

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

TERESA L DRAKE,)
)
Employee,)
Claimant,)
)
v.) INTERLOCUTORY
) DECISION AND ORDER
)
FOUNDATION HEALTH, LLC,) AWCB Case No. 202300166
)
Employer,) AWCB Decision No. 24-0067
and)
) Filed with AWCB Fairbanks, Alaska
ALASKA NATIONAL INSURANCE CO.,) on December 6, 2024
)
Insurer,)
Defendants.)
)

Teresa Drake's (Employee) September 10, 2024 petition for a second independent medical evaluation (SIME) was heard on the written record in Fairbanks, Alaska on October 15, 2024, a date selected on July 3, 2024. Attorney Jason Weiner represented Employee. Attorney Adam Sadoski represented Foundation Health, LLC and Alaska National Insurance Co. (Employer). The record closed on October 15, 2024.

ISSUE

Employee contends there is a significant medical dispute between her attending physicians and Employer's medical evaluator (EME). Employee contends this warrants an SIME.

Employer contends there is no significant medical dispute and an SIME is not necessary. Employer contends Employee's request for an SIME should be denied.

Shall this decision order a SIME?

FACTUAL FINDINGS

A preponderance of the evidence establishes the following facts and factual conclusion

1) On January 3, 2024, Employee reported on January 2, 2024, while working for Employer, she was sitting on the floor when a “larger child came up and hugged her firmly from behind, resulting in pain to the lower back.” (Report of Injury, January 4, 2024).

2) On January 3, 2024, Employee described she was injured when “she was holding a baby while sitting on a mattress that was on the floor and a little kid came up behind her and pushed her forward multiple times whereupon she reached up and behind her to stop the kid, but then they all fell over off of the mattress.” (Spaulding Chiropractic Clinic, Chart Notes, Anton Keller, DC, January 3, 2023).

3) Beginning January 3, 2023 and continuing into March 2023, Employee received multiple chiropractic treatments. (Spaulding Chiropractic Clinic Chart Notes, January 3, 2023-March 2, 2023).

4) On January 3, 2023, Anton Keller, D.C., noted Employee had “an acute complaint in the left lumbar, left sacroiliac, right sacroiliac, lumbar, right lumbar, left lower thoracic, lower thoracic and right lower thoracic region” which “has worsened since the onset and the pain scale is presently rated 8/10.” Dr. Keller diagnosed “[s]train of lower back, vertebrrogenic low back pain, sprain of lumbar ligts, initial, Seg and somatic dysf of lumbar region, Seg and somatic dysf of sacral reg. Seg and somatic dysf of pelvic reg.” Dr. Keller scheduled a series of chiropractic treatments and released Employee to work, but with restrictions that included no bending or twisting and no lifting more than 5 pounds. (Chart Note, Keller, January 3, 2023; Alaska National Workers’ Comp. Work Status Document, January 2, 2023).

5) On February 15, 2023, following a series of chiropractic sessions, Dr. Keller advised Employee “to seek additional evaluation and/or treatment with a referral to a physical therapist” to “evaluate and treat myospasms as well as muscles not activating.” Keller continued Employee on a modified work release. (Keller, Chart Note, February 15, 2023).

6) On March 7, 2023, Employee began treating with Carly McQueen, PA-C. Employee said her injury occurred when she “was sitting cross-legged holding a baby when a two-year old got overly excited to hug her and kind of lunged on her while she was twisted away and bent in both

directions.” McQueen assessed “Muscle spasm of back”; Injury caused by twisting”; and indicated the “Encounter related to worker’s compensation claim.” Employee’s lumbar spine and sacroiliac joint x-rays showed nonacute and normal joint and disc spacing. Mild degenerative changes were seen in both Employee’s lumbar spine and sacroiliac joints. McQueen said she would consider a thoracic spine x-ray if Employee’s pain persisted and scheduled her to begin physical therapy. (McQueen, Chart Note, March 7, 2023).

7) On March 16, 2023, Employee began physical therapy for a “low back pain, with radiculopathy of LLE” diagnosis. (FMH Outpatient OT, Chart Notes, March 16, 2023.)

