ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 Juneau, Alaska 99811-5512

JACOB K. WALSH,	)	
	)	
Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201904454
	)	
ANCHORAGE SCHOOL DISTRICT,	)	AWCB Decision No. 24-0070
	)	
Self-insured Employer, Defendant.	)	Filed with AWCB Anchorage, Alaska on December 19, 2024
	)	

Jacob Walsh's (Employee's) request to add a psychiatrist to the parties' stipulated second independent medical evaluation (SIME) was heard on December 17, 2024, in Anchorage, Alaska, a date selected on November 13, 2024. An October 7, 2024 hearing request gave rise to this hearing. Attorney David Grashin appeared by Zoom and represented Employee. Attorney Krista Schwarting appeared and represented the Anchorage School District (Employer). There were no witnesses, and the record closed at the hearing's conclusion on December 17, 2024.

ISSUE

Employee contends the currently stipulated SIME with a neurologist should also include a psychiatrist. He bases this request on an alleged "gap" in the mental-health medical evidence and on Employer's medical evaluator's (EME's) statement referring Employee to a psychiatrist.

Employer contends the parties made a binding stipulation to an SIME with only a neurologist. It objects to adding a psychiatrist, because it will delay case resolution and because its EME

physician only suggested Employee see a psychiatrist so he could get help with his non-work-related mental health issues, to which the EME physician ascribes his chronic headaches.

Shall this decision relieve Employee from his stipulation and add a psychiatrist to the parties' stipulated neurology SIME?

FINDINGS OF FACT

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

1) On March 29, 2019, Employee reportedly "stood up from picking up a backpack and hit head on coat hook." The "skull" was affected, and the injury was a "contusion." (First Report of Injury, March 29, 2019).

2) On October 10, 2019, Dennis Chong, MD, physiatrist, examined Employee for an EME. Employee's main complaint was "constant headaches." He gave Dr. Chong this history:

> He was in his regular occupation as a Preschool Teacher's Assistant. On this day he was in a classroom and assisting students with putting on their jackets. He had one knee on the ground and then stood up. In the process he struck the rear of his head. He is unsure what he struck. He assumed it might have been a shelf but was informed by an investigator later that this may have been a coat hook. He developed immediate frontal headache. He had no lacerations or bleeding to his scalp. He completed his task of assisting the students and escorted them to the school bus. He then returned to the classroom and cleaned up the class, in preparation for the next class. He then was evaluated by the school nurse, who told him that he might have very minor swelling to the scalp. He completed his workday and worked for another week before being seen at a walk-in clinic, as his primary care did not take workers' compensation. He has not returned to work since.

According to Dr. Chong's report, Employee denied photosensitivity indoors, "but with sun." Employee said he may have dizziness but not vertigo, nausea or vomiting. Notably:

> He states that his history of headaches has been mild in the past, occurring approximately once per month and relieved with ibuprofen. He has had this for years.

Employee reported a 20-minute loss-of-consciousness in a pickup truck rollover in 2014. He had several football injuries in middle- and high-school with two or three concussions and at least one with consciousness loss. Around 2009 or 2010, Employee struck his head on a doorframe, with a resultant headache but no consciousness loss. At this examination, Employee was 6'2" tall and

weighed 330 pounds. He started wearing glasses in 2012, "secondary to orbital headaches while working on the computer or reading." Dr. Chong tested and found Employee's distance vision "compromised" on this exam. After reviewing the available medical records, he diagnosed (1) historical concussions with consciousness loss; (2) visual acuity decreased without corrective lenses and historical orbital headaches; (3) sleep apnea diagnosed January 2019; (4) history of ADD [Attention Deficit Disorder] diagnosed in 2014 but not currently medicated; (5) historical anxiety and depression, and currently medicated only for anxiety; (6) chronic morbid obesity; and (7) posttraumatic headache related to the industrial event. Dr. Chong added his causation opinion and further analysis:

> Post-traumatic headache related to the industrial event. At this juncture, he has a variety of other comorbidities, which includes visual acuity decrease without use of corrective lenses, anxiety, untreated ADD, and untreated obstructive sleep apnea, any of which combination is the most likely cause of his headache. This is no longer industrial related.
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> . . . .
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> The work injury was the substantial cause for post-traumatic headache. At this juncture, it would not be. The substantial cause is a variety of other conditions, all of which individually or in combination would better explain the non-migrainous headache. (Chong report, October 10, 2019).

3) Dr. Chong opined that while Employee had many preexisting conditions, the work injury did not aggravate them. He found the mechanism of injury not consistent with a concussion or mild traumatic brain injury (TBI). There was no consciousness loss, no amnesia, no acute confusional state and no transient focal neurological changes; all are concussion hallmarks. Dr. Chong further opined that Employee needed no further industrially-related medical treatment. Treatment was completed by September 2019 when Employee had no response to his Botox injections. He needed no further diagnostic testing. Dr. Chong stated Employee's subjective complaints outweighed objective findings because there was no indoor photosensitivity, or phonosensitivity or ataxia during his evaluation. In his opinion, Employee's work-injury was resolved without any work restrictions or permanent impairment. (Chong report, October 10, 2019).

4) On November 1, 2019, in a document dated October 28, 2019, Employer denied Employee's right to benefits based on Dr. Chong's EME report. (Controversion Notice, October 28, 2019).

