

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOLENE M. CLARK,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 202216636
KENAITZE INDIAN TRIBE,)
) AWCB Decision No. 23-0064
Employer,)
and) Filed with AWCB Anchorage, Alaska
) on November 7, 2023
ALASKA NATIONAL INSURANCE,)
)
Insurer,)
Defendants.)
)

Kenaitze Indian Tribe's and Alaska National Insurance's (Employer) August 18, 2023 petition to strike medical records was heard in Anchorage, Alaska on the written record on October 31, 2023, a date selected on September 27, 2023. A September 27, 2023 request gave rise to this hearing. Attorney Robert Bredesen represents Jolene M. Clark (Employee). Attorney Vicki Paddock represents Employer. The record closed at the hearing's conclusion on October 31, 2023.

ISSUE

Employer contends pages in Employee's medical summary containing handwritten notes and highlights by Employee on medical reports should not be considered medical records under the Alaska Workers' Compensation (Act). It contends the alterations will improperly influence the Board or a second independent medical evaluation (SIME) physician and prejudice Employer.

Employer requests an order striking the altered medical record pages and directing Employee to file unaltered copies.

Employee contends Employer is retaliating and harassing her by punitively requesting she be sanctioned for following the Act's requirement to timely file and serve copies of medical records in her possession. She contends she does not possess an unaltered copy of the medical records and Employer has a release and can obtain an unaltered copy of the records at a minimal cost. Employee contends the alterations are *de minimis* and meaningless and neither the Board nor an SIME physician would alter their analysis of the medical record based upon them. She contends some of the medical records objected to were already filed by Employer in May 2023. Employee requests an order denying Employer's petition.

Should Employer's petition to strike medical records be granted?

FINDINGS OF FACT

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

- 1) On May 15, 2023, Employer filed a medical summary with medical records. It contained a medical record dated January 17, 2023 by Benjamin M. Chimenti, DPT. (Medical Summary, May 15, 2023).
- 2) On August 14, 2023, Employer deposed Employee. (Employee deposition, August 14, 2023).
- 3) On August 15, 2023, Employee filed a two-page "medical summary" that stated, "The undersigned certifies that this office has retained the original of this document, which on this date was e-filed with the Board and a copy was emailed" to Employer's attorney's email address. Attached to the medical summary were 562 pages of medical records; thus, the total number of pages filed was 564. Portions of the medical records are highlighted or underlined, bracketed or circled with a highlighter on pages 3, 5, 14-15, 69-70, 74, 76, 105-106, 110, 117, 153, 156, 158, 400, 402, 424, 473, 493, 495-496, 503-506, 522-523, 538 and 562-564. On page 72, portions of the document stating "video session" were highlighted and next to it the word "NOT" was written with highlighter. On page 73, portions of the December 21, 2022 "Outpatient Referral" by Susan R. Hills, MA, were highlighted, underlined and bracketed and the words "Addendum Note from SR Hills" was written in highlighter. On page 155, portions of the January 17, 2023 report with

DPT Chimenti were underlined in highlighter and the words, “He claimed R foot HEALED due to KIT NOT 100% Released” was written in highlighter. (Medical Summary, August 15, 2023).

4) On August 18, 2023, Employer requested 35 pages from the August 15, 2023 medical summary be stricken, specifically pages 3, 5, 14-15, 69-70, 72-74, 76, 105-106, 110, 117, 153, 155-156, 158, 400, 402, 424, 473, 493, 495-496, 503-506, 522-523, 538, and 562-564, because “they have been highlighted in a manner that may improperly influence the Board or an SIME. Employer requests the Board not consider the pages identified in the attached memorandum, and order they be resubmitted without alternations.” (Petition, August 18, 2023).

5) On August 21, 2023, Employee opposed Employer’s petition to strike, contending AS 23.30.095(h) requires her to file and serve updated medical summary forms within five days after receiving the medical record. She contended her attorney filed those documents the day after her deposition when she provided him with those medical records. Employee contended the Board and SIME physicians are capable of reviewing the medical records “without confusion.” She contended Employer could obtain and file unaltered copies medical record as it has releases and Employee would not object. (Employee’s Opposition to Petition to Strike, August 21, 2023).

6) On September 12, 2023, *Clark v. Kenaitze Indian Tribe*, AWCB Dec. No. 23-0051 (September 12, 2023) (*Clark I*) denied Employee’s claim for an SIME. (*Clark I*).

