Alaska Workers' Compensation Appeals Commission

Fred Meyer, Inc., and Alaska Insurance Guaranty Association, (successor in interest to Fremont Insurance Co.),
Appellants,

vs.

Kristine B. Updike,
Appellee.

Final Decision
Decision No. 120 October 29, 2009

AWCAC Appeal No. 08-037
AWCB Decision No. 08-0202
Case No. 199322377

Appeal from Alaska Workers' Compensation Board Decision No. 08-0202, issued at Fairbanks, Alaska, on October 30, 2008, by northern panel members Fred Brown, Chair, and Jeff Pruss, Member for Labor.

Appearances: Randall J. Weddle, Holmes, Weddle & Barcott, PC, for appellants Fred Meyer, Inc., and Alaska Insurance Guaranty Association. Kristine Updike, *pro se,* appellee.[1]

Commission proceedings: Appeal filed December 29, 2008. Order to provide missing information for appeal issued December 30, 2008. Order on appellants' objection to appellee's submission of new evidence issued April 24, 2009. Oral argument on appeal presented July 30, 2009.

Appeal Commissioners: Philip Ulmer, David W. Richards, Kristin Knudsen.

By: Philip Ulmer, Appeals Commissioner

Kristine Updike seeks medical benefits, including total knee replacement, for her right knee as a result of a work-related injury at Fred Meyer in September 1993. The board denied her claim "at this time," but ordered a Second Independent Medical Evaluation (SIME). Fred Meyer and its insurer appeal.

Fred Meyer contends that the board properly denied Updike's claim because both the employer's and the employee's doctors agreed that Updike's claim was not compensable. Fred Meyer also argues that the board erred in ordering an SIME under

[1] Ms. Updike presented her oral argument by telephone.

AS 23.30.110(g) when Updike's claim was solely for medical benefits and there was no significant gap in the medical evidence. Updike argues that her current need for knee treatment, including possible knee replacement, is related to her 1993 work injury.

The parties' contentions require the commission to decide whether the board properly denied Updike's claim and whether the board could properly order an SIME under AS 23.30.110(g) when Updike's claim was solely for medical benefits. We conclude the board plainly erred in conditionally denying Updike's claim without examining the board's complete record and deciding the case. We vacate the board's order denying the claim, and remand for a rehearing. We also vacate the board's order for an SIME, concluding that AS 23.30.110(g) does not apply to claims seeking only medical benefits and direct the board to determine if, after examining the board's complete record, a qualifying medical dispute exists under AS 23.30.095(k).

1. Factual background and proceedings.

Kristine Updike injured her right knee in September 1993 when she slipped while working in the bakery department at Fred Meyer.[2] After having three surgeries on her right knee,[3] Updike settled her workers' compensation claims against Fred Meyer in January 1997.[4] In the compromise and release agreement, Updike did not waive future medical benefits for her right knee and Fred Meyer did not waive its right to contest any future medical benefits for her right knee.[5]

Updike continued to see Dr. Pierson in Fairbanks, who performed her last knee

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[2] Appellants' Exc. 000001. The original report of injury was not included in the board record submitted to the commission for this appeal. The board record seems to be missing many documents dated prior to January 1997.

[3] Appellants' Exc. 000002, 000005. These documents are missing from the board record: Dr. Pierson's post-operative report dated May 1, 1995, and his chart note of April 7, 1995, in which he summarizes when she had her prior right knee surgeries in 1994.

[4] Appellants' Exc. 000038, 000044. This compromise and release agreement, including the board's approval of the agreement, was also missing from the board record.

[5] Appellants' Exc. 000038.

surgery, until about March 1998.[6] Her right knee worsened over the last several months of 1997.[7] Dr. Pierson considered doing another surgery, noting, "[t]his would hopefully postpone the need for joint replacement and buy her some years to delay the replacement of the joint."[8] However, the surgery was ultimately cancelled because her right knee "dramatically" improved on its own as noted in a January 1998 exam.[9]

From 1999 to 2001, Updike was seen at the Tanana Valley Medical-Surgical Group, primarily by Dr. Cobden.[10] Dr. Cobden noted in November 2000 that she had degenerative arthritis in both knees, and that the right knee condition was worse than the left.[11]

Updike moved to Nevada sometime in 2001 and sought treatment for her right knee with Dr. William Ford.[12] Dr. Ford prescribed a knee brace and anti-inflammatory medications.[13] In March 2003 and February 2006, Dr. Ford noted that Updike would likely need a total knee replacement.[14]

In November 2006, Fred Meyer controverted Updike's claim for any further treatment on her right knee based on Dr. Steven Schilperoort's March 2006 employer medical evaluation.[15] Dr. Schilperoort concluded that Updike's 1993 work injury was not a substantial factor in bringing about her current need for treatment of her right knee.[16] He concluded that Updike had tricompartmental degenerative arthritis in her right knee that pre-existed her 1993 work injury and was not related to that work

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6 R. 0099.

