

Alaska Workers' Compensation Appeals Commission

Javier J. Sernas,
Appellant,

Final Decision

Decision No. 278 June 25, 2020

vs.

Juneau School District and City and
Borough of Juneau,
Appellees.

AWCAC Appeal No. 19-015
AWCB Decision No. 19-0040
AWCB Case No. 201706798

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 19-0040, issued at Juneau, Alaska, on March 28, 2019, by southern panel members Kathryn Setzer, Chair, Bradley Austin, Member for Labor, and Charles Collins, Member for Industry.

Appearances: Christopher D. Peloso, Law Offices of Chris Peloso, for appellant, Javier J. Sernas; Michelle M. Meshke, Meshke Paddock & Budzinski, PC, for appellees, Juneau School District and City and Borough of Juneau.

Commission proceedings: Appeal filed August 15, 2019; briefing completed February 21, 2020; oral argument held March 27, 2020.

Commissioners: Michael J. Notar, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (Board) issued a final decision and order on March 28, 2019, which 1) denied Javier J. Sernas' February 19, 2019, request to continue the March 5, 2019, hearing; and 2) denied Mr. Sernas' January 23, 2019, amended claim for past and continuing medical costs and temporary total disability (TTD) for his bilateral knees, left foot, and left ankle.¹ Mr. Sernas did not attend the hearing on

¹ *Javier J. Sernas v. Juneau School District and City/Borough of Juneau, Alaska Workers' Comp. Bd. Dec. No. 19-0040 (Mar. 28, 2019)(Sernas).*

March 5, 2019, contending he had requested a continuation of the hearing and when he did not hear otherwise, assumed his petition had been granted.

Mr. Sernas filed a notice of appeal with the Alaska Workers' Compensation Appeals Commission (Commission) on August 15, 2019. Appellees, Juneau School District and the City and Borough of Juneau (JSD), filed a motion to dismiss the appeal on August 20, 2019, contending that the appeal was grossly overdue. The Commission Chair relaxed the rules and accepted Mr. Sernas' appeal on September 13, 2019. Oral argument was heard on March 27, 2020. The Commission finds the Board should have provided more direction to Mr. Sernas regarding his request for a continuation of the hearing, and remands the matter for a hearing on the merits of Mr. Sernas' claim.

2. Factual background and proceedings.

Mr. Sernas has a long history of foot and knee pain. On December 1, 1993, Mr. Sernas reported pain in his left foot since October 1993 when he had "a weight strike his left foot on the dorsum" according to Jon A. Reiswig, M.D. Dr. Reiswig concluded Mr. Sernas sustained a fracture to the second metatarsal on his left foot, but he released Mr. Sernas to full -time work.²

On March 7, 1994, Mr. Sernas followed up with Dr. Reiswig, who stated, "There is not a whole lot more that can be done for this residual discomfort. I will, however, try a Lynco orthotic with a metatarsal pad in his shoe to see if this would give him some benefit."³ Mr. Sernas reported continuing pain in his left foot on April 11, 1994, but Dr. Reiswig could detect no difference between the left and right foot, as the X-rays revealed no change from December 1993. He referred Mr. Sernas to Len C. Ceder, M.D., for a second opinion.⁴

Dr. Ceder, on July 18, 1994, examined Mr. Sernas' left foot. Dr. Ceder reviewed Mr. Sernas' April 11, 1994, left foot x-ray and stated it appeared to show factures of the

² R. 1112-14; the Commission takes notice that many of Mr. Sernas' medical records have his last name spelled as Sernaz.

³ R. 1117.

⁴ R. 1119-20.

base of the second and third metatarsals. He recommended Mr. Sernas use orthotics for one month and return in two months.⁵

On April 10, 1995, Mr. Sernas stated if he ran on successive days he experienced irritation in the areas of his left foot fractures. He had minor tenderness to palpitation over the middle metatarsals proximal portion. X-rays revealed consolidated fractures with a dorsal hump on the second metatarsal and no arthritic change in the Lisfranc joint.⁶

Mr. Sernas saw Dr. Joseph Riederer on October 26, 1998, for left knee pain, reporting he picked up a container of potato salad at work and slipped and fell on his left knee primarily, but also on his right knee. Initially Mr. Sernas' left knee was quite swollen. Dr. Riederer ordered an x-ray of Mr. Sernas' left knee.⁷ On October 28, 1998, Mr. Sernas saw Dr. Reiswig, who noted that palpation of Mr. Sernas' knee revealed mild tenderness along the medial joint line, but he also had mild discomfort in both medial compartments. Dr. Reiswig planned to obtain and review the x-ray because of Dr. Riederer's report that there was a question of degenerative change and bipartite patella. Dr. Reiswig released Mr. Sernas to full-time work.⁸

On November 17, 1998, Mr. Sernas reported continuing, but lessening, left knee pain, and he described his knee as locking at times. Mr. Sernas thought his left foot injury caused his knee to be injured. Dr. Reiswig did not see a relationship between his left foot and knee, and diagnosed chronic left foot pain secondary to a previous injury and left knee pain due to a more recent work injury, possibly a torn medial meniscus. Dr. Reiswig recommended a left knee magnetic resonance imaging scan (MRI).⁹ The MRI on November 20, 1998, showed subtle apparent cleft of the mid-lateral meniscus suggesting a small radial tear.¹⁰

5 R. 1124.

6 R. 1130.

7 R. 1131-34.

8 R. 1135-37.

9 R. 1139-40.

10 R. 1142.

On December 23, 1998, Mr. Sernas followed up with Dr. Reiswig for continued left knee pain. Mr. Sernas consistently pointed to the anteromedial aspect of his left knee but his MRI showed no tear of the medial meniscus, only a possible fold in the lateral meniscus. Dr. Reiswig recommended an arthroscopy to make sure Mr. Sernas did not have a torn medial meniscus.¹¹

On January 18, 1999, Mr. Sernas reported his left knee locked up and he had to manipulate it to straighten it out, and his left foot still ached, especially with weather changes and cold.¹² On April 14, 1999, Dr. Ceder performed a left knee arthroscopic partial left lateral meniscectomy.¹³ On May 11, 1999, Mr. Sernas followed up with Dr. Ceder, and reported his left knee was doing much better one month after surgery. However, Mr. Sernas was still having discomfort, especially with attempted jogging. His left foot pain was exacerbated moderately since the surgery, and his left foot was particularly sensitive in the second to third and third to fourth interspaces and somewhat proximally as well. Dr. Ceder injected his left foot for a Morton's neuroma.¹⁴

On June 15, 1999, Mr. Sernas' left knee was still "clunking" two to three times a day. He worked part-time and did not feel he could do more. Dr. Ceder diagnosed mildly hypertrophic scars anteromedial and anterolateral portals, and probable left foot second to third and third to fourth Morton's neuromas. Dr. Ceder discussed surgical excision of the Morton's neuromas.¹⁵

On August 16, 1999, Mr. Sernas followed up with Dr. Ceder. Mr. Sernas was able to work a full eight-hour shift and his pain improved with the last injections, but the pain recurred. Mr. Sernas' left knee was still somewhat sensitive in the anterolateral joint line, and his left foot was hypersensitive over the proximal second and third metatarsals,

¹¹ R. 1144-45.

