

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CHRISTOPHER MORALES, )  
)  
Employee, )  
Claimant, ) INTERLOCUTORY  
) DECISION AND ORDER  
v. )  
) AWCB Case No. 202129399  
LOOMIS ARMORED US, LLC, )  
) AWCB Decision No. 23-0056  
Employer, )  
and ) Filed with AWCB Anchorage, Alaska  
) on October 9, 2023  
ARCH INSURANCE CO., )  
)  
Insurer, )  
Defendants. )  
)

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Christopher Morales' (Employee) April 11, 2022 claim and Loomis Armored US, LLC's and Arch Insurance Company's (Employer) July 27, 2023 petition to cancel the hearing and order a second independent medical evaluation (SIME) were heard on September 28, 2023, in Anchorage, Alaska. July 12, 2023 and August 10, 2023 hearing requests gave rise to this hearing. Attorney Patricia Huna represented Employee; attorney Vicki Paddock appeared represented Employer. All parties appeared by Zoom. There were no witnesses. The record closed at the hearing's conclusion on September 28, 2023.

## ISSUE

Employer contended the SIME the parties agreed to is not complete because the physician recommended a psychiatric evaluation to address the role of Employee's post-traumatic stress disorder (PTSD) to his symptomology and disability. It requested the hearing on the merits of

Employee's lumbar and thoracic back claim be cancelled under 8 AAC 45.074(b)(1)(F), (L) and (M) and a psychiatric SIME be ordered.

Employee contended he wanted a psychiatric SIME, but he opposed cancelling the hearing on the merits of his lumbar and thoracic back claim. He contends causation, disability, medical stability and medical treatment related to the lumbar and thoracic spine can be decided without deciding whether the work injury exacerbated or accelerated his PTSD, or the exact treatment for his lumbar and thoracic spine. Employee contended he needs disability benefits to support his family and medical treatment for the work injury and Employer mistreated him with dilatory payment of benefits and by controverting benefits without sufficient evidence. He requested an order requiring Employer to pay temporary total disability (TTD), medical benefits, transportation costs, penalty and attorney fees and costs for his work-related back injury. An oral order issued granting Employer's request for a hearing continuance and a psychiatric SIME.

**Was the oral order granting Employer's July 27, 2023 petition to cancel the hearing and order an SIME correct?**

FINDINGS OF FACT

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

- 1) On November 4, 2021, Employee was injured while working for Employer when he was in a rollover accident. (First Report of Occupational Injury, December 14, 2021).
- 2) On April 11, 2022, Employee stated he needed his diagnosis and prognosis for the November 4, 2021 work injury. He complained of intermittent dull back pain aggravated by movement and reported prolonged sitting, standing, going up stairs, and bending backwards causes aching pain with pressure. Employee underwent chiropractic treatment and physical therapy. He was unable to perform home exercises as recommended due to pain. Fil Beth Davis, NP, diagnosed sacroiliac joint sprain, lumbar spine ligament sprain and hip joint pain from a work-related motor vehicle accident, and referred Employee to orthopedics for ongoing back pain. She indicated Employee was, "Temporarily unable to resume any type of work activity, this may put the employee and his/her co-worker at risk" and the return-to-work date was to be determined at a subsequent visit. (Davis chart note and Work Status Note, April 11, 2022).

- 3) On April 11, 2022, Employee requested TTD and permanent partial impairment (PPI) benefits, medical and transportation costs, a compensation rate adjustment, penalty for late-paid compensation, interest, a finding of unfair or frivolous controversion and attorney fees and costs for a concussion and injuries to his cervical spine and back from his November 4, 2021 work injury. (Claim for Workers' Compensation Benefits, April 11, 2022).
- 4) On June 7, 2022, Employer denied TTD and PPI benefits, medical and transportation costs, a compensation rate adjustment, penalty for late-paid compensation, interest, a finding of unfair or frivolous controversion and attorney fees and costs, contending it had not received any documented restrictions from work since February 1, 2022, it did not have documentation supporting a change to Employee's compensation rate and Employee had been paid all benefits for which there was supporting medical records and documentation. (Controversion Notice; Answer to Employee's Workers' Compensation Claim, June 7, 2022).
- 5) On June 9, 2022, NP Davis referred Employee to Select Physical Therapy for a functional capacity evaluation and to orthopedics. She indicated he was, "Temporarily unable to resume any type of work activity, this may put the employee and his/her co-worker at risk" and the return-to-work date was to be determined at a subsequent visit. (Davis Work Status Note, June 9, 2022).
- 6) On July 13, 2022, R. David Bauer, MD, evaluated Employee for an employer's medical evaluation (EME). He diagnosed lumbar pain with no objective findings, noting it was physiologically unlikely Employee's pain complaints had not improved in the last 251 days. Dr. Bauer opined all objective and physiologic conditions that arose on November 4, 2021 had resolved, although the physiologic basis for Employee's ongoing subjective pain complaints is not apparent. He concluded:

At the current time, there is no objective or physiologic condition that could be considered the cause of Mr. Morales' disability and his ongoing subjective pain complaints. For a period of up to 90 days after the incident in question, Mr. Morales' subjective complaints might have been related to the automobile accident, but at the current time, there is no physiologic condition that would be the substantial cause of his complaints. Mr. Morales' current symptoms would be best described as being "medically unexplainable", a reflection of some psychosocial issue as opposed to any physiologic issue.

Dr. Bauer stated, “In reviewing the medical records, there have been no objective findings of any indication that the work incident remains a substantial cause of his disability” beyond February 2, 2022. He opined Employee was medically stable with no permanent partial impairment, no further treatment was reasonable or necessary and he was physically capable of performing any job that he was capable of prior to the work injury, stating, “If there are any limitations that would cause him not to be able to achieve heavy or very heavy labor, it would be his obesity and his deconditioning and not the sequela of the incident of November 4, 2021.” (Bauer EME report, July 13, 2022).

7) On July 26, 2022, Employer denied TTD and temporary partial disability (TPD) benefits, PPI benefits above zero percent, medical and transportation costs and reemployment benefits based upon Dr. Bauer’s EME report. (Controversion Notice, July 26, 2022).

8) On July 26, 2022, the parties agreed to an SIME. (Prehearing Conference Summary, July 26, 2022).

9) On October 5, 2022, the parties filed a mutually signed SIME form agreeing to an SIME with an orthopedic surgeon for disputes between Dr. Bauer and NP Davis on causation, compensability, treatment, functional capacity, medical stability, and PPI as a non-SIME issue. NP Davis’s April 11, 2022 and June 9, 2022 medical records and Dr. Bauer’s EME report were listed and attached to demonstrate the medical disputes. (SIME form, October 5, 2022).

10) On February 7, 2023, Jon Scarpino, MD, evaluated Employee for an SIME. He concluded the current substantial cause of Employee’s disability “in the most part” is the November 4, 2021 work injury but noted there was an underlying history of PTSD which he was treating for at the time of injury. Dr. Scarpino said it was possible that it was aggravated by the work injury, resulting or contributing to the high scores on his “PDQ and Fear-Avoidance Beliefs Questionnaires” and development of depressive symptoms. To “further assess this possibility, a review of all of his psychologist’s notes in relation to the treatment of the PTSD is required.” When asked if the work injury aggravated, accelerated or combined with the preexisting condition to produce a temporary or permanent change in the preexisting condition, Dr. Scarpino answered, “This question cannot be answered without further assessment of the pre-existing PTSD.” He concluded, “The subject accident appears to be the major contributor to Mr. Morales’ disability at this point in time. It appears, based on his physical examination today, that his subjective complaints have mainly a psychosocial origin. The contribution and possible

aggravation of the underlying PTSD syndrome, which was already under treatment, is unknown.” Dr. Scarpino said an independent psychiatric evaluation may be required. He found Employee medically stable by “Alaska definition” but noted there was a possible thoracic cord injury that had not been thoroughly evaluated and further diagnostic and evaluation of that condition was required, and it was unknown how Employee was fairing with his PTSD so “he cannot be considered medically stable until those condition are fully evaluated.” Dr. Scarpino found no specific objective findings during Employee’s physical exam that would limit his ability to return to work but found there was the possibility of an undiagnosed thoracic cord injury which needed further assessment and Employee’s treatment and current functioning for his PTSD needed to be reviewed. He did not perform a permanent impairment rating because Employee could not be considered medically stable. (Scarpino SIME report, February 7, 2023).

