Alaska Workers' Compensation Appeals Commission

ASRC Energy Services, Inc. and Arctic Slope Regional Corporation, Petitioners, vs. Jeffrey L. Kollman, Respondent.	Decision on Petition For Review Dec. No. 186 August 21, 2013 AWCAC Appeal No. 13-014 AWCB Decision No. 13-0076 AWCB Case No. 201007169

Decision on Petition for Review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 13-0076, issued at Fairbanks, Alaska, on June 27, 2013, by northern panel members Amanda K. Eklund, Chair, Zebulon Woodman, Member for Labor, and Krista Lord, Member for Industry.

Appearances: Robert J. Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for petitioners, ASRC Energy Services, Inc. and Arctic Slope Regional Corporation; Michael J. Jensen, Law Offices of Michael J. Jensen, for respondent, Jeffrey L. Kollman.

Commission proceedings: Petition for review filed July 12, 2013; opposition to petition for review filed July 24, 2013; petition for review granted August 15, 2013.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (board) recently issued an Interlocutory Decision and Order in this matter.[1] On July 12, 2013, petitioners, ASRC Energy Services, Inc. and Arctic Slope Regional Corporation (ASRC), filed a petition for review with the Workers' Compensation Appeals Commission (commission). The petition sought commission review of two of the board's orders from its interlocutory decision: 1) that Kollman may have a witness present and may record any employer's

[1] *See Jeffrey L. Kollman v. ASRC Energy Services, Inc. and Arctic Slope Regional Corp.*, Alaska Workers' Comp. Bd. Dec. No. 13-0076 (June 27, 2013).

medical examination[2] (EME), and 2) that Herbert A. Schwager, Ph.D., may be identified as a physician, as defined in AS 23.30.395(31). Respondent, Jeffrey L. Kollman (Kollman), filed an opposition to the petition on July 24, 2013. We granted the petition on August 15, 2013, having found that it satisfied a commission criterion for granting interlocutory review.[3]

2. Factual background.

The board held a hearing in this matter on May 9, 2013, during which it received evidence that pertained to several procedural disputes between Kollman and ASRC.[4] One of the issues was whether Kollman was entitled to have a witness present and to record the EMEs to be performed by Dr. Kim and Dr. Klecan.[5] Another issue was whether Dr. Schwager may be identified as a physician. The board made the following findings in that respect.

> Dr. Schwager holds a PhD in psychology and is a licensed psychologist in Arizona, where he still has an office. He is licensed in psychology by the National Register for Health Services. He is currently in private practice in Wasilla, Alaska, at Tele Behavioral Medicine Associates. He is actively treating 50-75 patients. He is not a licensed psychologist in Alaska, but is certified as a licensed professional counselor in Alaska. While he is trained in psychology, he does not "hold himself out to the public" as a psychologist. He describes the scope of his practice as "between the two [psychology and counseling]," and "not excluded or definitely included in either" psychology or counseling. When asked why he did not pursue certification as a psychologist in Alaska, he testified the licensing requirements for professional counseling are less strict, less cumbersome and less expensive.

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[2] AS 23.30.095(e) refers to employer examinations, whereas AS 23.30.095(k) refers to employer evaluations. In this decision, we use the terms interchangeably.

[3] 8 AAC 57.073(b)(2) provides that review will be granted if "the decision . . . involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the decision . . . may materially advance the ultimate resolution of the claim[.]"

[4] *See Kollman*, Bd. Dec. No. 13-0076 at 1.

[5] According to ASRC, the issue, as raised at a prehearing on March 4, 2013, was whether any medical examination, including EMEs and SIMEs (Second Independent Medical Evaluation), could be witnessed and recorded by a party. *See id*. at 6. The board confined its decision to EMEs.

> As a licensed professional counselor, he does not do psychometric testing. He describes his practice as counseling patients who have a primarily medical diagnosis in managing their behavioral symptoms. He considers himself to specialize in behavioral medicine. He frequently uses cognitive behavioral therapy techniques to help patients with chronic pain, traumatic brain injury and post-traumatic stress disorder.[6]

3. Standard of review.

The commission is to exercise its independent judgment when reviewing questions of procedure.[7] The two issues presented by the petition are procedural, subject to our independent review.