7 R. 0096-98.

8 R. 0096.

9 R. 0098.

10 R. 0183, 0195, 0198-0200.

11 R. 0192.

12 R. 0100.

13 R. 0103.

14 R. 0130, 0147.

15 R. 0001.

16 R. 0053, 0055.

injury.[17] Although Dr. Schilperoort lists and comments on some of Dr. Pierson's records, he does not list or otherwise reference Dr. Pierson's chart note from October 1997 in which Pierson mentioned he was hoping to postpone the need for knee replacement.[18] In January 2007, Dr. Schilperoort reviewed additional medical records, none of which were from Dr. Pierson, and concluded those records did not change his impressions in his March 2006 report.[19]

In March 2007, Dr. Ford agreed with Dr. Schilperoort's medical evaluation, stating, "I concur with his findings and recommendations and feel that he did a very complete in-depth evaluation of this problem."[20]

The board heard the claim for medical benefits on June 26, 2008.[21] The hearing transcript reflects that Updike did not appear at the hearing, although the board's decision repeatedly refers to Updike's testimony at the hearing.[22] No transcript of a deposition given by Updike is in the record.

After stating the applicable law, including the three-step presumption analysis, the board concluded that Fred Meyer conceded that the presumption of compensability attached to Updike's case because "the employer does not dispute the employee injured her knee at work and had repeated knee surgeries."[23] But the board concluded that Fred Meyer rebutted the presumption with Dr. Schilperoort's and Dr. Ford's opinions.[24]

The board then considered whether Updike proved that her 1993 work injury

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17 R. 0057.

18 R. 0038-0040. Dr. Schilperoort stated in the beginning of his file review section that "only pertinent items will be mentioned," so it is unclear whether he considered this chart note as not pertinent or whether he did not receive it for his review. R. 0034.

19 R. 0198-0200.

20 R. 0059.

21 Hrg. Tr. 3:4.

22 Hrg. Tr. 3:13-21; *Kristine B. Updike v. Fred Meyer Stores, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0202, 2-4 (October 30, 2008) (F. Brown, chair).

23 *Updike*, Alaska Workers' Comp. Bd. Dec. No. 08-0202 at 4.

24 *Id*.

was a substantial factor in her current need for medical treatment of her right knee. The board concluded that:

> Although Dr. Schilperoort concluded the employee's current knee condition is not substantially related to her work for the employer, we find the record is not entirely clear on this point. Particularly we find the chart notes of Dr. Pierson indicate the employee's degenerative joint disease and meniscus tears and chondral tears arose from trauma at work.[25]

The board decided to order a second independent medical evaluation (SIME) under AS 23.30.110(g) to assist the board in determining causation in Updike's case.[26] Nevertheless, the board also denied Updike's claim for additional right knee treatment "at this time."[27]

Fred Meyer appeals.

2. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[28] The commission examines "the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion."[29] However, the commission "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the board."[30] Because the

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[25] *Id*. at 5.

[26] *Id*.

[27] *Id*.

[28] AS 23.30.128(b).

[29] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citation omitted).

[30] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)). *See also* AS 23.30.122 (providing "[t]he board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."); AS 23.30.128(b)

commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented.[31]

The question whether the quantum of evidence is substantial enough to support a conclusion of a reasonable mind is a question of law.[32] The commission independently examines questions of law and procedure.[33]

3. The commission vacates the board's denial of Updike's claim because the denial is based on manifest or plain error.

Updike did not appeal the board's denial of her claim.[34] Issues that are not both argued before the board and properly raised on appeal to the commission may be deemed waived.[35] However, the Alaska Supreme Court may relax the appellate rules addressing waiver of issues when "doing so would not unfairly prejudice the opponent" and particularly when a litigant is self-represented.[36] Here, Updike is self-represented and there is no unfair prejudice to Fred Meyer because the commission questioned its counsel about whether the board's denial was proper during oral argument and because

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(providing the "board's findings regarding the credibility of testimony of a witness before the board are binding on the commission.").

