Alaska Workers' Compensation Appeals Commission

Floyd D. Cornelison, Appellant, vs. Rappe Excavating, Inc. and TIG Premier Insurance Company, Appellees.	Final Decision Decision No. 228 August 3, 2016 AWCAC Appeal No. 15-031 AWCB Decision Nos. 15-0139 & 15-0146 AWCB Case No. 199609785

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 15-0139, issued at Anchorage, Alaska, on October 20, 2015, by southcentral panel members Ronald P. Ringel, Chair, and Pamela Cline, Member for Labor, and Alaska Workers' Compensation Board Final Decision and Order on Reconsideration No. 15-0146, issued at Anchorage, Alaska, on November 6, 2015, by southcentral panel members Ronald P. Ringel, Chair, and Pamela Cline, Member for Labor.

Appearances: Floyd D. Cornelison, self-represented appellant; Michelle M. Meshke, Russell Wagg Meshke & Budzinski, PC, for appellees, Rappe Excavating, Inc. and TIG Premier Insurance Company.

Commission proceedings: Appeal filed December 7, 2015; briefing completed April 25, 2016; oral argument was not requested.

Commissioners: James N. Rhodes, Philip E. Ulmer, Andrew M. Hemenway, Chair *pro tempore*.

By: Andrew M. Hemenway, Chair *pro tempore*.

1. Introduction.

This case is before us on appeal from the two most recent of ten decisions in the matter.[1] In *Cornelison IX* and *Cornelison X*, the Alaska Workers' Compensation Board

[1] *See Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 00-0056 (Mar. 28, 2000) (*Cornelison I*); *Cornelison v. Rappe Excavating, Inc.,* (footnote continued on next page)

(Board) denied Floyd D. Cornelison's petition to strike from the record the reports of two employer's medical evaluators, and denied reconsideration of that decision. Mr. Cornelison filed an appeal.[2] We affirm the Board's denial of the petition to strike.

2. Factual background and proceedings.[3]

Floyd D. Cornelison sustained a low back injury in 1996 while employed by Rappe Excavating, Inc.[4] He had back surgery, which was unsuccessful, and he was awarded permanent total disability benefits in 2001.[5]

Alaska Workers' Comp. Bd. Dec. No. 01-0008 (Jan. 11, 2001) (*Cornelison II*); *Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 10-0153 (Sept. 9, 2010) (*Cornelison III*); *Cornelison v. Rappe Excavating, Inc.*, Alaska Worker's Comp. Bd. Dec. No. 12-0178 (Oct. 10, 2012) (*Cornelison IV*); *Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0060 (May 30, 2013) (*Cornelison V*); *Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0068 (June 19, 2013) (*Cornelison VI*); *Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0075 (June 26, 2013) (*Cornelison VII*); *Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0168 (Dec. 26, 2013) (*Cornelison VIII*); *Floyd Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 15-0139 (Oct. 20, 2015) (*Cornelison IX*); *Floyd Cornelison v. Rappe Excavating Inc.*, Alaska Workers' Comp. Bd. Dec. No. 15-0146 (Nov. 6, 2015) (*Cornelison X*).

[2] *Cornelius X* was entitled as final, and informed Mr. Cornelison that he could obtain review by filing an appeal with the Alaska Workers' Compensation Appeals Commission. We issued an order conditionally accepting Mr. Cornelison's notice of appeal. According to Rappe Excavating, several specific treatments have been controverted, but there is no pending claim or petition with respect to those controversions. Appellees' Opening Brief, p. 2. To the extent the Board's decision is not a final decision for purposes of appeal to the Commission, we treat the appeal as a petition for review and grant review in order to avoid injustice resulting from unnecessary delay and to provide guidance to the Board on issues that may evade review. *See* 8 AAC 57.073(b)(1), (4).

[3] We make no factual findings. We state the facts as found by the Board in its various decisions, adding context and detail by citation to the record.