8) On April 5, 2023, PA-C McQueen’s assessments included, “Injury caused by twisting”; “Muscle spasm of back”; “Chronic right-sided low back pain with right sided sciatica”; “Other chronic pain”; and noted the “Encounter related to worker’s compensation claim.” McQueen noted physical therapy had helped but not resolved Employee’s pain and physical therapists “are worried about bulging disc and recommend further imaging before continuing care.” McQueen released Employee to sedentary duty with restrictions including no lifting greater than 10 pounds, no significant squatting, bending, crawling, lifting, pushing or pulling. (McQueen, Chart Note, April 5, 2023; McQueen APRWR Form, April 5, 2023).

9) On April 17 2023, a lumbar spine magnetic resonance image (MRI) showed “L4-5 facet arthritis and disc bulging. L5-S1 annular fissure and disc bulging. No significant canal or neuroforaminal narrowing at any lumbar level.” (FMH Medical Imaging, April 17, 2023.)

10) On April 19, 2023, PA-C McQueen noted “Injury caused by twisting”; “L4-L5 disc bulge”; “Muscle spasm of back.” She continued to note, “Encounter related to worker’s compensation claim.” McQueen referred Employee to Kim Driftmier, M.D., orthopedic surgery, “for worker’s comp and further eval of L4-L5 bulging disc secondary to twisting injury” and to determine whether Employee was a candidate for steroid injection. McQueen released Employee for modified work duty – primarily sedentary tasks with restrictions that included no twisting bending, crawling, squatting, persistent overhead reaching and no lifting greater than 10 pounds. (McQueen, Chart Note, April 19, 2023; McQueen, APRWR Form, April 19, 2023.)

11) On May 2, 2023 PA-C McQueen’s assessment remained the same as those on April 19, 2023: “Injury caused by twisting”; “L4-L5 disc bulge”; “Muscle spasm of back”; and that the “Encounter related to worker’s compensation claim.” She advised Employee to see Dr. Driftmeir and to continue physical therapy. McQueen did not release Employee to perform

sedentary work. She indicated “patient is totally incapacitated at this time.” (McQueen, Chart Note, May 2, 2023; McQueen, APRWR Form May 2, 2023).

12) On May 4, 2023, physical therapy noted, “Pt is making some progress with exercise. She is still demonstrating significant symptoms that support disc pathology of lower lumbar region. At this time, she is still at risk of reinjury or further injury. . . .” (FMH Outpatient PT, May 4, 2023.)

13) On May 18, 2023, Employee treated with Dr. Kim Driftmier and x-rays were taken. The lumbar x-rays showed “facet joint sclerosis and arthropathy at L4-L5 and L5-S1. Mild height loss to the L5-S1 disc space. . . . No spondylolisthesis on bending films. . . . [C]ompression deformity to T12 of uncertain chronicity.” Thoracic spine x-rays indicated “slight asymmetry at the TL junction. Mild to moderate diffuse degenerative disc disease throughout the thoracic spine. . . .” Driftmier assessed “low back pain and other intervertebral disc degeneration and radiculopathy of the lumbar region.” He recommended a left L5-S1 epidural injection and continuing physical therapy. Driftmier said Employee’s injury was medically stable and not likely to preclude her return to her job of injury. He released Employee to return to work and said it was undetermined if Employee sustained a permanent impairment. (Driftmier, Chart Note, May 18, 2023; Physician’s Report, May, 18, 2023).

14) On May 22, 2023, PA-C McQueen assessed “Injury caused by twisting”; “L4-L5 disc bulge”; “Chronic low back pain with sciatica, sciatica laterality unspecified, unspecified back pain laterality.” She again, noted “Encounter related to worker’s compensation claim.” McQueen referred Employee to Susanne Fix, M.D. for a neurosurgery evaluation because Employee’s lower extremity weakness was progressive and worsening. McQueen’s “Clinical information/comments to Dr. Fix state:

Patient with twisting injury at work after a small child jumped on her while she was seated. Pain has progressively worsened, she also now has sciatica and leg weakness. MRI shows L4-L5 disc bulging, she has had x-rays from Dr. Driftmier’s office indicating a vertebral fracture that is well-healed. Referral to neurosurgery for further eval given new symptoms of leg weakness. She has been working with physical therapy.”

McQueen noted Employee was scheduled for a steroid injection to relieve sciatica symptoms; however, Driftmier “thinks she needs further specialty evaluation given new symptoms of leg

weakness over last 1-2 months.” McQueen encouraged Employee to continue physical therapy and other treatments as tolerated. (McQueen, Chart Note, May, 22, 2023).

