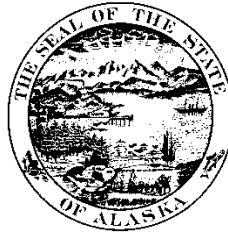


ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

BAYLEE ANTIJUNTI,)	
)	
Employee,)	INTERLOCUTORY
Claimant,)	DECISION AND ORDER
)	
v.)	AWCB Case No. 202202997
)	
PROVIDENCE ALASKA MEDICAL)	AWCB Decision No. 24-0018
CENTER,)	
)	Filed with AWCB Anchorage, Alaska
Self-insured Employer,)	on March 28, 2024
Defendants.)	
)	

Baylee Antijunti's (Employee) November 28, 2023 petition for a second independent medical evaluation (SIME) was heard on March 27, 2024, in Anchorage, Alaska, a date selected on February 13, 2024. A January 11, 2024 hearing request gave rise to this hearing. Attorney Andrew Wilson appeared and represented Employee who appeared and testified. Attorney Jeffrey Holloway appeared by Zoom and represented self-insured Providence Alaska Medical Center (Employer). The record closed at the hearing's conclusion on March 27, 2024.

ISSUE

Employee contends significant medical disputes over "causation," "compensability" and "treatment" between her attending physician and Employer's physician require an SIME. She further contends issues not currently in dispute including "medical stability" and "permanent impairment" should also be included in the SIME. Employee contends her 60-day period to request an SIME passed when she was not represented, and untimeliness should not prevent an SIME. Lastly, she contends the panel can order an SIME notwithstanding her late request.

Employer objects to an SIME and contends they are expensive, and in this case SIME costs may outweigh the value of Employee's claimed benefits, making the SIME an "unreasonable" cost. It contended while there "may" be a medical dispute concerning "causation," the dispute is not "significant." Moreover, Employer contended Employee waived her right to request an SIME because her request was not timely, and its untimeliness prevented an SIME physician from examining her before she had shoulder-altering surgery.

Shall this decision order an SIME?

FINDINGS OF FACT

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

- 1) On June 5, 2020, Peggy Jesse, NP, with Medical Park Family Care (Medical Park) examined Employee's left shoulder. The history was left-shoulder pain for one week with no known injury. Employee wanted a shoulder x-ray. She denied any recent injury or event but stated as an ultrasound technician, Employee thought "repetitive motion" performing her work duties contributed to her left-shoulder pain. It was exacerbated while she slept, or when doing a procedure on a patient where she had to place her body in an "awkward position." Employee's left-shoulder x-ray was normal, and NP Jesse referred her for physical therapy (PT). (X-ray report; Jesse report, June 5, 2020).
- 2) On December 23, 2020, Daniel Buckley, DC, saw Employee primarily for her "shoulders," but also for her neck, low back and knees. Her problem began "3 weeks" earlier for an "unknown" reason. Employee stated she had not been treated by anyone for these conditions in the past. She listed no injuries, surgeries, or childhood or adult diseases that she felt had contributed to her present symptoms, including "Shoulder Pain." Employee clarified her pain as "pinching in right neck/shoulder blade" and further clarified the exact location was her "right shoulder up to trap." (Buckley report, December 23, 2020).
- 3) On December 24, 2020, Dr. Buckley saw Employee again and provided care primarily to her neck. However, her secondary complaints were about her right and left shoulders, where Dr. Buckley observed muscle spasms. (Buckley report December 24, 2020).
- 4) Employee continued to treat with Dr. Buckley for among other things, her left shoulder, off and on through March 22, 2022. (Buckley records, January 11, 2021 through March 22, 2022).

5) On July 2, 2021, NP Jesse saw Employee for left-neck pain off and on for two months, which was progressively getting worse with, “No known injury.” Employee described her pain as tightening neck muscles but with no radicular symptoms in her upper extremities. Again, she reported, “No known injury.” She recalled similar symptoms in the past that resolved with concerted effort in “changing her body mechanics.” The diagnoses included depressive disorder and neck pain. NP Jesse recommended she attend PT, but Employee said she was seeing a chiropractor instead. (Jesse report, July 2, 2021).