[31] AS 23.30.128(a).

[32] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[33] AS 23.30.128(b).

[34] Updike seemed understandably confused as to whether the board denied her claim since the board also ordered an SIME to help clarify the cause of her right knee condition, stating in her brief that "The board did not error [stet] on current knee condition. I had four surgeries on knee to remove parts of meniscus which caused degeneration and arthritis – the arthritis was not preexisting before work related injury." Appellee. Br. Remark 1. Her confusion over this issue, coupled with the fact that she is not represented by an attorney, may explain why she did not appeal the denial.

[35] *See, e.g., Alaska Gold Co. v. State, Dep't of Revenue,* 754 P.2d 247, 254 (Alaska 1988) (stating, "The rule that objections must be made below in order to preserve a point on appeal normally should also be followed for appeals from administrative agencies.") (citation omitted).

[36] *Lyman v. State of Alaska*, 824 P.2d 703, 706 (Alaska 1992) (citations omitted).

Fred Meyer asserted the board properly denied Updike's claim in its points on appeal and its brief. It argued that the board's denial should be upheld because all the doctors who offered an opinion on causation concluded that Updike's current need for treatment for her right knee was no longer substantially related to her 1993 work injury.[37]

Moreover, the commission will consider an issue that has not been raised when the issue "involves a question of law that is critical to a proper and just decision"[38] or an error is "manifest on the face of the record."[39] The commission believes that the board made manifest errors in denying Updike's claim.[40] A manifest error occurs when "an

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[37] Appellants' Br. 7.

[38] *Vest v. First Nat'l Bank of Fairbanks*, 659 P.2d 1233, 1234 n.2 (Alaska 1983) (noting that reaching an issue not argued by the parties but "critical to a proper and just decision" is particularly appropriate when the matter has been called to the attention of the parties and they are "afford[ed] ... the opportunity to brief the issue.").

[39] *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896, 898 & n.4 (Alaska 1973) (holding that the board's findings were inadequate because they did not comply with the Alaska Administrative Procedure Act, even though the appellant did not specifically argue this point). *See also White v. Alaska Commercial Fisheries Entry Cmm'n*, 678 P.2d 1319, 1322 (Alaska 1984) (stating "[a]lthough White has not specifically argued that the lack of findings by the CFEC constitutes reversible error, we consider this point because the deficiency is manifest on the record before us."); *O'Neill Investigations v. Ill. Employers Ins. of Wausau*, 636 P.2d 1170, 1175 n.7 (Alaska 1981) (considering an issue not argued below where it is "not dependent on any new or controverted facts, and ... it is closely related to [the] trial court theory and could have been gleaned from its pleadings.").

[40] Alternatively, deciding whether the board properly denied Updike's claim is "critical to a proper and just decision" because the denial is logically inconsistent with ordering an SIME such that the commission cannot affirm both the denial and the SIME. *See Cragle v. Gray*, 206 P.3d 446, 450 (Alaska 2009) (reviewing whether succession contract statute applied to alleged oral agreement under which homeowner's granddaughter took care of homeowner in exchange for promise that house would be granddaughter's upon the owner's death because it was "critical to a just and proper resolution of the case," even though neither party argued that statute applied); *Gilmore v. Alaska Workers' Comp. Bd.*, 882 P.2d 922, 925 (Alaska 1994) (noting that the Court *sua sponte* ordered the parties to brief the equal protection and due process problems with AS 23.30.220(a) because the constitutionality of the statute was "critical to a proper and just decision."). *Cf. Aleck v. Delvo Plastics*, 972 P.2d 988, 990 n.8 (Alaska

obvious mistake that . . . should have been noticed" is made.[41] The manifest error standard is similar to the plain error standard that the Court applies to claims or arguments that were raised for the first time on appeal, rather than in the proceedings below.[42] "Plain error exists where an obvious mistake has been made which creates a high likelihood that injustice has resulted."[43] The rule "imposes a heavy burden on appellants to show that an error was both obvious and very likely consequential."[44]

The board made three inexplicable errors. First, *if* the board's record was complete, the board plainly erred because it did not weigh the evidence in the board record once it found the presumption had been overcome. The board said it found "the employer overcame the presumption with the medical opinions of Drs. Schilperoort and Ford."[45] But, instead of then weighing the evidence to determine if Updike had proved, by a preponderance of the evidence, that the 1993 work injury was "a substantial factor" in her current need for medical treatment of her right knee,[46] the board stated,

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1999) (not addressing whether AS 23.30.130's one-year statute of limitations applies to the reopening of a workers' compensation case because the parties did not argue the issue).