[4] *See Cornelison IX*, p. 4 (No. 1); *Cornelison VIII*, p. 3 (No. 1).

[5] *See Cornelison IX*, p. 4 (Nos. 1, 3); *Cornelison VIII*, pp. 3 (No. 1), 6 (No. 14); *Cornelison II*.

Since 1999, Mr. Cornelison's primary medical provider has been Dr. Leon Chandler, and the primary treatment modality has been oral narcotic pain medication.[6] Dr. Joel Seres saw Mr. Cornelison in 1999 and 2001, providing employer's medical evaluations concluding that Mr. Cornelison was unable to work (1999) and that multidisciplinary pain management was the appropriate treatment, with narcotic treatment (if at all) on a long term rather than as-needed basis (2001).[7] In 2002, Mr. Cornelison was provided an independent medical evaluation by Dr. Neil Pitzer, a Board-appointed physician, who did not rule out long-term use of narcotic medication, and did not recommend a multidisciplinary pain management program.[8]

In 2008, Dr. Seres again examined Mr. Cornelison; then and in 2009 he reviewed medical records since his prior examination as well as surveillance videos and investigative reports from 2007 and 2008.[9] Dr. Seres' reports characterized Mr. Cornelison's appearance on the surveillance videos as absent limping or other visible indications of discomfort.[10] Based in part on the surveillance videos and investigative reports, and in part on his examination and the medical records reviewed, Dr. Seres expressed the opinions that Mr. Cornelison was capable of returning to work as an operating engineer on a full-time basis without restriction,[11] that he was likely diverting drugs,[12] and that he had fraudulently obtained Social Security benefits.[13]

---

[6] *See Cornelison II*, p. 4; *Cornelison V*, p. 8 (No. 9); *Cornelison VIII*, pp. 29 (No. 75), 31 (No. 80) (Mr. Cornelison requires "690 mg. of opioid medicine daily to function"), 32 (No. 83).

[7] *See Cornelison VIII*, pp. 4-5 (Nos. 7-8) (1999), 6-7 (Nos. 15-16) (2001); *Cornelison IV*, p. 2 (No. 1) (1999).

[8] *See Cornelison VIII*, pp. 7-8 (No. 17).

[9] *See Cornelison IX*, pp. 4-5 (Nos. 5-8); *Cornelison VIII*, pp. 8-10 (Nos. 18-23).

[10] *See Cornelison VIII*, pp. 8-9 (No. 20).

[11] *Cornelison VIII*, p. 9 (No. 22).

[12] *Cornelison VIII*, p. 9 (No. 20).

[13] *Cornelison VIII*, p. 9 (No. 22).

Based on Dr. Seres' reports, Rappe Excavating filed a petition to terminate Mr. Cornelison's permanent total disability benefits.[14] A series of preliminary hearings ensued, resulting in Board decisions in 2010 (setting ground rules for Mr. Cornelison's deposition),[15] in 2012 (scheduling a hearing on various preliminary issues),[16] and in 2013 (denying Mr. Cornelison's petition to quash Dr. Seres' report and the surveillance videos and rule them inadmissible, as well as Rappe Excavating's petition for a Board-appointed independent medical examination).[17]

In addition to giving rise to the foregoing Board proceedings, Dr. Seres' 2008 and 2009 reports prompted Mr. Cornelison, in 2011, to file a civil action against Rappe Excavating's insurer and attorneys, and Dr. Seres.[18] While the Board proceedings and the civil action were pending, Mr. Cornelison obtained mental health treatment, paid for without controversion under his workers' compensation insurance coverage, from several providers (including a psychiatrist, Dr. Ramzi Nassar, in May 2011) for symptoms that Mr. Cornelison attributed to stress and anxiety resulting from the ongoing administrative and civil litigation.[19]

---

[14] R. 857-858. *See Cornelison IX*, pp. 4-5 (Nos. 5-8); *Cornelison VIII*, pp. 8-10 (Nos. 18-23).

[15] *Cornelison III*.