15) On June 5, 2023, Employee underwent an Employer’s Medical Examination (EME) with orthopedic surgeon David Glassman, M.D. He diagnosed “Lumbar sprain/strain as a work injury of January 2, 2023 which should have healed within six to eight weeks. . . .” Dr. Glassman opined Employee was medically stable with no further treatment recommended. He also diagnosed “multilevel lumbar spondylosis, which is a pre-existing degenerative condition, not related to the work event of January 2, 2023.” Dr. Glassman said any additional treatment Employee might require for her ongoing lower back pain stemmed from chronic age-related degenerative changes. He relied on the x-rays and MRI that showed “no objective evidence of acute trauma and no clinically significant neural compression.” Dr. Glassman opined Employee has the physical ability to return to her position as a child development leader as described in her job description. He said he would not impose any physical restrictions on Employee due to her January 2, 2023 work injury and found she has the physical capacity to participate in all [US Department of Labor] physical capacity classifications without limitation. He opined she reached medical stability on February 27, 2023. Dr. Glassman indicated Employee did not sustain a permanent partial impairment (PPI). (EME Report, Dr. Glassman, June 5, 2023).

16) On June 9, 2023, Employee received a left-sided L5-S1 epidural steroid injection. (Driftmier Procedure Note, June 9, 2023).

17) On June 19, 2023, PA-C McQueen’s assessment included “muscle weakness of lower extremity.” She continued to note “Encounter related to worker’s compensation claim.” McQueen said Employee “is currently unable to work due to worsening symptoms” and that the “symptoms continue to worsen and reduce . . . ROM [range of motion].” Employee reported significant left lower extremity range of motion loss and an unsteady gait. McQueen thought these symptoms were worsening and noted Employee also had limited lumbar spine range of motion. She urged Employee to schedule an appointment with Dr. Fix and to continue physical therapy as tolerable. McQueen said, “Patient is totally incapacitated at this time.” (McQueen, Chart Note, July 19, 2023; McQueen, APRWR, June 19, 2023).

18) On June 28, 2023, based on Dr. Glassman’s June 5, 2023 EME, Employer controverted all benefits. (Controversion Notice, June 28, 2023).

19) On July 10, 2023, PA-C McQueen assessed “Muscle weakness of lower extremity”; “Muscle spasm of back”; “Limb tremor”; “Generalized anxiety disorder, chronic”; and “Fibromyalgia, chronic.” Employee described a worsening tremor of lower extremities and severe muscle spasms which radiated into the right ribs, and right arm tremors. McQueen ordered a brain MRI “to rule out MS [Multiple Sclerosis] or other neurological changes.” She also referred Employee to neurologist James Foelsch, M.D., “for nerve conduction studies only, patient with L4-L5 disc herniation with progressively worsening symptoms of lower extremity weakness and tremor with certain positional changes.” McQueen thought Employee’s fibromyalgia history might be exacerbating her low back muscle spasms and prescribed Pregabalin to treat pain. She also noted Employee’s “generalized anxiety disorder may be contributing factor to changing symptoms.” Whether Employee shared a copy of Dr. Glassman’s report with McQueen is unclear, but it was discussed. (McQueen, Chart Notes, July 10, 2023)

20) On July 31, 2023, Employee treated with Samuel Waller, M.D. Employee’s chief complaint was “an increase in low back dysfunction and declining ambulatory function.” Dr. Waller, noted:

Teresa indicates she has a complex history with a spinal fracture 30-40 years ago, fibromyalgia and other abnormalities including autoimmune disorder. On January 2, 2023 while performing her function helping preschoolers, she experienced an accident. This left her with severe pain and declining ability to ambulate. . . . The patient feels as though she is losing strength in her bilateral lower extremities and is unable to walk much more than 100 yards before significant pain and dysfunction set in. She has pain that is across her beltline as well as pain that will radiate down her left lower extremity.

Dr. Waller’s impressions included: “The patient appears to have some dynamic changes at L4-5 where she has a disc bulge and some narrowing. This may be the etiology of some of her radiculopathy and pain.” Dr. Waller noted, “On examination the patient has significant hyperreflexia with clonus as well as long tract signs.” He suggested an injection trial for both diagnostic and therapeutic purposes and that Employee “undergo an MRI of cervical and thoracic spine as this may be some of the etiology of her waking difficulty.” (Waller, Chart Note, July 31, 2023).

