

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DALE SMITH,)
)
Employee,)
Claimant,)
)
v.) INTERLOCUTORY
) DECISION AND ORDER
)
TRINION QUALITY CARE SERVICES,) AWCB Case No. 201806957
)
Employer,) AWCB Decision No. 22-0052
and)
) Filed with AWCB Anchorage, Alaska
AMERICAN ZURICH INSURANCE CO.,) on July 15, 2022
)
Insurer,)
Defendants.)
)

Dale Smith's (Employee) May 4, 2020 petition for a second independent medical evaluation (SIME) was heard on July 13, 2022, in Anchorage, Alaska, a date selected on April 21, 2022. An April 21, 2022 stipulation gave rise to this hearing. Attorney Randall Cavanaugh represented Employee; attorney Michelle Meshke represented Trinion Quality Care Services and its insurer (Employer). All participants attended the hearing telephonically. As a preliminary matter, Employee requested a hearing continuance because a close family member passed away on July 11, 2022, and he did not think he was emotionally able to prepare for and participate at hearing; Employer objected to a continuance primarily noting the lengthy time this matter has been pending. Employer also objected to Employee calling witnesses who it contended were irrelevant to the SIME issue presented. After discussion at hearing, the parties stipulated that the statements set forth in Employee's witness list would be admissible as the witnesses' testimony though Employer reserved its right to dispute their testimony. Given this determination, the

parties also stipulated to end the oral hearing and have the panel decide this matter on the written record. Therefore, there were no witnesses and the record closed at the hearing's conclusion on July 12, 2022.

ISSUE

Employee has already had an SIME with an orthopedic specialist. He contends another SIME, with a neurologist, will assist the factfinders in resolving this case, and requests one. Employee contends a medical dispute between his attending physician and Employer's medical evaluators (EME) regarding causation of his need for a neurological evaluation and treatment is significant.

Employer contends Employee's SIME request is too late, and he waived his right to request one by not requesting it timely. It contends there is no significant medical dispute between its EME physicians and Employee's attending physicians. Employer further contends there is no gap in the medical records on this issue and another medical opinion will not assist the factfinders in deciding this case. It contends Employee's request for another SIME should be denied.

Should this decision order an SIME with a neurologist?

FINDINGS OF FACT

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

1) On May 11, 2018, Employee was trying to assist his autistic client who was jumping in front of a moving vehicle in a parking lot. He described the event as follows:

When he jumped out, he jumped out right in front of a car, and I seen the car, and I seen him, and I just reacted, and I grabbed him.

And when I grabbed him, he jumped up in the air, and then tore me around, like you undo a bottle top. From here, I went reverse, like I was looking at the truck instead of looking away (indicating). I grabbed him firmly because I thought the car was going to hit him, and at that moment, it wasn't like somebody didn't know it was my kid, I just thought he was going to be seriously injured or killed.

I just leaped out there with him and grabbed him. When I grabbed him, he leaped the other way, and I felt the upper part of my body come [apart], and I knew

instantly I was hurt. I was hurt before I even let him go. It was so powerful. It was like I grabbed a horse and the horse took me.

....

He's about 6, 6'1". About 265, 270 at the time. He was just real big. Like if he hadn't had autism, he would have been a college football lineman. Very wide. Very strong. I mean, when he's intense, it's like knocking onto top of this table. His body is like that. Very strong. Probably the strongest I've ever dealt with.

....

I grabbed him with both of my hands to move him, but when I reached for him, he was already moving back, but I already had a grip on him. He just tore toward the front of the truck. I had the tailgate down. I kind of hit the tailgate, and he just twisted my body around, and by the time I let him go, I was like, oh, you got me, you got me, Jake, you hurt me there.

....

I think when I was trying to get him to come to the truck, to get onto the tailgate, he leaped out. When he leaped out, I went to go grab him, and I seen the car. The car was like from her to me. I grabbed him, and when I grabbed him, he went that way, toward the side of the truck, and binded me up in between, holding him and the tailgate, and it was as far as my body could turn, and then once he was out of the way of the car, I let him go, but by then, I was already injured. (Deposition of Dale Smith, July 1, 2020 at 15-18).

2) On October 13, 2018, EME orthopedic surgeon Todd Fellars, MD, evaluated Employee for his work injury. He offered diagnoses and opined Employee needed no further diagnostic studies or tests for his work injury, which in his opinion included only (1) a work -related aggravation of preexisting right shoulder impingement syndrome, and (2) a thoracic sprain that had become medically stationary and resolved. In Dr. Fellars' opinion, Employee's remaining symptoms and conditions were not work-related and were attributable to other substantial causes. He did not recommend any further evaluations by other specialists (Fellars report, October 13, 2018).