11) On June 20, 2023, Dr. Scarpino reviewed 80 additional pages of records, including records from Anchorage VA Medical Center, Cornerstone Clinic Counseling Center, Orthopedic Physicians Alaska, and diagnostic imaging and studies. He found a “very significant disc protrusion at T7-8, with very significant cord compression on the right side” but noted Employee had no findings consistent with a thoracic radiculopathy or myelopathy on exam. Dr. Scarpino considered the disc herniation “to have been caused by the subject incident. Symptomatic disc herniations of this type are rare and the trauma of his motor vehicle accident would have been substantial enough to produce a disc herniation.” He discussed treatment options and noted pain is mostly treated with medication and physical therapy, corticosteroid injections can benefit patients with a “radicular component,” and surgical intervention is more difficult in the thoracic region. Dr. Scarpino stated:

Mr. Morales’ case is complicated by PTSD and associated mood disorder and chronic pain syndrome, as this can be significantly increasing the symptomatology. His significantly high scores on perceived pain disability, pain centralization, and fear-avoidance beliefs are not a contraindication to surgical intervention, but predictive of a less than ideal outcome and a prolonged, rocky postoperative course. The following would be indicated to complete his evaluation and get the best picture of how to proceed:

Although he had no radicular findings at the time of his evaluation in this office, electrodiagnostic studies to rule out the possibility of a lumbar radiculopathy would be appropriate, and one could include the intercostal muscles at the T7-8

and adjacent levels to be sure there was no electrical evidence of a thoracic radiculopathy in that area.

He should also be referred for a full Independent Psychiatric Evaluation to see what part the pre-existing PTSD, coupled with the other associated risk factors complicating the PTSD, is affecting his functional level and reported symptom intensity. As well, it should be determined if the subject incident, in and of itself, has caused an aggravation of the underlying PTSD.

It would be best if the psychiatrist who does this evaluation is also familiar with the treatment of pain centralization and the medication management of PTSD and pain centralization disorders.

If there is no contraindication and it is endorsed by that provider, he could be considered for a trial of duloxetine, which has been found to be helpful in pain control in patients with pain centralization disorder.

Should he be considered a candidate for surgical intervention following completion of his evaluation (with the understanding that with the underlying PTSD and mood disorder, the benefit is less predictable and there is the associated chance of prolonged recovery in association with surgery), then he could go forward with surgical intervention.

However, it would be the opinion of this examiner that his psychological condition needs to be stabilized as much as possible prior to proceeding with such, and that he needs ongoing psychiatric support during and following the surgical period, probably with cognitive behavioral therapy, as this has been shown to be of benefit in patients with pain centralization disorder and also of benefit in getting better results with rehabilitation in patients with severe fear-avoidance behavior. (Scarpino SIME report, June 20, 2023).

12) On June 24, 2023, Employee amended his claim, adding TTD and PPI benefits, medical and transportation costs, reemployment benefits and attorney fees and costs for a “mental health” injury. (Claim for Workers’ Compensation Benefits, July 24, 2023).

13) On July 26, 2023, Employer and Employee attended a prehearing conference:

Employee representative stated that she wished to schedule a Hearing on the “physical” portion of Employee’s WCC and that parties will proceed with the “mental health” portion of Employee’s WCC at a later date. Employee representative confirmed that the 7/24/2023 WCC relates to the “mental health” portion of Employee’s work injury. Employer representative advised that her client does not agree to separate the “physical” portion of Employee’s WCC from the “mental health” portion. Employer representative further stated that the injuries are “intertwined”, the SIME remains incomplete, and there has been no

Petition to bifurcate filed by either party. Employee representative noted that two separate WCC(s) have been filed but stated that her client will withdraw the 7/24/2023 WCC to proceed to hearing on the 4/11/2022 WCC.

The parties stipulated to an oral hearing to be held on 9/28/2023, for approximately 4 hours. . . .

The issues identified for hearing included: TTD, PPI, a compensation rate adjustment, unfair controversion, medical costs, transportation costs, penalty, interest and attorney fee and costs (Prehearing Conference Summary, July 26, 2023).

