee felt Dr. Vhymeister "was getting the dates all wrong"; he did not know what Dr. Vhymeister's records were referencing when they noted "he reports that in March 2020 he had an event that he landed on the left wrist" Employee testified he had another appointment and brought "Steve" with him to correct the records. Employee was unable to clarify what portions of the records were wrong without referencing another document. He confirmed he used his personal medical insurance for appointments with Dr. Vhymeister. Employee testified he "probably did" tell Dr. Jessen he fell on the bow of a ferry on March 17, 2019; he could not remember whether the information provided to Dr. Jessen was wrong. Steve Cline was a friend, and his back injury was around March of 2019. (Maita Deposition, April 6, 2021). Deposition exhibits included the August 20, August 31, and September 16, 2020 Vhymeister records. (*Id.*)

7) On April 26, 2021, Dr. Vhymeister testified Employee's August 20, 2020 record was exactly what Employee had told him verbally. He used a "live scribe" on the phone, which temporarily taped words that are deleted after being typed to get the most accurate recording of the history. As he talked with a patient, it was recorded for someone to transcribe as part of a scribe service. The audio recording was deleted within 24 hours. Regarding the events of September 16, 2020, Dr. Vhymeister testified:

Q. . . . Do you recall how that visit began independent of your notes?

A. My MA walked into my office and said that somebody new was in the room, a friend of the patient, requiring her to change my medical records because he thought they were inaccurate or there were errors. My MA did not change anything, but I advised them that they should discuss that with me. And then it was --

Q. If I could stop you there. I'm sorry MA is a medical assistants?

A. Yeah, my medical assistant is the one that rooms the patient and takes the basic information, vitals --

Q. Okay. And her discussion, is that also on this --

A. She signed it --

Q. --scribe?

A. Yes, is that I asked to put that in there and I asked her to type in there her initials . . . she's the one that put my patient in there. I wanted that on the record there.

Q. And did you -- I'm sorry, I kind of interrupted you there. So what was your recollection or according to your notes what went on?

A. . . . I walked in the room and, you know, said hello to my patient. And then this other individual, who I do not know who he was, other than he claimed to be that particular name, began making demands for me to change the record. And then I -- I will not work this way, basically, so I have concerns that -- I cannot work with a patient that I have to be changing records. I just don't work that way.

Q. And this other person, Mr. Cline, Steven Cline, what was -- what was his demeanor?

A. Not friendly.

Q. I understand there was a list of changes at that time that the patient and Mr. Cline wanted you to make. Did you -- did your office keep a copy of those requested changes?

A. I asked him for it. I said, "If there are changes that need to be made administratively," I said to him, he could leave me a copy and then you can always put an addendum for whatever situation they need to be reviewed, if this are -- going to be the accurate information, and he -- apparently I don't have any of those records. He refused to provide them and they, when I would not change the chart, basically I declined to take care of him and they left the office."

....

Q. And not knowing -- or I should say, with the patient and his friend having told you that it was not Workers' Comp related, whereas they had earlier said it was, that confusion was the reason you could not participate in the care?

A. That's one of the reasons.

Q. And the others were?

A. I have to trust my patient. I have to trust that the information they provide the first time is information that we're going to be working with until they get better.

Q. And you didn't feel that was possible in this case?

A. I did not.

....

(Vhymeister deposition, April 26, 2021).

8) On December 2, 2021, Employer filed its petition to bar third party involvement in EME/SIME appointments, asserting an unrelated third party, "Steven Kline," had accompanied Employee appointments and had "been abusive to medical staff, refused to allow [Employee] to answer questions, answered questions intended for [Employee], and actively derailed the medical examinations." (Petition to bar third party involvement, December 2, 2021). Attached as exhibits to the petition were the September 16, 2020 Vhymeister medical record, pages 22-25 of Dr. Vhymeister's deposition, and pages 1-4, 13, and 24-25 of a July 20, 2021 SIME report prepared by Alan C. Roth, M.D., J.D. in AWCB case no. 2019035652. "Steven Kline" accompanied Employee to the examination and interview; Employee indicated Steven Kline was a friend. Dr. Roth advised Employee that friends were not allowed to accompany examinees, but noted he permitted Steven Kline to do so

It was made clear to me that an exception would have to be made; otherwise, it did not appear that the examination was going to take place. [Employee] insisted that Mr. Klein was necessary to be present, because [Employee] has dyslexia, and I informed him that he would not be writing or reading anything further . . . He insisted that Mr. Klein can remember his history better than he can, although [Employee] later stated that he had no problem with his memory. Mr. Klein several times seemed to correct [Employee] in terms of his history, and was advocating for him. At one point, Mr. Klein refused to let [Employee] answer questions regarding his upper extremity injury, stating that it had nothing to do with this case. Mr. Klein clearly

stated he was not associated with a law office nor union. As the patient had traveled down from Alaska for this examination and as I had booked time for this examination, I felt it was expedient that the examination continue, in spite of these unusual circumstances.