3) On February 5, 2019, Employee claimed benefits for his right shoulder, right and left knees, arms and wrists and carpal tunnel syndrome. (Claim for Workers' Compensation Benefits, February 4, 2019). He later clarified that he sought benefits for his hips, neck and an evaluation for his neurological symptoms. (Deposition of Dale Smith, July 1, 2020 at 34-38).

4) On February 9, 201[9], EME Dr. Fellars examined Employee again. Employee reported some symptoms had gotten worse since the October 13, 2018 examination. He had significantly increased pain in his hands and forearms. Employee told Dr. Fellars he wanted bilateral carpal

tunnel syndrome release surgery and had recently developed severe neck pain. Dr. Fellars opined Employee still had only aggravated his right shoulder impingement syndrome and possibly had biceps tendinitis at the time of his work injury, which might benefit from additional care including surgery and thus was not medically stable. (Fellars EME report, February 9, 2019).

5) On August 5, 2019, orthopedic surgeon William Curran, MD, performed an SIME on Employee. He opined Employee had on the injury date an aggravation of his preexisting right shoulder condition that required non-surgical treatment followed by surgery. He agreed the work injury was not the substantial cause for the need for carpal tunnel release surgery. Dr. Curran also opined Employee's cervical strain was causally related to his industrial injury but had resolved and required no further treatment. In his opinion, Employee's left upper arm, bilateral wrists, right hip and left knee complaints were not related to his work injury with Employer. Dr. Curran provided a six percent permanent partial impairment rating for the right upper extremity. (Curran SIME report, August 5, 2019).

6) On October 11, 2019, Dr. Curran wrote an addendum describing why he opined Employee's left upper arm, bilateral wrists, right hip and knee complaints were not causally connected to his work injury with Employer. He had reviewed Employee's medical records and determined some of his responses to Dr. Curran's medical history questions were inconsistent with Employee's medical records. He noted Employee first complained of right hip, left upper arm, wrists and left knee pain over two months post-injury. Dr. Curran focused on the absence of complaints from contemporaneous medical records to these various body parts until too long after the work injury for him to make a causal connection. (Curran SIME report, October 11, 2019).

7) On October 31, 2019, Meshke wrote a check-the-box letter to Dr. Fellars asking him if he was available to perform another EME, to which he answered "no." The letter also asked, "Is an evaluation by Dr. Amit Sahasrabudhe appropriate as an alternative referral for an independent medical evaluation?" Dr. Fellars answered in the affirmative. (Meshke letter, October 31, 2019).

8) On January 23, 2020, EME orthopedic surgeon Dr. Sahasrabudhe saw Employee. He said Employee had a work-related cervical strain that had resolved and an aggravation of his preexisting right shoulder degenerative changes from which he recovered after surgery. In his

opinion all other symptoms were non-industrial and the work injury stopped being the substantial cause of any disability or need for treatment by October 1, 2019. He further stated:

The only treatment I'm aware of, by review of medical records and taking the history today, is a recommendation/referral for Mr. Smith to see a neurologist for his ongoing complaints. In and of itself, I have no objection to Mr. Smith seeing a neurologist; however, the need to consult with a neurologist is not the result of, or related to, the industrial incident of May 11, 2018, and the consultation ought to be done on a non-industrial basis. (Sahasrabudhe report, January 23, 2020).

9) On May 4, 2020, Employee requested an SIME with a neurologist, and contended there was a medical dispute as to "causation" and "medical stability" between physiatrist Sean Taylor, MD, and his attending physician orthopedic surgeon Owen Ala, MD, vis-à-vis Dr. Sahasrabudhe. He also raised permanent partial impairment as a "non-SIME" issue. Employee based his alleged medical dispute on Drs. Taylor's and Ala's December 5, 2019 reports. Both these doctors opined Employee needed a neurological consult and Dr. Taylor said he needed magnetic resonance imaging (MRIs) for his brain and neck. Drs. Taylor's and Ala's December 5, 2019 reports did not mention Employee's work injury and did not attribute causation for the need for their neurological referrals to that injury. By contrast, Dr. Sahasrabudhe's January 23, 2020 report agreed Employee needed to see a neurologist but stated the need for the neurological referral was not work-related. (Petition; SIME form, May 4, 2020).

10) On June 15, 2020, Dr. Ala stated:

It appears that the patient has neurologic problems that come from a source more proximal than the carpal tunnel. I highly recommend referral to a neurologist for evaluation of long-track findings. It appears that the patient's symptoms are result of his on-the-job injury in 2018. The patient had no neurologic symptoms prior to the injury, but the symptoms have persisted and, again, have decreased his daily function and his ability to perform duties on the job. Again, I recommend a referral to a neurologist and we will continue to monitor his progress. (Ala report, June 15, 2020).