5) On November 25, 2019, in a document dated November 14, 2019, Employee claimed temporary total, temporary partial, and permanent total disability (TTD, TPD, PTD) benefits, permanent partial impairment (PPI) benefits, an unfair or frivolous controversion, medical and related transportation costs, attorney fees and costs, a penalty for late-paid compensation, and interest. Employee stated:

> Head trauma/mild TBI. Employee stood up from helping student and struck back of head on shelf/coat rack. Back of head for initial injury but main injured area was frontal top of brain/head.
>
> I was controverted based on IME report. My benefits were terminated before being released by doctor. I disagree with the IME due to inconsistencies found in his report. (Claim for Workers' Compensation Benefits, November 14, 2019).

6) On December 29, 2019, Franklin Ellenson, MD, neurologist and Employee's attending physician, reviewed Dr. Chong's EME report and answered questions from Employee's attorney. He recommended additional Botox injections, Aimovig, a Prednisone taper and a "lumbar puncture." Dr. Ellenson opined that Employee's March 29, 2019 work-injury was the substantial cause of his disability and need for treatment, stating, "Jacob's symptoms were not present before and only began after the injury." He added, "Until Jacob's headaches are better controlled he is not able to return to work." (Ellenson responses, December 29, 2019).

7) On January 10, 2020, Employee petitioned for an SIME. The associated SIME form raised SIME issues including causation, compensability, treatment and medical stability; it listed no non-SIME issues. Only Grashin signed this form. (Petition, January 10, 2020).

8) On January 31, 2020, Employer opposed Employee's January 10, 2020 SIME petition. It contended there was no significant dispute between Employee's physician and its EME physician to warrant the cost. (Opposition to Employee's January 10, 2020, Petition for Second Independent Medical Evaluation, January 31, 2020).

9) On April 28, 2020, the Board's designee set a July 9, 2020 hearing on Employee's January 10, 2020 SIME petition. (Prehearing Conference Summary, April 28, 2020).

10) The July 9, 2020 hearing was canceled, so the parties could attempt mediation in September 2020. (Agency file: Judicial, Prehearings and Hearings, Hearing tabs, July 9, 2020).

11) The September 30, 2020 mediation did not resolve the case. (Agency file: Judicial tab, September 30, 2020).

12) On May 24, 2021, the parties attended a prehearing conference and stated they were gathering medical records and contemplating settlement through additional mediation. (Prehearing Conference Summary, May 24, 2021).

13) On October 6, 2021, the parties again attempted mediation but did not resolve the case. (Agency file: Judicial tab, October 6, 2021).

14) Apart from unsuccessful settlement attempts, little happened to move this case forward between the canceled July 9, 2020 hearing on Employee's January 10, 2020 SIME petition and Dr. Chong's subsequent EME on July 19, 2023. (Agency file; observations; experience).

15) On July 19, 2023, Dr. Chong saw Employee again and offered additional opinions:

> [Employee] had a preexisting condition of chronic anxiety with associated somatic symptoms, GERD with nausea, and musculoskeletal pain, and these three conditions have appeared to now conflate to result in chronic pain to the head, associated somatic symptoms, and nausea, which appears to now be perpetuated in a different form.
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> This is now likely the substantial cause of [Employee's] current condition. This is separate from the posttraumatic headaches, which should have resolved by approximately half a year from the industrial event.
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> . . . I recommend he undergo a Psychiatric Independent Medical Evaluation. (Chong report, July 19, 2023).

16) On October 18, 2023, Dr. Chong testified by deposition that he is board-certified in physical medicine and rehabilitation. He has seen Employee twice. Employee has a relevant history including headaches to the back of his head, "also known as orbital headaches," and not wearing his corrective lenses. He also has a significant history including anxiety, depression, daily nausea and ADD. The most common cause for orbital headaches, which begin in the back and can circle to the front of the head, is being nearsighted and not wearing corrective lenses. "So the daily stress of trying to see in an unclear manner results in the orbital headaches." When Dr. Chong saw him in 2023, Employee wore dark glasses that were not corrected. He found no significant objective changes between his 2019 and 2023 examinations. In Dr. Chong's opinion, photosensitivity would be expected closer to an injury, usually within one week, rather than later. Post-traumatic headaches causing photosensitivity would expect to resolve within weeks to months; the very worst case may take about one year. The first time Dr. Chong saw Employee in 2019, he was not wearing dark glasses during the examination. That implies that any photosensitivity would have

been resolved by then. Employee's cranial nerve testing and physical examination was completely normal. (Deposition of Dennis Chong, MD, October 18, 2023).

17) The International Classification of Headache Disorders, Third Edition, defines post-traumatic headache as a history of trauma of any sort to the head and the complaint of head pain. Employee's work injury with Employer was the substantial cause of only Dr. Chong's diagnosis of "post-traumatic headache." However, in his opinion Employee's post-traumatic headaches "had resolved by the time that [he] had evaluated him" on October 10, 2019. His opinion is based on the "natural history" of post-traumatic headaches. They present "proximate and contemporaneous" to an injury. Dr. Chong identified three post-traumatic headaches classes: (1) migrainous, (2) tension-type, and (3) cervicogenic headaches, meaning concurrent with head and associated neck trauma, so pain actually comes from the neck. Employee's attending physicians diagnosed him with the most common post-traumatic headache classification, migraine-type, and therefore treated him with appropriate anti-migraine drugs. Nevertheless, Employee did not improve by the time Dr. Chong saw him in September 2019. Therefore, after 1.5 years, Employee did not fit any of the three classifications for a typical post-traumatic migraine, tension or cervicogenic headache. In other words, Employee no longer described a headache that was classifiable as a post-traumatic headache and his ongoing symptoms were not consistent with ongoing post-traumatic headaches. (Deposition of Dennis Chong, MD, October 18, 2023).