21) On August 18, 2023, Gina Pender, M.D., assessed Employee with “Muscle weakness of lower extremity (ongoing since January 2023)”; Muscle spasm”; “Limb tremor”; “Chronic radicular pain of lower back”; “Paresthesia of both legs”; “Frequent falls”; “Poor concentration”; “Fibromyalgia”; “GAD” “History of COVID-19”; “History of traumatic injury of head”; and “Other chronic pain.” Dr. Pender recommended Employee continue physical therapy and “continue care with psychiatrist/neurologist Dr. Martino.” (Pender, Chart Notes, August 18, 2023.)

22) On August 21, 2023, Employee had MRIs of her cervical, thoracic, and lumbar spine. The cervical MRI showed unremarkable C5-C6 anterior fixation hardware. However, degenerative changes were seen at multiple levels with the worst at C6-C7. Employee’s thoracic spine was within normal limits for her age. Employee’s lumbar spine had mild to moderate L3-L4 and L4-L5 and mild L5-S1 disc bulge and lower lumbar spine degenerative changes. All MRI’s revealed Employee has spondylosis of all spine regions.”

23) On August 30, 2023 Employee received a lumbar transforaminal epidural steroid injection. (NorthStar Radiology, Procedure Note, August 30, 2023).

24) On September 5, 2023, Dr. Foelsch said:

On January 2nd while working, Ms. Drake injured her lower back. She has pain that radiates anteriorly through the left leg as well as to a lesser extent into the right leg. The pain has been relatively constant. At times, she feels there is weakness in the legs. She also has some numbness and tingling sensations distally in both legs. She also complains of some tremors in her arms. The weakness in her legs is not constant.

Dr. Foelsch conducted a EMG study of both Employee’s lower extremities, including paraspinal muscles, with normal results and no denervation evidence. Dr. Foelsch diagnosed “low back and bilateral leg pain without evidence of radiculopathy.” He recommended Employee return to her referring physician. (Foelsch, Chart Notes, September 5, 2023.)

25) On September 21, 2023, Dr. Waller said, “patient indicates she continues to have significant symptoms in her low back particularly when flexed forward at the hips and waist. She is frustrated by her continued severe symptoms and inability to get relief.” Dr. Waller said “patient appears to have some dynamic instability at L4-5 with most pronounced radiographic findings at this level. The patient had a positive response with clinical correlate at L4-5 with transforaminal epidural steroid injections.”

The patient has significant disease in her lumbar spine which appears to be her largest pain generation. The patient certainly is suffering from significant symptoms that could be generated from other areas in her body. . . . She seems to be a fair candidate for a minimally invasive transforaminal lumbar interbody fusion at L4-5. (Waller, Chart Note, September 21, 2023).

26) On October 10, 2023, Employee underwent a L4-L5 transforaminal lumbar interbody fusion. (Waller, Operative Report, October 10, 2023).

27) On October 26, 2023, Employee was doing generally well post-surgery and her pain was improving; however, she began experiencing sharp pain that radiated from her left glute to her medial ankle. (PA- C Susan Hartmann, Chart Note, October 26, 2023).

28) On November 20, 2023, Employee complained of increased low back dysfunction and declining ambulatory function. Dr. Waller said, “The patient is recovering quite nicely from surgery. I am hopeful that she will continue to make a full recovery. Her radiographic appearance is satisfactory. Her incisions appear to be healing well. We will continue to follow her.” (Waller, Chart Note, November 20, 2023).

29) On December 28, 2023, Employee filed a claim seeking medical costs, total temporary disability (TTD), PPI, and reemployment benefits, and attorney fees and costs. Employee also requested an unfair or frivolous controversion finding. (Workers’ Compensation Claim, December 28, 2023). Employee described that:

While sitting crossed legs and holding a 1-year-old, a toddler impacted her on the right side after running into her. To protect the 1-year-old she was holding, she elevated her right hip during the impact. The toddler then ran around to her left side and impacted her on the left side. The claimant elevated her left hip at this time, again to protect the 1-year-old she was holding in her left. She felt a pop and had increased lower back pain, as well as left leg pain, when this occurred. (Employee’s Claim for Workers’ Compensation Benefits, December 28, 2023; Glassman EME Report, June 5, 2023).