11) Dr. Ala's June 15, 2020 opinion created a medical dispute between him and Dr. Sahasrabudhe regarding causation of Employee's neurological signs and symptoms and his need to see a neurologist. (Experience, judgment and observations).

12) In its July 8, 2022 brief, Employer contended Employee already had an SIME with orthopedist Dr. Curran, which evaluated his work injury thoroughly and included neurological

issues. It conceded Employee's attending physician, Dr. Ala had referred him to a neurologist but contended he never opined the work injury necessitated this evaluation. Employer contended EME Dr. Fellars opined Employee had chronic right shoulder pain with preexisting impingement syndrome, which the work injury aggravated, and right, mild carpal tunnel syndrome, and right and left knee medial meniscus tears that were not work-related, and a thoracic strain the injury caused but which was medically stationary. It contended though Dr. Taylor recommended a neurology consultation because Employee had "long track findings on physical examination," he did not cite the work injury as a cause for this examination, which Dr. Taylor said should include a cervical and brain MRI. Employer further contended though Dr. Ala referred Employee to neurologist Franklin Ellenson, MD, "Dr. Ala's chart notes from this visit do not indicate this referral is work-related." It contended EME physician Dr. Sahasrabudhe concurred with Dr. Curran's SIME report finding Employee's history inconsistent with his medical records and agreed with Dr. Curran's opinion that the left upper extremity, bilateral wrist and hands, right hip and left knee were not work-related injuries. Employer contended, according to Dr. Sahasrabudhe, Employee suffered an aggravation of his preexisting right shoulder degenerative changes and had a cervical strain from the work injury, which had resolved. Otherwise, it contended Dr. Sahasrabudhe opined all other complaints were due to factors other than the work injury, notwithstanding his agreement that Employee should see a neurologist for symptoms unrelated to his injury with Employer. Employer further contended Employee's May 4, 2020 SIME petition to see a neurologist was too late, and he thus waived his right for another SIME under 8 AAC 45.092(g), citing Employee's reference on his SIME request form to a dispute he claimed arose on December 5, 2019. Furthermore, Employer contended Dr. Ala's June 15, 2020 chart note merely recounts Employee's "assertion" that his persistent neurological symptoms arose from his work injury and Dr. Ala never offered his own medical opinion. It also noted Employee's electromyography was normal. Employer contended Employee is simply looking for "a second bite at the apple" because he did not get a favorable SIME opinion from Dr. Curran. It contended there was no medical dispute, no gap in the medical evidence, the SIME would not assist factfinders in resolving the case and consequently for all these reasons Employee's request for a second SIME with a neurologist should be denied. (Employer's Hearing Brief, July 8, 2022).

13) In his July 11, 2022 brief, Employee contended several physicians have suggested he see a neurologist to determine why he has certain neurological signs and symptoms. He contended these signs and symptoms only arose after his work injury with Employer. Employee contended the SIME is an “investigative tool” helpful to the Board in deciding cases. He contended he cured a previous lack of an explicit medical dispute between his attending physician and the EME physicians by obtaining a causation opinion from Dr. Ala creating an explicit medical dispute about his neurological issues. (SIME Hearing Memorandum, July 11, 2022).

14) The panel takes official notice that medical care in Alaska is expensive; medical care for neurological issues is typically even more expensive. Panel members have less experience with neurological conditions than with orthopedic problems. An opinion from a neurologist in this case would help the panel resolve this remaining issue. (Experience, judgment observations, and inferences drawn from all the above).

PRINCIPLES OF LAW

The Board may base its decision not only on direct testimony and other tangible evidence, but also on its “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 . . . causation, medical stability . . . 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 Alaska Workers’ Compensation Appeals Commission in *Bah v. Trident Seafoods Corp.*, AWCAC Dec. No. 073 (February 27, 2008) addressed the Board’s authority to order an SIME. *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, the Board considers three criteria, 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? and
- 3) Will an SIME physician’s opinion assist the Board in resolving the disputes? (*Id.*).

8 AAC 45.092. Second independent medical evaluation

. . . .

(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. . . .

ANALYSIS

Should this decision order an SIME with a neurologist?

The Alaska Workers’ Compensation Appeals Commission in *Bah* set forth the findings necessary for a panel to order an SIME. First, there must be a medical dispute between Employee’s attending physician and Employer’s EME physician. On June 15, 2020, Employee’s attending orthopedic surgeon Dr. Ala said Employee has neurologic problems that come from “a source more proximal than the carpal tunnel.” He “highly” recommended Employee see a neurologist “for evaluation of long-track findings.” Dr. Ala opined it “ appears that the patient’s symptoms are result of his on-the-job injury in 2018.” Employer faults this opinion and states it is not Dr. Ala’s opinion, but only Employee’s assertion. Dr. Ala’s opinion is like hundreds this panel has reviewed over the years; it states a straight-forward opinion from Dr. Ala adequate to support an SIME dispute.

