

Alaska Workers' Compensation Appeals Commission

Lynden Transport, Inc. and ACE
American Insurance Co.,
Appellants,

vs.

Milton K. Mauget, Aurora Diagnostic
Imaging, LLC, and Advanced Pain
Centers of Alaska,
Appellees.

Final Decision

Decision No. 154 June 17, 2011

AWCAC Appeal No. 10-018
AWCB Dec. Nos. 10-0094 and 10-0108
AWCB Case Nos. 200803009 and
200702478

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 10-0094, issued at Fairbanks on May 21, 2010, by northern panel members William Walters, Chair, Damian J. Thomas, Member for Labor, and Debra G. Norum, Member for Industry, and Alaska Workers' Compensation Board Decision No. 10-0108, issued at Fairbanks on June 20, 2010, by northern panel members William Walters, Chair, and Damian J. Thomas, Member for Labor.

Appearances: Colby J. Smith, Griffin & Smith, for appellants, Lynden Transport, Inc. and ACE American Insurance Co.; James M. Hackett, James M. Hackett, Inc., for appellee, Milton K. Mauget; Aurora Diagnostic Imaging, LLC, and Advanced Pain Centers of Alaska, appellees, did not participate.

Commission proceedings: Appeal filed June 10, 2010; motion for stay granted July 6, 2010; briefing completed February 24, 2011; oral argument held April 27, 2011.

Commissioners: David Richards, S.T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

On April 22, 2010, the Alaska Workers' Compensation Board (board) heard the claim of appellee, Milton K. Mauget (Mauget), who works for appellant, Lynden

Transport, Inc. (Lynden). In due course, the board issued a decision¹ and a decision on reconsideration.² In the first decision, it found: 1) Mauget's *right* knee injury was not compensable;³ 2) developments at the hearing necessitated the hearing agenda to be modified;⁴ and 3) Mauget was entitled to an award of additional disability benefits for his *left* knee injury.⁵ The second and third rulings are at issue in this appeal. The commission concludes that the board erred in modifying the issues for hearing, vacates its decision awarding additional disability benefits for the *left* knee injury, and remands this matter to the board so that it may hear and decide whether Mauget is entitled to more disability benefits in connection with his *left* knee injury.

2. Factual background and proceedings.

Mauget has worked for Lynden for many years as a truck driver.⁶ His regular duties require him to load and unload the trucks. On February 1, 2007, Mauget injured his *left* knee at work.⁷ He was treated by Richard Cobden, M.D., who performed *left* knee surgery on Mauget, a partial arthroscopic *lateral* meniscectomy, on March 2, 2007.⁸ Lynden, through its workers' compensation insurer, ACE American Insurance Co. (ACE), paid Mauget: 1) temporary total disability (TTD) benefits beginning February 12, 2007, and ending May 6, 2007; and 2) permanent partial impairment (PPI) benefits based on a 2% whole person rating.⁹

¹ See *Milton K. Mauget v. Lynden Transport, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0094 (May 21, 2010) (*Mauget I*).

² See *Milton K. Mauget v. Lynden Transport, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0108 (June 20, 2010) (*Mauget II*).

³ *Mauget I*, Bd. Dec. No. 10-0094 at 12.

⁴ *Id.* at 9.

⁵ *Id.* at 12.

⁶ April 22, 2010, Hr'g Tr. 14:11-13, 15:5-6.

⁷ Exc. 001.

⁸ Exc. 020, 014, and 018.

⁹ Exc. 002.