6) On July 6, 2021, Employee reported to an emergency room that two days prior she was hit in the forehead with a softball. She had increased head and eye pressure, a moderate migraine headache, intermittent nausea and difficulty concentrating. Employee believed her “initial injury” was exacerbated when she hit her head on a counter at work on July 6, 2021. A physician diagnosed her with a concussion. (Emergency Room report, July 6, 2021).

7) On November 5, 2021, Christopher Coon, NP, at Medical Park saw Employee for left-shoulder pain for the prior two weeks. She reported primarily using her left arm in her work as a cardiac ultrasound technician and recently having difficulty with movements. NP Coon noted Employee reported a similar problem on June 5, 2020, with a negative shoulder x-ray at that time; PT was prescribed in June 2020, but not attended. Employee said she scanned with her left arm, but she was right-hand dominant. She had recently noticed diffuse pain and tenderness in the left shoulder. Employee recently had a breakup and moved jobs. She was under “considerable stress” and her depressive symptoms were worsening; her depression medication was not working. Employee was emotionally distressed and crying. Her left-shoulder motion was full, but she had a positive “shoulder shrug test and coracoid pain test.” Employee said she had a “prior injury as a child” and a history of “left shoulder dislocation and ‘popping.’” NP Coon found her test results suggestive for adhesive capsulitis without usual the motion change, and ordered a magnetic resonance arthrogram (MRI) to rule out rotator cuff pathology. (Coon report, November 5, 2021).

8) NP Coon did not offer a causation opinion in his November 5, 2021 report. (Observations).

9) On November 10, 2021, Employee had a left-shoulder MRI with contrast. The radiologist found abnormalities, “which could relate to prior labral tear or chronic labral injury.” There was no displaced labral tear. Another finding “could represent a normal variant sublabral sulcus,” but a “SLAP tear is difficult to entirely exclude.” (MRI report, November 10, 2021).

10) On November 15, 2021, José Hernandez, PA-C, with Orthopedic Physicians Alaska (OPA), saw Employee on referral from NP Coon. He reviewed the MRI and found a SLAP lesion and biceps tendinopathy. PA-C Hernandez opined that these lesions tend not to heal because irritation and inflammation can affect daily living activities. Although conservative methods may alleviate some pain, he opined they would not ultimately fix the problem. PA-C Hernandez suggested Employee have a left-shoulder diagnostic arthroscopy and ultimately decompression or open surgery and a Mumford procedure. Employee said she needed to continue working to build up personal time off but wanted to move forward with an injection while she accumulated leave. PA-C Hernandez administered the injection that day. (Hernandez report, November 15, 2021).

11) On February 16, 2022, PA-C Hernandez administered a second injection into Employee's left shoulder. The first injection had been "quite helpful"; however, while working as a sonographer and using her left-arm "quite a bit," the shoulder became sore again. Employee was still accumulating leave time and it would take a couple more months to get enough to have surgery. (Hernandez report, February 16, 2022).

12) On or about February 17, 2022, Employee formally reported an injury to Employer. The report listed "11/30/2021" as the injury date. She stated, "I have two torn labrums and SLAP tear due to repetitive motion." (First Report of Injury, February 21, 2022).

13) On May 6, 2022, Joseph Lynch, MD, orthopedic surgeon, examined Employee for an employer's medical evaluation (EME). Employee reported she was ambidextrous and had worked as a cardiac ultrasound technologist for Employer, since August 2021. During this examination, Employee had zero pain, but stated when the pain returns it can be as high as "7 or 8 out of 10." Her provider had recommended left-shoulder surgery. Employee said she had similar pain in June 2020 while working for the Alaska Native Medical Center. "She is uncertain if that [was] from an injury during softball." Employee said those symptoms went away. When asked about reports of childhood left-shoulder injuries, Employee said she did not recall any but could "move her shoulder in weird positions as a child." Dr. Lynch opined she was describing "multi-directional instability." She noted her patients at work for Employer were "larger" and her female patients were "more difficult," presumably to position properly. (Lynch report, May 6, 2022).

