

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MIKE HOVLAND,	)	
	)	
Employee,	)	
Claimant,	)	
	)	)INTERLOCUTORY
v.	)	)DECISION AND ORDER
	)	
PEAK OILFIELD SERVICE COMPANY,	)	AWCB Case No. 201906484
LLC,	)	
	)	
Employer,	)	AWCB Decision No. 22-0024
and	)	
	)	Filed with AWCB Anchorage, Alaska
AMERICAN ZURICH INSURANCE	)	on April 18, 2022
COMPANY,	)	
	)	
Insurer,	)	
Defendants.	)	

Mike Hovland's (Employee) August 2, 2021 petition for a Second Independent Medical Evaluation (SIME) was heard on the written record March 30, 2022, in Anchorage, Alaska, a date selected on March 1, 2022. A January 27, 2022 hearing request gave rise to this hearing. Attorney Elliot T. Dennis represents Employee. Attorney Jeffrey Holloway represents Peak Oilfield Service Company, LLC and American Zurich Insurance Company (Employer). The record closed at the hearing's conclusion on March 30, 2022.

## ISSUE

Employee contends his attending physician restricted his lifting capacities to 25 pounds and Employer's physician released him without any restrictions. He contends his attending physician's lifting limitation and a two percent permanent partial impairment (PPI) rating by

Employer's physician may qualify him for reemployment benefits, which are significant benefits. Employee contends an SIME is necessary to aid in resolving this significant medical dispute, as the issues are complex due the number of surgeries required to fix his broken clavicle.

Employer contends Employee failed to attach any medical reports to his petition or identify the disputes. It contends there is no significant dispute between Employee's attending physician and Employer's physician warranting an SIME as it paid disability benefits past the date Employee reached medical stability and was discharged from physical therapy, PPI benefits were paid and it paid all medical costs.

**Should an SIME be ordered?**

FINDINGS OF FACT

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

- 1) On April 19, 2019, Employee was working as a truck operator when he slipped and fell about six feet from the truck to the ground onto his right shoulder. He was diagnosed with a broken clavicle and transported by Guardian Flight to Providence Alaska Medical Center. (Guardian Flight chart note, April 19, 2019).
- 2) On April 24, 2019, Employee stated he was working on an oil rig about four days before and slipped, fell about six feet, and landed on his right shoulder. X-rays of his right shoulder showed comminuted and moderately displaced mid-clavicle fracture with superior angulation at the fracture apex. Employee was referred for open reduction internal fixation of his right mid-shaft clavicle fracture. (Lanny Schneier, PA-C, report, April 24, 2019; X-Ray report, April 24, 2019).
- 3) On May 2, 2019, Employee underwent surgery on his right clavicle fracture; a 10-hole Arthrex distal clavicle plate was implanted. (Noah Marks, M.D., Operative Report, May 2, 2019).
- 4) On April 30, 2019, Employer reported Employee fell backwards off a trailer while removing a strap and landed on his right shoulder on April 19, 2019. (First Report of Occupational Injury or Illness, April 30, 2019).
- 5) On September 17, 2019, Employee noticed "more of a prominence of the clavicle area." He did not have any significant pain and was performing "stuff" his physical therapist told him to

do. A right shoulder x-ray showed the implanted hardware was intact but the plate apex cephalad angulation was increased when compared to his previous x-ray. Dr. Marks thought the fact the plate moved from where it was placed indicated the fracture was not united and there was a possibility it would break, but Employee's clavicle fracture still had a chance to heal underneath the plate. He recommended to "hold the course" and continued to restrict Employee from working due to concerns the plate would break. (X-Ray report, September 17, 2019).

6) On September 24, 2019, Employee reported no issue with wound healing, but his inflammation markers revealed a normal ESR and a mildly elevated CRP. Dr. Marks thought there seemed to be "a likely biologic reason behind his nonunion" as a "P. acnes infection" could present with normal CRP and ESR. He stated the hardware needed to come out as it failed but noted the question was whether to consider "a plate holiday" to start IV antibiotics prophylactically to make sure there was no infection before re-plating and bone grafting the clavicle. Dr. Marks referred Employee to Danielle Ries de Chaffin, M.D. (Marks progress report, September 24, 2019).

7) On October 3, 2019, Dr. Ries de Chaffin removed the right clavicle hardware and obtained a culture of the operative site to evaluate whether it became infected because of the hardware fixation failure. (Ries de Chaffin Operative Report, October 3, 2019).

