ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

RANDY E. GILMORE, Employee, Claimant, v. MUNICIPALITY OF ANCHORAGE, Self-insured Employer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201915689 AWCB Decision No. 23-0013 Filed with AWCB Anchorage, Alaska on February 15, 2023.

Randy Gilmore's (Employee) September 26, 2022 Petition for a Second Independent Medical Exam (SIME) was heard on the written record on December 14, 2022 in Anchorage, Alaska, a date selected on November 14, 2022. An October 21, 2022 hearing request gave rise to this hearing. Attorney Jung Yeo represented Employee. Attorney Martha Tansik represented self-insured Municipality of Anchorage (Employer). The record closed at the hearing's conclusion on December 14, 2022.

ISSUES

Employee contends six prior work injuries against Employer should be consolidated with his 2019 work injury claim against Employer. He contends the injuries are similar and consolidating the cases and claims would result in a speedier remedy for the purposes of an SIME.

Employer contends consolidation is not the legally appropriate remedy. It contends the injuries are not similar or closely related. Employer contends consolidating the cases will not accord a speedier remedy, but will have the opposite result in direct violation of the legislature's mandate

in AS 23.30.001(1).

1) Should Employee's cases 199825222, 199909937, 200112508M, 200907728, 201411458, 201616297, and 201915689 be consolidated?

Employee contends a medical dispute exists between his attending physicians and Employer's medical evaluators (EME) and requests an SIME to resolve these disputes.

Employer opposes an SIME. It contends Employee has requested case consolidation as part of the SIME. Employer does not contend there is not a dispute, but rather a need for additional discovery prior to ordering an SIME.

2)Should an SIME be ordered?

Employee contends his attorney provided valuable services in obtaining an SIME and he should be awarded fees.

Employer contends that because an SIME should not be ordered at this time, Employee is not entitled to fees.

3)Is Employee entitled to attorney's fees?

FINDINGS OF FACT

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

1) On November 11, 2019, Employee injured his shoulder at Fire Station 11 while working for Employer as a firefighter. (First Report of Occupational Illness or Injury, November 18, 2019).

2) On January 23, 2020, Amit Sahasrabudhe, M.D., conducted an EME on Employee. He related the November 11, 2019 incident as the substantial cause for Employee's need for treatment on his left shoulder. The EME recommended an injection and physical therapy for six weeks for treatment. If symptoms persisted it was likely Employee would need surgical intervention; post-surgery it was likely Employee would reach medical stability within four months. (Sahasrabudhe report, January 23, 2020).

3) On June 16, 2020, Kevin Paisley, D.O., opined Employee sustained a work-related traumatic rotator cuff tear in his left shoulder. (Paisley report, June 16, 2020).

4) On October 1, 2020, Dr. Paisley performed left shoulder arthroscopic surgery. (Paisley report, October 1, 2020).

5) On December 30, 2020, Larry Levine, M.D., saw Employee and opined he displayed bilateral ulnar neuropathy likely caused by sitting in Employee's recliner and putting pressure on the medial elbow bilaterally post shoulder surgery. (Levine report, December 30, 2020).

6) On January 27, 2021, Dr. Paisley saw Employee and opined, "Marked bilateral ulnar neuropathy with evidence of both acute and chronic changes in an ulnar distribution . . . tenderness along the ulnar aspect of elbow, ulnar never does not sublux, and mild atrophy in his hand and dysesthesias along the ulnar never distribution." Upon review of the electromyography and nerve conduction studies (EMG/NCV), Dr. Paisley noted Employee's diagnosed condition was consistent with the imaging. (Paisley report, January 27, 2021).

7) On March 9, 2021, Dr. Paisley performed a right elbow cubital tunnel decompression. (Paisley report, March 9, 2021).

8) On May 27, 2021, EME Sahasrabudhe opined "additional medical treatment may very well be reasonable/necessary, at least with respect to the right elbow/ulnar never." In regard to the left shoulder he stated, "no additional medical treatment is indicated or necessary," with medical stability achieved on May 27, 2021. Dr. Sahasrabudhe gave a three percent permanent partial impairment (PPI) rating for the shoulder but declined to find medical stability for the right elbow/ulnar nerve. (Sahasrabudhe report, May 27, 2021).