¹² R. 1147.

¹³ R. 1151-52.

¹⁴ R. 1175.

¹⁵ R. 1177-79.

extending down to mid metatarsals and the metatarsal heads. Dr. Ceder referred Mr. Sernas to John P. Bursell, M.D., for a neurologic evaluation.¹⁶

On August 23, 1999, Dr. Bursell evaluated Mr. Sernas' chronic left foot pain. He fell at work in April of 1999 because left foot pain caused his left leg to give out, and he sustained an injury to his left knee. Mr. Sernas reported pain primarily on the top of his left foot that radiated out to the second and third toes. Dr. Bursell diagnosed posttraumatic left foot pain with unclear etiology after examining Mr. Sernas' left foot and reviewing x-rays taken that day. He recommended a left foot bone scan.¹⁷

On September 3, 1999, Mr. Sernas followed up with Dr. Bursell after the August 30, 1999, bone scan which was normal. Dr. Bursell recommended a reflexology program, fitted him with an orthotic to improve his gait and reduce foot pain, and prescribed Celebrex.¹⁸ On October 1, 1999, Mr. Sernas' foot pain was unchanged, and Dr. Bursell stated there did not appear to be a neuropathic component. He increased Mr. Sernas' Celebrex.¹⁹ On October 15, 1999, Dr. Bursell noted Mr. Sernas' left foot had not shown an improvement symptomatically with rehabilitative efforts. He could not see anything on the bone scan or x-ray studies to correlate with Mr. Sernas' ongoing left foot pain. Mr. Sernas would follow up with Dr. Ceder.²⁰ On December 21, 1999, Dr. Bursell rated a one percent permanent partial impairment (PPI) for Mr. Sernas' left knee.²¹

On April 19, 2000, Mr. Sernas had not noticed any improvement in his left foot pain symptoms with the orthotics. He still had intermittently sharp and severe pain limiting his activities. Mr. Sernas was concerned about his left knee because it was still bothering him. Dr. Bursell referred him to Alan S. Gross, M.D., for an orthopedic

¹⁶ R. 1180-81.

¹⁷ R. 1183-84.

¹⁸ R. 1186-87.

¹⁹ R. 1189.

²⁰ R. 1190-91.

²¹ R. 1205-07.

evaluation of his left knee.²² On April 27, 2000, Dr. Gross evaluated Mr. Sernas' left knee. The left knee MRI revealed an abnormal signal on the anterior cruciate ligament, but it otherwise appeared normal except for some blunting of the lateral meniscus consistent with the previous meniscectomy. Dr. Gross recommended a diagnostic arthroscopy to see if there was a fragment getting caught.²³

On May 5, 2000, Mr. Sernas visited Dr. Bursell and reported he was still having quite a few problems with his left foot pain. He wanted to have his left foot addressed before proceeding with treating his left knee. Dr. Bursell assessed metatarsalgia and stated Mr. Sernas might have a Morton's neuroma.²⁴

On August 21, 2000, Dennis R. Rice, D.P.M., at the University of Washington Medical Center, evaluated Mr. Sernas' left foot, and diagnosed Morton's neuroma, neuralgia in the second intermetatarsal space of the left foot secondary to trauma, and capsulitis or tendinitis to the plantar aspect of the third metatarsal phalangeal joint due to elevation of the second metatarsal. He recommended wider shoes and more rigid orthotics with an accommodative forefoot extension.²⁵

Mr. Sernas, on January 10, 2001, visited Dr. Bursell for his continuing left foot pain. Dr. Bursell could not feel any abnormalities and diagnosed chronic left foot pain following metatarsal fracture. He recommended an orthotic fitting as recommended by Dr. Rice and increased Mr. Sernas' dose of Celebrex.²⁶

On April 25, 2001, Dr. Bursell opined Mr. Sernas' left foot was stable, and his left forefoot pain with no obvious deformity was most likely soft-tissue related. He assessed a zero percent PPI rating for Sernas' left foot.²⁷

22 R. 1220.

23 R. 1223.

24 R. 1225.

25 R. 1237-39.

26 R. 1276.

27 R. 1283-84.

Mr. Sernas began treating with Ahn T. Lam, D.P.M on March 21, 2002. Mr. Sernas continued to see him through June 5, 2002, and Dr. Lam recommended surgery for the foot pain in the second metatarsophalangeal joint.²⁸ On August 9, 2002, Dr. Lam diagnosed a painful left second metatarsal deformity with dorsal nerve entrapment and exostosis secondary to trauma. Dr. Lam excised an entrapped nerve in the dorsal left second metatarsal and resectioned an exostosis from the dorsal left second metatarsal.²⁹

On March 12, 2003, Dr. Bursell noted Mr. Sernas' left foot was doing better after surgery, but he still had bilateral knee pain.³⁰

On June 12, 2006, the Board approved a settlement agreement which settled all benefits for Mr. Sernas' October 27, 1993, left foot work injury, October 6, 1998, bilateral knee injury, and a December 11, 1999, back work injury. Mr. Sernas was represented by counsel at the time of this settlement agreement, which included closure of medical benefits related to the left foot, bilateral knees, and back injuries. The employers, Foodland Supermarket, Inc. and Williams, Inc., provided a Spanish interpreter for Mr. Sernas.³¹

The next medical record of import, is for an emergency room visit by Mr. Sernas on March 3, 2014, for burning right and left foot pain, worse to the left. He reported he slipped on a wet floor at work and landed with all of his weight on the balls of the feet two days prior. X-rays of his right foot revealed no fracture but showed degenerative joint disease. Mr. Sernas was diagnosed with a right foot sprain, right and left foot contusions, and bone spurs, and was restricted from working for two days.³²

On April 4, 2017, Mr. Sernas saw Wendy Smith, PA-C, and reported bilateral foot pain making it difficult for him to do his job. He was concerned he had something wrong with his feet and denied any injury to the area. His pain symptoms were present for the

²⁸ R. 1324-34.

²⁹ R. 1341.

³⁰ R. 1362-63.

³¹ Exc. 40-49.

³² R. 1067-71.

past month and he described the pain as burning. PA-C Smith diagnosed diabetic neuropathy and prescribed Lyrica.³³

On May 18, 2017, Mr. Sernas reported he injured his left ankle at work on May 17, 2017, while vacuuming stairs when he missed a step and rolled his ankle.³⁴ He saw Robert W. Haight, M.D., at Juneau Urgent and Family Care, for constant left foot pain "after slipping on stairs last night at work, inverting his ankle." After reviewing x-rays of Mr. Sernas' left ankle, Dr. Haight diagnosed an acute left ankle sprain as the result of a work injury on May 17, 2017. He restricted Mr. Sernas from work until May 22, 2017, and recommended avoiding kneeling, squatting, jumping, running, and climbing ladders entirely, and prolonged standing. Dr. Haight also recommended Mr. Sernas wear a splint until May 29, 2017.³⁵

On May 22, 2017, Mr. Sernas followed up with Dr. Haight for continuing left foot pain. He went back to work, but had a hard time walking around; Naproxen 500 mg helped. Mr. Sernas' supervisor advised him to go home and see his doctor. Dr. Haight took Mr. Sernas off work until May 29, 2017, when he released Mr. Sernas to work without restrictions.³⁶

On May 31, 2017, Dr. Bursell evaluated Mr. Sernas' left ankle pain upon referral by Dr. Haight. Mr. Sernas filled out a health history form indicating he had left knee surgery in the 1980s. He told Dr. Bursell he twisted his left ankle while vacuuming stairs at work on May 17, 2017. His left ankle had quite a bit of initial swelling, but the ankle pain was not decreasing. Dr. Bursell diagnosed a grade 2 left ankle sprain. He recommended Mr. Sernas wear a CAM walker for two weeks and took him off work for two weeks.³⁷

³³ R. 1077.

