

Alaska Workers' Compensation Appeals Commission

Oumar P. Bah,
Appellant,

vs.

Trident Seafoods Corp. and Liberty
Northwest Insurance Corp.,
Appellees.

Final Decision

Decision No. 073 February 27, 2008

AWCAC Appeal No. 07-027

AWCB Decision No. 07-0134

AWCB Case No. 200510402

Appeal from Alaska Workers' Compensation Board Decision No. 07-0134, issued on May 23, 2007, by the southcentral panel at Anchorage, Alaska, Janel Wright, Designated Chair, Janet Waldron, Member for Industry.¹

Appearances: Oumar P. Bah, *pro se*, appellant. Nina Mitchell, Holmes, Weddle & Barcott, P.C., for appellees, Trident Seafoods Corp. and Liberty Northwest Insurance Corp.²

This decision has been edited to conform to technical standards for publication.

Commissioners: John Giuchici, Stephen Hagedorn, Kristin Knudsen, Chair.

By: Stephen Hagedorn, Appeals Commissioner.

This appeal concerns the board's decision denying the employee, Oumar P. Bah, a board-ordered Second Independent Medical Evaluation ("SIME"). The board found that there was no qualifying medical dispute under AS 23.30.095(k) and no significant gap in the medical evidence under AS 23.30.110(g). We conclude that the board had substantial evidence to support its findings that the conditions required by AS 23.30.095(k) and AS 23.30.110(g) were not met. Therefore, we conclude that the board did not abuse its discretion by denying Bah's request for an SIME.

¹ AS 23.30.005(f) states: "Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board."

² Both the appellant Oumar Bah and the appellees' attorney appeared telephonically for oral argument before the commission.

1. Factual background.

Bah, at age 59, worked on a fish-processing ship for about two weeks for Trident Seafoods before complaining that he could not bear the pain in his back and hands. He filed a notice of injury in Ohio, where he had returned to live, and in Alaska. He had last worked for Trident on July 8, 2005.

Bah first sought treatment from Dr. Steve Parsons and Dr. Robert Stephenson, D.O. After a brief course of physical therapy, Dr. Parsons released Bah to return to work with restrictions imposed from July 13, 2005 to July 22, 2005.³ X-rays taken by Dr. Parsons of Bah's low back were negative.⁴

Dr. Parsons referred Bah to Dr. Stephenson, who after examination, found that Bah's injuries were resolving. Dr. Stephenson indicated that Bah's back was objectively normal and he had no additional recommendations other than to complete the physical therapy and home exercises ordered by Dr. Parsons.⁵

Beginning in November 2005, Bah saw Dr. Whitfield who diagnosed a lumbar strain and ordered facet blocks.⁶ Dr. Whitfield did not believe an MRI was necessary.⁷ By February 22, 2006, Dr. Whitfield found that Bah was medically stable but that he could not return to his former employment.⁸ Both Dr. Parsons and Dr. Whitfield noted that Bah was not fit for the heavy labor required for fish processing before he experienced the pain in his lower back and hands.⁹

The employer chose not to conduct its own medical evaluation under AS 23.30.095(e).

³ R. 0063-0064.

⁴ R. 0065.

⁵ R. 0066-0067.

⁶ R. 0108.

⁷ R. 0108.

⁸ R. 0070-0072.

⁹ R. 0068-0069.

2. *Proceedings before the board.*

We discuss only those proceedings necessary to decide this appeal.¹⁰ Bah petitioned for an SIME under AS 23.30.095(k) in May 2006¹¹ and under AS 23.30.110(g) in January 2007.¹² The employer opposed both petitions.¹³ Bah disagreed with his doctors and wanted the board to order an SIME.¹⁴

The board concluded that “the only conflict in this case lies with the employee’s dissatisfaction with his physicians’ opinions. We find a board-ordered SIME is not appropriate when the purpose is merely to provide the employee with an additional opinion when he is not satisfied with the opinions of his treating physician.”¹⁵ In addition the board found “the record very clear regarding causation, treatment, the employee’s degree of impairment, and his ability to work,” such that an SIME was not necessary to assist the board in evaluating the claim.¹⁶ Consequently, the board denied Bah’s request for an SIME.¹⁷ Bah appeals.

3. *Our standard of review.*

The board’s findings of fact “shall be upheld by the commission if supported by substantial evidence in light of the whole record.”¹⁸ Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented to the commission.¹⁹ We do not address other issues that

¹⁰ Bah filed three claims, R. 0013, 0015-16, and 0017-18. This decision does not concern the merits of his claims.

¹¹ R. 0024-25.

¹² R. 0034-36.

¹³ R. 0005, 001012, 0038-40.

¹⁴ Tr. 4: 1-3.

¹⁵ *Oumar P. Bah v. Trident Seafoods Corp.*, Alaska Workers’ Comp. Bd. Dec. No. 07-0134, 9 (May 23, 2007) (J. Wright).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ AS 23.30.128(b).

¹⁹ AS 23.30.128(a).