9) On October, 25, 2021, Samuel Adams, M.D., saw Employee, and assessed neck pain and atypical nerve patterns. Dr. Adams' diagnosis of Employee's neck pain was cervicalgia and muscle weakness. He recommended physical therapy and follow up in three weeks. (Adams report, October 25, 2021).

10) On December, 29, 2021, Heath McAnally, M.D., saw Employee and opined, "This is an admittedly complex case; arguably the most straightforward component at this point is his cervicalgia which I believe on the basis of his primarily suboccipital and occipital pain is emanating from his C3/4 and also C2/3 joint the latter of which is particularly arthropathic, and which scenario is also very persistent with severe neck injury 20 years ago." Dr. McAnally recommended a C2/3 and C3/4 facet injection series. (McAnally report, December 29, 2021).

11) On March 15, 2022, Employee's physician Dr. Adams provided Employer's insurance adjuster with an assessment for Employee. Employee was deemed not able to return to work full duty and had not reached medical stability. Under estimated target date for medical stability, Dr. Adams put "TBD." In Dr. Adams' plan for the next 45 days, he recommended massage two times per week for two months, return to Dr. McAnally, acupuncture and follow-up in two months. (Letter to Dr. Adams, March 15, 2021).

12) On March 30, 2022, EME David Bauer, M.D., orthopedic surgeon, diagnosed cervical spondylitic disease, not caused by or aggravated by employment; degenerative changes within Employee's shoulders, neither caused nor aggravated by playing volleyball; and ulnar neuropathy, neither caused nor aggravated by sitting with his elbows on the arms of his recliner. He opined that the substantial cause for Employee's left shoulder surgery was the November 2019 injury; however, the substantial cause of all other conditions was aging, neither caused by nor aggravated by cumulative exposure or any degree of injuries sustained over the years. In his view, medical stability was reached on October 21, 2021, no further medical treatment was necessary. (Bauer report, March 30, 2022).

13) On April 8, 2022, Employer controverted Employee's claims. It denied all medical treatment for the cervical, thoracic and lumbar spine, right shoulder and ulnar nerve. Employer also denied PPI over zero percent for Employee's left shoulder. It based this controversion on EME Bauer's March 30, 2022 evaluation. (Controversion Notice, April 8, 2022).

14) On July 14, 2022, Lennett Lerch, NP, saw Employee for reevaluation of neck pain. NP Lerch diagnosed Employee with cervicalgia and hip pain. (Lerch report, July 14, 2022).

15) On August 20, 2022, Michael Montano, M.D., saw Employee for complaints of bilateral knee and shoulder pain with right shoulder greater than left. X-rays were taken of Employee's knees and Dr. Montano diagnosed a possible tear of the lateral meniscus in the right knee. No imagining was performed on the right shoulder but based on Dr. Montano's assessment there was a possible rotator cuff tear. (Montano report, August 20, 2022).

16) On September 26, 2022, Employee claimed: temporary total disability (TTD) and PPI benefits, attorney's fees and costs, transportation costs, medical costs, penalty for late paid compensation and interest. His claim pertains to work-related injuries to his cervical, thoracic, and lumbar spine, and bilateral shoulders, arms and elbows. (Claim for Workers' Compensation Benefits, September 26, 2022).

17) On September 26, 2022, Employee asked for an SIME and consolidation of cases. He contends a significant medical dispute exists between Employee's attending and EME physicians. Employee asks the Board to consolidate cases: 199825222, 199909937, 29112598M, 200907728, 201411458, 201616297, and 201915689, all involving injuries incurred while Employee worked for Employer. He contends all listed cases involve the same body parts in dispute with Employer and consolidation would provide a speedier remedy to Employee in resolving his claim for benefits. To date Employee has not filed claims in any of the listed cases except the present one: 201915689. (Petition, September 26, 2022; agency files).