On January 31, 2008, Dr. Cobden reviewed x-rays of Mauget's *left* knee, finding degenerative arthritis and internal derangement of that knee, and predicting that Mauget may eventually need a lateral compartment or total knee replacement.¹⁰ On February 14, 2008, Mauget injured his *left* knee at work.¹¹ On seeing him on February 18, 2008, Dr. Cobden's impression was degenerative arthritis and *medial* meniscus tear of the *left* knee.¹² Mauget was placed on light duty and paid temporary partial disability (TPD) benefits beginning February 18, 2008, and ending October 19, 2008.¹³ Charles N. Brooks, M.D., performed an employer's medical evaluation (EME) of Mauget on March 22, 2008.¹⁴ After noting Mauget's left knee complaints following the work incidents on February 1, 2007, and February 14, 2008,¹⁵ Dr. Brooks diagnosed: 1) a *lateral* meniscus tear of the *left* knee as a result of the February 1, 2007, incident; and 2) a *medial* meniscus tear of the *left* knee that was probably a degenerative condition.¹⁶ Elsewhere in his report, he stated that Mauget did not need further medical treatment for the *left lateral* meniscus tear, that his "current knee pain is probably due to the pre-existing and ongoing degenerative and possibly posttraumatic arthritis in his *left* knee[.]"¹⁷ and that "Mauget's condition with respect to the February 1, 2007, occupational injury is medically stable and has been for some time."¹⁸ When commenting on the arthritis in the *left* knee, Dr. Brooks stated that Mauget "reportedly does not have symptomatic arthritis in the uninjured *right* knee."¹⁹

¹⁰ Exc. 004-05.

¹¹ Exc. 008.

¹² Exc. 006.

¹³ *Mauget I*, Bd. Dec. No. 10-0094 at 3 and Exc. 051.

¹⁴ Exc. 013-23.

¹⁵ Exc. 014.

¹⁶ Exc. 018.

¹⁷ Exc. 020 (italics added).

¹⁸ Exc. 021.

¹⁹ Exc. 021 (italics added).

Until April 2008, Mauget's complaints were primarily related to his *left* knee, although he had occasionally mentioned that *both* knees bothered him.²⁰ On May 7, 2008, he saw Marc Slonimski, M.D.,²¹ complaining of pain in *both* knees, although Mauget's *right* knee was bothering him more. Dr. Slonimski ordered a magnetic resonance imaging (MRI) study of the *right* knee²² and placed temporary restrictions on Mauget's work activities.²³ The MRI done the following day revealed a medial meniscus tear of the *right* knee.²⁴

On May 16, 2008, Mauget filed a Workers' Compensation Claim, indicating February 14, 2008, as the date of injury.²⁵ He described pain in both knees, acknowledged that he was already receiving TPD benefits for his *left* knee, and stated his reason for filing the claim was that ACE "refuses to pay for MRI or acknowledge the claim on my *right* knee."²⁶ He requested TPD benefits and medical costs.²⁷

Mauget saw Dr. Cobden on May 22, 2008, who observed that the MRI of the *right* knee showed a medial meniscus tear and recommended a partial meniscectomy.²⁸ He noted: "The *left* knee may also need to be addressed. However, now it is the *right* knee that gives him the most trouble."²⁹ On June 13, 2008, Dr. Cobden performed partial medial and lateral meniscectomies of Mauget's *right* knee.³⁰

²⁰ Exc. 006, 008, and 024.

²¹ Dr. Slonimski, like Dr. Cobden, is associated with Advanced Medical Centers of Alaska – Fairbanks. Exc. 004-05, 006-07, 012, 024, and 031.

²² Exc. 031.

²³ Exc. 032.

²⁴ Exc. 033.

²⁵ Exc. 035-36.

²⁶ Exc. 035 (italics added).

²⁷ Exc. 036.

²⁸ Exc. 037-38.

²⁹ Exc. 038 (italics added).

³⁰ Exc. 039.