14) At the time of Dr. Lynch's examination, Employee was working for Employer, without restrictions. She was receiving no work-related benefits. After reviewing the records provided and examining Employee, Dr. Lynch diagnosed: (1) Left-shoulder pain since at least June 2020,

preceding her employment with Employer; (2) A left-shoulder MRI suggested labral tearing, which Dr. Lynch admitted could be “artifactual” or a “normal sulcus,” but not substantially caused by her work duties; and (3) A preexisting left-shoulder condition consistent with multi-directional instability. He opined this was not substantially caused by her work duties, but likely caused by her labral pathology “to the extent that is present.” (Lynch report, May 6, 2022).

15) When asked to identify all causes for Employee’s then-current symptoms, need for treatment and disability, Dr. Lynch stated:

The cause of diagnosis number 1, is something which pre-dated her employment in question and is undetermined and it is recognized that shoulder pain can be multifactorial, but predated her employment with her current employer. Based on the absence of a traumatic injury and activity consistent with a SLAP tear, the cause of diagnosis number 2, is a normal sulcus. The cause of diagnosis number 3 is a pre-existing issue as a young child (details unknown).

Before asking him which of the above causes was “the substantial cause” for Employee’s symptoms and need for treatment and disability, if any, the adjuster who wrote the cover letter gave Dr. Lynch the following explanation:

Since November 7, 2005 the legal test for causation in regards to an Alaska workers’ compensation case has been whether the work injury is “the substantial cause,” for the current condition and resulting disability and/or need for treatment. It is important that you apply this test for causation in assessing the role of the employee’s work injury in their current condition. When determining whether or not the employee’s inability to work (if any) or need for medical treatment (if any) is work-related, you must evaluate the relative contribution of different causes, conditions and injuries in the employee’s current condition. Worker’s [sic] compensation benefits are payable if, in relation to other causes, the work injury is the substantial cause of the employee’s condition and need for medical treatment. To be “the substantial cause” the work injury must be greater than other causes.

Given this explanation, Dr. Lynch opined:

[Employee] has had symptoms in her left shoulder that predated the employment with [Employer] and are similar in nature dating back to June 2020. Therefore, I am unable to identify her current employment as the cause of her current symptoms and need for treatment. In addition, this is in a setting of multi-directional [in]stability and the imaging findings of labral degeneration and/or tearing are not caused by repetitive use, but can be associated with multi-directional instability which is consistent with her history provided today. For all these reasons, I am

unable to identify the current employment as the substantial cause of her symptoms as they predated the work injury in question.

In his opinion, the October 30, 2021 work incident was not the substantial cause for Employee's symptoms and need for treatment or any disability. When asked for an alternate cause for her "current condition" and need for treatment and any disability, Dr. Lynch stated:

It [the alternate cause] is likely a condition which would have developed irrespective of her employment. It is acknowledged that her activities as an ultrasound stenographer may cause her shoulder to be symptomatic. However, it is not likely the cause of her condition.

Dr. Lynch opined that further treatment is medically reasonable and necessary but not related to the October 30, 2021 injury. He opined there was no "injury or incident" on that date, and "her symptoms predated her employment" with Employer. Dr. Lynch stated the work incident was not the substantial cause for the recommended treatment; the treatment was not necessary for her to return to work; was not needed for Employee to participate in an approved reemployment plan; and since she was currently reporting zero pain, was not necessary to relieve chronic debilitating pain. In his opinion, there was no work-related diagnosis, so medical stability was not applicable. Dr. Lynch said Employee would have no permanent partial impairment rating resulting from her work injury. (Lynch report, May 6, 2022).

16) On May 19, 2022, PA-C John Rexroth gave Employee her third left-shoulder injection. She was to follow-up with the surgeon. (Rexroth report, May 19, 2022).