³⁴ R. 1.

³⁵ R. 534-37.

³⁶ R. 531-33.

³⁷ R. 553-55.

On June 14, 2017, Mr. Sernas followed up with Dr. Bursell regarding his left foot and ankle injury. He informed Dr. Bursell he had prior left foot pain issues and had some kind of foot surgery, but he was unable to describe the surgery. Dr. Bursell noted a longitudinal scar across the dorsum of Mr. Sernas' left foot and that Mr. Sernas had significant tenderness to palpitation of the dorsal second, third, and fourth metatarsophalangeal joints. X-rays showed no evidence of fracture, no significant degenerative changes, and no evidence of acute pathology. Dr. Bursell stated Mr. Sernas' left ankle was doing well and resolved as expected. However, he was not sure what was causing Mr. Sernas' severe left foot pain. He referred Mr. Sernas to William R. Martin, III, M.D., a foot and ankle specialist.³⁸

On June 27, 2017, Dr. Martin evaluated Mr. Sernas' left mid- and forefoot. Mr. Sernas reported a previous foot surgery many years ago, but was not able to tell Dr. Martin the nature of the surgery, who performed it, or when it occurred. He had a full recovery and was able to carry on with his normal activities of daily life. About a month earlier, Mr. Sernas sustained an inversion-type left ankle injury when he was vacuuming some stairs. The pain was in his midfoot, not in his ankle. After reviewing Mr. Sernas' May 31, 2017, and June 14, 2017, x-rays, Dr. Martin diagnosed moderate midfoot arthritis, especially at the third and, to a lesser extent, at the second tarsometatarsal articulations. He recommended Mr. Sernas continue using his CAM walker and suggested an MRI of Mr. Sernas' midfoot and forefoot.³⁹

Dr. Martin reviewed the July 5, 2017, left foot MRI and stated it revealed continued midfoot arthritis, primarily in the proximal naviculomedial cuneiform articulations and some diffuse dorsal subcutaneous edema from his midfoot and extending into his forefoot. When asked to pinpoint with one finger where his foot hurt, Mr. Sernas pointed to his third metatarsal phalangeal joint. Dr. Martin reviewed the MRI again, but was unable to see any specific pathology in that area. He recommended a corticosteroid injection into Mr. Sernas' third metatarsal phalangeal joint and surrounding tissues.

³⁸ R. 0522.

³⁹ R. 0521.

Mr. Sernas reported immediate pain relief after the injection. Based on the MRI, he released Mr. Sernas to work full duty as of July 17, 2017, and encouraged Mr. Sernas to wean himself from wearing the CAM walker.⁴⁰

On August 17, 2017, Mr. Sernas followed up with Dr. Martin for left foot pain. He stated his symptoms completely alleviated after the injection and he tried to go back to work, but was still having problems. Mr. Sernas requested an injection in his midfoot and for Dr. Martin to prescribe continued use of the CAM walker. Dr. Martin examined Mr. Sernas' left foot and was not able to provoke a pain response with percussion, range of motion, or stressing of his midfoot joints, but noted arthrosis. He recommended physical therapy, deep tissue massage, and gait training, and offered another injection in three months.⁴¹

On August 30, 2017, Mr. Sernas saw PA-C Smith for bilateral foot pain. PA-C Smith diagnosed diabetic neuropathy and depression. She recommended he discontinue Lexapro, start Cymbalta, and restart Lyrica.⁴² On September 6, 2017, Mr. Sernas again saw PA-C Smith for foot pain. Mr. Sernas had been on Gabapentin and Cymbalta. She diagnosed diabetic neuropathy and recommended he continue to take Cymbalta and Gabapentin for pain on the bottoms of his feet.⁴³

Mr. Sernas underwent physical therapy on September 12, 14, 19, 25, 28 and October 3, 2017.⁴⁴ On October 5, 2017, Mr. Sernas reported left knee pain he thought began to worsen about a month earlier. He felt his left knee pain was from his May 2017 work injury, and said that at the time of injury he was more concerned about his left foot and ankle. Mr. Sernas' left foot and knees were hurting and he had more trouble walking due to the pain.⁴⁵

⁴⁰ R. 569.

⁴¹ R. 571.

⁴² R. 1078.

⁴³ R. 1079.

⁴⁴ R. 575-86.

⁴⁵ R. 587-88.

On October 17, 2017, Mr. Sernas visited Dr. Bursell for bilateral knee pain. He reported it began after a fall on stairs at work on May 17, 2017. Mr. Sernas reported he had no problems with knee pain prior to the work injury, and that his left knee pain was worse than his right. Upon examination, Dr. Bursell noted a positive McMurray test, right knee only. He reviewed x-rays of Mr. Sernas' knees which revealed advanced left and moderate right medial joint space narrowing, degenerative changes, and advanced patellofemoral arthrosis with lateralization of the patella. Dr. Bursell recommended a right knee MRI to assess for medial meniscus tear and a left knee replacement.⁴⁶

The Board found that the above medical report was the first report in which Mr. Sernas' medical providers indicated the treatment for his knees was connected to work for JSD in the medical records.⁴⁷

On October 19, 2017, Mr. Sernas asked Dr. Martin to give him a corticosteroid injection in his left foot. He reported a lot of pain and swelling in his left foot. Mr. Sernas had immediate pain relief after the left foot injection. Dr. Martin talked to Mr. Sernas about using a stiff-soled shoe or getting a metal plank in his shoe.⁴⁸ On October 24, 2017, Dr. Bursell evaluated Mr. Sernas' right knee after his October 20, 2017, MRI which showed an oblique tear with flap component along the mid-posterior horn of the lateral meniscus and tri-compartmental degenerative change. He referred Mr. Sernas to Dr. Martin for an orthopedic surgical consultation.⁴⁹

Dr. Martin evaluated, on October 31, 2017, Mr. Sernas' bilateral knee pain. Mr. Sernas reported more left knee pain than right knee pain and stated he wanted to deal with his left knee first. Dr. Martin noted Mr. Sernas recently complained of more right knee pain than left knee pain to Dr. Bursell. He reviewed Mr. Sernas' October 20, 2017, right knee MRI which revealed an oblique tear involving his lateral meniscus, marked attenuation, and irregularity involving the medial meniscus, in addition to the tri-

⁴⁶ R. 593.

⁴⁷ *Sernas* at 11, No. 48.

⁴⁸ R. 597.