18) In Dr. Chong's opinion, Employee did not have a concussion when he hit his head at work. Concussions require: (1) loss of consciousness, (2) event amnesia, (3) acute confusional state, and (4) transient neurological loss, meaning the patient had loss of either sensation or motor function. There is no evidence of these elements in Employee's post-injury history in his medical records. Without a concussion, Employee could not have a post-concussion syndrome. Dr. Chong found no objective, physical cause for Employee's head pain. Even a nerve block that would stop numerous sources for various headache types provided no relief for Employee's head pain complaints. Treatment for "cluster headaches" likewise did not improve his symptoms. Therefore, in Dr. Chong's opinion, no further physical treatments are medically necessary or reasonable. Gabapentin is not a typical treatment for headaches. He further opined Employee did not need referrals to major medical centers for further evaluation because he had been seen at the University of Washington Headache Clinic which, in Dr. Chong's opinion, is on par with other major health

centers. Employee has been treated with state-of-the-art migraine medication, all with no improvement. (Deposition of Dennis Chong, MD, October 18, 2023).

19) Dr. Chong said Employee has no physical restrictions on his ability to return to work on a full-time basis at his job at time of injury and other jobs he has held. In his second evaluation, Dr. Chong reviewed additional, pre-injury records and gained "insight" into Employee's situation. In his opinion, "secondary gain" is involved given Employee's "very significant history of anxiety and depression, to the point where it was functionally disabling." In his view:

> So then, he then has an event, which is a bump in the head that is not a concussion, and then he starts complaining of headaches, which, at the time, would be reasonable to accord him a diagnosis of post-traumatic headache.
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> But by the time I saw him half year later in October 2019 . . . it did not, at that point, meet the diagnostic criteria of post-traumatic headache, yet he continued to complain of head pain.
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> He was treated very comprehensively for any possible, and even beyond the possibility of types of headache associated with post-traumatic headache, for which he had no benefit.
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> And he started complaining of new symptoms by the time I saw him nearly four years later, and the symptoms of now having severe photosensitivity, severe aversion to light where he now needed to wear dark shades all the time, indoors, outdoors, and he has to do this so-called desensitization treatment that he had learned about through the lay media or otherwise.
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> So -- and yet, with that complaint, functionally, when I saw him again by this year, 2019 [sic], functionally he was now, for the most part, confined indoors.
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> He did not need to progress in either vocational preparation, either -- that means either returning to school or doing any new learning, he did not need to be outdoors interacting with individuals in a societal manner, so the secondary gain here is that it soothes, very much, his preexisting attention deficit, his anxiety and depression by being indoors and avoiding societal contact.
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> So that very much strongly suggests secondary gain. And being not a psychiatrist, I recommended then that he have an evaluation by a psychiatrist or psychologist to fully clarify his psychological difficulties and challenges. (Deposition of Dennis Chong, MD, October 18, 2023).

20) Dr. Chong noted Employee had no functional benefit from any treatment for the last several years. He opined that on occasion when Employee started a new anti-migraine drug, there was a

short placebo effect during which Employee thought he had slight improvement. But Dr. Chong opined that when these drugs work there is sustained pain relief to the point where there is functional improvement. Employee never had that improvement. By contrast, Dr. Chong said Employee actually worsened between his two evaluations. (Deposition of Dennis Chong, MD, October 18, 2023).

21) Daily nausea is a classic feature of anxiety; medical evaluations found no physical cause for Employee's nausea. In October 2019, Employee reported no nausea to Dr. Chong. Dr. Chong thought it would be "insightful and informative" if Employee saw a psychiatrist. At his first visit with Dr. Chong, Employee's self-reported anxiety score "was on the low side." This supported Dr. Chong's view that Employee's social isolation reduced his anxiety, which further supported his opinion that there is a "contributory secondary gain to his function by the time [Dr. Chong] saw him." There are no tests to confirm existence of a migraine headache. Post-traumatic headaches are an "associative diagnosis," meaning there is a history of an incident involving the head and a person complains of a headache thereafter. For treatment purposes, the physician must determine the classification in which the headache fits. Likewise, photosensitivity is a subjective complaint and is not "testable." Dr. Chong frequently sees patients with headaches. (Deposition of Dennis Chong, MD, October 18, 2023).

22) Dr. Chong administered a depression status test on Employee, and it had improved from his previous examination, which supported Dr. Chong's opinion that with Employee's "volitional, social isolation and avoidance of social stressors," he had improved, which "points towards the secondary gain." In his opinion, Employee does not have a TBI. If he had a TBI, he would improve, and new symptoms would not emerge in a "distant and delayed fashion." Most people see a primary care provider to treat headaches. If Dr. Chong had a patient with non-traumatic headaches, he would send the patient to a neurologist. However, it is within his physical medicine and rehabilitation specialty to treat patients with post-traumatic headaches. (Deposition of Dennis Chong, MD, October 18, 2023).