[41] *Jurgens v. City of North Pole*, 153 P.3d 321, 326-27 (Alaska 2007) (describing "manifest error" as a case in which "the agency had made an obvious mistake that the superior court should have noticed in trying to review the agency decision.") (footnote omitted).

[42] *Id. at* 327 n.16.

[43] *Asher v. Alkan Shelter, LLC,* 212 P.3d 772, 784 (Alaska 2009) (citations omitted). *See, e.g., Lyman*, 824 P.2d at 706; *Matter of L.A.M.*, 727 P.2d 1057, 1059 (Alaska 1986).

[44] *Shields v. Cape Fox Corp.*, 42 P.3d 1083, 1087 (Alaska 2002).

[45] *Kristin Updike*, Bd. Dec. No. 08-0202 at 4.

[46] *See, e.g., Robinson,* 69 P.3d at 495 (holding that Robinson had to prove that "the 1992 work injury was a substantial factor in causing his need for medical treatment and disability after May 1993.") (footnote omitted); *United Asphalt Paving v. Smith*, 660 P.2d 445, 447 (Alaska 1983) (imposing liability on an employer only if a work-related injury aggravated, accelerated or combined with the pre-existing condition and was "a substantial factor" contributing to the employee's current need for treatment); *Marsh Creek, LLC, v. Benston*, Alaska Workers' Comp. App. Cmm'n Dec. No. 101, 25 (March 13, 2009) (noting that the 2005 amendment of AS 23.30.010 changes

"Although Dr. Schilperoort concluded the employee's current knee condition is not substantially related to her work for the employer, we find *the record* is not entirely clear on this point."[47] The board's finding that the evidence was insufficiently clear to permit it to decide the case is logically inconsistent with its determination that there was sufficient evidence to overcome the presumption.[48] Evidence that overcomes the presumption is evidence that, if believed, would eliminate the reasonable possibility that the work is a substantial factor in bringing about the need for treatment.[49] In other words, if the employer's evidence overcame the presumption, it is evidence that is adequate to support a conclusion in a reasonable mind that the need for treatment is not work-related;[50] thus, it is enough evidence to decide the case in favor of the employer if it is not outweighed by contrary evidence.

Second, the board erred by conditionally deciding Updike's claim. The board's order stated, "The employee's claim for additional right knee treatment is denied *at this time*."[51] A decision that a claim is awarded or denied is a final decision on the claim. If the board lacked sufficient evidence to make a decision, it may order an SIME in

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the liability standard from "a substantial factor" to "the substantial factor" for injuries occurring after the amendment's effective date of November 7, 2005).

[47] *Kristine Updike*, Bd. Dec. No. 08-0202 at 5 (emphasis added).

[48] The board's confusion is also reflected in that it describes the employee, who did not appear at the hearing, as evident in the transcript, as representing herself and testifying at hearing. Hrg. Tr. 3:13-21; *Kristine Updike*, Bd. Dec. No. 08-0202 at 2-3 & 5.

[49] *Safeway, Inc. v. Mackey,* 965 P.2d 22, 27-28 (Alaska 1998) (holding physician's testimony that work was probably not a substantial factor in development of claimant's illness was sufficient to overcome the presumption); *Gillispie v. B & B Foodland,* 881 P.2d 1106, 1109-11 (Alaska 1994) (holding employer rebutted presumption where claimant's treating physician testified that work incidents merely caused temporary aggravations of claimant's prior back problems, and two other physicians testified that work incidents were not substantial or significant factors in bringing about herniated disc in back).

[50] *Bradbury v. Chugach Elec. Ass'n,* 71 P. 3d 901, 906-07 (Alaska 2003) (physicians' testimony that rupture of cyst was not work related could be accepted by a reasonable mind as adequate to support a conclusion).