⁴⁹ R. 598-600.

compartmental arthritis. After looking at Mr. Sernas' plain films, Dr. Martin noted he had bone on bone arthritis involving his left medial compartment and near bone on bone arthritis involving his right medial compartment. Dr. Martin discussed various treatment options including non-operative treatment and surgical treatment. He recommended a total left knee replacement because he doubted an arthroscopy would give Mr. Sernas sustained relief. Mr. Sernas elected to proceed with the total knee replacement.⁵⁰

On November 28, 2017, Mr. Sernas requested Dr. Martin place him on a "no work status" prior to his surgery. There were questions as to whether Mr. Sernas' primary insurance or workers' compensation would cover his left knee replacement.⁵¹ On December 6, 2017, Dr. Martin cancelled Mr. Sernas' scheduled left knee replacement surgery because Mr. Sernas fell the day before and sustained contusions and scrapes to his knees.⁵²

On December 22, 2017, JSD denied all compensation and medical benefits related to Mr. Sernas' bilateral knees contending a report for injuries to the bilateral knees was not timely under AS 23.30.100, and there was no medical evidence the work injury was the substantial cause of Mr. Sernas' disability or need for treatment for his bilateral knees.⁵³

On January 3, 2018, Mr. Sernas underwent a left knee total arthroplasty for arthritis.⁵⁴ On March 3, 2018, James R. Schwartz, M.D., evaluated Mr. Sernas for an Employer's Medical Evaluation (EME). He opined the May 2017 work injury was the substantial cause of Mr. Sernas' need for medical treatment for his left ankle, but was not the substantial cause of his need for medical treatment for his bilateral knees. Dr. Schwartz diagnosed a left ankle sprain related to the work injury, left subtalar joint arthrosis aggravated by the work injury, and degenerative bilateral knee disease

⁵⁰ R. 602.

⁵¹ R. 603.

⁵² R. 636.

⁵³ Exc. 55.

⁵⁴ R. 644-46.

unrelated to the work injury. He stated Mr. Sernas denied any prior knee injury. Dr. Schwartz concluded the pain in his knees was not related to the work injury because there was no documentation he fell onto his knees at the time of the work injury, and based on the delay in reporting knee pain until October 5, 2017, when he told the physical therapist his knee pain began to worsen a month prior. Mr. Sernas' left ankle was medically stable in October 2017 because his complaints changed from foot and ankle pain to knee pain, and he returned to work. No further medical treatment was recommended for the left ankle. Dr. Schwartz was unable to give a PPI rating because Mr. Sernas had a recent total knee replacement and needed to recover. He placed no restrictions because "Any related ankle restrictions will be overshadowed by restrictions on his knees."⁵⁵

On April 19, 2018, Mr. Sernas followed up with Dr. Martin after the knee replacement on January 3, 2018, asking for another month off from work. Dr. Martin questioned Mr. Sernas regarding his work readiness and inability to return to work, noting he was stable and improving. He questioned Mr. Sernas' motivations regarding his work status and increased his work status from two hours a day to four hours a day for the next month. Dr. Martin stated, "From my standpoint, the patient is taking longer to get back to full duty in [sic] other patients who have had similar operations and other similar circumstances." Dr. Martin recommended Mr. Sernas follow up in one month.⁵⁶

On April 20, 2018, JSD denied all compensation and medical benefits related to Mr. Sernas' bilateral knees, and TTD, temporary partial disability (TPD), medical benefits, and transportation costs related to Mr. Sernas' left ankle as of April 20, 2018, relying on AS 23.30.100 and Dr. Schwartz's EME report.⁵⁷

⁵⁵ R. 474-85.

⁵⁶ R. 1056.

⁵⁷ Exc. 56.

On April 23, 2018, Mr. Sernas filed a claim seeking TTD and medical costs for injuries he sustained to his ankle and knees while vacuuming after missing a step and falling.⁵⁸

On May 14, 2018, JSD denied the claim for TTD and medical benefits and transportation costs as unnecessary, unreasonable, or unrelated to Mr. Sernas' May 17, 2017, work injury. JSD contended Mr. Sernas' claim was barred under AS 23.30.100, and contended Mr. Sernas' work was not the substantial cause of his disability or need for medical treatment for his bilateral knees. JSD relied on Dr. Schwartz's March 3, 2018, EME report to conclude Mr. Sernas' bilateral knee pain was substantially caused by pre-existing degenerative change, Mr. Sernas' left ankle was medically stable as of October 2017, and no further treatment was recommended.⁵⁹

On May 15, 2018, Mr. Sernas saw Dr. Martin for left knee pain. He requested he go back to full duty work with no restrictions. Dr. Martin released him to full duty work with no restrictions and recommended he follow up in six months.⁶⁰

On May 17, 2018, JSD denied all benefits, relying on AS 23.30.100 and Dr. Schwartz's EME report.⁶¹

On May 22, 2018, Mr. Sernas contended his bilateral knee injuries were related to his May 2017 work injury. He was out of work from May 17, 2017, to July 16, 2017, and from November 22, 2017, to May 15, 2018. JSD said it paid TTD from May 17, 2017, to July 16, 2017. The Board designee informed Mr. Sernas of his right to seek an attorney, explained attorneys for injured workers cannot collect a fee of more than \$300.00 total and costs without approval, stated JSD could be ordered to pay for all or part of his attorney's fees and legal costs if he prevailed on his claim, and provided Mr. Sernas with a list of attorneys that had represented injured workers in the past.⁶²

58 Exc. 57.

59 R. 76-77.

60 R. 1059-60.

61 R. 40.

62 Exc. 59-61.

On June 14, 2018, Dr. Martin responded to a letter from JSD's attorney stating he disagreed with Dr. Schwartz's March 3, 2018, EME report because of Dr. Bursell's October 17, 2017, chart note reporting an injury on May 17, 2017.⁶³

On September 7, 2018, Mr. Sernas visited Dr. Martin for left foot pain. He requested a left midfoot corticosteroid injection. Dr. Martin diagnosed midfoot arthrosis and injected a corticosteroid in Mr. Sernas' left midfoot region in the area of maximal tenderness near the tarsometatarsal articulations.⁶⁴

On September 24, 2018, Dr. Martin was deposed.⁶⁵ Mr. Sernas did not appear.⁶⁶ Dr. Martin testified he is a board-certified orthopedic surgeon.⁶⁷ He did not know what the substantial cause of Mr. Sernas' current left foot pain was.⁶⁸ When asked if he knew the potential causes of Mr. Sernas' left knee arthritis, Dr. Martin stated,

I know that he has arthritis, but I can't tell you why he has arthritis. I can't -- again, it's the same thing as we talked about earlier. It can come from inflammatory arthropathy. It can come from wear and tear. It came come from some type of trauma. It can come from any number of causes. Sometimes God just says it's your turn. I don't know why he has it.⁶⁹

He does not agree with Dr. Schwartz's opinion that the work injury is not the substantial cause of Mr. Sernas' need for bilateral knee treatment, because Dr. Bursell's October 17, 2017, note mentioned Mr. Sernas had a fall and had pain in both knees, and "there is no proof one way or another."⁷⁰ Dr. Martin stated he "can't tell you what the cause is or is not of the patient's arthritis. I can only tell you that he has arthritis, and that the patient states that he had no pain in his knees prior to the fall, and after the fall that he does."⁷¹

⁶³ R. 543.

