

Case: *Fred Meyer, Inc. and Alaska Insurance Guaranty Association (successor in interest to Fremont Insurance Company) vs. Kristine B. Updike*, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (October 29, 2009)

Facts: Kristine Updike (Updike) injured her right knee in 1993 working for Fred Meyer. She had three surgeries and settled her workers' compensation claims, other than for future medical benefits. Updike then sought medical benefits for a knee replacement. In March 2006, Dr. Steven Schilperoort, the employer's medical examiner, concluded that Updike's 1993 work injury was not a substantial factor in bringing about her current need for treatment of her right knee. Updike's current doctor, Dr. William Ford, agreed with Dr. Schilperoort in March 2007, stating, "I concur with his findings and recommendations and feel that he did a very complete in-depth evaluation of this problem." Dec. No. 120 at 4. (Updike had earlier received treatment from Dr. Pierson and Dr. Cobden.)

The board denied her claim for right knee treatment "at this time" but ordered a second independent medical exam (SIME). *Id.* at 1. The board applied the compensability presumption, decided that it was rebutted but that Updike had failed to prove her claim by a preponderance of the evidence. However, the board concluded that Dr. Pierson's chart notes indicated that "the employee's degenerative joint disease and meniscus tears and chondral tears arose from trauma at work" and ordered an SIME under AS 23.30.110(g). *Id.* at 5. Fred Meyer appealed the order for an SIME.

Applicable law: 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," *Vest v. First Nat'l Bank of Fairbanks*, 659 P.2d 1233, 1234 n.2 (Alaska 1983), or an error is "manifest on the face of the record." *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896, 898 n.4 (Alaska 1973). A manifest error occurs when "an obvious mistake that . . . should have been noticed" is made. *Jurgens v. City of North Pole*, 153 P.3d 321, 326-27 (Alaska 2007). A manifest error is similar to a plain error; when plain error occurs, the court will consider claims or arguments raised for the first time on appeal. *Id.* at 327 n.16. "Plain error exists where an obvious mistake has been made which creates a high likelihood that injustice has resulted." *Asher v. Alkan Shelter, LLC*, 212 P.3d 772, 784 (Alaska 2009).

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. *E.g., Safeway, Inc. v. Mackey*, 965 P.2d 22, 27-28 (Alaska 1998).

AS 23.30.110(g) provides in relevant part:

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

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

Bah v. Trident Seafoods Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 073, 4-5 (Feb. 27, 2008), held that SIMEs were appropriate only "when there is a significant gap in the medical or scientific evidence" under § .110(g) or when a medical dispute exists between doctors for the employee and the employer under § .095(k). Under either provision, the issue or dispute must be relevant to a pending claim or petition and the purpose of the SIME must be to assist the board in resolving that issue or dispute.

Issues: Did the board properly deny Updike's claim? Could the board order an SIME under AS 23.30.110(g)? Was there a medical dispute under AS 23.30.095(k)?

Holding/analysis: Even though Updike did not appeal, the commission raised the issue of whether the board properly denied her claim because of manifest errors. The commission found three such errors. First, the board's finding that the evidence was insufficiently clear to permit it to decide the case was logically inconsistent with its determination that there was sufficient evidence to overcome the presumption. Second, the board erred in conditionally denying Updike's claim because the board "may not leave a claim in an indeterminate state forever by appending 'at this time' or other such conditional language." Dec. No. 120 at 10. Third, the board erred by failing to review the complete record. Documents as basic as the 1993 report of injury, physician report forms and the settlement agreement were missing from the record given to the commission. "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.'" The board's role is to weigh the evidence and determine credibility; when it fails to do so and nevertheless denies a claim, the result is unjust." *Id.* at 11.

The board erred in ordering an SIME because AS 23.30.110(g) did not apply to claims seeking only medical benefits.

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, it makes sense to interpret § .110(g) as excluding that type of a claim. *Id.* at 13.

Finally, the commission concluded that Dr. Pierson's chart note was insufficient 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 opined only 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. The commission observed that if the complete board record contained a clear statement of work-relationship of the need for future knee replacement from Dr. Pierson, the board could find that a medical dispute existed and order an SIME under .095(k) on remand.