17) On May 22, 2022, the adjuster asked Dr. Lynch a clarification question:

As you know, [Employee] worked for [Employer] for a three-month period from August 2, 2021 to October 30, 2021 as an echocardiographer. The employee reported she had worked as a stenographer for 6 years prior to working for [Employer]. You stated in your original report that the work injury with [Employer] is not the substantial cause in the need for treatment, disability or in producing [Employee's] shoulder condition. However, you also acknowledged that [Employee's] stenographer work could produce symptoms in the shoulder. Can you please clarify whether you believe [Employee's] cumulative work as an echocardiographer from August 2, 2021 to October 30, 2021, is the substantial cause in bringing about any disability or need for treatment in the shoulder?

To this question, Dr. Lynch responded:

The work of an echocardiographer did not cause the pathology noted on the MRI scan. Electrocardiography is not a “mechanism of injury” known to cause SLAP tears, pathophysiologically this does not make sense. Moreover, [Employee] developed shoulder pain well before her employment with [Employer].

Is it possible that she developed pain, in part, due to her previous employment? Yes, it is possible. Is it possible that the work of an echocardiographer can cause shoulder soreness? Yes, it is possible.

In this particular case, however, the preponderance of evidence does not support her three months of employment with [Employer] as the substantial cause. The mechanism is not consistent with the MRI findings, the body of evidence supports shoulder symptoms existing well before her employment with [Employer], and the duration of exposure (three months) is small relative to her cumulative life exposure; lastly there is mention in the records and her history of a pre-existing problem with the same shoulder in the remote past.

Taken together, the preponderance of evidence does not support her current work as the substantial cause of her current shoulder problem or need for treatment. (Lynch report, May 25, 2022).

- 18) Employee later testified that she never worked as a stenographer; the reference to it above was a dictation or typographical error. (Employee; inferences from the above).
- 19) On June 13, 2022, at the adjuster’s third request, Dr. Lynch said he could “rule out” Employee’s work activities with Employer from her hiring date on August 2, 2021, through October 30, 2021, as the substantial cause of her need for treatment, or disability, for her left shoulder. (Lynch response, June 19, 2022).
- 20) On or about June 23, 2022, the injury date changed to October 30, 2021. (Amended First Report of Injury, June 23, 2022).
- 21) On June 28, 2022, Employer controverted Employee’s right to “all benefits” in reliance on Dr. Lynch’s May 6, 2022, May 25, 2022 and June 19, 2022 reports. (Controversion Notice, June 28, 2022).
- 22) On September 12, 2022, Employee called the Workers’ Compensation Division (Division) about “appealing” Employer’s denial. Technician Pamela Hardy returned her call and “explained the process”; Employee was “a little intimidated” by it. The technician offered to send an “info packet” and Employee requested it both by email and regular mail. The technician confirmed Employee’s mailing address and email. The SIME process was not mentioned in the note. (Agency file: Judicial, Communications, Phone Call tabs, September 12, 2022).

- 23) The Division's "information packet" includes the pamphlet "Workers' Compensation and You." (Experience; observations).
- 24) On September 12, 2022, the Division's technician mailed and emailed the "Workers' Compensation and You" pamphlet to Employee. (Pamela Hardy email, September 12, 2022).
- 25) On September 20, 2022, NP Coon saw Employee who said her therapist had recommended she try anti-anxiety medication. Anxiety over a recent breakup with her significant other had taken "a toll on her" for about one week. Employee wanted to try cyclobenzaprine for shoulder-muscle "tightness/pain which she has had for years as an ultrasound tech." She described upper back and shoulder spasms that occurred after long hours of work as a cardiac sonographer. Employee was tearful and crying. Potentially relevant diagnoses included a situational panic attack, mild anxiety and depressive disorder and back muscle spasms. (Coon report, September 20, 2022).
- 26) On October 7, 2022, Employee called the Division again to ask why her claim form had been rejected. Technician Hardy explained that her signature and date were missing; Employee would resend it. (Agency file: Judicial, Communications, Phone Call tabs, October 7, 2022).
- 27) On November 1, 2022, Employer served Employee by mail at her address of record with a form that included Dr. Lynch's May 6, 2022, May 25, 2022 and June 19, 2022 EME reports, setting forth his opinions in detail. (Medical Summary, November 1, 2022).
- 28) On January 31, 2023, Employee called the Division to check on her case's status. Technician Hardy advised her nothing had occurred because no one had appeared for a recent prehearing conference. (Agency file: Judicial, Communications, Phone Call tabs, January 31, 2023).
- 29) On February 23, 2023, Duane Heald, PA-C, at OPA saw Employee for her left shoulder. She had never done PT for it, so he referred her. Employee was to follow-up with Dr. Manion at OPA in six weeks. PA-C Heald gave Employee another left-shoulder injection at this visit. (Heald report, February 23, 2023).
- 30) On March 20, 2023, Employee called the Division to inquire about her case and left a voicemail message. (Agency file: Judicial, Communications, Phone Call tabs, March 20, 2023).
- 31) On March 20, 2023, technician Hardy returned Employee's call and left a voicemail message explaining the prehearing conference process. (Agency file: Judicial, Communications, Phone Call tabs, March 20, 2023).