Bah raises concerning his medical care because these issues are outside the scope of this appeal. The commission is required to exercise its independent judgment on questions of law and procedure.²⁰

4. Discussion

The board properly denied Bah's request for an SIME under AS 23.30.095(k) because of the lack of a qualifying medical dispute and under AS 23.30.110(g) because of the lack of a significant gap in the medical evidence necessary to resolve the dispute before the board.

AS 23.30.095(k) provides in relevant part:

In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted.

As we stated in *Smith v. Anchorage School District*, "[t]he statute clearly conditions the employee's right to an SIME ... upon the existence of a medical dispute between the physicians for the employee and the employer."²¹ Moreover, the board would need to find that such a dispute is significant or relevant to a pending claim or petition and that an SIME would help the board resolve the dispute. Here, the employer did not conduct an independent medical evaluation. Instead, the employer relied on the reports of the employee's physicians. The opinions of the employee's physicians are not opposed by an employer medical evaluation. In the absence of opposing medical opinions between employer and employee physicians, there cannot be a medical dispute. Therefore, the board properly found that there was no qualifying medical dispute.

²⁰ AS 23.30.128(b).

²¹ Alaska Workers' Comp. App. Comm'n Dec. No. 050, 8 (Jan. 25, 2007). Although *Smith* dealt with a version of AS 23.30.095(k) that has since been amended by the Legislature, the statutory changes have not altered the requirement of a medical dispute "between the employee's attending physician and the employer's independent medical evaluation."

Under AS 23.30.110(g),²² the board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. In Bah's case, the board found "the record very clear regarding causation, treatment, the employee's degree of impairment, and his ability to work." We conclude that substantial evidence supports this finding. The record reflects that the employee's three physicians were largely in agreement that Bah's back was improving and that he could work in jobs not requiring heavy labor. Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in the evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board.

Moreover, we note that the purpose of ordering an SIME under either AS 23.30.095(k) or AS 23.30.110(g) is to assist the board, not to give employees an additional medical opinion at the expense of the employer when they disagree with their own physicians. "[T]he SIME physician is the *board's expert*,"²³ not the employee's or employer's expert. As we observed in *Smith*, an employee who is dissatisfied with his doctor's treatment and opinions may try to change doctors.²⁴ In Bah's case,

²² AS 23.30.110(g) states in part that "[a]n injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require."

²³ *Olafson v. State, Dep't of Trans. & Pub. Facilities*, Alaska Workers' Comp. App. Comm'n Dec. No. 061, 23 (Oct. 25, 2007).

²⁴ AS 23.30.095(a) provides in part:

[T]he injured employee may designate a licensed physician to provide all medical care and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians.

Dr. Whitfield has declined to treat him any further.²⁵

5. Conclusion

There is substantial evidence to support the board's finding that no qualifying medical dispute would be resolved by the introduction of an SIME opinion. Furthermore, there is substantial evidence in the record to support the board's finding that the medical evidence was clear and understandable, and an SIME would not be helpful in ascertaining the rights of the parties. Therefore, we agree that the board did not abuse its discretion in denying Bah's request for an SIME and we AFFIRM the board's decision and return the record to the board to proceed on Bah's pending claims.

Date: 27 Feb. 2008

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

John Giuchici, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission AFFIRMED the board's decision denying Oumar P. Bah's petition for a Second Independent Medical Examination. The appeals commission's decision ends all administrative proceedings on Mr. Bah's petition, but it does not end Mr. Bah's workers' compensation case. It does not affect his claims for workers' compensation. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision is distributed, look at the Certificate of Distribution box on the last page.

²⁵ R. 0178-79. A physician's refusal to treat is grounds to change physicians under 8 AAC 45.082(c)(4)(B). In any case, Bah's statements in oral argument indicate he moved from Ohio to Maryland. It is anticipated that he will inform the adjuster and the board, for purposes of AS 23.30.095(a), the name of his attending physician in Maryland. A change of physician required by a move in residence of greater than 50 miles is a substitution, not a change. 8 AAC 45.082(c)(4)(A).

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. Because this is not a final decision on the merits of the workers' compensation claim, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. If you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision is distributed.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier.

If you wish to appeal this decision to the Alaska Supreme Court, or petition the Supreme Court for other review, you should contact the Alaska Appellate Courts **immediately**:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Alaska Workers' Compensation Appeals Commission's Decision No. 073, the final decision in the appeal of Oumar P. Bah vs. Trident Seafoods Corp. and Liberty Northwest Insurance Corp., AWCAC Appeal No. 07-027, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 27th day of February, 20 08.

Signed
L. Beard, Appeals Commission Clerk

<u>Certificate of Distribution</u>	
I certify that a copy of this Final Decision in AWCAC Appeal No. 07-027 was mailed on <u>2/27/08</u> to Oumar P. Bah (certified) & N. Mitchell at their addresses of record and faxed to Mitchell, Director WCD, & AWCB Appeals Clerk.	
<u>L. Beard</u>	<u>2/27/08</u>
L. Beard, Appeals Commission Clerk	Date