By contrast, EME orthopedic surgeon Dr. Fellars identified two orthopedic conditions arising from the work injury (a sprain and an aggravation of a preexisting shoulder condition) and did not recommend any further evaluations by other specialists. Similarly, EME orthopedic surgeon Dr. Sahasrabudhe said Employee had a work-related cervical strain that had resolved and an aggravation of his preexisting right shoulder degenerative changes from which he recovered after surgery. In his opinion all other symptoms were non-industrial and the work injury stopped

being the substantial cause of any disability or need for treatment by October 1, 2019. Dr. Sahasrabudhe also opined he had no objection to Employee seeing a neurologist; however, the need to consult with a neurologist is not the result of, or related to, the May 11, 2018 industrial incident and should be done on a non-industrial basis. Thus, the first prong of the *Bah* test is met because there is a medical dispute between Employee's attending physician and two EME doctors regarding Employee's neurological symptoms and the need to see a specialist, and whether the need for a referral to a neurologist or the neurological symptoms are work-related and if the work injury is the substantial cause of the need for any treatment and disability for those symptoms.

Second, *Bah* states the medical dispute must be significant or relevant to an issue in dispute. This decision takes official notice that medical care especially dealing with neurological issues is expensive. *Rogers & Babler*. If Employee has a work-related neurological issue, it is likely medical treatment to address it would be costly, making this dispute "significant." Moreover, a neurologist's opinion about Employee's symptoms would be relevant to his claim for benefits related to neurological conditions. Therefore, *Bah*'s second prong is also met.

Lastly, neurological symptoms and conditions often require a specialist to evaluate the patient and draw applicable conclusions. The panel has limited experience with such conditions. *Rogers & Babler*. It does not appear Employee has seen a neurologist for his work injury but has seen orthopedic surgeons some of whom addressed his neurological symptoms to a degree. Though well-educated and trained, orthopedic surgeons are not neurologists. A neurologist's opinion would aid the panel in resolving this case at a future hearing. This meets *Bah*'s third prong.

Employer contends Employee waived his right to seek an SIME because he filed his May 4, 2020 request more than 60 days after the date it contends he had the medical records giving rise to the medical dispute. 8 AAC 45.092(g)(2). But as Employer correctly noted in its briefing, Employee had no basis to request a neurologist SIME prior to Dr. Ala's June 15, 2020 report. The fact Employee cited to medical records in his May 4, 2020 SIME request form that did not show a medical dispute is immaterial. His SIME request form was premature; it was not late.

Employee asked for an neurological SIME prior to obtaining Dr. Ala's June 15, 2020 report. Requiring him to file another petition and SIME form after June 15, 2020 would place "form" over substance. Thus, 8 AAC 45.092(g)(2) is inapplicable here. Alternately, even if 8 AAC 45.092(g)(2) applies here, parties waive their rights to ask for an SIME by making an untimely request, but the factfinders have discretion and "may order" an SIME if they find a medical dispute satisfying the *Bah* criteria. AS 23.30.095(k). Employer's other contentions were considered but are inapplicable given the above analysis. This decision will order an SIME with a neurologist.

CONCLUSION OF LAW

This decision will order an SIME with a neurologist.

ORDER

- 1) Employee's May 4, 2020 petition for an SIME with a neurologist is granted.
- 2) The parties are directed to appear before a designee for a prehearing conference as soon as possible at which the designee will schedule dates for the parties to present medical records for the SIME physician in accordance with the applicable regulations.
- 3) The appropriate designee will select a neurologist from the Division's SIME list in accordance with Division procedures and applicable regulations.
- 4) The selected neurology SIME physician is authorized in his or her discretion to perform necessary diagnostics to determine (1) if Employee's neurological signs or symptoms arose out of and in the course of his employment with Employer, and (2) if his work with Employer, in relation to other causes, is the substantial cause of any disability or need for medical treatment for his neurological signs or symptoms since May 11, 2018. The designee may use his discretion to prepare and submit his additional SIME questions for the neurologist's consideration.

Dated in Anchorage, Alaska on July 15, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, 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 Dale Smith, employee / claimant v. Trinion Quality Care Services, employer; American Zurich Insurance Co., insurer / defendants; Case No. 201806957; 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 July 15, 2022.

/s/
Kimberly Weaver, Office Assistant