

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

ROBERTO ORTEGA, )  
)  
Employee, )  
Claimant, )  
)  
v. ) INTERLOCUTORY  
) DECISION AND ORDER  
)  
NANA REGIONAL CORP., ) AWCB Case No. 202120031  
)  
Employer, ) AWCB Decision No. 23-0052  
and )  
) Filed with AWCB Anchorage, Alaska  
AMERICAN ZURICH INS. CO., ) on September 14, 2023  
)  
Insurer, )  
Defendants. )  
)

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Roberto Ortega's (Employee) June 1, 2023 petition for a second independent medical evaluation (SIME) was heard on September 14, 2023, in Anchorage, Alaska, a date selected on July 25, 2023. A July 13, 2023 hearing request gave rise to this hearing. Attorney Adam Franklin appeared and represented Employee. Attorney Jeffrey Holloway appeared by Zoom and represented Nana Regional Corp. and its insurer (Employer). There were no witnesses. The record closed at the hearing's conclusion on September 14, 2023.

## ISSUE

Employee contends he is entitled to an SIME because there are significant medical disputes between his attending physicians and Employer's doctor. After the prehearing conference where this issue is set for hearing, he requested another prehearing conference to add attorney fees and costs for the SIME as issues for this hearing, but this never occurred.

Employer initially opposed the SIME because it contended Employee failed to provide discovery. However, on the same date Employee filed his hearing brief, Employer withdrew its objection to the SIME and agreed to it. Employer still disagrees with Employee's SIME form. It objects to the fee and cost issue being heard because it was not properly raised.

**Is Employee's request for attorney fees and costs properly before the panel?**

FINDINGS OF FACT

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

- 1) On June 1, 2023, Employee petitioned for an SIME. (Petition).
- 2) On June 23, 2023, Employer answered the June 1, 2023 petition and opposed it, stating Employee had failed to comply with a prehearing discovery order from May 19, 2023. It contended until Employee cooperated with discovery, the Board should not order an SIME. (Opposition to Petition for SIME, June 23, 2023).
- 3) On July 12, 2023, the parties attended a prehearing conference to discuss Employee's SIME petition. The only issue included in the discussion was the SIME; attorney fees and costs were not discussed or included in the summary. (Prehearing Conference Summary, July 12, 2023).
- 4) On July 25, 2023, the parties appeared at another prehearing conference to schedule a hearing on Employee's June 1, 2023 SIME petition. The only issue identified for the September 14, 2023 hearing was the SIME petition; attorney fees and costs were not included as issues for the hearing. Parties were to file their hearing evidence on or before August 25, 2023, and their briefs on or before September 7, 2023. (Prehearing Conference Summary, July 25, 2023).
- 5) On August 24, 2023, Employee requested another prehearing conference in "Fairbanks," before September 7, 2023. (Request for Conference, August 24, 2023).
- 6) On August 25, 2023, Division of Workers' Compensation (Division) staff called Franklin's office to clarify his August 24, 2023 prehearing conference request. Staff was confused because Employee had requested a prehearing conference in Fairbanks, for this Anchorage venue case. It was also unclear why Employee requested the prehearing conference, and if it was an "emergency." Staff left a message. (Agency file: Judicial, Communications, Phone Call tabs, August 25, 2023).