23) On December 12, 2023, Employee updated his SIME form; it raised the same SIME issues as in his initial form but included Dr. Chong's July 19, 2023 EME opinions. The revised SIME form also raised non-SIME issues, functional capacity and PPI. (SIME form, December 12, 2023).

24) On December 14, 2023, in a document dated December 12, 2023, Employee "renewed" his SIME petition. He stated:

> Related medical records for the original petition [sic] for SIME (Neurologist) were previously [sic] filed with the Board. Medical records for petition for psychiatric SIME is [sic] attached. (Renewed Petition, December 12, 2023).

25) On December 29, 2023, Employer denied an SIME was warranted "at this time" based on Employee's proposed SIME form. It contended Employee had not updated the SIME form with current recommendations and opinions from his physicians. Employer contended the 2019 records upon which Employee relied did not reflect any current disputes because they were too old. It contended he had not obtained opinions from his providers disputing any offered from Dr. Chong. Lastly, while conceding that Dr. Chong recommended a psychiatric evaluation, Employer contended he did not recommend it as a consequence of the work injury. It concluded there was no basis for a psychiatric SIME. Employer did not object specifically to any suggested SIME or non-SIME issue listed. (Answer to Petition for an SIME, December 29, 2023).

26) On February 6, 2024, at the first prehearing conference in this case since May 27, 2021, the designee set an April 10, 2024 hearing on Employee's December 12, 2023 SIME petition; the issue was, "Necessity of a psychiatrist." Employer "agreed that a neurological SIME is necessary," but did not agree a psychiatrist was required. It did not object to any proposed SIME or non-SIME issue on the updated form. (Prehearing Conference Summary, February 6, 2024).

27) The parties' February 6, 2024 prehearing conference agreement was an oral stipulation for a neurology SIME in accordance with Employee's December 12, 2023 SIME form. (Judgment).

28) On March 1, 2024, at Employer's request, the parties agreed to vacate the April 10, 2024 hearing date and rescheduled the hearing on Employee's psychiatrist-SIME issue for April 3, 2024. (Prehearing Conference Summary, March 1, 2024).

29) On March 8, 2024, Employee withdrew his psychiatric SIME petition and hearing request, and asked the Workers' Compensation Division (Division) to cancel the April 3, 2024 hearing on that petition. (Notice of Withdrawal of Petition for an SIME and ARH, March 8, 2024).

30) On March 14, 2024, in accordance with Employee's request, the Division canceled the April 3, 2024 hearing. (Agency file: Judicial tab, March 14, 2024).

31) On May 1, 2024, the parties at a prehearing conference "agreed to proceed forward with a Neurological" SIME. Employee's counsel stated he was still gathering discovery on the need for a "psychological SIME." The parties stipulated, and the Board's designee ordered, the parties to begin providing records for the SIME. (Prehearing Conference Summary, May 1, 2024).

32) On August 5, 2024, Schwarting wrote to the Board's designee noting the parties previously stipulated to a neurological SIME. She added, "Mr. Grashin and I respectfully request that the Board proceed with scheduling this evaluation." (Schwarting letter, August 5, 2024).

33) Employee's agency file does not include any objection to Schwarting's August 5, 2024 letter from Employee. (Agency file).

34) On October 7, 2024, Employee by email, in his petition dated December 12, 2023, and in a "rescission" document, rescinded his March 8, 2024 withdrawal of his SIME petition and its related hearing request. He also "renewed" his December 12, 2023 petition for a psychiatric physician to participate in the SIME, and "renewed" his associated hearing request. In other words, Employee re-filed his December 12, 2023 petition. He identified medical disputes in causation, compensability, treatment and medical stability. He also requested an SIME address non-SIME issues including functional capacity and PPI. (Rescission of Notice of Withdrawal of Petition for an SIME and ARH, October 7, 2024; Renewed Petition and SIME form, December 12, 2023).

35) On October 10, 2024, neither Employee nor his attorney attended a scheduled prehearing conference. Schwarting advised that the parties had previously agreed to a neurological SIME, but since that agreement, "Employee has requested a SIME panel consisting of a Neurologist and a Psychologist." Employer would not agree to adding a physician to the agreed neurologist SIME. The designee decided to reconvene the prehearing conference so Employee could attend, and then schedule a hearing. (Prehearing Conference Summary, October 10, 2024).

36) On October 25, 2024, Employer answered Employee's renewed petition and opposed the "unilateral attempt to stop the neurological SIME from proceeding." It contended the parties "stipulated to a neurological SIME, which has the force of a Board order, and assert that it should proceed promptly." (Answer, October 25, 2024).

37) On November 13, 2024, the parties attended a prehearing conference at which the designee identified issues for a scheduled December 17, 2024 hearing, including the "Neurology vs. Neurology/Psychology" SIME issue, and attorney fees and costs. Although Employer agreed to move forward with the neurology SIME, it did not agree with adding another physician. (Prehearing Conference Summary, November 13, 2024).