Later Dr. Roth reported

He had a fracture to his scaphoid of his hand which Mr. Klein refused to allow him to tell me about, and the patient does not care to discuss . . . I informed the claimant and his advocate that there may be some overlap between radiating pain from the neck to the arm and fractured wrist in addition the fact that there may be overlap between the trauma of falling on the boat and whatever else had happened that they did not care to share. . . .

Dr. Roth noted Employee denied any previous memory problems but “continually” asked Mr. Klein for answers to questions, stating that was due to dyslexia. The report provided “[h]e denies being treated for any general medical problems or unrelated orthopedic issues. Mr. Klein corrects him and reminds him that he had a knee injury requiring injections to the knee, and then Mr. Klein states this was probably aggravated by his injury in question. It is notable that [Employee] does not recount pain to the knee when asked earlier what was injured at the time of his injury.” (Roth SIME, July 20, 2021).

9) Employee did not answer the December 2, 2021 petition or object to its attached exhibits. (Agency file).

10) Employee did not file a hearing brief. (Agency file).

11) A notice of appearance has not been filed regarding a non-attorney representative for Employee. (Agency file).

12) No request for cross-examination of Dr. Vhymeister or Dr. Roth was filed. (Agency file).

PRINCIPLES OF LAW

AS 23.30.001. Legislative Intent. 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 . . . employers

AS 23.30.095. Medical treatments, services, and examinations. . . . (e) The employee shall, after an injury, at reasonable times during the continuation 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 . . . furnished and paid for by the employer. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases

(k) In the event of a medical dispute . . . 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 . . . selected by the board The cost of an examination and medical report shall be paid by the employer. . . .

In *ASRC Energy Services, Inc v. Kollman*, AWCAC Dec. No 13-0076 (August 21, 2013), the Alaska Workers' Compensation Appeals Commission (Commission) reviewed the provisions of Civ. R. 25 and *Langfeldt-Haaland v. Saupe Enterprises*, 768 P.2d 1144 (Alaska 1989) regarding employee's right to have legal counsel present at a medical examination. The Commission concluded

[T]he two legal principles identified by the dissent in *Langfeldt-Haaland* are of greater utility in deciding the EME issues. In terms of a chilling effect, the spirit and letter of AS 23.30.095(e) are violated when an employer is restricted in its choice of physician in a manner other than that provided for in the statute. As for fundamental fairness, it is lacking where only the employee's counsel, and not the employer's counsel, can attend and record EMEs and possibly other medical examinations.

Id. at 6. The Commission considered the provisions of AS 23.30.001(1), interpreting the Alaska Workers' Compensation Act to "ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers," and hearings "in workers' compensation cases shall be impartial and fair to all parties." AS. 23.30.001(4). Consideration was also given to "medical reasons" for preserving the integrity of medical examinations, including whether an examinee may unpredictably change his presentation to the examiner when an observer is present, whether an observer may be distracting to the examinee, and whether the presence of a third party may present a potential ethical conflict. The Commission noted AS 23.30.095(e) does not provide authority for counsel to attend and record EMEs; nor did any board regulation. Rather, AS 23.30.095(e) left the choice of the EME physician to the employer, with only a licensing restriction in place. If EMEs were "allowed to be witnessed and recorded by the employee's counsel, it would have a chilling effect and is unfair to employers,

whose counsel would have no reciprocal rights to attend and record EMEs or other medical examinations.” The Commission further found as a “matter of respect for another profession, in this case, the medical profession, it is appropriate that we give the examiners the benefit of the doubt as far as the propriety of their examinations are concerned, unless and until they provide reasons not to.” *Id.* at 9. The Commission held “employees’ counsel may attend and record EMEs provided that, in their sole and unfettered discretion, the EME physicians agree to them doing so.” *Id.* at 10. (The initial Board decision on appeal in *Kollman* had found that Employee was entitled to have EMEs witnessed and recorded, providing “any witness accompanying Employee at a future EME may observe the proceeding only, and may not participate in or attempt to influence the EME process in any way.” *Kollman v. ASRC Energy Services, Inc.*, AWCB Dec. No. 13-0076 at 19 (June 27, 2013)).

Prior board decisions refused to allow injured workers’ legal counsel to be present at, or to record, EMEs. *Caples v. Valdez Creek Mining Co.*, AWCB Dec. No. 89-0280 (October 20, 1989); *Eggleston v. BP Alaska Exploration, Inc.*, AWCB Dec. No. 94-0222 (August 31, 1994); *Rapp v. AREA Realty*, AWCB Dec. No. 98-0251 (October 2, 1998)(employee prohibited from having any third party or representative present at his EMEs). The basis for denial rested primarily on concerns that counsel would be obstructive, recording equipment was obtrusive, and that the presence of a legal representative or recorder would be inconsistent with the Act’s goal of providing benefits efficiently. *Caples* noted that insurers were required to pay compensation timely or face penalties absent sufficient grounds to controvert benefits, and no reimbursement for overpaid compensation could be awarded except as an offset against future benefits. *Caples* at 4. *Caples* found that the presence of lay representatives in Workers’ Compensation proceedings was “an additional difference militating against allowing parties’ representatives to attend medical examinations.” *Id.* at 5. Weighing the employee’s due process right to counsel against permitting attorneys to attend medical examinations in workers’ compensation cases, the board found attendance by employee’s attorneys would be “riot legally mandated;” it upheld suspension of temporary total disability payments where employee had obstructed medical examinations by conditioning participation on the presence of counsel and video equipment. *Id.* at 6. At least one board decision, *Young v. Houston Contracting/Nana*, AWCB Dec. No. 00-0115 (June 14, 2000), found that the board had “consistently held that third party representatives are not permitted to be