14) On July 27, 2023, Employer requested the September 28, 2023 hearing be cancelled and a psychiatric SIME be ordered in accordance with 8 AAC 45.074(b)(1)(F). It contended the SIME is not complete because Dr. Scarpino recommended a psychiatric SIME with a psychiatrist familiar with pain centralization and medical management of PTSD and pain centralization disorder. (Petition and Employer's Memorandum in Support of Petition to Cancel 9/28/23 Hearing and Order Psychiatric SIME under 8 AAC 45.074(b)(1)(F), July 27, 2023).

15) On August 9, 2023, Employee objected to cancelling the hearing, contending Dr. Scarpino clearly stated the cause of Employee's lumbar and spine issues were the work injury and that he should not work until further treatment is provided, and benefits should be awarded. He contended causation and disability can be decided while further necessary psychiatric evaluation is pending. Employee contended Employer stopped payment without a controversion and it should not be allowed to continue delaying the case. (Objection to Employer's Petition to Cancel Hearing, August 9, 2023).

16) On September 6, 2023, the Board designee added Employer's July 27, 2023 petition to cancel the hearing and for an SIME as issues to be decided at the September 28, 2023 hearing. (Prehearing Conference Summary, September 6, 2023).

17) On September 18, 2023, Employee withdrew his claims for PPI benefits and a compensation rate adjustment. (Notice of Withdrawal of Claims, September 18, 2023).

18) Employer attorney stated she could follow the procedure in 8 AAC 45.092(h)(1) and (2) and provide Employee's attorney with three binders by October 13, 2023. (Record).

19) Employee's attorney stated she could follow the procedure in 8 AAC 45.092(h)(3) and (4) by October 20, 2023. (Record).

PRINCIPLES OF LAW

**AS 23.30.001. Legislative intent.** It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;  
. . . .

(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.

**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. . . .

**AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

**AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or



conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

Bifurcation is appropriate where a party has raised a potentially dispositive issue and the relevant law and facts were substantially independent of the other issues to be considered separately.

*Nelson v. Klukwan, Inc.*, AWCB Decision No. 09-0071 (April 13, 2019).

**8 AAC 45.050. Pleadings. . . .**

**(f) Stipulations.**

. . . .

(2) Stipulations between the parties may be made in writing at any time before the close of the record or may be made orally in the course of a hearing or a prehearing;

(3) Stipulations of fact or to procedures are binding upon the parties named in the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation; a stipulation waiving an employee's right to benefits under AS 23.30 is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board;

(4) Notwithstanding any stipulation to the contrary, the board may base its findings upon the facts as they appear from the evidence, may cause further evidence or testimony to be taken, or may order an investigation into the matter as prescribed by AS 23.30.

**8 AAC 45.074. Continuances and cancellations.** (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party;

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

. . . .

(F) a second independent medical evaluation is required under AS 23.30.095(k);

. . . .

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

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

(i) The report of the physician who is serving as a second independent medical examiner must be done not later than 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. The board will presume the evaluation ended after the injured worker was examined. If the evaluation ended at a later date, the physician must state in the report the date the evaluation was done. . . .

*Roberge v. ASRC Construction Holding Company*, AWCAC Decision No. 269 (September 24, 2019) held an SIME had not been completed and a final report had not been provided by the SIME physician when the SIME physician included numerous references to the need for an EMG and a nerve conduction study in his report.

ANALYSIS

**Was the oral order granting Employer's July 27, 2023 petition to cancel the hearing and order an SIME correct?**

Employer requested the hearing on the merits of Employee's lumbar and thoracic back claim be cancelled, contending the SIME the parties agreed to is not complete because the SIME physician recommended a psychiatric evaluation to address the role Employee's PTSD plays in his symptoms and disability. Employee contended his lumbar and thoracic back claim can be separated from his mental health claim and he opposed canceling the hearing on his lumbar and thoracic back claim. Hearing continuances are not favored and not routinely granted; there must be "good cause" to continue a hearing. 8 AAC 45.074(b). "Good cause" includes when an SIME is required under AS 23.30.095(k) and additional evidence is necessary to complete the hearing due to inquiry at hearing. 8 AAC 45.074(b)(1)(F), (L), (M).