[16] *Cornelison IV*. We denied a petition for review of that decision, as did the Alaska Supreme Court. *See Cornelison v. Rappe Excavating, Inc.*, Alaska Workers' Comp. App. Comm'n Appeal No. 12-025 (Order Dec. 21, 2012); Alaska Supreme Court No. S-15008 (Order, Feb. 7, 2013).

[17] *Cornelison V*. The Board granted Rappe Excavating's petition for reconsideration of the latter ruling, but on reconsideration again denied the request for a Board-appointed independent medical evaluation. *See Cornelison VI*, *Cornelison VII*.

[18] *Cornelison V*, p. 2. We take official notice that a judgment in favor of the defendants was issued and the case is currently on appeal. *See Cornelison v. Griffin, et al.*, 3PA-11-01386CI (Superior Court, Third Judicial District); *Cornelison v. TIG, et al.*, No. S-15647 (Alaska Supreme Court).

[19] *See* Employer's Hearing Brief, pp. 2-5 (Exc. 172-175); Exc. 210-212 (Dr. Nassar, May 5, 2011), 233-247.

Rappe Excavating's petition to terminate permanent total disability benefits was heard by the Board in December 2013.[20] On December 26, 2013, the Board issued a decision denying the petition in which it concluded, according to its own subsequent characterization of that decision, that the surveillance videos and investigative reports were inaccurate, flawed, and unreliable.[21] The Board gave no weight to Dr. Seres' 2008 and 2009 reports, in part because of his reliance on the surveillance videos and in part because of inconsistencies and discrepancies in his own report and testimony.[22]

After the Board issued its decision, Rappe Excavating retained Dr. Joella Beard as an employer's medical evaluator. In 2014, she examined Mr. Cornelison and reviewed his medical records, including Dr. Seres' 2008 and 2009 reports; she did not review the surveillance videos.[23] She was not asked to provide an opinion regarding Mr. Cornelison's disability status, but rather to provide diagnoses and treatment recommendations.[24] Dr. Beard issued reports in April and November, 2014.[25] In her initial report, in addition to Mr. Cornelison's low back condition, she diagnosed adjustment disorder and habituation to drugs, and recommended evaluation by an orthopedic surgeon and a psychiatrist specializing in addiction; she did not recommend

---

[20] *Cornelison VIII*, p. 1.

[21] *Cornelison IX*, p. 3. *See generally*, *Cornelison VIII*, pp. 12-24 (Nos. 33-62).

[22] *Cornelison IX*, p. 3. *See Cornelison VIII*, pp. 24-26 (No. 60) ("The panel's observations on viewing the video footage . . . contrasts with Dr. Seres' . . . observations and, accordingly, his opinions based on those observations."); (No. 63) ("Although the weight of Dr. Seres' opinions is diminished by the faulty video surveillance and discrepant reporting on which he relied, inconsistencies in his own reporting contribute to the panel's decision to accord no weight to his opinions."); (No. 64) ("Inconsistencies continue through Dr. Seres' October 4, 2013 deposition testimony[.]"); (No. 67) ("There are further deficiencies in and discrepancies between Dr. Seres' reports and his deposition testimony.").

[23] *Cornelison IX*, p. 5 (No. 15). *See* Exc. 109-129.

[24] *Cornelison IX*, p. 6 (No. 15).

[25] Exc. 113-125 (April 2, 2014); 126-129 (November 3, 2014).

use of an implantable device.[26] In June 2014, Dr. Chandler referred Mr. Cornelison to Dr. Nassar for treatment relating to addiction.[27]