present during employer sponsored medical evaluations.” The employee in *Young* had been accompanied to his EME by an attorney representative of the Alaska Injured Workers’ Alliance; the representative insisted that he be allowed to accompany the employee for the examination, despite prior notification that the EME physician did not allow attorneys or recording devices in the examination. Testimony was taken indicating employee had not agreed to submit to the examination without the representative present; eventually security was called and both employee and his representative were escorted out of the building. The employer incurred additional expense in securing a second EME. The board found that employee had selected his representative, the employer should not be penalized for employee’s choice, and ordered forfeiture of a portion of employee’s claimed compensation for failing to reasonably attend the EME. *Young* at 6. Employee’s refusal to meaningfully respond to an EME physician’s reasonable query regarding employee’s then-current symptoms was found to be both unreasonable and obstructive in *Woodin v. Agrium Kenai Nitrogen Operations*, AWCB Dec. No. 09-0136. Counsel was denied the ability to attend and videotape an SIME in *Hayes v. Guardian Security Systems, Inc.*, AWCB Dec. No. 01-0241 (November 28, 2001), finding it distinguishable from the adversarial proceedings anticipated by civil litigation in Civ. R. 35 and noting the need to limit the communications a party or its representative may have before the SIME report is issued.

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 45.092. Additional examination. Second independent medical evaluation. . . .

(i) . . . the evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. . . . Until the parties receive the . . . written report, communications by and with the second independent medical examiner are limited, as follows:

(1) a party or a party’s representative and the examiner may communicate as needed to schedule or change the scheduling of the examination;

(2) the employee and the examiner may communicate as necessary to complete the examination.

....

(j) After a party receives an examiner's report, communication with the examiner is limited . . . If a party wants the opportunity to

(1) submit written questions or depose the examiner, the party must

(2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or

(3) question the examiner at hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.

(k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication.

8 AAC 45.120. Evidence. (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing . . .

8 AAC 45.178. Appearances and withdrawals. (a) A person who seeks to represent a party in a matter pending before the board shall file a written notice of appearance with the board, and shall serve a copy of the notice upon all parties. The notice of appearance . . . must specify whether the representative is an attorney licensed to practice law within the State of Alaska. If the person who seeks to represent a party is not licensed to practice law within the State of Alaska, the notice of appearance must be accompanied by

(1) the Employee's written authorization if the person represents the employee;
or

(2) the employer's written authorization unless the person seeking to represent the employer is an employee of

(A) the employee's insurer; or

(B) the adjusting company handling the claim for the employer's insurer.

....

ANALYSIS

Shall third party Steven Kline be prohibited from being involved in or present at any EME or SIME in this case?

Employer requested an order issue preventing third party Steven Kline from being involved in or attending any EME or SIME in the present case. Employer presented unopposed evidence from this and other workers' compensation cases indicating Mr. Kline has obstructed physician examinations by refusing to allow Employee to answer medical questions, answering questions for Employee, and revising Employee's answers to questions. Mr. Kline insisted on being present for EME and SIME examinations despite existing policies prohibiting his presence.

Employer has a right to an EME and the right to select its EME physician. AS 23.30.095(e). Employer has a right to have Employee reasonably participate in its EME, including having related medical questions answered by the Employee, for the examination to proceed without obstruction, bias or advocacy by a third party, and to forego the additional expense of additional depositions or follow-up examinations instigated by third parties.

The Alaska Worker's Compensation Appeals Commission has held that an employee may not have legal counsel present at an EME absent permission from the EME physician. *Kollman*. Mr. Klein is not an attorney and has not entered an appearance; no clear precedent exists to support the position that he be allowed to attend or actively participate in the examination or to block Employee's participation in the EME in whole or in part. No provision of the Act provides for a third party to be present at an EME. *Caples; Rapp; Young*. Mr. Kline shall be prohibited from attending or participating in any future EMEs in this case.

No precedent has been found or provided by either party allowing Employee's friend to attend or obstruct any portion of an SIME. SIME examinations are intended to be neutral, to be conducted by physicians vetted by the Board, and to resolve medical disputes between an employee's treating physicians and Employer's physician. AS 23.30.095(k). There is no provision in the Act for a