On July, 10, 2008, Lynden filed an Answer to Mauget's claim dated May 16, 2008, disputing any entitlement to TPD and medical costs.³¹ Even though both Mauget's claim and Lynden's Answer referenced February 14, 2008, as the date of injury, the Answer stated: "[In his March 22, 2008, EME report] Dr. Brooks opined that Mr. Mauget's *right* knee was not injured as a result of the 2007 injury and diagnosed him with symptomatic arthritis in the uninjured *right* knee."³² Lynden's liability for medical costs were denied on a similar basis.³³

When Mauget saw him on September 11, 2008, Dr. Cobden reported: "It was February 14, 2008, when crawling under a trailer that he aggravated his *right* knee. His surgery was on June 13, 2008."³⁴ Lynden controverted medical costs for Mauget's *right* knee on October 1, 2008, although the notice referenced an injury date of February 1, 2007, and a 2007 case number.³⁵ The bases for the controversion were: 1) Dr. Brooks' March 22, 2008, EME report indicated that Mauget did not injure his *right* knee; and 2) no physician had provided an opinion that Mauget's *right* knee condition was related to work at Lynden.³⁶

Mauget saw Dr. Cobden again on November 5, 2008, with *left* knee complaints. After reviewing x-rays, Dr. Cobden diagnosed degenerative joint disease in the left knee and planned a *left* total knee reconstruction.³⁷

³¹ Exc. 041-43.

³² Exc. 042 (italics added). Actually, Dr. Brooks stated that Mauget "reportedly does *not* have symptomatic arthritis in the uninjured right knee." Exc. 021 and n.19, *supra* (italics added).

³³ Exc. 042.

³⁴ Exc. 044 (italics added).

³⁵ Exc. 045.

³⁶ *Id.* The record does not reflect whether Lynden had received Dr. Cobden's September 11, 2008, chart note when the controversion was filed.

³⁷ Exc. 047-48.

John E. McDermott, M.D., conducted a second independent medical evaluation (SIME) of Mauguet and prepared a report dated April 20, 2009.³⁸ He concluded that Mauguet's *right* knee problems were the result of degenerative arthritis.³⁹ Dr. McDermott noted that there was "no reference to right knee problems in either [the February 1, 2007, or February 14, 2008, incidents]."⁴⁰ He concurred that Mauguet needed a total *left* knee replacement.⁴¹

On June 16, 2009, Lynden again controverted benefits for the *right* knee.⁴² The controversion was based on both the March 22, 2008, EME report by Dr. Brooks, and the April 20, 2009, SIME report by Dr. McDermott.⁴³

On August 4, 2009, Dr. Cobden performed *left* knee replacement surgery.⁴⁴ Lynden paid Mauguet TTD benefits from August 4, 2009, through September 14, 2009.⁴⁵

A prehearing conference (PHC) was held on January 21, 2010. The PHC summary indicated injury dates of February 1, 2007, and February 14, 2008, and 2007 and 2008 case numbers.⁴⁶ The summary noted the May 16, 2008, claim as being at issue, set a hearing on April 22, 2010, and stated: "Issues for hearing are causation of [Mauguet's] *right* knee injury and the associated medical costs for treatment of the *right* knee, and TTD benefits from 10/20/08 through 08/03/09."⁴⁷

³⁸ Exc. 025-30.

³⁹ Exc. 029.

⁴⁰ *Id.*

⁴¹ Exc. 030.

⁴² *Mauget I*, Bd. Dec. No. 10-0094 at 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Exc. 051.

⁴⁶ Exc. 053-54.

⁴⁷ Exc. 053 (italics added). In relation to his *left* knee condition, Mauguet was on light duty and paid TPD benefits from February 18, 2008, through October 19, 2008. Exc. 051.

At the April 22, 2010, hearing, counsel for Lynden stated his understanding of the hearing's purpose:

[W]e're here today primarily addressing the issues of the right knee. It does seem like some of the . . . benefits requested by Mr. Mauget are [for] time loss benefits or more benefits than he has already received in regards to the left knee, but the primary impetus that brought us here today was the right knee, and in addressing the right knee the employer's of the position that the majority of the medical documentation demonstrates that Mr. Mauget's right knee condition is arthritic in nature, degenerative in nature, and not the result of any work-related injury.⁴⁸

Shortly after the foregoing statement was made, the following exchange took place between the chair and Lynden's counsel:

Chair: [F]rom the original prehearing summary that set this hearing the actual claim was for TTD benefits for the time period from October and for compensability of the right knee condition. Mr. Mauget has been arguing temporary partial disability benefits instead of TTD. Is that -- do you -- I mean, that may be a bit of a surprise to you. Do you have any objection to that or . . .