8) On October 17, 2019, Dr. Ries de Chaffin performed an iliac crest bone graft to Employee's right clavicle nonunion and an open reduction internal fixation with a plate. (Ries de Chaffin Operative Report, October 17, 2019).

9) On October 29, 2019, Employer notified the reemployment benefits section Employee had been totally unable to return to his employment at the time of injury for 90 consecutive days as a result of the injury. (Employer's Notice of 90 Consecutive Days of Time Loss for Injuries Occurring on or After November 7, 2005, October 29, 2019).

10) On January 3, 2020, the rehabilitation specialist recommended Employee be found ineligible for reemployment benefits based upon Dr. Ries de Chaffin's predictions. Employee worked for Employer since 1991, first as an Equipment Operator and then as a Project Superintendent from 2009 forward. The specialist found Employee had not received any previous reemployment, rehabilitation or job dislocation benefits, nor had he waived any benefits. (Eligibility Evaluation, January 3, 2020).

11) On January 22, 2020, the RBA-designee determined Employee was ineligible for reemployment benefits because Dr. Ries de Chaffin predicted he would have permanent physical capacities to perform the physical demands of his job at the time of the injury as well as jobs he performed during the 10-year period prior to the injury and predicted he would have no permanent impairment. (Letter, January 20, 2020).

12) On May 6, 2020, Wilbert Pino, M.D., an orthopedic surgeon, examined Employee for an Employer's Medical Evaluation (EME), and diagnosed "a right clavicular fracture nonunion, status post open reduction and internal fixation and bone graft, healed at maximum medical improvement, work related; right first rib fracture, minimally displaced, healed; and musculoskeletal sprain/strain of the cervical, thoracic and lumbar spine, stable without neurological deficits, work related, healed." Dr. Pino recommended future removal of the hardware at a time decided by Employee and his treating physician based upon his persistent subjective complaints of right shoulder discomfort and cold intolerance. He opined Employee was able to resume normal work activities and reached medical stability on March 10, 2020. Dr. Pino provided a one percent PPI rating. (Pino EME report, May 6, 2020).

13) On June 1, 2020, Dr. Ries de Chaffin surgically removed the right clavicle hardware. The postoperative plan included "weightbearing as tolerated" and a follow up in two weeks. (Ries de Chaffin Operative Report, June 1, 2020).

14) On June 5, 2020, Employee went to the emergency room and reported hearing a large pop and feeling pain in his right shoulder after pulling a heavy object toward him. An x-ray revealed a minimally displaced mid-right clavicle fracture with apex superior angulation. (Emergency room report, June 5, 2020).

15) On June 9, 2020, Employee reported he went to pick something up in his yard and felt a pop in his right shoulder. He said his clavicle hurt when he tried to move his shoulder. Dr. Ries de Chaffin discussed surgical versus nonsurgical treatment and stated she would recommend not taking the hardware out if a plate was surgically implanted again. (Ries De Chaffin progress report, June 9, 2020).

16) On June 24, 2020, Dr. Ries de Chaffin performed a right clavicle open reduction internal fixation with an anterior plate. (Ries de Chaffin Operative Report, June 24, 2020).

17) On July 9, 2020, Dr. Ries de Chaffin restricted Employee from lifting over five pounds and from pushing, pulling and overhead activities. (Ries de Chaffin progress report, July 9, 2020).

18) On July 9, 2020, Employer denied temporary total disability (TTD) benefits from May 26 to 30, 2020 and from June 3 to 4, 2020, based upon Dr. Pino's EME report finding him medially stable, which was received on May 26, 2020; the surgery to remove hardware on June 1, 2020, and a release to work without restrictions on June 3, 2020; and the re-fractured of Employee's clavicle on June 5, 2020. (Controversion Notice, July 9, 2020).

19) On August 18, 2020, Dr. Ries de Chaffin recommended physical therapy for range of motion but said she would "hold off on strengthening given the history of multiple refractures." She stated Employee was able to return to sedentary work but had not reached medical stability and she did not anticipate a PPI from the work injury. (Ries de Chaffin report; response, August 18, 2020).

20) On September 18, 2020, Employee reported feeling tight in his right shoulder. Dr. Ries de Chaffin recommended physical therapy for range of motion but not for strengthening due to his history of multiple re-fractures. She restricted his lifting to less than 10 pounds. (Ries de Chaffin progress report, September 18, 2020).

21) On October 21, 2020, Employee underwent physical therapy. "Strengthening activity" was suspended, and he had a seven to 10 pound lifting restriction with activities of daily living. (Seth Hosking, PT, DPT, Daily Notes, October 21, 2020).