4. Discussion.

a. Applicable law.

Interpretation of a statute starts with its plain language, although statutes are ultimately construed "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[8]

AS 23.30.095(e) reads in relevant part:

> The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may

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[6] *Kollman*, Bd. Dec. No. 13-0076 at 8.

[7] *See* AS 23.30.128(b).

[8] *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007) (quoting *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999)).

> have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.

AS 23.30.395(31) reads: "physician" includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists[.]"

b. EME physicians cannot be required to allow the witnessing and recording of EMEs.

At the outset, we note that AS 23.30.095(e), the only statutory subsection pertaining to EMEs, is silent on the subject of whether an employee may have a witness present and may have the EME recorded. Instead, it states in part: "The employee shall . . . submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer." Thus, the statute provides no underpinning for the board's order. It leaves the choice of an EME physician *exclusively to the employer*, with the only restriction being that the physician must be licensed to practice where the EME takes place.[9]

In reaching its decision, the board cited an Alaska Supreme Court (supreme court) case,[10] as persuasive authority for its ruling to allow a witness to attend, and the recording of, Kollman's EMEs. In a split (3-2) decision, the majority held that plaintiff's counsel may be present and record a medical examination of the plaintiff.[11] It is

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[9] Similarly, there is no board regulation, *see* 8 AAC 45.010—.900, which addresses EME procedures.

[10] *See Kollman*, Bd. Dec. No. 13-0076 at 12 (citing *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144 (Alaska 1989)).

[11] *See Langfeldt-Haaland*, 768 P.2d at 1147.

persuasive authority because the court quite carefully and explicitly limited its holding to medical examinations in civil litigation.

Initially, we observe that in civil litigation, medical examinations are provided for in Civil Rule 35.[12] The language of the rule is significantly different than the language of AS 23.30.095(e). It is the court which bears the responsibility for ordering medical examinations under the civil rule. Given the wording of the rule, presumably the court can exercise some control over who is selected to perform those medical examinations. In contrast, subsection .095(e) expressly reserves the prerogative of choosing a physician to perform the EME to the employer, subject to the restriction as to where it should take place.

In *Langfeldt-Haaland*, both the majority and the dissent discussed primarily legal principles for and against allowing plaintiff's counsel to attend and record the examination. The majority contended: 1) there is a constitutional right to counsel in civil cases arising from the due process clause;[13] 2) counsel may observe shortcomings and improprieties during the examination which could be the subject of inquiries on cross-examination at trial; and 3) counsel may object to questions posed to the plaintiff during the examination that concern privileged information.[14] The dissent countered: 1) adopting such a rule could have a chilling effect on otherwise reputable physicians performing medical examinations; and 2) there is no reciprocal right of defense counsel to attend the plaintiff's medical examination or examinations conducted by non-treating medical experts hired for trial by the plaintiff.[15]

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[12] **Rule 35. Physical and Mental Examination of Persons. (a) Order for Examination.** When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner[.]

[13] The commission is precluded from addressing constitutional issues, *see Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007), which eliminates our consideration of this rationale as a basis for allowing Kollman's EME to be witnessed and recorded.

[14] *See Langfeldt-Haaland*, 768 P.2d at 1146.

[15] *See id*. at 1147-48 (dissenting opinion).

We recognize the legitimacy of the legal principles identified by the majority in *Langfeldt-Haaland* in support of allowing plaintiff's counsel to witness and record medical examinations. Having witnessed and recorded the examination, it stands to reason that plaintiff's counsel would be in a better position 1) to object to questions posed by the physician that concern privileged information, and 2) to cross-examine the examining physician in deposition or at trial. Nevertheless, we believe that in those circumstances, the trial court can effectively deal with the attempted introduction into evidence of any privileged communication, and on cross-examination, experienced, competent counsel can adequately explore whether there were any improprieties in the administration of the medical examination.