⁶⁴ R. 1398.

⁶⁵ R. 140-175.

⁶⁶ Dr. William Martin Dep., Aug. 24, 2018, at 3:1-3.

⁶⁷ Martin Dep. at 5:4-6.

⁶⁸ *Id.* at 17:2-5.

⁶⁹ *Id.* at 22:1-9.

⁷⁰ *Id.* at 24:22 – 25:6; 25:8-11.

⁷¹ *Id.* at 25:1-6.

He could not give an opinion one way or another on whether or not the fall from May 2017 was the substantial cause of Mr. Sernas' need for total knee replacement surgeries, or whether the May 2017 work injury was the substantial cause for Mr. Sernas' need for left foot treatment.⁷² Dr. Martin thought there will be a time when Mr. Sernas will need a total right knee replacement, but he did not currently have plans to do the knee replacement.⁷³

On September 24, 2018, Mr. Sernas was deposed.⁷⁴ He thought he did not need a Spanish language interpreter. He testified he was vacuuming the stairs with a backpack vacuum cleaner when he missed a step and fell down.⁷⁵ Mr. Sernas twisted his left ankle and his knees were bleeding.⁷⁶ He thought his knee injuries were "blood only" and "no big deal."⁷⁷ Mr. Sernas' knees started bothering him a little bit later.⁷⁸ He tore holes in both knees of the jeans he was wearing.⁷⁹ Mr. Sernas went home and cleaned his knees and he called his boss.⁸⁰ Mr. Sernas cannot read English, so someone at "central office" helped him fill out the occupational injury report on May 18, 2017.⁸¹ The form did not report his knees were hurt.⁸² He did not include his knee injuries because his knees were only bleeding.⁸³ A week later Mr. Sernas went to central office and told them he made a

⁷² Martin Dep. at 26:7-20.

⁷³ *Id.* at 36:5-11.

⁷⁴ R. 88-138.

⁷⁵ Javier Sernas Dep., Sept. 24, 2018, at 16:19 – 17:22.

⁷⁶ Sernas Dep. at 17:7-22.

⁷⁷ *Id.* at 17:7-12.

⁷⁸ *Id.*

⁷⁹ *Id.* 18:21 – 19:1.

⁸⁰ *Id.* at 17:7-12; 18:6-8.

⁸¹ *Id.* at 19:21 – 20:22.

⁸² *Id.* at 20:23 – 21:8.

⁸³ *Id.* at 21:2-8.

mistake not reporting his knee injuries.⁸⁴ He did not tell Urgent Care about his bilateral knee injuries.⁸⁵ When Mr. Sernas worked for another employer in 1993, he broke his left foot when cans of chili fell on it.⁸⁶ Dr. Lam performed the foot surgery and he saw Dr. Bursell for therapy and pain.⁸⁷ The foot pain went away, but it took time.⁸⁸ Mr. Sernas sustained a left knee injury while working for another employer when he slipped on potato salad, and Dr. Schwarting performed surgery with a small hole.⁸⁹ Mr. Sernas had difficulties remembering the date of his prior left knee surgery and asserted he could not remember some dates for being off work.⁹⁰

He did recall settling the prior work injuries.⁹¹ He did not remember telling Dr. Schwartz he never had any knee problems before, but thought maybe he didn't hear Mr. Sernas or understand him, or maybe he started losing his memory.⁹² Mr. Sernas told Dr. Schwartz the same things he stated during his deposition.⁹³ His left ankle still hurts.⁹⁴ Mr. Sernas thinks it is "like you glue a glass together," after it breaks and is glued back together it is "not 100 percent better."⁹⁵ If anything taps it, it is "super easy to go back to damage again."⁹⁶ Mr. Sernas' right knee is still painful. He had a lot of pain the night

⁸⁴ Sernas Dep. at 19:1-6.

⁸⁵ *Id.* at 21:17-19.

⁸⁶ *Id.* at 22:2-12.

⁸⁷ *Id.* at 22:14-15, 22-25.

⁸⁸ *Id.* at 23:1-4.

⁸⁹ *Id.* at 24:18-24; 26:19 – 27:3.

⁹⁰ *Id.* at 26:8-18; 27:4-14.

⁹¹ *Id.* at 28:24 – 29:8.

⁹² *Id.* at 30:13 – 31:1.

⁹³ *Id.*

⁹⁴ *Id.* at 31:12-21.

⁹⁵ *Id.* at 31:16-21.

⁹⁶ *Id.* at 31:22 – 32:2.

before his deposition.⁹⁷ He first told a teacher about his work injury and then his work team.⁹⁸ Mr. Sernas acknowledged there is no medical record of his knees hurting until October because he thought it would go away; but it never went away so he went to Dr. Martin.⁹⁹ He only told central office and Linda Brace his knees hurt. Because the pain did not go away he went to see Dr. Martin.¹⁰⁰

After Mr. Sernas' left knee heals, he wants a right knee replacement because it will get worse.¹⁰¹ When asked if there was any other treatment for his left ankle that Mr. Sernas thought he needed, he said no, only his knees.¹⁰² Mr. Sernas agreed he made a mistake not reporting his knee injuries right away.¹⁰³ He was told he had arthritis, but it never bothered him until after the accident.¹⁰⁴ Mr. Sernas wants his knees fixed.¹⁰⁵ Dr. Martin told him he could not perform the left knee surgery in December because his knee was cut.¹⁰⁶ Mr. Sernas' private health insurance paid for his left knee replacement and afterwards he took both sick leave and annual leave.¹⁰⁷ When JSB did not want to pay, he went to the Board to tell JSB it has to pay for it.¹⁰⁸

On December 10, 2018, Dr. Schwartz provided an addendum EME report. After reviewing additional medical records from 1993 through 2014 and from 2017 and 2018, Dr. Schwartz stated his prior opinions in his March 3, 2018, EME report regarding the

97 Sernas Dep. 32:16-22.

98 *Id.* at 36:12-20.

99 *Id.* at 39:25 – 40:15.

100 *Id.* at 40:16 – 41:24.

101 *Id.* at 44:22-25.

102 *Id.* at 45:12-14.

103 *Id.* at 46:19-25.

104 *Id.*

105 *Id.* at 47:8-14.

106 *Id.* at 48:19-23.

107 *Id.* at 49:12 – 50:20.