22) On October 27, 2020, Employee's range of motion was good, he was able to fully flex and abduct his shoulder and his incision was well healed. Dr. Ries de Chaffin stated Employee should follow up in six weeks. (Ries de Chaffin progress report, October 27, 2020).

23) On December 8, 2020, Dr. Ries de Chaffin recommended Employee begin working on strengthening with physical therapy over the next two months and placed him on a weight restriction which she sent to the physical therapist. She said they were taking it very slow given Employee's numerous failures. (Ries de Chaffin progress report, December 8, 2020).

24) On February 9, 2021, Employee stated he concluded he would never really be able to go back to his normal job and was planning to seek out vocational rehabilitation. Dr. Ries de Chaffin agreed he was not likely to get back to the point where he could hang from his arm with his body weight as he described he needed to do for his normal job and thought vocational rehabilitation was a great idea. She recommended focused functional rehabilitation therapy and reevaluation in two months, when she would likely order a functional capacity evaluation (FCE). (Ries de Chaffin progress report, February 9, 2021).

- 25) On April 13, 2021, Employee had excellent range of motion and his incision was well healed. Dr. Ries de Chaffin recommended an FCE. (Ries de Chaffin progress report, April 13, 2021).
- 26) On March 19, 2021, Employee underwent physical therapy and had a 20 pound restriction for the next two months. He was able to tolerate “strengthening activities” with 15 and 20 pounds. (Hosking Daily Note, March 19, 2021).
- 27) On May 20, 2021, Dr. Pino evaluated Employee for an EME and opined further treatment was not medically necessary. He opined Employee reached medical stability as of October 27, 2020, and should be capable of resuming his normal activities without restrictions. Dr. Pino assessed a two percent PPI rating. (Pino EME report, May 20, 2021).
- 28) On May 25, 2021, Employee was released from physical therapy. He could tolerate lifting to 20 pounds without increases in pain. (Hosking discharge summary, May 25, 2021).
- 29) On July 20, 2021, Dr. Ries de Chaffin permanently restricted Employee from lifting greater than 25 pounds. (Ries de Chaffin Medical Status Form, July 20, 2021).
- 30) On August 2, 2021, Employee requested an SIME based upon a “medical dispute between doctors.” (Petition, August 8, 2021).
- 31) On September 2, 2021, Employer answered Employee’s petition and contended an SIME is not appropriate because no claim had been filed. (Answer, September 2, 2021).
- 32) On September 2, 2021, Employee’s attorney entered an appearance on Employee’s behalf. (Entry of Appearance, September 2, 2021).
- 33) On September 2, 2021, Employee claimed TTD and PPI benefits, medical and transportation costs, penalty for late-paid compensation, interest, a finding of unfair or frivolous controvert and attorney fees and costs. Under “Reason for filing claim,” he wrote, “ER has stopped paying TTD without a determination of medical stability pursuant to Alaska law. EE has not been able to return to work.” (Claim for Compensation Benefits, September 2, 2021).
- 34) On September 28, 2021, Employer denied TTD benefits from October 28, 2020, forward, PPI benefits greater than two percent, medical benefits and transportation costs from October 28, 2020 forward, penalty, interest and attorney fees and cost. (Controversion Notice, September 28, 2021; Answer, September 2, 2021). Employer admitted TTD benefits through October 27, 2020, a two percent PPI rating, medical and transportation costs incurred prior to October 27, 2020. Employer relied on Dr. Pino’s EME reports opining Employee was capable of return to work without restrictions as of October 27, 2020. (Answer, September 2, 2021).

35) Employer paid TTD benefits from April 21 through May 29, 2019; September 21, 2019 through March 10, 2020; March 17 through May 25, 2020; June 1 and 2, 2020; and June 5, 2020 through June 22, 2021, and \$5,310 in PPI benefits, equaling a three percent rating. (Indemnity Paid Report).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .

The board may base its decision not only on direct testimony, medical findings, 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 23.30.041. Rehabilitation and reemployment of injured workers.**

. . . .

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor’s “Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles” for

(1) the employee’s job at the time of injury; or

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor’s “Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles.”

**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. . . .

*Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8, 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." *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). *Bah* stated in dicta, that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition. *Bah* said when deciding whether to order an SIME, though the statute does not expressly require it, three criteria should be considered:

- 1) Is there a medical dispute between Employee's physician and an EME?
- 2) Is the dispute significant? and
- 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 in 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 23.30.155. Payment of Compensation.** . . . . (h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.