[51] *Kristine Updike*, Bd. Dec. No. 08-0202 at 5 (emphasis added).

compliance with either AS 23.30.095(k) or AS 23.30.110(g) and wait for that report to decide the claim, or inform the parties of the questions it has and open the record for more evidence. The commission must affirm the board if substantial evidence supports the finding of a lack of clarity in the record, even if the commission would have independently concluded that the evidence was sufficiently clear to reach a decision.[52] The board may reconsider, or modify, its decision as provided by statute,[53] but it may not leave a claim in an indeterminate state forever by appending "at this time" or other such conditional language.

Third, the board erred by failing to review the complete board record. The record forwarded to the commission consists of 230 pages, in a case that stretches back to 1993. The medical records are limited to a copy of the employer's medical examination and the records provided by the employer with a medical summary[54] in 2006. The board's record should consist of all documents filed in the board's case file;[55] in this case, documents as basic as the report of injury, purportedly filed in 1993, are missing. There are no physician report forms indicating that physician reports were filed *with the board*;[56] no report of injury, no compensation reports, and no copy of an approved compromise and release agreement in the record. If, as the board represented to the commission, this is the complete record before the board at the time

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[52] *See Lindhag*, 123 P.3d at 952 (noting that the Supreme Court on review "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the Board.") (citation omitted).

[53] AS 23.30.130; AS 44.62.540.

[54] A medical summary is a form 07-6103, filed after receiving a claim, listing each medical report in the party's possession which "may be relevant to the claim." 8 AAC 45.052(a) & (b).

[55] 8 AAC 45.120(f).

[56] AS 23.30.095(c) requires physicians to report treatment *to the board* within 14 days following treatment for a workers' compensation claim for medical care to be valid and enforceable. 8 AAC 45.082(d) requires the physician to report the treatment on a "form 07-6102" to obtain payment. Nothing in the board's record suggests that Dr. Pierson, or any other physician, ever completed a form 07-6102 or reported treatment to the board.

this case was heard, it was plainly *incomplete.* Moreover, nothing in the board record indicates that the board notified the parties that the board record was incomplete.

The commission concludes the board's failures are manifest or plain errors because they are "obvious mistakes" that create "a high likelihood that an injustice has resulted."[57] The board's role is to weigh the evidence and determine credibility;[58] when it fails to do so and nevertheless denies a claim, the result is unjust. Therefore, the commission vacates the board's order denying Updike's claim and remands for further proceedings consistent with this opinion.

4. The board erred in ordering an SIME under AS 23.30.110(g) when Updike sought only medical benefits, not compensation.

The board ordered an SIME based on its authority in AS 23.30.110(g),[59] which provides in relevant part:

> An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician

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[57] *See Hutka v. Sisters of Providence in Wash.*, 102 P.3d 947, 960 (Alaska 2004) (finding plain error where the court awarded both liquidated damages and prejudgment interest when the Federal Labor Standards Act prohibited such a dual recovery); *Shields*, 42 P.3d at 1087-88 (holding the failure to instruct on comparative fault was plain error because AS 09.17.080(a) requires such an instruction "in clear and mandatory terms"); *Lyman*, 824 P.2d at 707 (finding plain error in the superior court's application of the standards of Rules 79 and 82 because federal claims brought in state court must use standards set forth in the federal statute); *Matter of L.A.M.*, 727 P.2d at 1059-60 (noting "[t]he due process right to proper notice in a parental rights termination proceeding is so fundamental that justice requires us to consider S.M.'s claim of defective notice" and finding plain error because statutory notice requirements were violated); *City of Nome v. Ailak*, 570 P.2d 162, 168 & 171 (Alaska 1977) (finding plain error where the court submitted to the jury separate counts of false arrest and false imprisonment without instructing that two counts were mutually exclusive and reducing the duplicate award of damages and also noting that "[j]ury instructions which set forth an entirely erroneous standard of liability" would usually amount to plain error). *Cf. Asher,* 212 P.3d at 784-85 (finding no plain error because trial court did not need to allocate damages to the plaintiffs because in finding the defendant liable for fraudulent misrepresentation, it implicitly found the plaintiff was not at fault for relying on that misrepresentation).

[58] AS 23.30.122; AS 23.30.128(b).

[59] *Kristine Updike*, Bd. Dec. No. 08-0202 at 5.

> which the board may require. . . . Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

Fred Meyer argues that because Updike is claiming only medical benefits, rather than compensation, defined as "the money allowance payable to an employee,"[60] the board could not order a § .110(g) evaluation.[61] We agree.