7) On September 27, 2023, the Board designee identified the issues for hearing as “ER’s 08/18/2023 petition to strike or edit medical records (filed with the board on 8/15/23).” (Prehearing Conference Summary, September 27, 2023).

8) On October 24, 2023, Employer contended Employee’s alterations of the medical records are not “medical records,” cited *Rockstad* and requested the altered medical record pages be stricken from the record and Employee be ordered to file unaltered copies. It contended the alternations may improperly influence the Board or an SIME physician, prejudicing Employer. Employer stated, “It is clear that Clark and her attorney have access to these records and are able to prepare and serve unaltered records to the Board” based upon the August 15, 2023 medical summary stating his office “has retained the original of this document.” (Employer’s Brief for 10/31/23 Hearing, October 24, 2023).

9) On October 24, 2023, Employee contended the Act does not require an injured work to gather their medical records; it only requires a party to file “the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control” as stated

in AS 23.30.095(h), and those in their possession under 8 AAC 45.052. She cited *Palmer v. Kennett Greens Creek Mining Co.*, AWCB Dec. No 98-0018 (January 21, 1998). She contended Employer was also in control of the medical records because she had signed medical releases authorizing Employer to obtain them. Employee contended she complied with the statute and regulation because she filed the set of records in her possession which contained the alternations she made. (Employee’s Hearing Brief, October 24, 2023).

10) On October 30, 2023, Employee objected to arguments in Employer’s hearing brief, contending its arguments were “not within the scope of issues” set for hearing. She contended Employer’s argument that the altered medical records are not medical records should not be considered because it was not raised in the petition. Employee contends Employer contradicted itself when it requested an order directing Employee to file an unaltered copy of the medical records. She contended Employer’s argument that her attorney has unaltered copies was also not raised in the petition and is “disingenuous” because it is untrue. (Employee’s Objection to Employer’s Hearing Brief, October 30, 2023).

11) On October 31, 2023, Employer contended it was not adding issues because it asked for the same action sought in the petition and motion in support. It contended Employee’s medical summary is evidence “that there is a copy of the records at issue which can be filed by Employee without alterations or comments.” (Employer’s Rebuttal to Employee’s Objection to Hearing Brief, October 31, 2023).

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.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board’s “experience, judgment, observations, unique or peculiar facts of

the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

AS 23.30.095. Medical treatments, services, and examinations. . . .

(h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.

. . . .

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. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

. . . .

8 AAC 45.114. Legal memorandum. Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must

(1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established;

8 AAC 45.052. Medical summary. . . . (d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

. . . .

8 AAC 45.120. Evidence. . . . (l) Unless a genuine question is raised as to the authenticity of the original or, in the circumstances, it would be unfair to admit the

duplicate in place of the original, a duplicate is admissible in accordance with this section to the same extent as an original.

(1) For purposes of this subsection, a duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent techniques that accurately reproduce the original.

(2) The following duplicates are admissible to the same extent as an original:

(A) duplicates of medical reports or records of any governmental agency

In *Rockstad v. Chugach Eareckson Support Services*, AWCB Dec. No. 08-0208 (November 6, 2008), the employee with a non-attorney representative, wrote a one-page paragraph incident report describing an off-duty assault by a co-worker. Initially, the Board designee excluded the incident report from the SIME binder. But that same day the employee visited the psychiatric nurse practitioner for routine evaluation and the incident report was attached to a chart note from the practitioner. The designee thereafter included the one-page paragraph incident report attached to the chart note in an SIME binder. The employer contended the incident report was not medical evidence and should not be included in the medical binder. The Board found the designee abused his discretion by including the incident report in the SIME binder because it was not a medical record under the Act. The employee had already reported the incident to the psychiatric nurse practitioner in her initial intake appointment and the practitioner did not form or modify a medical opinion based upon the incident report. The Board ordered the designee to remove the one-page paragraph incident report from the SIME binder.

In *Mitchell v. United Parcel Service*, AWCB Dec. No. 14-0049 (April 7, 2014), the employee filed evidence containing handwritten annotations and highlighting. While the Board found the alterations inappropriate because they disrupted orderly process and procedure when they are “interspersed on the face of documentary evidence rather than confined to legal memoranda and oral argument,” it relaxed procedural requirements for the *pro se* employee. It found the panel could easily distinguish irrelevant, repetitious and hearsay statements from fact and held the oral order stating the alterations would be disregarded by the Board but the reports would not be stricken from the record was correct.

ANALYSIS

Should Employer’s petition to strike medical records be granted?