38) Employee is 34 years old. His pre-injury medical history includes anxiety, depression, irritable bowel syndrome resulting from anxiety, and right-shoulder chronic pain or "pre-arthritis." He takes prescription medication for these conditions. Employee had a pre-injury history

including concussions. His first concussion was around 1998, when he fell backwards from a rocking chair onto bricks; he went to the emergency room. Employee's second and third concussions happened around 2002, which he incurred playing football; he went to the emergency room for those as well, and the team physician treated him with Tylenol and Motrin. His fourth concussion happened around 2005 while playing football; he saw the same physician who told him to "wait it out and see if it got better." Employee's fifth concussion occurred around 2008, when he was in an all-terrain vehicle (ATV) accident where he was thrown from the vehicle; he spent 12 hours in the emergency room and received Tylenol and Motrin. His sixth concussion happened around 2015 when he had a coughing fit, lost consciousness and rolled his truck over; Providence Hospital emergency room saw him and performed a computerized tomography (CT) scan and other diagnostics. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

39) Prior to Employee's work injury, his team physician told him he may have attention deficit disorder (ADD). Employee has had bilateral shoulder surgeries and right-knee surgery. His right-shoulder surgery resulted from the ATV accident, while the knee surgery was from a football injury. A fall occasioned the left-shoulder surgery. Employee had sleeping difficulties before his work injury; he attributed this to anxiety at night "in his sleep." He had no issues with his "energy level." Prior to his work injury with Employer, Employee said he did not have headaches on a regular basis. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

40) Employee began working as a personal care attendant (PCA) for two disabled people around 2011. Thereafter, he moved to Alaska and began working for Employer as a noon-duty and a temporary school assistant. Between 2016 and 2018, before he moved into his job at the time he was injured, Employee was a dog-walker, then a mobile-manager for Employer in a cafeteria, and a cafeteria manager for Employer. Lastly, Employee moved into a teaching assistant position with Employer, which was more in line with his training and goals. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

41) Employee testified that on the injury date, he was helping a child put on his winter clothing and was bending down. He was down on one knee and "stood up with force and hit the back top of [his] head on the coat shelf/coat rack combination." Employee explained that he "had pushed pretty hard" with his legs almost "a jumping manner without the physical lift" but with about the same exertion as if he was jumping from a squat and "enough that it made a loud bang" when he hit. The teacher he was assisting heard the bang and saw that he "was not all there," and came to

check on him. Employee reported his injury the same day. He was able to finish the day but was "lightheaded, dizzy with light nausea" and a "3-4/10" level "headache-wise at that point." Immediately after he hit his head, his headache was "6 or 7," but "nulled down a little bit" thereafter. He felt the same the next day, although his headache was slightly worse. The pain he described was in the "front, top" of his head. He had an abrasion and a "goose egg on the back of [his] head." (Videoconference Deposition of Jacob Walsh, October 27, 2023).

42) On the injury date, Employee saw the school nurse and saw another provider a few days later. He reported "head pain or headache, light sensitivity at that point, and noise sensitivity." Employee was having "vision issues, motion sickness." He was vomiting. Employee's physician put him on immediate work restriction and told him to "wait and give it time." By the time Employee saw Dr. Ellenson, he had the same pain in the same spot, but it had increased to level "8 or 9" at times; his other symptoms were the same. Dr. Ellenson told him to go to a dark room when the pain got intense, and prescribed amitriptyline and metoclopramide. To Employee's knowledge, Dr. Ellenson has never released him to return to work. Through the end of October 2019, his symptoms decreased slightly; *i.e.*, it took a little longer for the sensitivities to increase his pain to level 8 or 9. Dr. Ellenson tried Botox and other injected medications, and ganglion nerve blocks, with only "potential slight improvement" not reaching even "two percent." He referred Employee to the University of Washington Headache Clinic. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

43) Physicians at the University of Washington started Employee on different medications and supplements, as well as yoga, which did not help. He returned to Dr. Ellenson. Employee also tried some "new-age" migraine-related medications. He had an adverse reaction to one infusion. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

44) Employee does low-intensity yoga, massage, basic stretching and takes Tylenol along with his prescription medications. When he feels a migraine coming on, he will drink a partial "Coke" and immediately go to a dark, quiet room. He wears noise-canceling headphones everywhere he goes and wears sunglasses. Employee wakes up with his pain between a "1 and a 3." Whenever he hears a noise, Employee will start to get pain, which begins in the "front top portion of [his] brain." Employee described it as "one direct pain" with some dizziness. If he moves quickly throughout the day, he will get motion sickness. Typically, Employee will have "fits" of nausea, if not having it "all day." His pain scale goes from "1 to 3 to 8 -- 7 to 8" if there is enough stimuli,

with some vertigo and tunnel vision. Employee also described word-finding issues. He has the symptoms "every day." (Videoconference Deposition of Jacob Walsh, October 27, 2023).