On July 26, 2022, the parties agreed to an SIME at a prehearing conference and on October 5, 2022, the parties agreed to an SIME with an orthopedic surgeon under AS 23.30.095(k) due to medical disputes between Dr. Bauer and NP Davis. 8 AAC 45.050(f)(2), (3). On February 7, 2023, Dr. Scarpino evaluated Employee for an SIME and concluded further evaluation was

needed for a possible thoracic cord injury, and said Employee's subjective pain complaints had mainly a psychosocial origin and an independent psychiatric evaluation may be required to consider the contribution and possible aggravation of his underlying PTSD. After reviewing additional medical records, Dr. Scarpino opined the work injury was substantial enough to cause the thoracic disc herniation but recommended Employee undergo a psychiatric examination to assess whether Employee's preexisting PTSD was affecting his functioning level and symptom intensity, and to determine if the work injury aggravated his PTSD, and suggested electrodiagnostic studies to rule out the possibility of lumbar and thoracic radiculopathy, "to complete his evaluation." The orthopedic SIME was not complete because Dr. Scarpino stated an additional psychiatric evaluation and electrodiagnostic studies were needed to complete his evaluation of Employee's lumbar and thoracic back. 8 AAC 45.092(i); *Roberge*.

The incomplete orthopedic SIME is good cause to continue the hearing on the merits of Employee's lumbar and thoracic back claim under 8 AAC 45.074(b)(1)(F) because (1) an SIME under AS 23.30.095(k) is required and must be completed before a hearing on the merits of Employee's claims, and (2) additional evidence, including the psychiatric evaluation and electrodiagnostic studies and an addendum SIME report from Dr. Scarpino after he reviews the psychiatric evaluation and electrodiagnostic studies, is needed under 8 AAC 45.074(b)(1)(L) before hearing Employee's claims.

Employee is attempting to separate his lumbar and thoracic back claim from his mental health claim, contending the work injury is the substantial cause of his need for thoracic and lumbar back medical treatment and disability, while also contending the work injury aggravated his PTSD. The Act requires the fact-finders to evaluate the relative contribution of different causes of the disability or the need for treatment when determining whether or not the disability or need for treatment arose out of and in the course of employment. AS 23.30.010(a). Dr. Scarpino stated Employee's preexisting PTSD may be affecting his lumbar and thoracic back pain symptoms and functioning level and the work injury may have aggravated his PTSD and additional psychiatric evaluation and electrodiagnostic studies were needed to complete his evaluation.

Therefore, Employee's lumbar and thoracic claim cannot be separated from his mental health claim. AS 23.30.135(a); *Nelson*. It would not be fair, efficient or predictable to determine compensability of Employee's lumbar and thoracic back claim prior to obtaining a complete SIME report. AS 23.30.001(1), (4); AS 23.30.010(a). This decision will order a psychiatric SIME with a psychiatrist selected from the Division's SIME list, Employee to arrange and obtain electrodiagnostic studies for his lumbar and thoracic back, Employer to pay for the psychiatric SIME electrodiagnostic studies, and the designee to send the electrodiagnostic report and psychiatric evaluation to Dr. Scarpino for review and issuance of an addendum SIME report.

#### CONCLUSION OF LAW

The oral order granting Employer's July 27, 2023 petition to cancel the hearing and order an SIME was correct.

#### ORDER

- 1) Employer's July 27, 2023 petition to cancel the hearing and order an SIME is granted.
- 2) A psychiatrist will conduct an SIME addressing Employee's lumbar and thoracic spine and mental health.
- 3) Employee is directed to arrange and obtain electrodiagnostic studies for his lumbar and thoracic back.
- 4) Employer is ordered to pay for the psychiatric SIME and electrodiagnostic studies for Employee's lumbar and thoracic back pursuant to the Act.
- 5) The designee will select an appropriate psychiatrist from the Division's SIME list, following the normal procedure for identifying the physician to perform the SIME, as soon as possible.
- 6) Employer is directed to follow the procedure in 8 AAC 45.092(h)(1) and (2) and provide Employee's attorney with three binders by October 13, 2023.
- 7) Employee's attorney is directed to follow the procedure in 8 AAC 45.092(h)(3) and (4) by October 20, 2023.
- 8) The designee will send the electrodiagnostic reports and psychiatric SIME report to Dr. Scarpino for review and issuance of an addendum SIME report.