18) On October 17, 2022, Employer denied all benefits claimed by Employee. It also opposed an SIME until discovery was completed based on the voluminous medical reports requested by Employee. Employer opposed case consolidation and contended consolidation is the incorrect remedy and even if it was correct the listed cases are significantly different than Employee's current claim for benefits and therefore should not be consolidated. Lastly, Employer petitioned to strike fees and costs associated with Employee filing medical records that had previously been filed on medical summaries. (Answer to Employee's Workers' Compensation Claim, Answer to Petition for SIME, Opposition to Petition for Consolidation, October 17, 2022).

19) On October 21, 2022, Employee requested a hearing on his request for an SIME and case consolidation. Employee references "Exhibit B031" an Answer to Employer's Petition to Strike Fees/Costs for Duplicate Filings; it does not appear Employee's answer was filed with the Division but was served on Employer's attorney. Employee in his answer asked the Board to: (1) Add Employer's petition to strike to the SIME hearing, (2) Deny the petition to strike, (3) Grant attorney's fees and costs related to Employer's October 17, 2022 petition, and (4) Grant attorney fees and costs if Employee prevails on his SIME request. (Affidavit of Readiness for Hearing, Answer to Employer's Petition to Strike Fees/Costs for Duplicate Filings, October 21, 2022).

20) At a prehearing conference on November 15, 2022, the parties requested a written record hearing and identified the following issues: (1) Employee's case consolidation petition, (2) Employee's petition for an SIME, and (3) Employee's request for interim fees and costs. Employer contended Employee is not entitled to interim fees. (Prehearing Conference Summary, November 15, 2022).

21) The parties after the November 15, 2022 prehearing conference exchanged communication via email to the prehearing designee to clarify the issues for the written record hearing. Employee requested the Petition to Strike be added as an issue. Employer responded to Employee's email and noted that no hearing request had been filed on Employer's petition and Employer maintained its position that interim fees are not warranted and since no hearing request has been filed Employer would maintain its position for a final merits hearing on the issue of attorney's fees for duplicative filings. (Employee's Notice of Evidence, Exhibit B035-36, December 6, 2022).

22) On December 6, 2022, Employee filed an affidavit of attorney's fees and costs, which itemized 51.00 hours of attorney time totaling $20,145.00. Costs and paralegal fees were not provided in the affidavit. Employee's affidavit of fees includes all action Yeo had taken in this case to present. Employee raised two issues specifically: case consolidation and a request for an SIME. Those two issues along with interim fees are the subject of this hearing. The affidavit utilizes a block-billing format with a brief description of the work performed, the hours spent performing the work multiplied by the attorney's hourly rate. Employee included briefing as it applied to the reasonableness of the fees under *Rusch v. SEARHC*¸ 453 P.3d 784 (2019). Based on the fee affidavit the following costs appear related to the pursuit of an SIME by Employee:

Date	Description		Time Spent	Rate	Total
9/24/2022	Review	Medical Records	1.5	$395.00	$592.50
	Draft Claim		0.4	$395.00	$158.00
	Draft Petition		0.5	$395.00	$197.50
	Draft SIME form		3.2	$395.00	$1,264.00
	Prepare medical summary		0.7	$395.00	$276.50
12/2/2022	Legal Research	SIME	0.5	$395.00	$197.50
	Prepare	Exhibits	3	$395.00	$1,185.00
12/3/2022	Draft Brief		9	$395.00	$3,555.00
12/4/2022	Draft Brief		8.1	$395.00	$3,199.50
		TOTAL	**26.9**		**$10,625.50**

23) Employee's attorney has practiced law since 2008, he is licensed in the State of California. Prior to coming to Alaska, he worked as a line attorney for the Kern County Department of Child Support Services where he handled civil enforcement cases and appeared before the California Superior Court to try cases. More recently, he spent three years serving as a Hearing Officer in

the Alaska Department of Labor and Workforce Development Adjudications Office, he served as the designated chair on hearings and issued orders on workers' compensation cases before the board. He has since moved into a practice that represents injured workers. He has been in his current position since April of 2022. (Affidavit of Counsel for Award of Interim Fees and Costs, December 6, 2022).