3. Board proceedings.

After receiving Dr. Beard's initial report, Rappe Excavating controverted the use of an implantable device, such as a morphine pain pump, and scheduled an employer's medical evaluation with a psychiatric specialist, Dr. Keyhill Sheorn.[28] Mr. Cornelison filed a petition to strike and for a protective order, asking to strike Dr. Seres' reports from the record based on the Board's determination that they were entitled to no weight, and to strike the report of Dr. Beard because she had relied, in part, on Dr. Seres' reports.[29] The petition to strike was intended to (1) preclude the use of Dr. Seres' reports in any future employer's medical evaluation or Board-appointed independent medical examination, and (2) preclude reliance on Dr. Beard's report as a basis for (a) referral for a psychiatric evaluation and (b) controversion of a morphine pain pump.[30]

Rappe Excavating, in response, asserted that Dr. Seres' reports are relevant, in part, because they are the basis of Mr. Cornelison's claimed mental injury, and that by declining to quash the reports, *Cornelison V* had made the reports part of the record and that ruling should be adhered to as the law of the case.[31] With respect to Dr. Beard's consideration of those reports, Rappe Excavating argued that there is no indication that she unduly relied on them, or that they prejudiced her, and therefore her

---

[26] *Cornelison IX*, p. 6 (No. 15); Exc. 123-124.

[27] Exc. 261.

[28] Employer's Hearing Brief, p. 2, Exc. 172 and Exhibit A; *Cornelison IX*, p. 7 (No. 16).

[29] R. 6831-6832. *See Cornelison IX*, p. 3; Memorandum in Support (July 10, 2015).

[30] Memorandum in Support, pp. 1-2, Exc. 130-131.

[31] Answer, Exc. 155-156; Employer's Hearing Brief, pp. 5-6, Exc. 175-176.

recommendations (a) for a psychiatric evaluation and (b) against use of an implantable morphine pain pump should not be disregarded.[32]

Mr. Cornelison argued that because the Board, subsequent to *Cornelison V*, ruled in *Cornelison VIII* that Dr. Seres' reports are entitled to no weight, *Cornelison V* was no longer a valid basis for including them in the record: they should be struck from the record based on the Board's findings in *Cornelison VIII*.[33] Given the Board's findings in *Cornelison VIII*, Mr. Cornelison argued that, at the least, Dr. Beard should have been provided that decision for her review in conjunction with Dr. Seres' reports.[34] To permit Dr. Seres' reports to continue to be used is contrary to due process of law and public policy, he argued.[35]

The Board concluded that because the reports are relevant to Mr. Cornelison's claim they must be included in the record and admitted into evidence.[36] The Board concluded that it did not have authority to preclude the submission of any particular medical records to an employer's medical evaluator, but that "deliberately withholding significant relevant information, or deliberately including irrelevant, highly prejudicial information" could result in penalties or referral to the Division of Insurance.[37] The Board did not address whether Dr. Beard's report was a valid basis for a referral for a psychiatric employer's medical evaluation, or for controverting a claim for an implantable morphine pain pump.[38]

---

[32] Answer, Exc. 156-157; Employer's Hearing Brief, pp. 6-7, Exc. 176-177.

[33] Hearing Brief, pp. 3-5, Exc. 161-163.

[34] *See* Hearing Brief, p. 6, Exc. 164.

[35] Hearing Brief, p. 6, Exc. 164.

[36] *See Cornelison IX*, p. 11, citing AS 23.30.095(h), 8 AAC 45.120(e).

[37] *Cornelison IX*, p. 12.

[38] At the hearing, Mr. Cornelison stated that he had no objection to submitting to an employer's medical evaluation with a psychiatrist "so long as it is properly procured and there is a proper basis and foundation." Hr'g Tr. at 12:23-25, Sept. 22, 2015. Mr. Cornelison added that he had not filed a claim for use of an

(footnote continued on next page)