45) Dr. Ellenson wanted to send him to Mayo Clinic; other than that, he had no further treatment suggestions. Because Employee is on Medicaid, he is a "cash patient" and does not have funds to go to Mayo Clinic. As of his deposition, he was taking gabapentin, memantine, odextrom, Ubrelvy and Nutec. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

46) Employee thinks his preexisting anxiety and depression have increased because of his work-injury because he went from being active and social to "being stuck at home." He requested to return to work with Employer post-injury, but it denied his request given Dr. Ellenson's strict restrictions on what he could do. Otherwise, he has not applied for other jobs or worked anywhere since his injury. He applied for Social Security disability, which as of the deposition date was not decided. Employee thinks he is permanently and totally disabled unless another medication can bring him back "most of the way." He has no limitation on standing, other than prolonged standing given his potential for vertigo. Employee can walk slowly "grandmother" like. He can climb "two, three maybe" stairs but exertion starts to increase pressure and pain in his head. Employee would not be able to crawl, or reach down and deal with children. He would have a "severe issue" with lifting something from floor to table-height because that gives him immediate head pain and dizziness with potential loss-of-consciousness. Employee tried to pick up a box one time from the ground and almost passed out. He could possibly lift from shoulder-height up, but any time he does any exertion beyond "basic" he gets increased "aura pain -- pain, and then kind of an aura with it." (Videoconference Deposition of Jacob Walsh, October 27, 2023).

47) Employee described a typical day for him as follows:

> So currently a typical day for me is waking up, I take about a half hour after I get up, I sit up and just slowly transition to the sitting up because that can be hit or miss about how -- if I start with an initial motion sickness or vertigo.
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> I then get up and -- and slowly walk to the restroom and do your morning restroom break as -- as we do. And then I go back to the room. Or in some cases if the house is quiet, I will start -- I will head out to the living room and sit -- try to sit down in the living room and do basic fitness.
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> I will look on my phone a little bit on -- on fully dark mode and try to get a little exposure. And then I go and -- and get a drink of water or -- or something for the morning. And then morning meds.

> And then I typically am either in the dark room in the -- in the living room, or if the -- if my fiancée needs to be working or has meetings then once I start to feel that pain coming on beyond a 3 or a 4 I head back to our -- our bedroom where it's kind of my safe place. It is a little darker and easier.
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> And then most of the time it's mostly reading for a little bit if I can. Most everything is in, let's say, 30-minute segments. Sometimes I am able to watch TV quietly for 40, 45 minutes before I start to feel pain. And then each time I feel that spike I -- I push it a little and then I immediately go and -- and -- you know, headphones on, and -- and do some things to try to get back to a -- a good number, safe place again.
>
> And that's typic -- typically would be the cycle all day long is just trying to get enough exposure but not too much to make myself severely ill, and then dinner and bed. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

48) Employee's fiancée lives with him. His cooking ability is limited "due to the smell"; smells make him nauseous. His fiancée does all the cooking. One time he was toileting and a loud noise like a phone call set him off and he needed help getting back to bed, fearing that nausea and vertigo would make it difficult for him to walk. He only showers when his fiancée is home. He "rarely" leaves home, but his fiancée pushes him about once weekly to pick up groceries with her. Employee rarely drives; perhaps once every six months. He can no longer participate in his pre-injury hobbies or sporting events. The "light and noise sensitivity" as well as increased activity prevent him from enjoying his previous pastimes. Post-injury, Employee tried to go to a party with his fiancée and some friends, but they had to leave within 30 to 40 minutes. (Videoconference Deposition of Jacob Walsh, October 27, 2023).

49) On December 10, 2024, Employer in its brief noted that Dr. Chong testified by deposition that when he recommended a psychiatric evaluation, it was not for the work injury. To Employer's knowledge, Employee has not seen a mental-health provider post-injury. It contended the parties stipulated to an SIME with a neurologist, which is the same specialty as attending physician Dr. Ellenson. Employer contended Employee stipulated to an SIME and this is the same as a "Board order." It contended Employee has not shown "good cause" under the regulations to be relieved from his stipulation. Employer said the Board should not give Employee an additional medical opinion at its expense, especially where there are no gaps in the medical record. Employer has not scheduled and does not intend to schedule a psychiatric EME. It argued Employee interminably delayed this case and the Board should move it forward as the parties previously agreed. Employer

further contended that since Employee's attorney has not obtained a benefit for him, the Board should not order an SIME beyond the agreed-upon neurologist, and because Employee has delayed the matter, the Board should award him no attorney fees or costs. It seeks an order enforcing the parties' previous neurology-SIME stipulation and denying his request to add a psychiatrist. (Employer's Hearing Brief, December 10, 2024).

50) On December 11, 2024, Employee in his brief suggested the Board order an SIME to include a neurologist and a psychiatrist. He noted Dr. Chong in his EME report recommended a psychiatric evaluation. Employee stated there is a significant medical dispute between his attending physician and Dr. Chong, Employer's EME. He further contended there is a "gap" in the medical evidence because there are no medical opinions from a psychologist or psychiatrist. Therefore, Employee argued if an SIME is not ordered, this leaves him unable to obtain any benefits "prior to an eventual merits hearing, mediation or settlement." He contended this is contrary to the legislature's intent. Employee contended this is a simple issue and adding a psychiatric physician to an SIME panel will help the Board "and the parties" decide this stagnant case. (Employee's Hearing Brief -- Petition for SIME & Attorney's fees, December 11, 2024).

51) At hearing on December 17, 2024, the parties resolved their differences over recently filed medical records, rendering Employer's objection to them moot. (Record).