- 7) On August 28, 2023, Division staff called Franklin's office again to clarify his August 24, 2023 prehearing conference request. Staff left a message stating additional information was necessary before the Division would schedule a prehearing conference. (Agency File: Judicial, Communications, Phone Call tabs, August 28, 2023).
- 8) On August 30, 2023, Division staff called Franklin's office for the third time to clarify his August 24, 2023 prehearing conference request. Staff again left a message stating additional information was required before the Division could act on the request. (Agency File: Judicial, Communications, Phone Call tabs, August 30, 2023).
- 9) Later, on August 30, 2023, Division staff spoke to Franklin's office, which advised he was not in but would return the call on August 31, 2023, to clarify the prehearing conference request. (Agency File: Judicial, Communications, Phone Call tabs, August 30, 2023).
- 10) On September 1, 2023, Franklin called the Division to clarify the August 24, 2023 prehearing conference request. He stated the reason for the prehearing conference request was to add and discuss attorney fees that were not previously included as issues for the upcoming hearing. Staff asked Franklin if he had reached out to Holloway to discuss his concern, and Franklin said he had not but would do so and possibly resolve the attorney fee and cost issue. "In case of disagreement," Division staff provided Franklin with the Board designee's available days for a prehearing conference, including September 8 and 12, 2023, with available time slots for a prehearing conference. Franklin told Division staff he would get back to her as soon as possible. (Agency File: Judicial, Communications, Phone Call tabs, September 1, 2023).
- 11) Nothing in the agency file shows Employee followed through on his request for a prehearing conference prior to the September 14, 2023 hearing. (Agency file).
- 12) On September 5, 2023, Employer withdrew its June 23, 2023 opposition to Employee's SIME petition, although it still disagreed with his proposed SIME form. It contended because Employee had failed to comply with a discovery order from May 2023, Employer had initially opposed the SIME. However, since Employee had at least partially complied with the order, Employer consented to the SIME. (Non-Opposition to Petition for SIME, September 5, 2023).
- 13) On September 5, 2023, Employee filed his hearing brief for the September 14, 2023 hearing. In it, he cited relevant facts concerning opinions from his physicians and from an employer's medical evaluator. Employee also argued the applicable SIME law, requested an SIME and related attorney fees and costs "for overcoming Employer's resistance to an SIME in this matter."

Attached to his brief were Franklin’s resume, Employee’s various medical records, numerous record releases Employee had signed, his responses to Employer’s discovery requests and what appear to be Franklin’s itemization of SIME legal services performed, showing 6.2 hours at \$500 per hour, totaling \$3,100. There is no attached affidavit from Franklin regarding these attorney fees. (Employee’s Hearing Brief in Support of His Petition for an SIME, September 7, 2023).

14) Employee’s agency file does not contain Franklin’s affidavit supporting his request for SIME-related attorney fees and costs. (Agency file).

PRINCIPLES OF LAW

**8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on

- (1) identifying and simplifying the issues;
- . . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

**8 AAC 45.070. Hearings.** (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e).  
. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing. . . .

**8 AAC 45.180. Costs and attorney's fees. . . .**

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. . . . An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and

the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee. . . .

. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state. (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section. . . .

**8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

### ANALYSIS

#### **Is Employee's request for attorney fees and costs properly before the panel?**

The only issue set for hearing on September 14, 2023, was Employee's June 1, 2023 SIME petition. On September 5, 2023, Employer withdrew its previous opposition to the SIME and agreed to it. That position change rendered Employee's SIME petition moot. In his brief, Employee contended he was entitled to attorney fees and costs for obtaining Employer's eventual concession and agreement to his request for an SIME, but at hearing he conceded his request for fees and costs was not raised as an issue for this hearing. 8 AAC 45.180(b), (d); 8 AAC 45.065(c).

On July 25, 2023, the parties attended a prehearing conference where, according to the prehearing conference summary, the SIME petition was the only issue set for hearing on September 14, 2023. Unless modified, the July 25, 2023 prehearing conference summary "governs the issues" at

hearing. 8 AAC 45.065(c). Similarly, absent “unusual and extenuating circumstances” shown at hearing, the July 25, 2023 prehearing conference summary “governs the issues” and the hearing’s course. 8 AAC 45.070(g).

After Division contacts to clarify his conference request, Franklin advised the Division that he wanted to add attorney fees and costs as issues for the SIME petition hearing. However, no subsequent prehearing conference occurred. Consequently, the only issue for hearing on September 14, 2023, was Employee’s request for an SIME, which as stated is moot. At hearing, Employee showed no “manifest injustice” to him by the panel adhering to the prehearing conference summary. 8 AAC 45.195. Thus, although his brief requested attorney fees and costs, his request as it relates to obtaining the SIME will be held in abeyance because it is not properly before the panel at this hearing. 8 AAC 45.065(c); 8 AAC 45.070(g).

CONCLUSION OF LAW

Employee’s request for attorney fees and costs is not properly before the panel.

ORDER

- 1) Employee’s June 1, 2023 petition for an SIME is moot.
- 2) Employee’s request for SIME-related attorney fees and costs is held in abeyance as not properly raised for this hearing.
- 3) Employee is directed to request a prehearing conference immediately, at which the designee in her discretion will set the SIME process in motion.

Dated in Anchorage, Alaska on September 14, 2023.

ALASKA WORKERS’ COMPENSATION BOARD

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/s/  
William Soule, Designated Chair

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/s/  
Randy Beltz, Member