4. Arguments on appeal.

Mr. Cornelison's brief raises two issues for our consideration: whether the Board erred in declining to strike (1) Dr. Seres' and (2) Dr. Beard's reports from the record.[39] In asking that these reports be struck, or as he puts it, "expunged" from the record, Mr. Cornelison relies on the Board's determination in *Cornelison VIII* that Dr. Seres' reports are entitled to no weight, because they are based in part on surveillance videos and investigative reports that the Board has characterized as "inaccurate, flawed, and unreliable."[40] Because the Board has found Dr. Seres' reports to be entitled to no weight, and they include highly prejudicial accusations of wrongdoing that the Board has expressly discredited, Mr. Cornelison argues that the Board should preclude other physicians from relying on them.[41] As for Dr. Beard's reports, Mr. Cornelison argues that they should be struck because she relied on Dr. Seres' reports, which the Board has ruled are unreliable.[42] With respect to both physicians' reports, Mr. Cornelison argues that it would be a violation of due process of law to permit an examining physician to rely on them without providing him any opportunity to rebut the accusations they contain.[43]

---

implantable pain pump and both he and Rappe Excavating agreed that was an issue that the Board did not need to address. Hr'g Tr. at 30:17-20.

[39] Appellant's Brief, p. 1. Mr. Cornelison's opening brief addresses two other issues: whether the Board erred in (3) failing to consider his due process rights, and (4) failing to refer the insurer to the Division of Insurance pursuant to AS 23.30.250. *Id.*, pp. 1, 15-19. Issue (3) is an argument Mr. Cornelison makes in connection with the first two issues, and will be considered in that context. Issue (4) was not identified as an issue for the Board's consideration in the prehearing conference and it was not addressed in the Board's decision. We deem it outside the scope of this appeal.

[40] *Cornelison IX*, p. 3. *See generally*, *Cornelison VIII*, pp. 12-24 (Nos. 33-62).

[41] *See* Appellant's Brief, p. 12 ("Dr. Seres reports are based on highly prejudicial, false and misleading surveillance materials, rendering his reports to be useless for any proper purpose.").

[42] *See* Appellant's Brief, pp. 13-15.

[43] Appellant's Brief, pp. 15-17.

Rappe Excavating asserts that it requested an employer's medical evaluation with respect to Mr. Cornelison's mental health "for the purpose of managing ongoing medical benefits[,]" observing that Mr. Cornelison has been provided mental health treatment related to his 1996 injury.[44] Rappe Excavating argues that Dr. Seres' reports "are relevant . . . , in part, because [Mr. Cornelison] places so much emphasis on them as the basis for his mental distress."[45] Rappe Excavating argues that Dr. Seres' reports are admissible into evidence and that Mr. Cornelison's objections go to their weight, not their admissibility, and that it is "required to keep the record intact" pursuant to AS 23.30.095(h).[46] Dr. Beard's report should not be excluded from the record, Rappe Excavating argues, because there is no indication she placed any significance on Dr. Seres' allegations of Social Security fraud or drug diversion, and the only issue she was asked to address was appropriate medical treatment.[47] Rappe Excavating contends that under "applicable regulations" (not identified) it was required to submit all medical records to its evaluating physician, and that "[a]s the Board noted, it would be inappropriate for an employer to 'cherry pick' medical records and deliberately withhold medical records from an examiner."[48] Rappe Excavating argues that omitting Dr. Seres' reports would have confused an examiner, given the number of references in the medical records to the distress that they had allegedly caused.[49]

5. Discussion.

Mr. Cornelison's petition to strike and the parties' arguments involve three related but distinct legal issues: (1) the Board's authority to exclude a medical record

---

[44] Appellees' Opening Brief, p. 1 (hereinafter, Appellees' Brief). *See supra*, note 19.

[45] Appellees' Brief, p. 5.

[46] Appellees' Brief, p. 6 (". . . AS 23.30.095(h) still applies, and all medical evidence relative to the claim is still relevant and must be submitted to gain a complete understanding of the claim.").

[47] *See* Appellees' Brief, p. 7.

[48] Appellees' Brief, p. 8.