As the following discussion reveals, the commission concludes that the two legal principles identified by the dissent in *Langfeldt-Haaland* are of greater utility in deciding the EME issue. In terms of a chilling effect, the spirit and letter of AS 23.30.095(e) are violated when an employer is restricted in its choice of physician in a manner other than that provided for in the statute. As for fundamental fairness, it is lacking where only the employee's counsel, and not the employer's counsel, can attend and record EMEs and possibly other medical examinations.

In connection with its petition, ASRC provided evidence in the form of a survey of board-approved SIME physicians that demonstrates that a significant percentage of those physicians would not allow the witnessing and recording of their examinations.[16] Based on that survey, we infer that a significant percentage of physicians conducting EMEs would decline to perform them if they are required to allow the examinations to be witnessed and recorded, as Drs. Kim and Klecan did here. AS 23.30.095(e) states that the choice of an EME physician is exclusively the employer's; it does not say that the choice of an EME physician is exclusively the employer's, provided that the employer chooses a physician who would allow witnessing and recording of the EME. We conclude that to introduce this condition to the EME process, which, incidentally, the board has never done by regulation in over 50 years, would have a chilling effect on

[16] *See* Petition for Review, Exhibit D.

some physicians' willingness to perform EMEs, and thus interfere with the employer's choice of physician.

Turning to fundamental fairness considerations, the board, as it did here, frequently quotes AS 23.30.001(1) for the proposition that the Alaska Workers' Compensation Act should be interpreted "so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to insured workers at a reasonable cost to employers[.]"[17] However, another subsection of that statute, which was not quoted by the board, is more to the point in this case. It states in part: "[H]earings in workers' compensation cases shall be impartial and fair to all parties[.]"[18] Frequently, medical evidence is presented at hearings. If the employee is allowed to have his or her EME witnessed and recorded by his or her counsel, is it fair for the employer's counsel to be barred from attending the EME? Moreover, although it is somewhat rare in workers' compensation matters for an employee to have retained medical experts, in addition to a treating physician, is it fair to bar the employer's counsel from attending and recording medical examinations of the employee performed by the retained experts or treating physician? In the commission's judgment, the answer to both of these questions is "no." The employee's counsel would have an unfair advantage at hearing if only he or she were permitted to attend and record an EME.

Focusing our attention elsewhere, there are medical reasons for preserving the integrity of medical examinations as well as legal ones. In the commission's view, the legal community has shown too little consideration for these medical concerns. Few of the cases we have reviewed on the subject pay any significant amount of attention to them. We believe the better approach is to take these medical concerns into account.

ASRC provided anecdotal information regarding medical concerns in two exhibits it filed with its petition.[19] The exhibits are copies of articles written for members of the

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17 *Kollman*, Bd. Dec. No. 13-0076 at 10.

18 AS 23.30.001(4).

19 *See* Petition for Review, Exhibits B and C.

medical and legal professions. One is entitled *Observation Compromises the Credibility of an Evaluation*. The author cites to research which indicates that *the examinee* may unpredictably change his or her presentation to the examiner when an observer is present at the examination. According to the author, "such observation destroys the credibility of the evaluation process, and any subsequent findings."[20] Certainly anything that would have an adverse effect on the integrity of the examination process should be avoided. The other article is entitled *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*. It takes the position that in the case of neuropsychological examinations, involved third parties, that is, individuals who have some stake in the outcome of the examinations, should be excluded from the examinations.[21] The author noted that an observer is a distraction to the examinee, which may affect the examinee's performance when undertaking psychological testing.[22] Interestingly, the article also pointed out that neuropsychologists are under an ethical duty "to inform lawyers, judges, and others that the presence of an involved third party observer represents a potential ethical conflict."[23] If allowing an observer, let alone the employee's attorney, might pose an ethical conflict for neuropsychologists, and any other medical specialty that has a similar ethical standard, it seems heavy-handed to us to insist on a procedure that might compromise the integrity of the medical profession.

Of additional interest, the dissenters in *Langfeldt-Haaland* commented:

> [The majority's] ruling is premised on the assumption that most physicians hired to conduct [employer] medical examinations are nothing more than "hired guns." The assumption that most physicians will exceed the legitimate scope of such exams unless checked by the presence of opposing counsel denigrates the professionalism and objectivity of the medical profession.[24]

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20 Exhibit B at 2.