52) At hearing, the parties reiterated their arguments and citations from their respective hearing briefs. Employee added that having an SIME panel including a psychiatrist now, would prevent him from having to travel twice for an SIME, given his condition. Employer added that Grashin failed to file his attorney fee affidavit and itemization as required by regulation. Therefore, it objected to his attorney fee and cost request on this additional ground. When asked why he had not timely filed his attorney fee petition, Grashin stated he did not want to spend the hours it would have taken to do it before he found out whether he had prevailed at hearing. When asked if there was "good cause" for the Board to relieve him of his prior stipulation to a neurological SIME, Employee stated he had no objection to moving forward with the neurology SIME. However, he stated things had changed since 2019, when Dr. Chong said work was the substantial cause of Employee's post-traumatic headaches, and 2023 when he stated he needed to see a psychiatrist. Employer responded that nothing had changed since the parties stipulated to the neurological SIME. (Record).

53) Five years to accomplish an SIME is unprecedented. It takes Division staff and a physician months to process, arrange for and complete an SIME with a single physician, and longer if more than one physician is on a panel SIME. (Experience; judgment).

PRINCIPLES OF LAW

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

> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .

The Board may base its decision not only on direct testimony and other tangible evidence, but also on its "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 . . . 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 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. *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 does not require it:

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?

AS 23.30.110. Procedure on claims. . . .

> (g) An injured employee claiming . . . compensation shall submit to the physical examination by a duly qualified physician which the board may require. . . .

Under AS 23.30.110(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 opinion would help. An SIME is the Board's physician, and an SIME examination is not intended to benefit the parties or give an injured worker a free examination at an employer's expense. *Bah*.

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000. . . .
>
> (b) If an employer . . . otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Attorney fees have been awarded for obtaining an SIME against an employer's resistance. *Gillion v. The Northwest International*, AWCAC Dec. No. 253 (August 28, 2018), which is precedent, determined an SIME is a benefit to the injured worker.

> **8 AAC 45.050. Pleadings**. . . .
> . . . .
>
> (f) **For stipulations under this subsection**,
> . . . .
>
> (2) stipulations between the parties may be made in writing at any time before the close of the record or may be made orally in the course of a hearing or a prehearing;
> (3) stipulations of fact or to procedures are binding upon the parties named in the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation; . . .
>
> **8 AAC 45.180. Costs and attorney's fees**. . . .
>
> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. . . . An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the

hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee. . . .

. . . .

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

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

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

ANALYSIS

Shall this decision relieve Employee from his stipulation and add a psychiatrist to the parties' stipulated neurology SIME?

This case has moved forward at a snail's pace. On January 10, 2020, Employee petitioned for an SIME. AS 23.30.095(k). Less than 30 days from now, it will have been an unprecedented five

years since this request, and yet an SIME has still not been accomplished. Procedurally, this case has been anything but "quick" and "efficient." *Rogers & Babler*; AS 23.30.001(1).

There were no prehearing conferences held in this case between May 27, 2021, and February 6, 2024. On February 6, 2024, Employer agreed to a neurological SIME. 8 AAC 45.050(f)(2). But because Employee wanted to add a psychiatrist to the stipulated neurology SIME, and Employer objected, the designee set an April 10, 2024 hearing on Employee's request. That hearing was vacated on Employer's request and replaced with an earlier April 3, 2024 hearing. For reasons not gleaned from the record, eight days after the designee rescheduled the hearing to April 3, 2024, Employee withdrew his psychiatric SIME petition and related hearing request, and the Division canceled the hearing at his urging. On August 5, 2024, the parties jointly asked the designee to move forward on the stipulated neurology SIME. Thereafter on October 7, 2024, Employee rescinded his previous withdrawal of his SIME petition and renewed his request to add a psychiatrist to the SIME, thereby creating a panel. On November 13, 2024, the designee scheduled the instant December 17, 2024 hearing on Employee's request.

It is not clear why Employee flip-flopped on his desire to bring his psychiatric SIME issue to hearing. At this point, the parties are exactly where they were when they stipulated to a neurological SIME on February 6, 2024. Experience shows it will take months for the Division to process, schedule and complete just a neurological SIME. Arranging for a "panel" SIME frequently takes longer. *Rogers & Babler*.

The parties orally stipulated to an neurological SIME at a prehearing conference. 8 AAC 45.050(f)(2). Such stipulations are binding on the parties and have the effect of an order unless there is "good cause" to relieve a party from that stipulation. 8 AAC 45.050(f)(3). Employee seeks relief from the stipulation; that is the real issue in dispute here. Neither party is trying to walk-back their agreement for an neurology SIME. Therefore, cases Employee cited to support his position are not particularly helpful.

Rather, Employee seeks to alter the stipulation by adding a psychiatrist. When asked what "good cause" he relied on for this proposed relief, Employee contended that Dr. Chong in 2019 said work

was the substantial cause of Employee's headaches, but in 2023, Dr. Chong said Employee needed to see a psychiatrist. But in both instances, Dr. Chong opined that work was no longer the substantial cause of Employee's headaches or his need to treat them; his reports and deposition give his detailed analyses as support for his opinions. Moreover, Dr. Chong testified that his suggestion Employee see a psychiatrist was not for his work-related injury, but was recommended to provide useful information to treat Employee's underlying mental health conditions, which Dr. Chong had gleaned from Employee's medical records. In his view, these issues as they affect "secondary gain," are the substantial cause of Employee's ongoing symptoms. At this point, there is medical evidence already in this file supporting both parties' positions; their SIME stipulation suggests that both parties agreed the three *Bah* requirements have been met. At this point, there is no "gap" in the medical evidence; there are simply over-ripe medical disputes. AS 23.30.110(g). Parties have a right to stipulate to an SIME, and they have done so here. 8 AAC 45.050(f).