[49] Appellees' Brief, p. 8.

from the Board's case file; (2) an employer's discretion to omit its own examining physician's report from the medical records submitted to a subsequent employer's examining physician; and (3) the Board's discretion to exclude from evidence a medical report from an evaluating physician. The Board's decision and the parties' briefs do not clearly distinguish these issues, but we are constrained to do so in order to fully and adequately address the parties' arguments. In doing so, we also distinguish between three different forms of relief pertinent to those distinct legal issues: (1) an order striking a document from the case file; (2) a protective order with respect to a medical examination; and (3) an order excluding from evidence, for purposes of a specific factual decision or legal determination, a document that is in the case file.

a. Petition to strike: all relevant medical reports must be included in the case file.

AS 23.30.095(h) provides that upon the filing of a claim or other pleading, the parties must send to the division the signed reports of all physicians "relating to the proceedings that they may have in their possession or under their control" and that "[t]here is a continuing duty . . . to file . . . all the reports during the pendency of the proceeding." In addition to this statutory requirement, 8 AAC 45.032(4) provides that the Board will put in the case file "documents or anything relating to the employee's injury that is filed with the division or board." An employer's medical evaluator's report falls within the scope of both requirements. Hence, such a report must be included in the Board's case file. Under 8 AAC 45.110(a), every document in the Board's case file is part of the written record at a hearing in the case. Accordingly, the Board correctly denied Mr. Cornelison's motion to strike Dr. Seres' and Dr. Beard's reports from the record.

b. Petition for protective order: irrelevant and prejudicial material.

Rappe Excavating scheduled an employer's medical examination with Dr. Keyhill Sheorn, a psychiatrist.[50] Mr. Cornelison sought a protective order precluding Rappe Excavating from submitting Dr. Seres' reports to Dr. Sheorn, on the grounds that

[50] *See supra*, note 28.

(1) the Board had already ruled that Dr. Seres' reports were entitled to no evidentiary weight, and (2) they are highly prejudicial. The Board's decision stated that "[n]othing in the [Workers' Compensation] Act allows the board to dictate what medical records an employer sends to its medical evaluator[.]"[51] On appeal Rappe Excavating argues that an employer lacks discretion to exclude any relevant medical reports from submission to its medical evaluator.[52]

With respect to the latter point, Rappe Excavating has not identified any statute or regulation that requires an employer to submit all relevant records to its examining physician.[53] In any event, what is at issue is not whether an employer has discretion to exclude relevant medical records, or whether the Board has express or implied authority to "dictate" the records to be submitted. What is at issue, rather, is the Board's authority to protect an employee or employer from adverse consequences that would otherwise result from the inclusion or exclusion of specific materials from such a submission.

As the Board specifically noted, even if it cannot "dictate" what medical records are provided to an examiner, it can sanction an employer for "deliberately withholding

---

[51] *Cornelison IX*, p. 12.

[52] *See* Appellees' Brief, p. 8.

[53] AS 23.30.095(e) provides for examination by an employer-selected physician. It does not include any express requirements regarding the medical records or other information that must, or may, be submitted to the physician by the employer. However, it implicitly requires the submission, to the extent it is "medically appropriate", of at least some "existing diagnostic data." *Id.* ("Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination."). The extent to which Dr. Seres' reports consist of diagnostic data within the scope of AS 23.30.095(e) is an open question: in addition to a patient history and report of a physical examination, they include a recitation of the contents of other medical records, comments on those records, and various opinions, not all of which are medical in nature (*e.g.*, opining that Mr. Cornelison was diverting drugs or that he had engaged in Social Security fraud). Similarly, it is an open question whether or not it is "medically appropriate" for another physician to rely on Dr. Seres' reports, given that they are, in part, based on discredited surveillance videos and investigative reports. Those are both issues for the Board's initial consideration.

significant relevant information" or for submitting "irrelevant, highly prejudicial information" to an employer's evaluating physician.[54] It is entirely appropriate, in that light, for the Board, upon the request of a party, to consider protecting a party from adverse consequences that would otherwise result from the submission (or exclusion) of a specific medical record.[55]