30) On January 4, 2024, Employee reported her overall health had improved but she “continues to have sharp pain that radiates from her low back into hip and down into her groin and left thigh” and the pain was localized “on her low back near the sacral sulcus.” PA-C Hartmann thought Employee’s “SI joint may be contributing.” She ordered an updated “MRI and flexion/extension films,” encouraged continuing physical therapy and suggested Employee receive a left SI joint injection. (Hartmann, Chart Note, January 4, 2024).

31) On January 18, 2024, Employer controverted all benefits based on Dr. Driftmier's May 18, 2023 report and Dr. Glassman's June 5, 2023 EME report. Employer contended there is no medical evidence to support that the work injury is the substantial cause of Employee's disability or need for medical treatment. (Controversion Notice, January 8, 2024.)

32) On January 24, 2024, Employee received a steroid injection in the left sacroiliac joint. (North Star Radiology, Procedure Note, January 24, 2024).

33) On February 1, 2024, Dr. Waller said:

In many ways she is doing quite well. It appears that she has significant sacroiliac joint dysfunction. I am hopeful that PT and some injections will help calm this down and get this improved. We will continue to follow her after another course of physical therapy. . . . I am hopeful that given time this will resolve but otherwise we may need to consider surgical management. (Waller, Chart Note, February 1, 2024.)

34) On May 29, 2024, Employee underwent a left sacroiliac joint fusion. (Waller, Surgical Report, May 29, 2024).

35) On July 11, 2024, Employee reported she was doing quite well and was excited about participating in physical therapy. She had no new symptoms and was hopeful for continued improvement. (Waller, Chart Note, July 11, 2024).

36) On August 22, 2024, Employee's pelvis x-ray showed "Stable appearance to the instrumented anterior and posterior fusion at L4-5." The lumbosacral junction region's alignment appeared satisfactory. (Waller, Chart Note, August 22, 2024).

37) On September 11, 2024, Employee requested an SIME under AS 23.30.095(k). Employee's petition did not include an SIME Form or any supporting medical records as required under 8 AAC 45.070(b)(1). (Petition, September 11, 2024; Observation).

38) On September 12, 2024, the Division advised Employee of 8 AAC 45.070(b)(1)'s requirements. (Division Letter, September 12, 2024).

39) On September 13, 2024, Employee filed an SIME form and medical records she contends reflect a medical dispute between Employee's physician and Employer's physician regarding causation, treatment, impairment, functional capacity, and medical stability.

40) On October 8, 2024, Employee and Employer filed hearing briefs. Employee requests an SIME be ordered. Employer opposes an SIME.

41) On October 8, 2024, Employee contended a medical dispute exists between her physicians and Dr. Glassman that the January 2, 2023 work injury is the substantial cause of her disability and need for medical treatment, medical stability, functional capacity, and degree of impairment. Employee relies her treating provider, PA-C McQueen’s records from March 7, 2023, April 5, 2023, April 19, 2023 and July 10, 2023 to establish the medical dispute and need for an SIME. (Employee’s SIME Hearing Brief, October 8, 2024).

42) On October 8, 2024, Employer contended none of McQueen’s medical records establish a dispute and an SIME is not warranted because neither McQueen nor any of Employee’s other physicians’ opinions conflict with Dr. Glassman’s opinions. Employer also contended to the extent a dispute exists, it is limited to the date of medical stability but is insignificant since Employee was paid disability through June 27, 2023 – approximately four months beyond the date Dr. Glassman determined she was medically stable. (Employer’s SIME Hearing Brief, October 8, 2024).

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 §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* emphasized that when deciding whether to order an SIME, the Board consider three criteria:

- 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? *See also, James v. Northern Construction* AWCB Decision No. 16-0052 (June 30, 2016).

In the absence of opposing medical opinions between Employer and Employee physicians, there cannot be a medical dispute. *Bah*. The term "significant dispute" includes considering the cost and extent of benefits at stake given the claims and medical disputes. *Betts v. Greenling Enterprises, LLC*, AWCAC Appeal No. 22-0013, Order on Petition for Review (November 30, 2022).

AS 23.30.110. Procedure on claims. (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.

AS 23.30.095(k) and 110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Dec. No. 97-0165 (July 23, 1997).

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. . . .

AS 23.30.155. Payment of compensation.