- 32) On March 23, 2023, technician Hardy returned Employee's call and left another voicemail message explaining the prehearing conference process. (Agency file: Judicial, Communications, Phone Call tabs, March 23, 2023).
- 33) On March 23, 2023, the parties appeared for a prehearing conference before a Board designee. The summary for that conference states the designee "provided Employee with a copy of the pamphlet, Workers' Compensation and You," and provided a link to the Division's website where that publication is also found. (Prehearing Conference Summary, March 23, 2023).
- 34) On July 13, 2023, Thomas Paynter, MD, orthopedic surgeon with OPA, evaluated Employee's left shoulder. Employee reported first noticing symptoms when she started a new job as a ultrasonographer, and did "not have previous shoulder issues." She reported, "No significant past medical history." Dr. Paynter reviewed the 2021 MRI arthrogram and found a "SLAP" tear and biceps tendinopathy. His reference to a "2020 one" MRI is an error that occurs with voice dictation software. (Experience). Dr. Paynter opined, "Given her work environment and job duties as well as the timing of her symptoms, it is medically reasonable that her injury and symptoms are [sic] precipitated while starting her new job at Providence." (Paynter report, July 13, 2023).
- 35) On August 3, 2023, Employer served Employee by mail at her address of record with a form that included Dr. Paynter's July 13, 2023 report. (Medical Summary, August 13, 2023).
- 36) Sixty days from August 3, 2023, including three days for service by mail, was October 5, 2023. (Observations).
- 37) On September 21, 2023, Employee called the Division requesting a deposition copy. (Agency file: Judicial, Communications, Phone Call tabs, September 21, 2023).
- 38) On November 22, 2023, Wilson entered his appearance as Employee's representative. (Entry of Appearance, November 22, 2023).
- 39) On November 27, 2023, Employee claimed temporary total disability and permanent partial impairment benefits, medical and transportation costs, a compensation rate adjustment, interest and attorney fees and costs. (Workers' Compensation Claim, November 27, 2023).
- 40) On November 28, 2023, Employee petitioned for an SIME, and filed an SIME form setting forth a medical dispute regarding "causation" between Drs. Paynter and Lynch. (Petition; SIME form, November 28, 2023).
- 41) On December 13, 2023, Employer denied Employee's claim for all benefits, again relying on Dr. Lynch's three prior EME reports. (Controversion Notice, December 13, 2023).

42) On January 17, 2024, Dr. Paynter diagnosed a left superior labrum anterior and posterior [SLAP] tear, and anterior labral tear with rotator cuff tendinitis. He performed arthroscopic labral repair on Employee's left shoulder along with an open repair for biceps tenodesis, and significant debridement. (Operative Report, January 17, 2024).

43) To date, Employer has paid Employee no benefits under the Alaska Workers' Compensation Act (Act) for this injury. (Agency file: Payments tab, March 20, 2024).

44) Shoulder surgery is relatively expensive, can cause disability and may result in permanent impairment. SIME reports have proven useful in helping Board panels best ascertain the parties' respective rights. (Experience; observations).