In this case, it is the employee who seeks a protective order, to guard against the submission of what he contends is irrelevant and highly prejudicial information to the employer's physician.[56] Mr. Cornelison's argument is that Dr. Seres' reports should not be submitted because (1) the Board has already determined, in *Cornelison VIII*, that the reports have no evidentiary weight and (2) they are highly prejudicial. When the Board has determined that evidence is entitled to no evidentiary weight, it is saying that the evidence has no tendency to make the existence of a material fact any more or less likely to be true: in short, a Board determination that evidence has no evidentiary weight is equivalent to a legal conclusion that the evidence is irrelevant.[57] If evidence is not only irrelevant, but also highly prejudicial, we agree with the Board that it is not appropriately submitted to the employer's medical evaluator.

But the Board did not rule, in *Cornelison VIII*, that Dr. Seres' reports are of no evidentiary weight for all purposes. The sole factual issue before the Board in *Cornelison VIII* was the continuing existence of a disability. As the Board pointed out in

---

[54] *Cornelison IX*, p. 12.

[55] The availability of this remedy, and the fact that Mr. Cornelison availed himself of it in this case, disposes of his argument based on due process of law: that the Board ruled against him does not mean that it did not provide him due process of law.

[56] Given that Mr. Cornelison has asked that the reports not be submitted to Dr. Sheorn, Rappe Excavating has no need of a protective order to guard against sanctions for omitting them: an employer can scarcely be accused of deliberately omitting information in order to bias its examiner in its favor if it omits the information at the request of the employee.

[57] *See Rivera v. Wal-Mart Stores, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 122, p. 9, note 22 (Dec. 15, 2009).

Cornelison IX, other factual issues may arise and it is possible that the Board may determine that Dr. Seres' reports have some evidentiary weight with respect to those issues.[58] Nonetheless, given the Board's findings in *Cornelison VIII*, a decision by Rappe Excavating to submit Dr. Seres' reports to Dr. Sheorn, despite Mr. Cornelison's objection, should not be lightly undertaken.

For example, absent a claim by Mr. Cornelison for treatment for a mental health condition resulting from exposure to Dr. Seres' reports, their relevance to such a claim is not a sound ground upon which to assert they are relevant with respect to treatment for addiction.[59] In any event, with respect to the necessity and reasonableness of specific forms of treatment, Dr. Seres' opinions appear to rest on his view, based largely on the discredited surveillance videos and investigative reports and soundly rejected by the Board in *Cornelison VIII*, that Mr. Cornelison did not have a continuing disability.[60] For that reason, the Board might well conclude that Dr. Seres' opinions regarding the necessity and reasonableness of particular forms of medical treatment are of no more evidentiary value than they were with respect to the existence of permanent total disability. The Board might even conclude that submitting Dr. Seres' reports to Dr. Sheorn would be tantamount to attempting to unfairly influence Dr. Sheorn's opinions, particularly with respect to the existence of a somatoform disorder. Given those possibilities, and in light of the highly prejudicial contents of those reports, in order to protect itself from sanctions for the submission of irrelevant and highly prejudicial information to Dr. Sheorn, if it insists on submitting those materials to

---

[58] *See Cornelison IX*, p. 11 ("*Cornelison V* only resolved Employee's continuing entitlement to PTD benefits; other issues, such as the reasonableness and necessity of medical treatment were not addressed and may arise in a future hearing. Both Dr. Seres' and Dr. Beard's reports may be relevant to those issues. The reports will be examined . . . at a hearing on the merits of a claim or petitions if scheduled for hearing . . . and the weight to be accorded to the reports [on those issues] will be determined.").

[59] *See supra*, notes 44, 45.

[60] *See* Exc. 23.

Dr. Sheorn despite Mr. Cornelison's objection, Rappe Excavating could petition the Board for a protective order of its own, permitting it to include those reports in the materials provided to Dr. Sheorn without risking sanctions for doing so.[61]

c. Admission of evidence: not all relevant evidence is admissible.