Counsel: I -- I've been attempting to distill which knee goes with what benefits to . . . avoid any kind of surprise, because some of this is surprising me, but I -- if I understand his claim, which is that the time when he worked as a modified duty as a security guard he does not want -- he wants additional temporary partial disability benefits, which I think if I'm correct in that understanding then I understand that to be TTD benefits before, which . . . my argument really doesn't change on that characterization, so that's fine.⁴⁹

In his closing argument, Lynden's counsel stated:

In addressing the right knee it's the employer's position this evidence supports that it's not a compensable injury, and that Mr. Mauget should not be entitled to medical benefits or time loss benefits associated with the right knee condition. To the extent that today's hearing is addressing the left knee I will candidly admit that I'm somewhat off guard by anything addressing the left knee, in part because I had thought that we

⁴⁸ April 22, 2010, Hr'g Tr. 32:5-15.

⁴⁹ April 22, 2010, Hr'g Tr. 38:23-39:17.

were -- it was concerning the compensability of the right knee and that's why we had the various medical providers involved[.]⁵⁰

In due course following the hearing, the board issued its decision in which, among other things, it modified the PHC "to consider the issues as actually presented and argued by the unrepresented claimant[;]"⁵¹ and awarded Mauget additional disability benefits.⁵² Lynden moved for reconsideration. In its decision on reconsideration, the board affirmed its previous award of additional disability benefits.⁵³

3. *Standard of review.*

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵⁴ "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁵⁵ The commission exercises its independent judgment in reviewing questions of law or procedure.⁵⁶

4. *Discussion.*

a. *Applicable law.*

This appeal presents a single question: Did the board err when it modified the issues identified in the PHC summary, in order to hear and decide whether Mauget was

⁵⁰ April 22, 2010, Hr'g Tr. 63:16-25.

⁵¹ *Mauget I*, Bd. Dec. No. 10-0094 at 9.

⁵² *Id.* at 12.

⁵³ *Mauget II*, Bd. Dec. No. 10-0108 at 12.

⁵⁴ *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

⁵⁵ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

⁵⁶ AS 23.30.128(b).

entitled to additional disability benefits on account of injury to his *left* knee? We apply our independent judgment in reviewing this procedural issue.⁵⁷

The Alaska Supreme Court has held that the board's authority to hear and determine questions with respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties."⁵⁸ The board has discretion to raise questions *sua sponte* with sufficient notice to the parties.⁵⁹ But, absent findings of "unusual and extenuating circumstances," the board is limited to deciding the issues delineated in the prehearing conference, and, when such "unusual and extenuating circumstances" require the board to address other issues, sufficient notice must be given to the parties that the board will address these issues.⁶⁰

Consistent with these principles, the Alaska Workers' Compensation Act, specifically AS 23.30.001(4), provides that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered." Moreover, a board regulation, 8 AAC 45.065(c) states in part: "The [PHC] summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the [PHC] summary governs the issues and the course of the hearing." Another board regulation, 8 AAC 45.070(g), provides: "Except when the

⁵⁷ The following discussion borrows selectively from the commission's decision in *Alcan Electrical & Engineering, Inc. v. Redi Electric, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 112, 9-10 (July 1, 2009). However, we are reluctant to consider any constitutional implications this procedural issue may present because the commission is not empowered to decide constitutional issues. See *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007); *Rockstad v. Chugach Eareckson Support Services, et al.*, Alaska Workers' Comp. App. Comm'n Dec. No. 140, 27 (Nov. 5, 2010).

⁵⁸ *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

⁵⁹ *Id.*; *Summers v. Korobkin Constr.*, 814 P.2d 1369, 1372 n.6 (Alaska 1991).