24) On December 6, 2022, Employee in his hearing brief contends (1) An SIME should be ordered because there is a significant medical dispute between Employee's physician and EME, and an SIME physician's opinion would assist the factfinders in resolving it, (2) Employee's cases should be consolidated as they are "similarly or closely related," and case consolidation would provide a speedier remedy, (3) If an SIME is ordered, Employee is entitled to interim attorney fees because an SIME is a benefit and (4) Employer's October 17, 2022 petition to strike fees and costs for "duplicate" medical summary filings should be denied because Employee filed medical summaries pursuant to 8 AAC 45.052(a). (Employee's Hearing Brief, December 6, 2022).

25) On December 6, 2022, Employer in its brief contends (1) there is no legal basis for consolidation of cases, (2) an SIME on the consolidated cases is improper since there is only an active dispute between Employee's and Employer's physicians on whether it was work or degenerative conditions that caused Employee's shoulder and neck pain in the present case, and (3) there is no basis to award interim attorney's fees because Employee has not prevailed on either claim consolidation or an SIME. (Employer's Hearing Brief, December 6, 2022).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to . . . this chapter. . . .
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> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered

The Board may base its decision 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).

> **8 AAC 45.065. Prehearings.** . . .
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> (h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition in accordance with 8 AAC 45.050 that sets out the grounds for the appeal. Unless a petition is filed under this subsection no later than 10 days after service of a board designee's discovery order, a board designee's discovery order is final.

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
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> (k) In the event of a medical dispute regarding determinations of 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 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 Dec. No. 073 (February 27, 2008) addressed the Board's authority to order an SIME under §095(k). The AWCAC referred to its decision in *Smith v. Anchorage School District,* AWCAC Dec. No. 050 (January 25, 2007), and said, referring to AS 23.30.095(k):

> [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.

The Commission in *Bah* stated when deciding whether to order an SIME, the Board typically considers the following 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?

> **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. . . .
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> **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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation 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.
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> (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.

The Board has awarded attorney fees in cases where an employer unsuccessfully resisted an SIME. *Stepanoff v. Bristol Bay Native Corp.*, AWCB Dec. No. 09-0041 (February 26, 2009). The Commission has awarded attorney fees on a dispute concerning an SIME petition. *Gillion v. North West Co. Int.l*, AWCAC Dec. No. 253 (August 28, 2018). Both Gillion and the employer had agreed an SIME was necessary, but did not agree on the SIME form. Resolution of the dispute was necessary before the SIME could go forward. The Board eventually decided two separate forms were the equivalent of a single form, but incorrectly decided Gillion was not entitled to attorney fees as he did not prevail on getting his requested language included on the form. The Commission found Gillion did prevail when the Board ordered the SIME process to move forward, which could not have taken place without Gillion seeking a Board decision.

Therefore, it found Gillion should be awarded attorney fees for the work in obtaining the ordered SIME. *Id*. at 11.

In *Adamson v. University of Alaska*, 819 P.2d 886 (Alaska 1991), the employee's attorney was successful in obtaining a second hearing before the Board, which was lost on the merits. The employee was ultimately successful on appeal to the Supreme Court. The Court denied employee's appeal of the Board denial of her claim for attorney fees for her success in obtaining the second hearing and interpreted AS 23.30.145(b) to mean the employee must be successful on the claim itself, not on the collateral issue of obtaining a second hearing. The Court remanded the attorney fees issue because the employee's appeal to the Supreme Court of her claim for chiropractic care was successful. *Id*.

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), after a contentious case, the parties reached a settlement of all benefits except the employee's attorney fees. The claimant's attorney sought $425 per hour and submitted an affidavit detailing 277.55 hours of work as well as a list of witnesses who would testify at a hearing on his fees. At hearing, the claimant was permitted to testify, but the attorney and other witnesses were precluded from testifying. The Board did allow the claimant's attorney to file a declaration stating he had more than 35 years' experience practicing law in multiple states, had represented hundreds of personal injury clients and dozens of workers' compensation clients, including many clients he had assisted *pro bono*. In reviewing the claimed hourly rate, the Board stated it would review attorney fee awards in other published cases, but did not provide the parties with copies of the decisions or the names of the cases upon which it relied. The Board reduced claimant's attorney's hourly rate to $300 per hour and the amount for "paralegal tasks" to $130 per hour. In addition, the panel reduced the fee for time spent on tasks on which the claimant failed. The Supreme Court reversed, holding the Board should have considered the witnesses' testimony and allowed the parties the opportunity to respond to any cases or other information on which it relied. The Court held that because attorneys are not required to hire paralegals, it was improper to reduce the hourly rate when the work is done by the attorney. The Court also held the Board must consider all an attorney's experience, not just the attorney's compensation experience. The Court held the Board must consider all factors in Alaska Rule of Professional Conduct 1.5(a)

when determining a reasonable attorney fee. Those factors are:

1. the time and labor required, the novelty an difficulty of the questions involved, and the skill requisite to perform the legal services properly;

2. the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.

The Supreme Court remanded *Rusch* for reconsideration consistent with its decision.

8 AAC 45.040. Parties. . . .

(c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party.

(d) Any person against whom a right to relief may exist should be joined as a party. . . .

. . . .

(f) Proceedings to join a person are begun by

(1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or

(2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action.

(i) If a claim has not been filed against the person served with a petition or notice to join, the person may object to being joined based on a defense that would bar the employee's claim, if filed.

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

(4) whether a claim was filed against the person by the employee; and

(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.

(k) If claims are joined together, the board or designee will notify the parties which case number is the master case number. After claims have been joined together,

(1) a pleading or documentary evidence filed by a party must list the master case number first and then all the other case numbers;

(2) a compensation report, controversion notice, or a notice under AS 23.30.205(f) must list only the case number assigned to the particular injury with the employer filing the report or notice;

(3) documentary evidence filed for one of the joined cases will be filed in the master case and the evidence will be considered as part of the record in each of the joined cases; and

(4) the original of the board's decision and order will be filed in the master case file, and a copy of the decision and order will be filed in each of the joined case files.

(l) After the board hears the joined cases and, if appropriate, the division will

> separate the case files and will notify the parties. If the joined case files are separated, a pleading or documentary evidence filed thereafter by a party must list only the case number assigned to the particular injury with the employer filing the pleading or documentary evidence.
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> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
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> (b) **Claims and petitions.**
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> (5) A separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case. If a single incident injures two or more employees, regardless of whether the employers are the same, two or more cases may be consolidated for the purpose of taking evidence. A party may ask for consolidation by filing a petition for consolidation and asking in writing for a prehearing, or a designee may raise the issue at a prehearing. To consolidate cases, at the prehearing the designee must
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> (A) determine the injuries or issues in the cases are similar or closely related;
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> (B) determine that hearing both cases together would provide a speedier remedy; and
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> (C) state on the prehearing summary that the cases are consolidated, and state which case number is the master case number.

In *Gillette v. Alaska Communications Systems Holdings*, AWCB Dec. No. 15-0157 (December, 4, 2015), the Board declined to consolidate two cases in which the employee had worked for the same employer and injured similar body parts. The designee noted that joinder would likely be the more appropriate remedy as opposed to case consolidation.

ANALYSIS

1) Should Employee's cases 199825222, 199909937, 200112508M, 200907728, 201411458, 201616297, and 201915689 be consolidated?

Employee has requested "consolidation" of seven separate cases as part of his request for an SIME. His hearing arguments were directed only toward "consolidation," not "joinder." Employer opposed "consolidation," but addressed "joinder" as the legally appropriate

mechanism to hear multiple cases at one time. The regulation addressing "consolidation" upon which Employee relies states "A separate claim must be filed for each injury for which benefits is claimed. . . ." 8 AAC 45.050(b)(5). In *Gillette*, the designee likened the statute's purpose as written is to allow multiple harmed parties in one incident the ability to litigate their claims more efficiently in one case, at one hearing with all named parties present.