(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical

examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

Under §135(a) and §155(h), wide discretion exists to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in claims, to best “protect the rights of the parties.” *Hanson v. Municipality of Anchorage*, AWCB Decision No. 10-0175 (October 29, 2010). Under §110(g) the Board may order an SIME when there is a significant “gap” in the medical evidence, or a lack of understanding of the medical or scientific evidence prevents the Board from ascertaining the rights of the parties and an SIME opinion would help. *Bah*. “It is enough that the parties present evidence of a medical dispute to request an SIME.” *Geister v. Kid’s Corp, Inc.*, AWCAC Decision No. 045 (June 6, 2007) at 9.

The decision to order an SIME rests in the Board’s discretion. *Olafson v. State Department of Transportation*, AWCAC Dec. No. 06-0301 (October 25, 2007). An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the Board to assist it by providing a disinterested opinion. *Id.* at 15.

8 AAC 45.070. Hearings. . . .

(1) A hearing is requested by using the following procedures:

. . . .

(F) To resolve a medical dispute under AS 23.30.095(k) or to request the board order a physical examination under AS 23.30.110(g), a party shall file with the division and serve on opposing parties a petition asking the board to order a second independent medical evaluation, a completed second independent medical evaluation form signed by the party that filed the petition, and medical records reflecting the medical disputes; if the parties do not stipulate to the second independent medical evaluation within 20 days of service of the documents, the board or its designee will schedule a hearing, the board will hold a hearing on the written record with briefs, and the board will issue its decision and order within 60 days of the date the documents were filed with the division and served on the opposing party; an affidavit of readiness for hearing form is not required.

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

(h) In an evaluation under AS 23.30.095(k). . . . The board may direct

(1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder;

(2) the party making the copy to serve the binder of medical records upon the opposing party together with an affidavit verifying that the binder contains copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binder to review the copies of the medical records to determine if the binder contains copies of all the employee's medical records in that party's possession; the party served with the binder must file the binder with the board not later than 10 days after receipt and, if the binder is

(A) complete, the party served with the binder must file the binder upon the board together with an affidavit verifying that the binder contains copies of all the employee's medical records in the party's possession; or

(B) incomplete, the party served with the binder must file the binder upon the board together with a supplemental binder with copies of the medical records in that party's possession that were missing from the binder and an affidavit verifying that the binders contain copies of all medical records in the party's possession; the copies of the medical records in the supplemental binder must be placed in chronological order by date of treatment, with the initial report on top, and numbered consecutively; the party must also serve the party who prepared the first binder with a copy of the supplemental binder together with an affidavit verifying that the binder is identical to the supplemental binder filed with the board;

(4) the party, who receives additional medical records after the binder has been prepared and filed with the board, to make two copies of the additional medical records, put the copies in two separate binders in chronological order by date of treatment, with the initial report on top, and number the copies consecutively; the party must file one binder with the board not later than seven days after receiving the medical records; the party must serve the other additional binder on the opposing party, together with an affidavit stating the binder is identical to the binder filed with the board, not later than seven days after receiving the medical records;

8 AAC 45.090. Additional examination. . . .

(b) Except as provided in (g) of this section, . . . , the board will require the employer to pay for the cost of an examination AS 23.30.095(k), AS 23.30.110(g), or this section.

ANALYSIS

Shall this decision order a SIME?

A prerequisite to an SIME is a “medical dispute” regarding one or more enumerated issues “between the employee’s attending physician and the employer’s independent medical evaluation. . . .” AS 23.30.095(k). In other words, an attending physician and the EME’s opinion must disagree 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.*

Employee and Employer disagree that there is a medical dispute between their respective physicians. Employee contends there is a significant medical dispute. Employer contends Employee’s physicians have not opined on causation and a medical dispute cannot be established.

Employee relies on her treating provider, PA-C McQueen’s March 7, 2023, April 5, 2023, April 19, 2023 and July 10, 2023 medical records. She contends they establish a medical dispute between PAC-McQueen and EME Dr. Glassman that the January 2, 2023 work injury is the substantial cause of her disability and need for medical treatment, medical stability, functional capacity, and degree of impairment. (Employee’s SIME Hearing Brief, October 8, 2024).