⁶⁰ *Alcan*, App. Comm'n Dec. No. 112 at 10.

board or its designee determines that unusual and extenuating circumstances exist, the [PHC] summary . . . governs the issues and the course of the hearing."

b. The board erred in hearing and deciding that additional disability benefits were owed Mauget in relation to his left knee injury.

The summary from the PHC on January 21, 2010, indicated that a hearing would be held on April 22, 2010, at which the "[i]ssues for hearing are causation of [Mauget's] *right* knee injury and the associated medical costs for treatment of the *right* knee, and *TTD* benefits from 10/20/08 through 08/03/09."⁶¹ Furthermore, in conformity with the PHC summary, at the hearing, it appeared that Lynden's counsel had come prepared to dispute whether Mauget's *right* knee condition entitled him to more benefits.

[W]e're here today primarily addressing the issues of the right knee. . . . [T]he primary impetus that brought us here today was the right knee, and in addressing the right knee the employer's of the position that the majority of the medical documentation demonstrates that Mr. Mauget's right knee condition is arthritic in nature, degenerative in nature, and not the result of any work-related injury.⁶²

The only modification of the issues at hearing agreed to by Lynden was whether the disability benefits claimed between October 20, 2008, and August 3, 2009, were TPD benefits, instead of TTD benefits, as indicated in the PHC summary.⁶³

In its decision, without making a specific finding that unusual or extenuating circumstances existed at the hearing, the board decided to modify "the Prehearing Conference Summary to consider the issues actually presented and argued by the unrepresented claimant."⁶⁴ Ultimately, it ruled in part: "The employee's limited income, light duty work from October 19, 2008 through August 3, 2009, was caused by

⁶¹ Exc. 053 (italics added).

⁶² April 22, 2010, Hr'g Tr. 32:5-15.

⁶³ April 22, 2010, Hr'g Tr. 38:23-39:17.

⁶⁴ *Mauget I*, Bd. Dec. No. 10-0094 at 9.

the employee's work-related *left* knee injury. Accordingly, the employee will be entitled to *TPD* benefits for that period[.]”⁶⁵

AS 23.30.001(4) requires that hearings in workers' compensation cases be impartial and fair to *all* parties. We conclude that it was unfair to Lynden for the board to modify, of its own accord, the issues at hearing to consider whether Mauget's left knee condition entitled him to additional disability benefits. Moreover, there were no unusual or extenuating circumstances justifying the board's departure from the PHC summary, which limited the issues at hearing to those related to Mauget's right knee condition. Specifically, Lynden's counsel's remarks at hearing cannot reasonably be understood as agreeing to any change in the hearing agenda other than a different characterization of the type of disability benefits being claimed. Without sufficient notice to Lynden that the board would hear evidence and argument relative to Mauget's left knee condition and its compensability, it was inappropriate for the board to modify the issues identified in the PHC summary, and rule on the left knee issue.

5. Conclusion.

The commission VACATES the board's decision and REMANDS this matter to the board to determine whether Mauget is entitled to TPD benefits from October 20, 2008, to August 3, 2009, for his left knee condition.

Date: 17 June 2011

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David Richards, Appeals Commissioner

Signed

S.T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

⁶⁵ *Mauget I*, Bd. Dec. No. 10-0094 at 12 (italics added).

APPEAL PROCEDURES

This is a final decision on the merits of this appeal from the board's Decision No. 10-0094. The commission vacated the board's decision and remanded (returned) the case to the board. The commission's decision becomes effective when distributed unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).⁶⁶ To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed⁶⁷ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any

⁶⁶ A party has 30 days after the service or distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

⁶⁷ *See* n.66, *supra*.

proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed⁶⁸ 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 a minor formatting change, this is a full and correct copy of the Final Decision No. 154 issued in the matter of *Lynden Transport, Inc. v. Mauget*, AWCAC Appeal No. 10-018, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 17, 2011.

Date: June 21, 2011



Signed

B. Ward, Commission Clerk

⁶⁸

Id.