The consolidation regulation is not intended to apply to the situation here, where Employee may have injured himself multiple times while working for the same employer, and never filed claims in any of the previous cases except the present case. In short, 8 AAC 45.050(b)(5) is inapplicable to this case because Employee has not filed claims in any of the previous cases. For these reasons, Employee's request to consolidate these cases will be denied. However, Employee could still "join" those previous cases. 8 AAC 45.040 says "parties," as well as "claims" and "cases," may all be "joined." Subsections (a) through (j) in 8 AAC 45.040 clearly refer to joining "parties," or in other words, "persons," people, companies and so forth. By contrast, (k) and (l) specifically refer to joining "claims" and "cases." The appropriate regulation applicable to Employee's situation would be 8 AAC 45.040(k). This subsection, in stark contrast to the subsections above it in the same section, states only what the designee will do when "claims are joined together." The Employee will need to file claims for benefits in the previous cases for those cases to be "joined."

A primary reason for joining claims is to facilitate discovery in multiple claims. This decision cannot unilaterally "join" Employee's cases because no claims have been filed in the previous cases and Employer should be afforded an opportunity to be heard on whether the cases should be "joined." AS 23.30.001; AS 23.30.135. While this decision will decline to consolidate Employee's cases for the reasons stated above, should Employee wish to have his cases joined, rather than consolidated, he should file a claim in each case, file a petition to join all claims and cases and request a prehearing conference, at which the designee will decide whether to join the claims. 8 AAC 45.040(j), (k). If a party objects to the designee's order, which fundamentally affects discovery, that party may appeal pursuant to 8 AAC 45.065(h).

2) Should an SIME be ordered?

Employee seeks an SIME. AS 23.30.095(k). The purpose of an SIME is not to assist any party but to assist the factfinders. *Bah.* When there is a medical dispute between an injured worker's attending physician and an EME physician, an SIME may be ordered. AS 23.30.095(k). There are three requirements before an SIME can be ordered. *Bah*.

First, there must be a medical dispute between Employee's attending physician and Employer's EME as it pertains to Employee's cervical spine, bilateral shoulders and right elbow. On March 30, 2022, Dr. Bauer opined Employee's disability and need for medical treatment after his November 2019 injury was caused by aging. He opined "even without his past injuries, Employee's neck and right shoulder would be in the same condition." Attending physician Dr. Adams said Employee's November 2019 accident was the substantial cause of Employee's work injury, but that he had not reached medical stability and recommended additional treatment. Employer's physician does not dispute that Employee's initial symptoms were caused by the accident but opined they should have resolved after surgery by October 1, 2021. Employee's physician recommended additional treatment before assessing stability. Thus, there is a medical dispute between Employee's attending physician and the EME physician.

Second, the dispute must be significant. Employee seeks disability and medical benefits. Because Employee's entitlement to those benefits depends on whether his undisputed work injury is still the substantial cause of his disability or need for further treatment as it pertains to his cervical spine, bilateral shoulders and right elbow, his inability to return to work and the date of medical stability, the dispute is significant because these benefits may be substantial. *Rogers & Babler*. This justifies the cost of an SIME.

Third, an SIME physician's opinion would assist the factfinders in resolving the disputes. The parties' physicians are not in agreement on the above-described medical issues. Employee has had multiple injuries to his body over the course of his employment, some requiring no treatment and others requiring surgery. In short, an additional medical opinion would aid the factfinders in resolving the disputes and this decision will order an SIME in this current case only. AS 23.30.001(1), (4); AS 23.30.095(k); *Bah*.

3) Is Employee entitled to attorney's fees?

Employee requests attorney fees for time spent pursuing his September 26, 2022 petition seeking an SIME, and associated costs. AS 23.30.145(b). An attorney fees award is permitted when an employee has successfully prosecuted a claim or benefit. *Id.* Employer contends Employee is not entitled to attorney fees because an SIME is not a disability benefit. It also contends *Adamson* precludes an award of fees and costs. AS 23.30.395(26) states "medical and related benefits includes but is not limited to physicians' fees. . . ." An SIME involves physician's fees for medical records review and examination to obtain a medical opinion from a physician and Employer is required to pay for the SIME cost. 8 AAC 45.090(b). Employee has raised the collateral issue of "consolidation" and an SIME. Employee could fail on one issue and prevail on the other, thus warranting fees. An employee cannot be ordered to pay for the SIME costs, unless he fails to attend the SIME without good cause at which point he still would not pay outright but would have his compensation reduced to reimburse the employer. 8 AAC 45.090(b), (g). Furthermore, attorney fees in cases where an employer unsuccessfully resisted an SIME are routinely awarded. *Stepanoff*; *Gillion*. The SIME would not have gone forward had Employee not filed a petition and sought an order, as Employer opposed an SIME. *Gillion*; *Carroll.* Therefore, Employee is entitled to part of his attorney fees for time spent pursuing his September 26, 2022 petition seeking an SIME because he was successful on his petition.