Employer opposes an SIME and contends no significant medical dispute exists. It contends that none of McQueen’s medical records establish a dispute. Employer also contends that neither PA-C McQueen nor any of Employee’s other physicians have addressed or expressed any conflicting opinion as to Glassman’s assertions that: (1) Employee suffered a lumbar sprain/strain work injury that reached medical stability on or about February 27, 2023 and for which no additional treatment is required or recommended; (2) Employee’s need for any additional treatment beyond February 27, 2023 related solely to Employee’s preexisting condition; (3) Employee’s work injury did not prevent her from being physically able to return to her position at the time of injury with the ability to participate in all classifications without

limitation; and (4) Employee had zero PPI. Employer also contends that to the extent a dispute exists it is limited to the date of medical stability and is not significant.

The panel has broad discretion to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in claims and to protect the parties' rights. AS 23.30.135(a); AS 23.30.155(h); *Northern Construction; Hanson*. The panel is not limited to reviewing only the records cited by the parties but rather has discretion to, and prudently should, review all medical records when determining whether to order an SIME. (*Id.*) The decision to order a SIME is properly based on current medical evidence. *Northern Construction*.

Bah said when deciding whether to order an SIME involves three considerations:

- 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?

These considerations will be addressed in order:

(1) *There is a medical dispute.*

Employer's physician, Dr. Glassman, is unequivocal in opining that Employee's work injury was limited to a muscle sprain/strain, which was medically stable on February 27, 2023; no further treatment was required or recommended for the work related injury; Employee was physically capable of returning to her employment without limitations; and that all of Employee's symptoms/conditions/treatment after February 27, 2023 related to Employee's preexisting medical conditions. Dr. Glassman drew a demarcation when he opined that all Employee's conditions/symptoms/treatments after February 27, 2023 are unrelated to her January 2, 2023 work injury. *Rogers & Babler*. What is unclear from Dr. Glassman's opinion, however, is whether Employee's work injury aggravated, exacerbated or combined with Employee's preexisting condition to cause Employee's inability to work and need for medical treatment. (*Id.*)

Although none of the medical records from Employee's various providers specifically say, "I disagree with Dr. Glassman," their opinions nonetheless conflict with Glassman's opinions and raise a dispute. *Bah*. Dr. Glassman said Employee could return to her pre-injury employment without restrictions as of February 27, 2023. PA-C McQueen initially placed Employee on restricted work duty but after several follow-up treatments listed Employee as being "totally incapacitated" and not released to work. PA-C McQueen attributes causation to Employee's "twisting injury at work." By contrast, Dr. Glassman opined Employee's continued disability and need for medical treatment was caused by her pre-existing spondylosis and degenerative disc disease. Another of Employee's treating physicians, Dr. Waller, noted "Employee had "some dynamic changes at L4-5 where she has a disc bulge and some narrowing." He thought these changes may be the cause of some of her radiculopathy and pain. He also suggested Employee had dynamic instability at L4-5 and noted she had a positive response to an L4-5 epidural steroid injection. Dr. Waller's opinion, taken at "face value" indicates Employee's disc bulge was a "dynamic" change and the substantial cause of Employee's need for medical treatment. Dr. Glassman, on the other hand, opined Employee needed no further treatment. This evidence satisfies *Bah* requirement one to order an SIME.

(2) *The medical dispute is significant.*

The term "significant dispute" includes considering the cost and extent of benefits at stake given the claims and medical disputes. *Betts*. Employee seeks medical costs, permanent partial impairment, temporary total disability, and reemployment benefits. Medical and disability benefits were denied on June 28, 2023. Since then, Employee has had injections, surgery, and physical therapy. In this panel's experience, fusion surgery and related treatment is relatively expensive. *Rogers & Babler*. As of August 22, 2024, Employee had not been released to return to work. It can take a prolonged recovery period before reaching medical stability after fusion surgery. *Id*. Spinal fusion usually results in a PPI rating. *Id*. If Employee prevails her claims could result in her receiving substantial benefits. Thus, the dispute is "significant." This satisfies *Bah* requirement two to order an SIME.

(3) *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). The SIME's purpose is to have an independent expert provide an opinion about a contested issue. *Seybert*.