The Board's decision not to strike Dr. Seres' reports from the record appears to rest in substantial degree on the view that all relevant evidence should be admitted into evidence and considered by the fact finder at hearing.[62] In that light, the Board's decision might be construed as establishing the law of the case with respect to the admission into evidence of Dr. Seres' reports at a future hearing. We deem it appropriate, therefore, to briefly address the admissibility of those reports.

Under 8 AAC 45.120(e), relevant evidence is admissible only "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Accordingly, the Board has discretion to deny the admission into evidence of an expert medical opinion that is based, in part, on a surveillance video and investigative reports that it has determined are unreliable: an expert opinion that is in substantial degree based on unreliable information can reasonably be characterized as not the sort of evidence that reasonable persons would rely on in the conduct of serious affairs.

---

[61] To the extent Mr. Cornelison objects to the consideration of Dr. Beard's report by Dr. Sheorn, we note that the Board has not ruled, as it did with respect to Dr. Seres' reports, that Dr. Beard's report is entitled to no evidentiary weight, and we also note that Mr. Cornelison did not argue to the Board, as he did with respect to Dr. Seres' reports, that Dr. Beard's report contained highly prejudicial information. To the extent that Mr. Cornelison objects to using Dr. Beard's report as a basis for referral to Dr. Sheorn, this is harmless error to the extent Dr. Sheorn evaluates Mr. Cornelison as a "psychiatry addiction specialist", because Mr. Cornelison's treating physician has also referred Mr. Cornelison to a mental health practitioner for addiction treatment. *See supra*, note 38. We note that Dr. Beard's report does not provide a specific referral for a psychiatric examination with respect to a somatoform condition. *See* Exc. 123 (Referral to psychiatrist or psychologist appropriate "for the above cited reasons", *i.e.*, addiction therapy).

[62] *See Cornelison IX*, pp. 9-10, 11.

As the Board has recognized, medical opinion evidence may be relevant in a future hearing regarding a variety of factual matters other than the existence of a permanent total disability, and in particular with respect to the reasonableness and necessity of specific medical treatments, such as whether an implantable medication pump[63] or mental health treatment for addiction is reasonable and necessary.[64] Whether Dr. Seres' or Dr. Beard's reports, or Dr. Sheorn's report, will be admissible with respect to the necessity and reasonableness of any specific form of medical treatment is a question to be determined by the Board in light of the specific request for treatment, the condition for which treatment is sought, the opinion solicited and expressed, and the reliability and relevance of the information relied on as the basis for the opinion.

---

[63] *See supra*, note 38.

[64] It is not clear that there is any current dispute with respect to mental health treatment. Mr. Cornelison's attending physician (Dr. Chandler) referred Mr. Cornelison to a mental health practitioner for addiction therapy, and Dr. Beard concurred in that referral. Mr. Cornelison states that he is no longer seeking mental health treatment for stress or anxiety resulting from Dr. Seres' reports, and in light of *Cornelison IX* it does not appear that Rappe Excavating at present contends that mental health treatment for a somatoform disorder is reasonable or necessary. Mental health treatment for chronic pain, in some form other than therapy for addiction, has been suggested on several occasions, but does not appear to be presently the subject of a dispute.

6. Conclusion.

The Board's decision to deny Mr. Cornelison's petition to strike the reports of Dr. Seres and Dr. Beard from the record is AFFIRMED. This matter is REMANDED to the Board. We do not retain jurisdiction.

Date: ___*August 3, 2016*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair *pro tempore*

PETITION FOR REVIEW

A party may file a petition for review of this decision with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this decision's distribution, shown in the box below.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

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 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 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 and correction of typographical errors, this is a full and correct copy of Decision No. 228 issued in the matter of *Floyd D. Cornelison vs. Rappe Excavating, Inc. and TIG Premier Insurance Company,* AWCAC Appeal No. 15-031, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 3, 2016.

Date: *August 4, 2016*

Signed

K. Morrison, Appeals Commission Clerk