45) The 25-page "Workers' Compensation and You" pamphlet, last revised on August 31, 2012, states regarding an SIME:

SECOND INDEPENDENT MEDICAL EVALUATION (SIME). When your physician and the insurer's physician disagree on the nature or extent of the injury or illness, a party may request an examination by a physician chosen by the Board (SIME).

....

1. **Examinations Ordered by the Board.** If your doctor and the insurer's doctor disagree about your medical condition, the Board may select a physician to examine you. The insurer must pay the costs of this examination and your reasonable transportation and lodging expenses. Your compensation benefits may be reduced to repay the insurer the doctor's fee and other costs associated with this examination if you fail to attend the examination and the Board finds good cause did not exist for your failure to attend.

....

U. SECOND INDEPENDENT MEDICAL EVALUATION (SIME) FORM (6147). This form is used to request a medical evaluation by a physician selected by the Board.

Although the pamphlet includes a section called "**TIME LIMITS**," neither that section nor the document in its entirety provide the 60-day time-limit for a person to request an SIME. ("Workers' Compensation and You").

46) At hearing on March 27, 2024, Employee testified that prior to hiring Wilson as her attorney, she did not know what an SIME was or how to obtain one. Had she known about it earlier, Employee said requesting it would have been the "smart thing" to do. She clarified she did not have an MRI in 2020. Employee did not recall getting the "Workers' Compensation and You"

pamphlet in the mail from the Division either in 2022 or in 2023. She testified she never called the Division to discuss her case before she retained Wilson. (Employee).

47) At hearing, consistent with her hearing brief, Employee contended the Act provides for the Board ordering an SIME when there is a medical dispute between an injured worker's attending physician and the Employer's EME. She relied on *Bah* and contended: (1) there was a medical dispute; (2) the dispute was significant; and (3) an SIME opinion would assist the Board in resolving the case. Employee also relied on *Dwight*, which she contended trumped the Board regulations regarding timeliness. Though conceding that she had not timely filed an SIME request, Employee also contended that as a non-attorney her failure to request an SIME timely pursuant to regulation was excusable and, in any event, the panel could order an SIME on its own volition. Employee contended the panel is not required to "weigh the credibility" of a doctor's report when determining whether to order an SIME, but rather, take the report at "face value." (History and Facts, March 22, 2024; record).

48) At hearing, consistent with its brief, Employer contended while there "may" be a medical dispute about "causation," the dispute was not "significant" mainly because Dr. Paynter's July 13, 2023 report lacked a correct factual history and thus should be "discounted." It contended Employee's shoulder injury is "routine." Employer also contended SIMEs are expensive, and having one for a routine shoulder injury could result in the SIME and related accommodations actually costing more than the benefits to which Employee may be entitled. It also relied on *Bah*, and on AS 23.30.001(1), which requires the Board to interpret the Act to result in a "reasonable cost" to Employer. Given its take on Dr. Paynter's report, Employer contended an SIME would not be a "reasonable" cost. It contended Employee's self-represented status did not justify her completely ignoring her right to request an SIME timely. Employer disagreed with Employee's interpretation of *Dwight*. Moreover, Employer contended Employee's failure to request an SIME timely prevented an SIME physician from examining her shoulder before she had shoulder-altering surgery. (Hearing Brief of Providence Alaska Medical Center, March 22, 2024; record).

49) Board panel members typically do not see invoices from SIME physicians, so they are unaware of the costs. In rare circumstances, panel members may have seen SIME invoices in complex cases with voluminous medical records. (Experience; observations).

50) Employee's agency file at this time has limited medical records and her case is relatively "routine." (Experience; observations).

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 . . . quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers; . . .

The Board may base its decision on not only 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).

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

(k) In the event of a medical dispute regarding . . . 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. The cost of an examination and medical report shall be paid by the employer. . . .