Although familiar with most orthopedic injuries, the panel is not sufficiently familiar with how a twisting injury, the mechanism involved here, might cause a disc bulge or otherwise aggravate, exacerbate, or combine with a preexisting age-related physical condition. An SIME will assist the panel to decide whether such an injury is the substantial cause of Employee's disability and need for medical treatment. If it is determined work is the substantial cause of Employee's disability and need for medical treatment, an SIME opinion will also assist in determining whether Employee is or will be medically stable, if she has a PPI, and if she has the functional capacity to return to her job of injury. Finally, if Employee is found not to be medically stable, an SIME opinion will assist to determine if continuing treatment is reasonable and necessary. The third *Bah* requirement to order an SIME is satisfied.

CONCLUSION OF LAW

The panel shall order an SIME

ORDER

- 1) Employee's petition for a SIME is granted.
- 2) The SIME will be performed a neurosurgeon selected from the board's list. If, at the time of processing, the board's designee determines that no physician on the board's list is available and/or qualified to perform the examination under 8 AAC 45.092(e), the board's designee will notify the parties and request that they provide the names, addresses, and curriculum vitae of physicians in accordance with 8 AAC 45.092(f).
- 3) The medical disputes are the cause of Employee's disability and need for medical treatment, reasonable and necessary medical treatment, medical stability, PPI, and whether she has the physical capacity to return to her job of injury.
- 4) All filings regarding the SIME must be sent to workerscomp@alaska.gov and served on the opposing party.

5) Employer will make two copies of all Employee's medical records in its possession, including medical providers' depositions, a written job description and the written physical demands of Employee's job as described in the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles*, put the copies in chronological order by treatment date, starting with the first medical treatment and proceeding to the most recent medical treatment, number the pages consecutively, and put them in a binder. This must be done on or before December 17, 2024. Employer must serve one binder on Employee and one with the Division, with an affidavit verifying the binder contains copies of all medical records in Employer's possession no later than 5:00 PM on December 17, 2024.

6) The binder may be returned for reorganization if not properly Bates stamped and prepared in accordance with this prehearing summary.

7) Not later than 10 days after receipt of the binder, Employee must review the binder to determine if it contains all of Employee's medical records in Employee's possession. If the binder is complete, Employee must file an affidavit with the Division verifying the binder contains copies of all medical records in Employee's possession. If the binder is incomplete, Employee must make two copies of the additional medical records missing from the first binder. Each copy must be put in a separate binder (as described above). One supplemental binder and an affidavit verifying the medical records completeness must be filed with the Board. The remaining supplemental binder must be served upon Employer together with an affidavit verifying that it is identical to the binder filed with the Board. Employee is directed to file with the Division and serve the binder on the opposing party within 10 days of receipt of the initial binder.

8) Any party who receives additional medical records or physicians' depositions after the binders have been prepared and filed with the Division, is directed to make two supplemental binders as described above with copies of the additional records and depositions. Within seven days after receiving the records or depositions, the party must file one supplemental binder with the Division and serve one supplemental binder on opposing party together with an affidavit verifying that it is identical to the binder filed with the Division.

9) The assigned workers' compensation officer will review, prepare, and submit to the SIME physician questions in accordance with 8 AAC 45.092(h) and that include the Division's standard SIME questions addressing causation, whether the work injury aggravated, accelerated,

or combined with a pre-existing condition to produce a temporary or permanent change in the pre-existing condition, medical stability, degree of impairment, functional capacity, and what specific additional treatment, if any, Employee needs.

10) The parties may review their rights under 8 AAC 45.092(j) to question an SIME physician after the parties receive the physician’s report.

11) The parties are advised that a failure to comply with the above orders may result in the SIME going forward notwithstanding a party’s noncompliance.

12) SIME physicians are often located outside of Alaska and long-distance travel may be required. If Employee requires travel accommodations, she must request an accommodation from the Employer. The accommodation request must be accompanied by a letter from Employee’s attending physician in their workers’ compensation case, pursuant to and within the constraints of AS 23.30.095(a) and 8 AAC 45.082(b), detailing the necessary accommodation.

Dated in Fairbanks, Alaska on December 6, 2024.

ALASKA WORKERS’ COMPENSATION BOARD

/s/ John Burns
John Burns, Designated Chair

/s/ Sarah Lefebvre
Sarah Lefebvre, 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

TERESA L DRAKE v. FOUNDATION HEALTH, LLC

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 Teresa Drake, employee / claimant v. Foundation Health, LLC, employer; Alaska National Insurance Co., insurer / defendants; Case No. 202300166; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on December DAY, 2024.

_____/s/_____
Whitney Murphy, Office Assistant II