Although the Supreme Court generally construes "compensation" to include medical benefits in interpreting the Alaska Workers' Compensation Act,[62] the Court "occasionally will reach the opposite result if statutory language strongly suggests a narrower reading."[63] Here, another statutory provision, AS 23.30.095(k), that deals with second independent medical examinations in the context of medical disputes, strongly suggests "compensation" should be narrowly defined in § .110(g).

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[60] AS 23.30.395(12). Updike waived her entitlement to compensation for disability, including temporary total disability, temporary partial disability, permanent partial impairment, permanent total disability, penalties, interest, costs and reemployment benefits under the 1997 compromise and release agreement. Appellants' Exc. 000037-38.

[61] Appellants' Br. 11-12.

[62] *Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184, 1191-92 (Alaska 1993) (holding that compensation includes medical benefits for the purposes of awarding interest and assessing a statutory penalty for late payments under AS 23.30.155(e)); *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989) (holding medical benefits are compensation for the purposes of computing prejudgment interest); *Williams v. Safeway Stores*, 525 P.2d 1087, 1089 n.6 (Alaska 1974) (noting in dicta that the only reasonable reading of the word "compensation" in important sections of the act, such as AS 23.30.010 and AS 23.30.045(a), is one that includes medical payments). *See also Croft v. Pan Alaska Trucking, Inc.,* 820 P.2d 1064 (Alaska 1991) (holding that "compensation" includes attorney's fees for the purposes of employer liability under AS 23.30.045(a) and therefore employer's exclusive remedy to recoup any overpayments of "compensation" was by withholding from future payments under AS 23.30.155(j)).

[63] *Childs,* 860 P.2d at 1192. *See Providence Washington Ins. Co. v. Busby*, 721 P.2d 1151, 1152-53 (Alaska 1986) (per curiam) (excluding medical benefits from definition of compensation for the purposes of the Second Injury Fund because "differing interpretations of 'compensation' in other contexts . . . are inapposite to the case at bar.").

AS 23.30.095(k) provides in relevant part that:

> 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 . . . .

"Whenever possible, each part or section of a statute should be construed with every other part or section, so as to produce a harmonious whole."[64] The act is best harmonized by limiting § .110(g) evaluations to situations in which an employee is receiving or claiming entitlement to disability payments because § .095(k) permits evaluations when medical benefits alone are claimed so long as there is a qualifying medical dispute. Because § .095(k) explicitly applies to claims of medical benefits,[65] it makes sense to interpret § .110(g) as excluding that type of a claim.[66]

We also note that as a matter of public policy, second independent medical examinations should not be ordered lightly. Such examinations, while not invasive, involve the employee's person, and should not be required without evidence of need. They also frequently involve travel, a thorough physical examination, and costs to the employer.[67] In *Bah v. Trident Seafoods Corp.*, we held that SIMEs were appropriate

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[64] *Forest v. Safeway Stores*, *Inc.*, 830 P.2d 778, 781 (Alaska 1992). *See also Romann v. State, Dept. of Transp. and Pub. Facilities*, 991 P.2d 186, 190 (Alaska 1999) (in producing a harmonious whole, the court "assume[s] that every word and phrase in the statute has meaning and must be given effect.").

[65] AS 23.30.095(k) applies to medical disputes regarding "determinations of causation, medical stability, . . . degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability . . . ."

[66] *See Croft*, 820 P.2d at 1066 (employing the principle of statutory construction *expressio unius est exclusio alterius* that designating certain things in a statute indicates that omissions should be understood as exclusions); *Burrell v. Burrell*, 696 P.2d 157, 165 (Alaska 1984) ("It is an accepted rule of statutory construction that to include specific terms presumptively excludes those which are not enumerated.").

[67] AS 23.30.095(k) provides that "[t]he cost of an examination and medical report shall be paid by the employer." *See also Dwight v. Humana Hosp. Alaska*, 876

only "when there is a significant gap in the medical or scientific evidence" under § .110(g) or when a medical dispute exists between physicians for the employee and the employer under § .095(k).[68] Under either statutory provision, we further noted that the issue or dispute must be relevant to a pending claim or petition and that the purpose of ordering an SIME must be to assist the board in resolving the issue or dispute.[69] Thus, the commission concludes that when § .095(k) explicitly applies to claims for medical benefits, the board cannot use § .110(g) to circumvent the requirement of a medical dispute under § .095(k).