108 *Id.* at 50:24-25.

substantial cause of Mr. Sernas' need for medical treatment for his left foot and ankle and bilateral knees had not changed. He opined the substantial cause of Mr. Sernas' need for treatment for midfoot arthritis is the pre-existing midfoot injury and subsequent pathology and surgery. The work injury was a soft tissue injury which would have resolved by three months. Dr. Schwartz opined Mr. Sernas' left knee is medically stable since he returned to work, and no further interventional treatment was proposed. Mr. Sernas' need for a right knee replacement is unrelated to the work injury. Because there was no structural injury identified in Mr. Sernas' left foot other than soft tissue and the left ankle, Mr. Sernas has no ratable impairment for the left foot. Mr. Sernas needed no further medical treatment for his left knee and left ankle and foot, but Mr. Sernas' right knee needed further treatment, including physical therapy, a steroid injection, anti-inflammatories, and a possible knee replacement. However, the work injury was not the substantial cause of his need for right knee medical treatment. Occasional palliative care for Mr. Sernas' left foot and ankle was reasonable and necessary, but treatment was actually for the preexisting condition from the 1993 work injury and would include injections in his foot, repair or replacement of orthotics, and physical therapy.¹⁰⁹

On December 13, 2018, Mr. Sernas requested a hearing on his claim.¹¹⁰

On December 20, 2018, Mr. Sernas saw Dr. Martin for left ankle pain. He reported an increase in pain and swelling in his left ankle aggravated by activities and relieved somewhat by rest. Mr. Sernas denied any history of trauma. He also reported continued pain in his knee, although he stated it improved. An x-ray of Mr. Sernas' left ankle demonstrated some mild to moderate joint space narrowing in the front portion of his ankle. Dr. Martin observed mild synovitis in his left foot and ankle. Mr. Sernas' left knee x-ray demonstrated the implants were intact with some settling of the tibial tray. Dr. Martin talked with Mr. Sernas about having arthritis in his ankle and using

¹⁰⁹ R. 1376-1394.

¹¹⁰ R. 186.

compression stockings to control the synovitis, and recommended observing his knee and increasing his activity levels.¹¹¹

On January 4, 2019, JSD controverted TTD, TPD, PPI, all medical benefits as of April 20, 2018, all benefits related to Mr. Sernas' bilateral knees, and all benefits related to his left foot.¹¹²

On January 23, 2019, Mr. Sernas orally amended his claim to add his left foot as an injured body part from the May 17, 2017, work injury. The parties agreed to schedule an oral hearing on March 5, 2019, to hear Mr. Sernas' April 23, 2018, claim.¹¹³ On January 24, 2019, the Division mailed a summary of the January 23, 2019, prehearing conference and a notice advising the date, time, and place for a hearing to the parties. The proof of service of the prehearing conference summary indicated it was served on Mr. Sernas at his address of record. The proof of service of the March 5, 2019, hearing notice indicated service on Mr. Sernas at his address of record. The Division mailed the copy of the January 23, 2019, prehearing conference summary and the March 5, 2019, hearing notice in the same envelope. The envelope was sent to Mr. Sernas at his address of record by certified mail with a return receipt requested.¹¹⁴

On January 25, 2019, Mr. Sernas reported to Dr. Bursell his left knee pain and swelling, with the pain greatest when he first stands up after sitting. Dr. Bursell recommended Mr. Sernas follow up with Daniel Harrah, M.D., to determine whether there was a problem with his prosthesis.¹¹⁵

On January 26, 2019, the USPS indicated the envelope containing the January 23, 2019, prehearing conference summary and March 5, 2019, hearing notice was picked up.¹¹⁶

¹¹¹ R. 1399.

¹¹² R. 42.

¹¹³ R. 395-98.

¹¹⁴ *Id.*; R. 1425-26.

¹¹⁵ R. 1400.

¹¹⁶ R. 1425-26.

On February 5, 2019, Dr. Harrah evaluated Mr. Sernas' left knee. His knee had moderate effusion and had good extension strength and about a 10 degree extensor lag with no appreciable patellar instability. X-rays of Mr. Sernas' knee on January 25, 2019, show the lateral tibial component is overlapping the fibula and appeared to be facing the proximal tibiofibular joint, and the patella was off of the trochlea and inferiorly displaced. Dr. Harrah inserted a needle in Mr. Sernas' left knee and obtained 44 cc. of slightly cloudy fluid. If the workup for infection was negative, Dr. Harrah thought the most likely diagnosis was at least a partial quadriceps rupture.¹¹⁷

On February 14, 2019, Mr. Sernas' left knee MRI revealed thickening with moderately advanced tendinopathy of the distal quadriceps tendon, interstitial degeneration and longitudinal interstitial tearing of the distal tendon, borderline patella baja, scarring within Hoffa's fat pad, chronic tendinopathy of the infrapatellar tendon, and moderate-sized joint effusion with synovial thickening along the suprapatellar bursa.¹¹⁸

On February 19, 2019, Mr. Sernas spoke with a workers' compensation technician and reported he was having knee surgery the next day. He was worried he was going to lose his job because he did not have any leave, and wanted to know who was going to pay him during his recovery from surgery. The technician tried to explain the Family Medical Leave Act (FMLA) to Mr. Sernas, but he did not seem to understand about FMLA. The technician explained the March 5, 2019, hearing was scheduled to address Mr. Sernas' claim, and suggested he speak to JSD's human resource office about his upcoming surgery and leave. Mr. Sernas requested assistance to file his pre-surgery instructions, which the technician provided. He told the technician he will get an attorney if he loses at hearing. The technician explained Mr. Sernas can seek an attorney "at any time, including now," and provided him a list of attorneys. Mr. Sernas stated he needed more time to get an attorney. The technician explained he could file a petition to request

¹¹⁷ R. 1401.

¹¹⁸ R. 1403-04.

a hearing continuance and assisted Mr. Sernas with the petition form.¹¹⁹ On February 19, 2019, Mr. Sernas requested a hearing continuance stating, "Need to find someone to represent me. Requesting more time to find an attorney."¹²⁰ Mr. Sernas did not file a hearing brief or witness list.¹²¹

At hearing on March 5, 2019, the designated chair attempted to contact Mr. Sernas at his telephone number of record and received a message stating the number was not in service with no option to leave a message. Mr. Sernas failed to appear in person or telephonically.¹²² JSD contended the hearing should proceed in Mr. Sernas' absence. It contended Mr. Sernas did not have surgery on February 20, 2019, and worked the day before the March 5, 2019, hearing.¹²³

Cherish Hansen, the Human Resources Manager for JSD, testified she spoke with Mr. Sernas on February 19, 2019, and he told her he needed left knee surgery the next day and needed to be off work. He did not know how long he was going to be off work and was concerned about his leave. Mr. Sernas worked on March 4, 2019. The first time Mr. Sernas told her he injured his knees was in December 2017 when he came in to talk to her about his knee surgery. Mr. Sernas told her that he had fallen in the shower after taking a "chemical" for pre-op care and he hit his knees and they were bleeding. The next day, the doctor looked at his knees and told him he could not do the surgery and cancelled it. Mr. Sernas returned to full duty work on May 15, 2018, with no restrictions.¹²⁴

Dr. Schwartz testified Mr. Sernas denied any prior left knee injury or surgery during his examination. When he performs an examination, Dr. Schwartz dictates his interpretation of what the injured workers tell him in front of the injured worker while he

¹¹⁹ ICERS Event Entry, Walk-In, February 19, 2019.

¹²⁰ R. 372.

¹²¹ *Sernas* at 21, No. 82.

¹²² *Id.* at 23, No. 83.

¹²³ *Id.*, No. 84.