Employee's lawyer's fee affidavit included all work performed from the date his attorney accepted to the case to present. He utilized a "block billing" format in his fee affidavit. Employee noted certain tasks performed in relation to the SIME and those were listed in a chart above. However, Employer objected to all fees incurred to date being included as part of the interim fees. Employee included 17.1 hours in drafting his brief for this hearing. Employer objects to the time as excessive and not warranted for the benefits received. As it relates to the issues he has proffered he was only successful on the SIME and not "consolidation" of cases. Therefore, his time spent drafting his brief will be reduced to 8.6 hours. However, Employee's attorney successfully obtained the SIME he sought, and Employer opposed. In doing so, Employee expended 18.4 hours, as his fee affidavit shows. Based on the affidavit provided and review of tasks performed the time spent toward the SIME is reasonable.

In addition to reviewing the work done, *Rusch* requires review of the eight factors in Alaska Rule of Professional Conduct 1.5(a) in determining a reasonable fee. Employee provides what the *Rusch* factors are in his fee affidavit, but fails to provide further detail than that all work he has performed in this case is directly related to his pursuit of an SIME. This on its face fails because he has pursued consolidation of cases as well, which is included in his fee affidavit.

> *1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.*

Questions regarding SIMEs are common in workers' compensation cases. They are not particularly difficult, and do not require an unusually high level of skill to perform. Employee also seeks attorney fees. Entitlement to fees does not present a novel or difficult issue, not does it require exceptional legal skill to properly draft a fee affidavit that accurately itemizes hours expended and describes the work's extent and character.

> *2. The likelihood, that the acceptance of the particular employment will preclude* other employment by the lawyer;

To some extent, time spent working on any client's case prevents an attorney from spending that time on another client's case. Employee contends time spent pursuing an SIME in this case precluded acceptance of work for other clients. He provides no additional detail.

> *3. The fee customarily charged in the locality for similar services;*

Employee contends $395 is a customary and usual rate for work performed. Employer disagrees and contends less experienced workers' compensation attorneys warrant a fee rate of $300. Attorneys with decades of experience in Alaska typically request rates above $400 per hour, and courts have affirmed rates based on their experience level and time in practice. Prior to representing injured workers, Employee's attorney worked as a child support attorney in California and served three years as a Hearing Officer with the board. Employee's attorney has been performing work for clients in workers' compensation for less than a year. While Employee's attorney has only represented injured workers for a short period of time, he has spent the previous three years adjudicating workers' compensation claims so his familiarity and experience is higher than that of an attorney just starting out representing injured workers.

4.The amount involved and the results obtained;

Employee's attorney was successful in obtaining the SIME. While an SIME does not result in a monetary benefit to an employee directly, where causation is an issue, it significantly moves the case toward resolution, and attorney fees in the past have been awarded to a successful claimant.

5.The time limitations imposed by the client or by the circumstances;

In his affidavit, Employee's attorney did not identify any time limitation imposed by the client or the circumstances.

6. The nature and length of the professional relationship with the client;

Employee's attorney filed an Entry of Appearance in August of 2022; the length of his relationship with the client has not been significant. The issues for which the client sought representation are not issues that would be considered extraordinary in the realm of workers' compensation law. Neither party addressed how this factor should affect the attorney fee.

7. The experience, reputation and ability of the lawyer or lawyers performing the services; and

The parties disagree on the customary rate and even further disagree as to experience level of Employee's attorney. In his affidavit, the attorney contends he has been practicing law since 2008; prior to representing clients he was a hearing officer in the adjudications section for three years and has now moved to claimant representation. Employer draws attention to the short time in which Employee's attorney has represented injured workers but does not dispute that the attorney was licensed in 2008. Employee's attorney is not licensed in the State of Alaska but that is not required to represent injured workers here. As a Workers' Compensation Hearing Officer the attorney presided over workers' compensation hearings, performed substantial legal research, and drafted and issued decisions on complicated legal matters for three years. The attorney has represented injured workers for less than a year and is requesting the average going rate for a workers' compensation attorney. Employer believes his rate should be closer to $300. A rate of $395 is most appropriate given the length Employee's attorney has practiced law in

general, his time adjudicating workers' compensation cases, and his current experience in representing injured workers.