The board's error in relying on § .110(g) to order an SIME is not harmless.[70] If there had been evidence in the record establishing a conflict of opinion about the need for knee replacement, the board may have properly ordered an SIME under § .095(k). However, the commission concludes the board lacked evidence of a medical dispute relating to causation.

5. The commission vacates the board's order of an SIME and remands to the board to determine whether a qualifying medical dispute exists under AS 23.30.095(k).

In *Bah*, we specified that the board may order an SIME under § .095(k) only when a medical dispute relevant to resolving the claim exists between the employee's and the employer's physicians, and when an SIME would help the board resolve the dispute.[71] In Updike's case, the board justified its decision to order an SIME on a finding that "the

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P.2d 1114, 1119 (Alaska 1994) (noting that "such exams are expensive is well understood. That this economic burden was intended by the legislature to be automatically passed to the private sector and the ultimate consumer of goods and services [via the employer] when such exam is unnecessary to the proper performance of the Board's responsibilities seems more than doubtful.").

[68] Alaska Workers' Comp. App. Cmm'n Dec. No. 073, 4-5 (February 27, 2008).

[69] *Id*. at 5.

[70] An error is harmless when it does not alter the outcome. *See Dwight*, 876 P.2d at 1120 (holding that the failure to inform parties of right to SIME was not harmless error because, given equivocal medical evidence, an SIME could have influenced the Board's decision to deny benefits).

[71] App. Comm'n Dec. No. 073 at 4.

chart notes of Dr. Pierson indicate the employee's degenerative joint disease and meniscus tears and chondral tears arose from trauma at work."[72] Dr. Pierson opined in October 1997 that Updike would need knee replacement surgery in the future and suggested that she remain in contact with her worker's compensation caseworker about her needs for treatment.[73] His chart note supports an inference that Dr. Pierson knew Updike had a workers' compensation claim for her "right knee injuries." It supports an inference that he believed she would need a knee replacement. But this chart note is not sufficient to draw the inference that Dr. Pierson believed the work injury was a substantial factor in the future need for a right knee replacement.

Dr. Pierson's other records do not add support to the inference the board appears to draw. In December 1997, Dr. Pierson, after describing the employee's objections to being seen by the employer's medical examiner, states she has "[d]egenerative joint disease of the right knee which is secondary to trauma and localized."[74] A month later, he states her "left knee has a massive effusion *with no apparent etiology*" but dramatic improvement of the right knee.[75] In March 1998, he says she has "degenerative joint disease of both knees, which is secondary to injury and localized."[76] Neither of these notes states the degenerative joint disease in both knees, that described "secondary" to injury or trauma, require a future knee replacement and that the work injury is a substantial factor in causing the need for a future knee replacement. On the other hand, the employer's physician, Dr. Schilperoort, clearly stated that her 1993 work

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[72] *Kristine Updike*, Bd. Dec. No. 08-0202 at 5.

[73] R. 0096.

[74] R. 0097. Dr. Pierson "encouraged to seek support through the workers' compensation system" to obtain timely care – that is, the arthroscopic evaluation and debridement (R. 0096) that Dr. Pierson felt would benefit her. From this it appears he felt the need for that care was work –related.

[75] R. 0098 (emphasis added).

[76] R. 0099.

injury was not a substantial factor in her current need for right knee treatment.[77]

Although Updike's current treating physician agrees with Dr. Schilperoort's opinion,[78] if the board's record contained a clear statement of work-relationship of the need for future knee replacement from Dr. Pierson, the board may have found that a medical dispute existed based on the prediction by the employee's doctor. It is possible that Dr. Pierson filed physician report forms with such statements on them, but, assuming the record transmitted to the commission was the record before the board, the board did not have those forms when it decided this case.

The commission notes that an SIME may help the board in ascertaining whether Updike's current need for treatment of her right knee is related to her 1993 work injury. But, an SIME is not to be performed because the board's record is missing documents. The board found that an SIME was needed because "the record is not entirely clear."[79] The evidence is that the record was not *entire* – not that it was "partially unclear."