Considering the broad procedural discretion granted in AS 23.30.135(a) and AS 23.30.155(h), wide discretion exists under AS 23.30.095(k) and AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME. An SIME's purpose is to have an independent expert provide an opinion about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). Contested benefits' value are considered when determining if a medical dispute is significant. *See eg., McKenna v. State of Alaska*, AWCB Decision No. 16-0086 (September 26, 2016). (Contested benefit was permanent total disability benefits.)

**AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

**AS 23.30.395. Definitions.** In this chapter. . . .

(16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

. . . .

**8 AAC 45.092. Second independent medical evaluation. . . .**

(f) If the board or its designee determines that the list of second independent medical examiners does not include an impartial physician with the specialty, qualifications, and experience to examine the employee, the board or its designee will notify the employee and employer that a physician not named on the list will be selected to perform the examination. The notice will state the board's preferred physician's specialty to examine the employee. Not later than 10 days after notice by the board or its designee, the employer and employee may each submit the names, addresses, and curriculum vitae of no more than three physicians. If both the employee and the employer recommend the same physician, that physician will be selected to perform the examination. If no names are recommended by the employer or employee or if the employee and employer do not recommend the same physician, the board or its designee will select a physician, but the selection need not be from the recommendations by the employee or employer.

(g) If there exists a medical dispute under AS 23.30.095(k),

. . . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

....

(B) the board on its own motion determines an evaluation is necessary.

#### ANALYSIS

##### **Should an SIME be ordered?**

An SIME may be required when there is a medical dispute regarding functional capacity and degree of impairment between the employee's attending physician and the employer's physician. AS 23.30.095(k). Employer contended Employee failed to properly request an SIME because he failed to attach any medical reports to his petition or identify the disputes. 8 AAC 45.092(g)(2). However, AS 23.30.135(a), AS 23.30.155(h) and 8 AAC 45.092(g)(3)(B) permit this decision to order an SIME if it determines one is necessary.

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. Dr. Ries de Griffin permanently restricted Employee's from lifting greater than 25 pounds and predicted he would not have a permanent impairment. Dr. Pino opined Employee had no restrictions and provided a two percent PPI rating. There are medical disputes regarding Employee's functional capacity and permanent impairment. *Rogers & Babler.*

Second, the dispute must be significant. *Bah.* Employee's attending physician's lifting limitation and a two percent PPI rating by Employer's physician may qualify him for

reemployment benefits, which are significant benefits. An employee is eligible for reemployment benefits if a physician predicts the employee will have permanent physical capacities less than the physical demands of the employee's job as described in the United States Department of Labor, Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) job descriptions for the employee's job at the time of injury or other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury. AS 23.30.041(e). Employee was found ineligible for reemployment benefits based upon his physician's prior prediction he would have permanent physical capacities to perform the physical demands of his job at the time of the injury as well as jobs he performed during the 10-year period prior to the injury and predicted he would have no permanent impairment. Since that opinion, Employee's physician provided a permanent lifting restriction of less than 25 pounds. His functional capacity is relevant to whether he would have permanent physical capacities to perform the physical demands of his job at the time of the injury as well as jobs he performed during the 10-year period prior to the injury as provided in the SCODRDOTs. *Rogers & Babler*.

Employee also sought TTD benefits and contends he is unable to work. "Disability" means incapacity to earn wages he was receiving at the time of injury in the same or any other employment because of the work injury. AS 23.30.395(16). Employer's physician opined Employee reached medical stability, which would make him not entitled for TTD benefits, even if he was disabled. Employee's physician has stated he was not medically. The SIME statute does not require a party to demonstrate a medical dispute to any degree of certainty or to meet a legal standard. Employee's functional capacity is relevant to determine whether he is disabled. *Rogers & Babler*. TTD benefits and reemployment benefits are significant benefits and justify an SIME. *Bah; McKenna*.

Third, whether an SIME physician's opinion will assist the factfinders to resolve the dispute is considered. *Seybert*. This case involves a complex medical history as Employee underwent many surgeries due to unexpected and unpredicted complications. An SIME by an impartial orthopedic surgeon would assist the fact-finders and offset any possible bias with these complex issues. AS 23.30.135(a); AS 23.30.155(h). Therefore, Employee's petition for an SIME will be



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 Mike Hovland, employee / claimant v. Peak Oilfield Service Company LLC, employer; American Zurich Insurance Company, insurer / defendants; Case No. 201906484; 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 April 18, 2022.

/s/  
Pamela Hardy, Workers Compensation Technician