8. Whether the fee is fixed or contingent.

Virtually all fees for employees' attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate.

Employee will be awarded $7,268 in attorney fees (18.4 hours X $395 = $7,268). Considering the benefits obtained and the time expended, this is a reasonable, fully compensatory fee.

CONCLUSIONS OF LAW

1) Employee's cases 199825222, 199909937, 200112508M, 200907728, 201411458, 201616297, and 201915689 will not be consolidated.
2) An SIME will be ordered.
3) Employee is entitled to attorney's fees.

ORDER

1) Employee's September 26, 2022 petition to consolidate cases is denied.
2) Employee's September 26, 2022 petition for an SIME is granted.
3) Employee's request for interim attorney's fees is granted in the amount of $7,268.
4) The SIME will address: "causation" (as it relates to Employee's work injury and his cervical spine, bilateral shoulders and right elbow), "functional capacity" (Employee's ability to work full time), "the amount and efficacy of the continuance of or necessity of treatment" and "medical stability."
5) An orthopedic surgeon will conduct the SIME on Employee's cervical spine, bilateral shoulders and right elbow.
6) The designee responsible for obtaining SIME physicians will select an appropriate physician from the authorized SIME list, the designee will follow the normal procedure for identifying the physician to perform the SIME as soon as possible.

7) Employer is directed to follow the procedure in 8 AAC 45.092(h)(1) and (2) and provide Employee's attorney with three binders, within 10 days from this decision and order's date.
8) Employee's attorney is directed to follow the procedure in 8 AAC 45.092(h)(3) and (4).

Dated in Anchorage, Alaska on February 15, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kyle D Reding, Designated Chair

/s/
Randy Beltz, Member

NANCY SHAW, MEMBER, DISSENTING IN PART

I would not conclude that a petition to consolidate multiple claims by a single employee against a single employer can be brought only under 8 AAC 45.040. Both 8 AAC 45.040(k) and and 8 AAC 45.050(b)(5) reference joinder or consolidation of "claims" and "cases." But 8 AAC 45.040 has specifically to do with parties to an action, and 8 AAC 45.050(b)(5) deals with "claims," much as the civil rules (AKRCP 18 and 19) deal separately with the "joinder of parties" and the "joinder of claims." Where a party seeks consolidation of claims, it makes more sense to me that the party invoke 8 AAC 45.050(b)(5) which sets out the criteria for consolidation of claims and, in 8 AAC 45.050(b)(6) and 8 AAC 45.050(b)(7), the administrative treatment of consolidated claims.

Section 8 AAC 45.050(b)(5) states clearly that "a claim must be filed for each injury for which benefits are claimed." The majority finds that the petition for consolidation fails because the employee has not filed a claim in each case that he seeks to consolidate with the current one. But, here, the employee has not made a claim for benefits in the old cases. It appears that, when he was injured and required it, the employer paid for his medical care, and then he returned to work. So these are not, based on the record at hand, cases for which claims must have been or must now be filed. I would not find that the employee has failed to satisfy a prerequisite to consolidation.

I would grant the petition to consolidate the listed injury cases with the current claim because the body parts affected are, or might be, the same and the medical histories developed in connection with the earlier injuries are relevant to disposition of the current claim.

I concur in the Board's decision to grant a second independent medical examination on the terms set out in the Decision and Order, and I concur in the award of attorney's fees, were the petition for consolidation granted by this decision, then additional attorney's fees would be addressed.

/s/
Nancy Shaw, 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 Randy E. Gilmore, employee / claimant v. Municipality of Anchorage, self-insured employer; defendant; Case No. 201915689; 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 February 15, 2023.

/s/
Kimberly Weaver, Office Assistant II