¹²⁴ Hr'g Tr. at 11:2-4; 11:12 – 14:19; 53:25 – 54:17; 56:14-17, Mar. 5, 2019.

is speaking to him. He tells each injured worker to listen to what he dictates because it goes into the report and to not let him make any mistakes. Mr. Sernas was sitting with Dr. Schwartz when he dictated that Mr. Sernas denied any prior left knee injury or surgery and he did not correct Dr. Schwartz. When he examined Mr. Sernas' left foot and asked him about the incision scar, Mr. Sernas told him the scar was from a snake bite 30 years prior. Mr. Sernas' left ankle and foot fully reached medical stability in October 2017 when his complaints changed from his left foot to his knee. The aggravation of Mr. Sernas' left foot injury resolved in July 2017 when he returned to work. He noted Mr. Sernas' knee injuries were not significant enough for Mr. Sernas to report them when he first sought medical treatment. The amount of arthritis Mr. Sernas has in his knees would not have been caused by the work injury, even as Mr. Sernas described it. When someone injures a knee, whether it is arthritic or not, the complaints of pain should start at the time of the injury, there is no delay in the onset of pain after an injury. The 1993 x-rays seemed to indicate old healed fractures in his left foot, but you don't get that appearance at five or six weeks post injury.¹²⁵

Linda Brace, a claims adjuster, testified Mr. Sernas initially told her he rolled his left ankle while vacuuming stairs. He first told her about his knee injuries on October 9, 2017. During their conversations on May 26, 2017, June 15, 2017, and July 12, 2017, he denied any prior injury to his left ankle and foot and did not tell her he injured his knees. On October 9, 2017, Mr. Sernas told her he had increased pain in his knees approximately six to seven weeks earlier, and at the time of injury his knees were bleeding. Mr. Sernas did not tell her that he had any problems with diabetic neuropathy in his feet.¹²⁶

JSD contended Mr. Sernas' past representations to Ms. Brace, Ms. Hansen, and Dr. Schwartz should be taken into consideration. It contended Dr. Bursell's failure to mention Mr. Sernas' past medical history in his 2018 medical reports was disingenuous.

¹²⁵ Hr'g Tr. at 25:3-9; 25:12 – 26:1; 27:10-15; 28:19 – 29:7; 29:16 – 30:7; 30:10 – 31:3; 32:13-16.

¹²⁶ Hr'g Tr. at 40:20-23; 43:1-4; 45:23 – 46:10; 41:16 – 42:19; 43:15 – 44:2; 44:17 – 46:10.

JSD contended Mr. Sernas complained of bilateral foot pain one month prior to the work injury. It contended Mr. Sernas' claim for bilateral knee injuries is barred because he failed to provide notice of his bilateral knee injuries within thirty days without a satisfactory reason. JSD contended Mr. Sernas' claim is not compensable. It contended Mr. Sernas is not entitled to additional benefits for his left foot and ankle.¹²⁷

The Board found Mr. Sernas' claim was not barred by AS 23.30.100 because JSD learned of the knee claim when Mr. Sernas first sought treatment for the knee, and there was no evidence JSD was denied the ability to investigate the injury between the date of the injury in May 2017 and the first medical treatment in October 2017.¹²⁸

However, the Board held that continuances are disfavored and denied Mr. Sernas' petition for a continuance because his stated reason of the need to find an attorney was not good cause. Moreover, the Board found that because Mr. Sernas asked for the hearing, received the hearing notice in the mail, and was not reachable by telephone on the day of the hearing, the hearing should go forward in his absence and his claim would be dismissed per JSD's request.¹²⁹ The Board found that that Mr. Sernas did not prove his claim for benefits for his knees by a preponderance of the evidence. The Board further found that Mr. Sernas was a poor historian and not credible due to his lapses in memory concerning his work and medical history.¹³⁰

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.¹³¹ Substantial evidence is relevant evidence that a reasonable mind might accept as

¹²⁷ *Sernas* at 22, No. 88.

¹²⁸ *Id.* at 33, 37.

¹²⁹ *Id.* at 31-32, 37.

¹³⁰ *Id.* at 22, No. 89.

¹³¹ AS 23.30.128(b).

adequate to support a conclusion.¹³² "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."¹³³ The weight given to the witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.¹³⁴ On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.¹³⁵ However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine the credibility of witnesses.¹³⁶

Decisions of the Commission are based solely on the record before the Board, the briefs of the parties, and oral argument before the Commission. The Commission does not accept or review new evidence.¹³⁷

4. Discussion.

Mr. Sernas, on appeal, contends the Board denied him procedural due process by denying his petition for a continuation and then proceeding with the hearing in his absence. He further states that the Board used evidence from JSD that Mr. Sernas was not able to contest and put on witnesses that Mr. Sernas was not able to cross-examine. In his petition to the Board for reconsideration of the denial of his claim, Mr. Sernas stated he misinterpreted the Board's silence on his request for a continuance as acceptance of his request. The Board also did not file a written decision on this petition.

¹³² See, e.g., *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

¹³³ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984)).

¹³⁴ AS 23.30.122.

¹³⁵ AS 23.30.128(b).

¹³⁶ AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

¹³⁷ AS 23.30.128(a).

JSD, on the other hand, contends the Board gave Mr. Sernas a full and fair opportunity to attend the hearing by sending notice of the hearing to his address of record, and it was only due to Mr. Sernas' own failure to provide the Board with a working telephone number that he was not reached on the day of the hearing. His absence from the hearing was his fault, not the fault of the Board. JSD also contends the evidence in the record is substantial evidence that the Board correctly found that Mr. Sernas' medical evidence did not support his claim for benefits. JSD asserts the Board's decision should be affirmed.

The Alaska Supreme Court (Court) has indicated the kind of direction a self-represented litigant should be given by the Board to aid in pursuing a workers' compensation claim. The Court, in *Richard v. Fireman's Fund Insurance Company*, stated that the Board had a responsibility to "fully advise [injured workers] as to all the real facts which bear upon [their] condition and [their] right to compensation, so far as it may know them, and of instructing [them] on how to pursue that right under the law."¹³⁸ In *Bohlmann v. Alaska Construction & Engineering, Inc.*, the Court remanded the case to the Board because it had failed to correct the employer's erroneous assertion regarding the time in which to request a hearing.¹³⁹ The Court likened the Board's responsibilities to an injured worker to the trial court's obligation to inform a pro se litigant of deficiencies in the pleadings, the need for an expert witness, and how to correct discovery responses. "[W]e have noted that pro se litigants are not always able to distinguish between 'what is indeed correct and what is merely wishful advocacy dressed in robes of certitude.' The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants."¹⁴⁰

¹³⁸ *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963)(*Richard*).

¹³⁹ *Bohlmann v. Alaska Constr. & Eng'g, Inc.*, 205 P.3d 316 (Alaska 2009)(*Bohlmann*).

¹⁴⁰ *Id.* at 320.

In *Tobar v. Remington Holdings LP*, the Court found the Board had not properly advised Ms. Tobar of her right to a Board ordered Second Independent Medical Evaluation (SIME). “While an SIME is discretionary and not always appropriate, the circumstances of this case appear to favor its use: the claimant does not have a lawyer, she has limited English proficiency, and she apparently failed to call Board’s attention to existing medical records that were important to her case. . . .”¹⁴¹

The Commission has also looked at what the Board should do to assist self-represented litigants. In *Lewis v. Hickel Investment Company*, the Commission reviewed the denial of a motion for a continuance under the abuse of discretion standard and remanded the matter for a hearing.¹⁴² The Commission found that it was not clear that the Board had properly notified Mr. Lewis as to how and when to file a witness list nor how to arrange for a witness’s testimony. The Board went forward with a hearing even after it was clear Mr. Lewis did not understand the need for witnesses. The Commission also found no manifest injustice to Hickel if the hearing were delayed for two months since it did not present any witnesses.