Given the significant, unprecedented delay in obtaining an SIME in this case, Employee's explanation does not constitute "good cause" to alter the stipulation or relieve him from its terms. An EME physician and an attending physician have offered their opinions, which provide a basis for the stipulated SIME. Employee's attending physicians have both been neurologists, and a neurology SIME is therefore appropriate, and the parties have so stipulated. AS 23.30.095(k). It may be that a neurology SIME will resolve the primary causation issue, without assistance from a psychiatrist. If so, the single-physician SIME will be a more "reasonable cost" to Employer than a panel and will result in the SIME occurring more "quickly" and "efficiently." AS 23.30.001(1); *Rogers & Babler*. Therefore, Employee's request for relief from his stipulation, and to add a psychiatrist to the stipulated neurology SIME, will be denied.

Employee also requests attorney fees and costs related to the SIME issue. AS 23.30.145. He requested an SIME on January 10, 2020. Employer opposed that request and resisted an SIME altogether until February 6, 2024, when it stipulated to one with a neurologist. Alaska Workers' Compensation Appeals Commission precedent holds that if an injured worker obtains an SIME over an employer's objection, his attorney is entitled to associated attorney fees and costs. *Gillion*. By resisting and then stipulating to the SIME, Employer put Employee's attorney in a position to obtain attorney fees and costs on this SIME issue.

However, regardless of whether Employee seeks attorney fees under AS 23.30.145(a) or (b), his attorney still had a duty to file and serve a verified affidavit itemizing the hours expended on the SIME issue, at least "three working days before the hearing," and an itemized costs bill. 8 AAC 45.180(b), (d)(1), (f). Grashin admittedly did not file an attorney fee affidavit or cost bill itemization. When asked at hearing why he did not, Grashin said he did not want to spend hours creating it unless he actually prevailed on this SIME issue. That reasoning is inadequate to waive this procedural requirement because waiver may not be employed simply to excuse Employee's attorney from "failing to comply with the requirements of law" or to permit him "to disregard the requirements of law," which is what he did in this instance. 8 AAC 45.195.

Therefore, if Employee seeks attorney fees under §145(a), this decision must "deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee." Alternately, if he seeks attorney fees under §145(b), he has waived his right to "recover a reasonable fee in excess of the statutory minimum fee," unless there is "good cause" to excuse his failure to comply with the applicable regulation. Not wanting to take the time to compile the required evidence to support a request for actual attorney fees and costs related to successfully obtaining a neurology SIME over Employer's initial objection, does not constitute "good cause" for failure to comply with the regulation. 8 AAC 45.180(d); 8 AAC 45.195.

Thus, under either statutory provision, Employee's attorney is entitled to only statutory minimum attorney fees on the value of the neurology SIME, which he successfully obtained against Employer's resistance. This statutory minimum attorney fee would include the value of the physician's charges for the examination and related report writing, as well as any SIME travel and lodging costs for Employee. Deposing the SIME physician or calling him or her as a witness at hearing, or charges the physician may incur responding to post-SIME questions, are all post-SIME actions taken independent of the SIME itself. Consequently, Employer will not be required to pay Employee statutory minimum attorney fees on any such post-SIME-related events.

The designee will exercise discretion to include in the Division's letter to the selected SIME physician the designee's standard SIME questions for the issues listed below. As the parties stipulated to the neurology SIME after Employee amended his SIME form on December 12, 2023,

and Employer did not object to the SIME or non-SIME issues listed thereon, the designee will include the following issues for the neurology SIME physician's consideration: causation, compensability, treatment, medical stability, functional capacity and PPI. The designee will be directed to move this case forward to an SIME promptly; this decision and order replaces any necessity for Schwarting to sign the December 12, 2023 SIME form.

CONCLUSION OF LAW

This decision will not relieve Employee from his stipulation and add a psychiatrist to the parties' stipulated neurology SIME.

ORDER

1) Employee's request for relief from his stipulation and his request to add a psychiatrist to the parties' stipulated neurology SIME is denied.
2) Employee's request for SIME-related attorney fees and costs is granted in part. Employer is ordered to pay Employee's attorney statutory minimum attorney fees on the value (*i.e.*, cost) of the neurology SIME, limited to the physician's examination and report charges, as well as any SIME travel and lodging for Employee to attend the SIME.
3) The designee will include the designee's standard questions given the listed issues.
4) This decision and order replaces any necessity for Schwarting to sign the December 12, 2023 SIME form.
5) The designee is directed to schedule and hold a prehearing conference in this case as soon as possible and to move this SIME forward promptly in accordance with this decision and order.

Dated in Anchorage, Alaska on December 19, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Marc Stemp, Member

/s/
Pam Cline, 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 Jacob K. Walsh, employee / claimant v. Anchorage School District, employer; self-insured / defendants; Case No. 201904454; 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 December 19, 2024.

/s/
Rochelle Comer, Workers Compensation Technician