The Alaska Workers’ Compensation Appeals Commission in *Bah v. Trident Seafoods Corp.*, AWCAC Dec. No. 073 (February 27, 2008) addressed the Board’s authority to order an SIME under AS 23.30.095(k). *Bah* stated in *dicta*, that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition. *Bah* said when deciding whether to order an SIME, the Board considers three criteria, though the statute requires only one:

- 1) Is there a medical dispute between Employee’s physician and an EME?
- 2) Is the dispute significant? and
- 3) Will an SIME physician’s opinion assist the Board in resolving the disputes? (*Id.*).

Dwight v. Humana Hospital Alaska, 876 P.2d 1114, 1119-20 (Alaska 1994), addressed former AS 23.30.095(k). That version was similar to the current law but stated that if there was a medical dispute between the employee’s attending physician and an EME, an SIME “shall be conducted.” On appeal, the injured worker argued the Board erred in dismissing her claim and finding she had waived her right to an SIME, because there was a medical dispute, and the Board was thus “required” to order an

SIME. Alternatively, she argued the Board was required to “inform her” of her right to an SIME, but did not. Two of *Dwight*’s three holdings are still relevant: (1) In every case the Board is required to give the parties notice of their right to request and obtain an SIME in the event of a medical dispute; (2) If a party requests an SIME the Board must order one; and (3) In the event of a medical dispute, the Board on its own can order an SIME. The Alaska legislature amended AS 23.30.095(k) post-*Dwight*, removed the “shall” requirement and replaced it with “may,” as set forth above. Therefore, under the current statute, the Board “may” order an SIME, or it may not.

Dwight also relied on *Richard v. Fireman’s Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963), which states, “[A] workmen’s compensation board . . . owes to every applicant for compensation the duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, . . . and of instructing him on how to pursue that right under the law.”

AS 23.30.135. Procedure before the board. (a) . . . 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. . . .

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

(g) If there exists a medical dispute under AS 23.30.095(k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

. . . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party’s right to request an evaluation under AS 23.30.095(k) is waived; . . .

ANALYSIS

Shall this decision order an SIME?

The SIME provision, AS 23.30.095(k), states a prerequisite to an SIME: there must be a “medical dispute” regarding one or more enumerated issues “between the employee’s attending physician and the employer’s independent medical evaluation. . . .” In other words, an attending physician must disagree with the EME’s opinion on one or more specified points. The issues on which physicians could disagree include: “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.” Without a medical dispute, or at least a gap in medical evidence, there can be no SIME ordered as there would be no need for one. *Bah.*

Current regulations provide a time limit for a party to request an SIME; they must request one within 60 days after the party received the medical reports reflecting a dispute. If a request is untimely, by regulation the right to request an SIME is “waived.” 8 AAC 45.092(g)(2).

Employer contends Employee failed to request an SIME timely; she conceded as much as hearing and did not request one by October 5, 2023. It also contends the Division sent Employee on at least two occasions its pamphlet “Workers’ Compensation and You,” which it contends advised Employee of her right to request an SIME. However, the pamphlet takes a vague, indirect approach to advising Employee that she has a right to request an SIME. In fact, if one reads nearly the entire 25-page pamphlet, one might “connect the dots” and find out that there is a form that one could use to make the request. However, the pamphlet completely fails to provide a deadline for doing so, even though it provides deadlines for taking other important actions in a case.

Employer further contended Employee’s failure to request an SIME timely deprived an SIME physician of the opportunity to examine her shoulder before Dr. Paynter operated. It inadequately explained why this was a critical factor. Dr. Lynch was able to give causation opinions without having the benefit of intraoperative photographs of Employee’s shoulder. Dr. Paynter’s intraoperative findings and photos should assist an SIME physician in forming opinions.

The “Workers’ Compensation and You” pamphlet failed to meet the *Richard* standard, because it failed to adequately instruct Employee how and when to request an SIME timely, or face the consequence of waiving her right to request one. Therefore, even assuming she received and

reviewed the “Workers’ Compensation and You” pamphlet, under *Richard*, Employee has not waived her right to an SIME because the Division failed to advise her adequately.

A) There is a medical dispute.