21 *See* Exhibit C at 3.

22 *See id*. at 4.

23 Exhibit C at 7.

24 *Langfeldt-Haaland,* 768 P.2d at 1147 (dissenting opinion).

The dissent submits that the infrequent cases of abuse of the process can be effectively dealt with on a case-by-case basis.[25] The commission agrees. As a matter of respect for another profession, in this case, the medical profession, it is appropriate that we give the examiners the benefit of the doubt as far as the propriety of their examinations are concerned, unless and until they provide reasons not to. The alternative, a blanket rule allowing counsel for the injured party to attend and record medical examinations, is undesirable.

Lastly, the board, and Kollman,[26] referenced another board decision, *Greer v. State*,[27] in support of their argument for a rule allowing counsel to be present and to record EMEs. We do not find *Greer* to be of persuasive value. Among other things, the board in *Greer* viewed the examinations provided for in Civil Rule 35 as equivalent to EMEs under AS 23.30.095(e). We do not.[28] Moreover, the survey provided by ASRC of SIME physicians calls into question the board's assertion that many physicians allow witnesses to be present and record medical examinations.

Summarizing, there are legal and medical reasons for and against allowing an employee's counsel to attend and record an EME. On balance, the reasons against allowing counsel to attend and record EMEs are more persuasive to us. The statute, AS 23.30.095(e), does not provide that authority, nor is there any board regulation which does. Civil Rule 35 medical examinations are distinguishable from EMEs because the court has the authority to order the medical examinations and any restrictions on them. Subsection .095(e) leaves the choice of an EME physician to the employer, with the only restriction being that the physician must be licensed in the place where the EME is performed. If EMEs are allowed to be witnessed and recorded by the employee's counsel, it would have a chilling effect and is unfair to employers, whose counsel would have no reciprocal rights to attend and record EMEs or other medical

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25 *See Langfeldt-Haaland,* 768 P.2d at 1147 (dissenting opinion).

26 *See* Opposition to Petition for Review at 5.

27 Alaska Workers' Comp. Bd. Dec. No. 10-0190 (Nov. 26, 2010).

28 *See* discussion in Part 4(b), *supra*.

examinations. From a medical standpoint, there are reasons to exclude counsel, or any other involved third party, from observing and recording EMEs. The presence of witnesses has been known to affect the examinees. For these and the other reasons mentioned, we hold that employees' counsel may attend and record EMEs provided that, in their sole and unfettered discretion, the EME physicians agree to them doing so.

c. AS 23.30.395(31) has been interpreted to include psychologists as physicians.

The issue whether Dr. Schwager can be identified as a physician is simpler to resolve. The list of medical professionals that are physicians under AS 23.30.395(31) does not include psychologists. However, the supreme court has construed that subsection to include psychologists as physicians.[29] There is no reason not to follow that authority, thus, we subscribe to the supreme court's holding that psychologists are physicians.

5. Conclusion.

We reverse the board's order that Kollman's counsel can attend and record his EMEs. Counsel may attend and record the EMEs, provided that the examining physicians agree. We affirm the board's order that Dr. Schwager can be identified as a physician, and return jurisdiction to the board for proceedings consistent with this decision.

Date: *21 August 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

[29] *See Thoeni, supra* at 1258.

RECONSIDERATION

Reconsideration of this decision is not available.

PETITION FOR REVIEW

This is a non-final decision as to the appeals commission's reversal and remand to the board. This non-final decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted.

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.[30] To see the date of distribution look at the box below.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that this is a full and correct copy of the Decision on Petition for Review No. 186 issued in the matter of *ASRC Energy Services, Inc. and Arctic Slope Regional Corporation vs. Jeffrey L. Kollman,* AWCAC Appeal No. 13-014, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 21, 2013.

Date: *August 22, 2013*

Signed
K. Morrison, Deputy Commission Clerk

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[30] A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was distributed by mail only to a party, then three days are added to the 10 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.