Employer contended medical records containing handwritten notes and highlights should not be considered medical records under AS 23.30.095(h), and cited *Rockstad*. Employee contended Employer’s argument should not be considered because it was not raised in the petition. However, Employee raised the defense that she followed AS 23.30.095(h) in her opposition.

In this case, most of the alterations made by Employer that Employer objected to consisted of highlighting, underlining, bracketing or circling of portions of medical records written by medical providers. The only medical record pages containing written commentary by Employee was on page 155, where Employee wrote one sentence with highlighter on the January 17, 2023 report by DPT Chimenti, “He claimed R foot HEALED due to KIT NOT 100% Released,” and page 73 on the December 21, 2022 “Outpatient Referral” by Susan R. Hills, MA, where Employee wrote “Addendum Note from SR Hills” in highlighter.

A party filing a claim must “immediately send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control” and copies must be served upon the opposing party. AS 23.30.095(h). All parties have “the continuing duty” to file and serve medical records “during the pendency of the proceeding.” AS 23.30.095(h); 8 AAC 45.052(d). A duplicate of the original is admissible to the same extent as the original unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in place of the original. 8 AAC 45.120(l). Either party could have obtained, filed and served a copy of the 35 pages of medical records in dispute at a fraction of the cost to litigate this issue. AS 23.30. 095(h); 8 AAC 45.052(d); *Rogers & Babler*.

The filing and serving of medical summaries with attached medical records is the procedure provided by the Act to provide notice to the Board, and the opposing party, that the party filing them will be relying on the medical records listed in the medical summary. 8 AAC 45.052(d). The filing and serving of legal memorandum or “hearing briefs” before a hearing is the procedure provided to the parties to deliver their written opinion to the panel regarding issues in dispute and

weight and credibility to be afforded to medical records and opinions. 8 AAC 45.114. Medical records filed with a medical summary form should be the original or a copy of the original records generated by the medical provider so a party should not alter them. AS 23.30.095(h); 8 AAC 45.120(l). Comments on issues in dispute or the weight or credibility to afford the medical evidence should be provided in legal memoranda, not on medical records. AS 23.30.095(h); 8 AAC 45.052(d); 8 AAC 45.114. Employee did not follow the procedure to file original medical records because she altered the records, including writing comments on them, before filing them on a medical summary. AS 23.30.095(h); 8 AAC 45.052(d); 8 AAC 45.114; *Rogers & Babler*.

In *Rockstad*, an employer objected to including a description of an assault written by the injured worker that was attached to a medical provider's chart note in an SIME binder after the designee had initially excluded it from the SIME binder because it was not a medical record. This case is clearly distinguishable from *Rockstad* because the commentary from Employee was significantly smaller and she did not seek to have the medical provider incorporate her commentary in the medical record after it was excluded. Additionally, Employer had already filed an unaltered copy of the January 17, 2023 record by DPT Chimenti on May 15, 2023, which may be examined. Furthermore, Employee did not include a written explanation for the highlighting, underlining, bracketing or circling so the reason for them is unknown. Therefore, the alterations of the medical record in this case are of negligible influence. *Rogers & Babler*.

This situation is most similar to *Mitchell*, where the injured worker highlighted and made annotations on the medical records. Factfinders can easily identify and disregard Employee's alterations. Even if an SIME had been ordered, the highlighting, underlining, bracketing or circling of portions of the medical records are of negligible influence, and the SIME binder could include the unaltered copy of the January 17, 2023 report by DPT Chimenti filed previously by Employer. Therefore, the alterations would not improperly influence anyone, and Employer will not be prejudiced by their inclusion in the medical record. AS 23.30.135(a); *Rogers & Babler*.

It would not be quick or efficient to strike the altered medical records and require Employee to obtain, re-file and serve unaltered pages in this case when the alterations are of negligible influence

and Employer will not be prejudiced by their inclusion in the record. AS 23.30.001(1), (4). Employer's petition to strike will be denied.

CONCLUSION OF LAW

Employer's petition to strike medical records should be denied.

ORDER

Employer's August 18, 2023 petition to strike medical records is denied.

Dated in Anchorage, Alaska on November 7, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Kathryn Setzer, Designated Chair

/s/

Robert Weel, 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 Jolene M. Clark, employee / claimant v. Kenaitze Indian Tribe, employer; Alaska National Insurance, insurer / defendants; Case No. 202216636; 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 November 7, 2023.

/s/

Lorvin Uddipa, Workers' Compensation Technician