Alternately, even if Employee waived her right to request an SIME by failing to request one timely, this panel retains its right under *Dwight* to order an SIME on its own motion. Employee provided documentary evidence showing at least one medical dispute between relevant physicians in her case -- “causation.” Specifically, Dr. Paynter diagnosed a left-shoulder “SLAP” lesion and opined that given her work environment, job duties and symptomatic timing, he found it medically reasonable that her injury and symptoms were precipitated while starting her new job with Employer. Contrary to Employee’s assertion, NP Coon did not offer a causation opinion, so his medical record does not support a dispute. Dr. Paynter’s report will be taken at “face value.”

By contrast, Dr. Lynch opined Employee had no work injury with Employer, said he could not identify her employment with Employer as the substantial cause of her symptoms because they predated the work injury, stated her job could not physiologically cause her injury, and he “ruled out” her work with Employer as the substantial cause of her condition and symptoms. Dr. Lynch suggested the substantial cause of her need for treatment and disability was her preexisting shoulder condition. AS 23.30.095(k). His report will be taken at “face value” as well. This evidence satisfies *Bah* requirement (1) for this decision to order an SIME.

B) The medical dispute is significant.

In this panel’s experience, shoulder surgery is relatively expensive. It can take a prolonged period to recover from and may cause lengthy temporary total or partial disability. An operated shoulder may result in a permanent partial impairment rating. *Rogers & Babler*. Employee filed a claim for temporary total disability and permanent partial impairment benefits, medical and related transportation costs for her left shoulder, a compensation rate adjustment and interest. If Employee prevails on “causation,” these claims could result in her receiving significant benefits at stake in this claim. Thus, the dispute is “substantial” because the potential benefits at issue are substantial. This satisfies *Bah* requirement (2) to order an SIME.

C) *An SIME will assist the panel in deciding this case.*

Lastly, in this panel's experience, SIME reports are useful in deciding cases and best ascertaining the parties' respective rights. *Rogers & Babler*; AS 23.30.135(a). Employer contends SIMEs are expensive, and in this case SIME costs may outweigh the value of Employee's claimed benefits. Employer provided argument but no evidence of what a shoulder SIME typically costs. Panels have limited experience regarding SIME costs because panel members rarely see invoices from SIME physicians. And when they do, they are in complex cases with voluminous medical records. At this point, Employee's agency file does not include substantial medical records and, as Employer stated, she has a "routine" shoulder issue. Even assuming an SIME is relatively expensive, they have been routine costs in workers' compensation cases since they were instituted in statute decades ago. Employer provided no evidence that a routine SIME is an unreasonable cost. *Rogers & Babler*; AS 23.30.001(1).

Given the above analysis, this panel will order an SIME on "causation." If the parties want to stipulate to add additional disputes to the SIME, they may do so. But "causation" is a threshold issue in this case upon which all other benefits sit. Since there is no specific medical dispute regarding permanent partial impairment benefits, medical stability or the other disputes that could be addressed in an SIME, this order will limit the SIME to "causation" of Employee's need for medical treatment and disability for her left shoulder, unless the parties stipulate otherwise.

CONCLUSION OF LAW

This decision shall order an SIME.

ORDER

- 1) Employee's November 28, 2023 petition for an SIME is granted.
- 2) Alternately, the panel orders an SIME on its own motion.
- 3) The parties are directed to schedule and attend a prehearing conference at which time the designee will make appropriate deadlines to prepare for the SIME.
- 4) The SIME will be limited to "causation" of Employee's need for medical treatment and related disability for her left shoulder unless the parties stipulate to add other issues to the SIME.

5) The SIME will be conducted by an orthopedic surgeon from the Division’s SIME list.

Dated in Anchorage, Alaska on March 28, 2024.

ALASKA WORKERS’ COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Mark Sayampanathan, Member

_____/s/
Bronson Frye, 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 Baylee Antijunti, employee / claimant v. Providence Alaska Medical Center, self-insured employer, defendant; Case No. 202202997; 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 March 28, 2024.

_____/s/
Pamela Hardy, Workers Compensation Technician