The board's reference to Updike's testimony (which is not in the record) and Dr. Pierson's chart notes suggests that the board was referring not to the clarity of the opinions of Dr. Schilperoort or Dr. Ford but rather to the clarity of the medical records it had. However, the board's record on review does not support a finding that the record is unclear on the causal relationship between the need for knee replacement and the 1993 injury. Although the board found "the chart notes of Dr. Pierson indicate the employee's degenerative joint disease and meniscus tears and chondral tears arose from trauma at work,"[80] this is not enough to change Dr. Pierson's statement about delaying the need for future knee replacement to an affirmative statement of causal

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[77] R. 0053, 0055. It is possible that Dr. Schilperoort either did not review or did not have Dr. Pierson's chart note that indicated her future need for knee replacement surgery, R. 0038-40. But, Dr. Schilperoort stated in the beginning of his file review section that "only pertinent items will be mentioned," so it is unclear whether he considered this chart note as not pertinent or whether he did not receive it for his review. R. 0034.

[78] R. 0059.

[79] *Kristine Updike*, Bd. Dec. No. 08-0202 at 5.

[80] *Id.*

relationship between the future need for a knee replacement and the work injury. The commission cannot say that the record provided by the board on review supports a finding of a medical dispute on causation of the need for a knee replacement.

Unlike the circumstances in *Bah*, here, the board has ordered an SIME on its own initiative. In *Bah*, the employee requested an SIME under either AS 23.30.095(k) or AS 23.30.110(g), because he disagreed with his own physicians.[81] We noted that the purpose of an SIME 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"[82] and that "the SIME physician is the board's expert."[83] Here, the board's order for an SIME without a request by Updike dispels the concern that the purpose of the SIME was to get an additional medical opinion on Updike's behalf, rather than to assist the board in reaching a decision. However, ordering the employee to attend, and the employer to pay for, an SIME is no substitute for the board's careful review of the record and evidence.

Therefore, we vacate the board's order for an SIME. We direct the board to obtain the entire case file of the 1993 injury, and to inform the parties if the record contained therein has been misplaced or destroyed. If the complete case file record is available, we direct the board to determine before rehearing the employee's claim if, after examining the complete medical record, a qualifying medical dispute exists under AS 23.30.095(k). If the board misplaced or destroyed the case file or any part of it, the board shall request the parties' assistance in recreating the case file and the record contained therein. Based on the recreated record, the board shall decide before rehearing of the employee's claim if a qualifying medical dispute exists under AS 23.30.095(k).

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[81] App. Cmm'n Dec. No. 073 at 2-3.

[82] *Id.* at 5.

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

6. Conclusion.

The commission VACATES the order denying Updike's claim because the order was made in manifest or plain error. The commission VACATES the board's order for an SIME and REMANDS the case to the board for REHEARING. The board is directed to obtain (or recreate) and review the complete case file, to notice the claim for hearing, and to provide an opportunity to the claimant to testify and present witnesses in support of her claim and to the employer to present witnesses in support of its position. If, before the hearing, the record demonstrates a conflict of medical opinion on the question, "Is the 1993 work injury a substantial factor in the need for a right knee replacement?" the board may order an SIME under AS 23.30.095(k) to assist it in reaching a decision.

Date: *October 29, 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final administrative decision on the merits of this appeal. The commission found the board made legal errors. The effect of this decision is that the commission VACATED (made void) the board's decision and order and REMANDED (sent back) the case for rehearing of the claim for medical benefits, with instructions. The board must hear the case again and issue a new decision.

This is a final commission decision on an appeal of a final board order on a claim. You have the right to appeal this decision to the Alaska Supreme Court. An appeal, if available, must be instituted in the Supreme Court within 30 days of the date this decision is distributed. See the box on the last page to find the date of distribution.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for

review or hearing within 10 days after the date of distribution of this decision. You may wish to consider consulting with legal counsel before filing a petition or an appeal.

If you wish to appeal (or petition for review or hearing) 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 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this 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. AS 23.30.128(f). If appeal is not available, proceedings for other review under the Appellate Rules must be instituted within 10 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 40 days after the date this decision is mailed to the parties, whichever is earlier.

CERTIFICATION

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the text of the Final Decision in the matter of *Fred Meyer, Inc., and Alaska Insurance Guaranty Association, (successor in interest to Fremont Insurance Co.) v. Kristine B. Updike,* AWCAC Appeal No. 08-037, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 29, 2009.

Date: *November 6, 2009*

Signed
B. Ward, Appeals Commission Clerk