The issue before the Commission concerns the procedure for deciding a petition for a continuance and the holding of a hearing in the absence of a party who has requested a continuance. The Commission does not defer to the Board in reviewing procedural issues and exercises its independent judgment.¹⁴³ The standard of review is abuse of discretion.¹⁴⁴

The Commission finds it disconcerting that a man who is not literate in any language should be denied the right to a hearing because he did not respond to the written notice of the hearing and did not apprise the Board of his current telephone number. Although Mr. Sernas does appear to speak and understand some English it is

¹⁴¹ *Tobar v. Remington Holdings LP*, 447 P.3d 747, 757 (Alaska 2019).

¹⁴² *Lewis v. Hickel Investment Co.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 268 (Sept. 18, 2019).

¹⁴³ AS 23.30.128(b).

¹⁴⁴ See, e.g., *Bohlmann*, 205 P.3d 316.

not his native language and he is illiterate in his native (Mayan/Zapotec) language, in Spanish, and in English. Several of his doctors, especially Drs. Reiswig, Ceder, and Bursell, noted his language difficulties in describing his injury and his symptoms.

Although he attempted to handle his claim through the hearing date by himself, on the premise that he should be able to handle the issues without legal counsel, like many people it is evident he overestimated his ability to handle complex litigation in a foreign language. It is also clear from the record that he relied on instruction from the Board technicians. The Court has admonished the Commission and the Board about the need to provide self-represented litigants with help meeting the technical requirements of the Alaska Workers' Compensation Act (Act). Thus, the Commission is disconcerted that when Mr. Sernas approached the Board technician about a continuation of the hearing date and told the technician he was having surgery the next day that information was not included in the petition for a continuance. Rather, the technician focused on his request for help in filing his pre-operation information and his possible need for an attorney if he lost at hearing. The technician only listed the fact that Mr. Sernas was thinking he needed to find an attorney. The petition was filed on February 19, 2019, for the hearing set for March 5, 2019, and a possibility existed he would still be recovering from surgery on March 5, 2019. Mr. Sernas most likely did not appreciate that his having surgery might be good cause for a continuance. Moreover, since Mr. Sernas is illiterate in English, he would not have been able to read the petition to know what it said. He relied on the Board technician. The fact that Mr. Sernas did not have the scheduled surgery only came to light at the hearing itself, which Mr. Sernas did not attend.

The Board found Mr. Sernas not credible due to his inconsistent reporting in his medical history and his memory lapses. The Commission is bound by the Board's finding regarding credibility. However, the Commission is disturbed by a finding of non-credibility when the Board did not see or speak to Mr. Sernas. Moreover, the Board was aware that his first language is Zapotec/Mayan, his second is Spanish, and his third is English, and he is not literate in any language. The Board reached its finding of non-credibility solely on Mr. Sernas' history of his injuries, his lack of memories, and other inconsistencies, without giving him an opportunity to explain. The doctors may not have understood his

responses regarding his medical history and he may not have understood the doctors' questions. The Board's failure to consider that his language difficulties might have contributed to his "memory lapses" and the inconsistencies in his medical history is unsettling at best. How the Board could judge his credibility without either hearing or seeing him is disturbing. The Court, in *Tobar*, found that more help was due to a pro se claimant who had limited English language skills.

Moreover, the Board, pursuant to its regulation at 8 AAC 45.195 could have waived a procedural requirement "if manifest injustice to a party would result from a strict application of the regulation."¹⁴⁵ Although the regulation also advises that a waiver may not be used solely to excuse a party from failing to comply with the requirements of the law, granting a continuation to a self-represented litigant whose first language is not English and who is not literate in any language as the Board knew, does not rise to the level of excusing a party for failure to comply with the requirements of the law. Especially, as here, the Board technician failed to include the fact that Mr. Sernas had surgery scheduled for the next day, and impliedly might not be able to attend the hearing on March 5, 2019. If that information had been included, the Board might well have continued the hearing for good cause. The fact that Mr. Sernas, for some reason, did not go through with the scheduled surgery was not known until the day of the hearing when JSD apprised the Board that Mr. Sernas had not had surgery and had, in fact, worked the day before the hearing.

Mr. Sernas has also asserted he assumed when he did not hear from the Board that the hearing had been continued per his request. This assumption is not unreasonable if the technician failed to inform him when the petition would be decided. While an attorney would have known to check on the status of the hearing, Mr. Sernas did not know to follow up. Moreover, if the Board had provided written notice to Mr. Sernas that the petition for the continuation was going to be determined at the time of the hearing, then Mr. Sernas might have understood the importance of attending a hearing which he otherwise believed would be continued. It would be prudent when

¹⁴⁵ 8 AAC 45.195.

dealing with a self-represented litigant, especially one whose first language is not English, to provide such notice. It appears that when Mr. Sernas received written communications from the Board he found someone to read them to him.

Furthermore, the Court has noted that the Act was enacted for the benefit of the employee and has stressed the duty to assist self-represented litigants.¹⁴⁶ It is a fundamental principle of the American judicial system that whenever possible a litigant should have the opportunity to present the litigant's side of the story. Although a continuance on the day of the hearing would have caused JSD some economic dislocation, that economic dislocation is not as significant as the complete denial of Mr. Sernas' opportunity to be heard.

It is important that the Commission and the Board at all times be sensitive to the needs of the self-represented litigant and ensure that the process is fair and equitable. The Court, on May 6, 2020, issued a statement addressing the needs of the judicial system and asking lawyers, in particular, to "commit ourselves to making these ideals [on which our society is founded] real by once again dedicating our effort to ensuring that we provide an accessible and impartial forum for the just resolution of all cases."¹⁴⁷ The Court further stated "Our country and our state are built upon the principle that all of us are created equal. And our courts are tasked with putting that principle into action by allowing people to seek redress for their grievances with the assurance they will be heard and treated fairly."¹⁴⁸

Given the above language and the language difficulties of Mr. Sernas, the Commission holds that the Board abused its discretion and erred in not continuing the hearing on March 5, 2019. The matter is remanded to the Board to afford Mr. Sernas an opportunity to present his case that his medical problems are work related and should be compensable.

¹⁴⁶ See, *Bohlmann*, 205 P.3d 316, 320; *Richard*, 384 P.2d 445, 449 n.15.

¹⁴⁷ Corrected – Statement from the Alaska Supreme Court, disseminated by the Alaska Bar Association via email, June 8, 2020.

¹⁴⁸ *Id.*

5. Conclusion.

The Board's decision is REVERSED and REMANDED for a hearing.

Date: 25 June 2020 Alaska Workers' Compensation Appeals Commission



Signed

Michael J. Notar, Appeals Commissioner

Signed

Amy M. Steele, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, 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 Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 278, issued in the matter of *Javier J. Sernas v. Juneau School District and City and Borough of Juneau*, AWCAC Appeal No. 19-015, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 25, 2020.

Date: July 1, 2020



Signed

K. Morrison, Appeals Commission Clerk