ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

Cristina R. VanDort Employee, Claimant, v. Greatland Foods, Inc., Employer, and Royal Insurance Co. of America and Arrowood Indemnity Co., Insurers; and Fred Meyer Stores, Inc., Employer; and Frito-Lay, Inc., Employer; and Fidelity Guaranty Insurance Co., Insurer; Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case Nos. 199612216, 199703124M, 200324875, 200424614 AWCB Decision No. 13-0102 Filed with AWCB Anchorage, Alaska on August 28, 2013

Cristina R. VanDort's (Employee) April 23, 2013 petition for a second independent medical evaluation (SIME) and attorney's fees and costs was heard on July 23, 2013, in Anchorage, Alaska. The hearing date was selected on May 30, 2013. Attorney Michael Jensen appeared and represented Employee. Attorney Robert Griffin appeared and represented Greatland Foods, Royal Insurance Co. of America, and Arrowood Indemnity Co. (Employer I). Attorney Joseph Cooper appeared and represented Fred Meyer, Inc., which is self-employed (Employer II). Attorney Jeffrey Holloway appeared telephonically and represented Frito-Lay, Inc. and Fidelity Guaranty Insurance Co. (Employer III). The record closed at the hearing's conclusion on July 23, 2013.

ISSUES

Employee contends a second SIME with a different physician should be ordered because the April 4, 2011 SIME report and May 27, 2011 SIME supplemental report are inadequate to help the board resolve the dispute. Employee asserts the reports did not take into consideration all the facts relevant to causation: the doctor allegedly was unfamiliar with Employee's job duties working for Employers II and III, and did not review Employee's November 23, 2010 deposition testimony. Employee also asserts the SIME physician applied the wrong legal standard and lacks credibility.

Employer I attended the hearing but did not submit a brief or present an argument. Employer II asserted the existing SIME reports were comprehensive, Employee was requesting a second SIME only because she did not like the results of the first one, and a new SIME would do nothing to further assist the board. Employer III concurred, emphasizing the first SIME addressed all issues including causation, medical treatment, medical stability, permanent physical impairment (PPI) and functional capacities. Employers II and III agreed ordering a "duplicative" SIME would contravene the Alaska Workers' Compensation Act's (Act) intent to ensure the quick, efficient, fair and predictable delivery of benefits at a reasonable cost to employers. If a second SIME is ordered, Employer III requested it be conducted by the same physician because his familiarity with the case would mitigate costs.

1. *Should Employee be granted a second SIME?*

Employee contends if she obtains a second SIME she will have secured a benefit and is entitled to attorney's fees and costs.

Employers II and III contend even if Employee obtains a second SIME, no fees or costs would be due because an SIME is a collateral issue, not a benefit.

2. Should Employee be granted attorney's fees and costs?

FINDINGS OF FACT

The following findings of fact and factual conclusions are established by a preponderance of the evidence:

1) Employee stated she worked for Employer I as a route supervisor from February 17, 1996 to the autumn of 1998. During that time she reported lower back strains occurring on June 15, 1996 and February 25, 1997 (Employee's July 18, 2013 hearing brief; Employee's Workers' Compensation file).

2) Employee stated she worked for Employer III as a route sales representative from August 1999 to August 2008 (Employee's July 18, 2013 hearing brief).

3) Employee stated she worked part-time for Employer II as a stocker in 2002 and 2003 (*Id.*).

4) On August 24, 2010, Michael Jensen filed an Entry of Appearance for Employee (Entry of Appearance, August 24, 2010).

5) On August 24, 2010, Employee filed a Workers' Compensation Claim against Employer I for the February 25, 1997 injury. Benefits sought were medical and medical-related transportation benefits; temporary total disability (TTD) from August 29, 2008 – March 6, 2009 and April 4, 2009 – continuing; vocational rehabilitation (to be determined); PPI greater than five percent (to be determined); interest; and attorney's fees and costs. The claim pertained to the low back and the indicated nature of the injury was postlaminectomy syndrome and arachnoiditis. The claim stated, "The employee suffered compensable injuries due to a [sic] traumatic incidents and/or cumulative trauma in the course and scope of her employment. Timely and proper notice of the injury has been given to the employer" (Workers' Compensation Claim, August 23, 2010).

6) On September 22, 2010, Robert Griffin filed an Entry of Appearance of Employer I (Entry of Appearance, September 22, 2010).

7) On November 23, 2010, Employer I deposed Employee (Deposition, filed January 20, 2011).

8) At prehearing on December 13, 2010, Employee and Employer I stipulated to an SIME (Prehearing conference summary, filed December 14, 2010).

9) On April 4, 2011, neurosurgeon Dr. John Cleary, M.D., filed a 75-page SIME report based on his March 28, 2011 evaluation of Employee (SIME report, April 4, 2011).

10) Employee's SIME Question No. 5 read:

> Was the work as a merchandiser/stocker from July 1999 to August 2008 also a substantial factor in causing [Employee's] current low back and/or chronic pain conditions or in aggravating, accelerating or making more symptomatic her persistent low back conditions? (*Id.* at p.73).

Dr. Cleary responded:

> Dr. Lewis, her primary care physician, on October 18, 2003 reported 'back pain happens once a year for last 10 years - does not radiate working.' This does not suggest that [Employee's] yearly episodes of low back pain were work-related. It is the undersigned's opinion that [Employee] had a natural progression of the degenerative condition in her lumbar spine in the years between 1999 and 2008 (*Id*.).

11) On May 21, 2011, Employee submitted 20 follow-up interrogatories to Dr. Cleary, who prepared his supplemental report on May 27, 2011. (SIME supplemental report response to interrogatories, May 27, 2011).

12) Interrogatory No. 1 read:

> . . . you state that [Employee's] injuries or work as a route salesperson/delivery person were not substantial causes of her subsequent pain complaints. If they were not substantial causes, were they a substantial factor among many factors for her pain complaints?

Dr. Cleary responded: "It is the undersigned's opinion that [Employee's] work injuries in 1996 and 1997 were a factor among multiple other factors in [her] subsequent pain complaints. However, the undersigned would not consider those work injuries as a substantial factor" (*Id.*at p.1).

13) Interrogatory No. 4 read:

> In your report you state that the osteoarthritis 'would be symptomatically aggravated by heavy lifting, repeated bending or stooping, weather change, cold weather, also by stress and depression, which could be anticipated to increase the muscle tension in [Employee's] low back.' In your opinion, was her work as a route supervisor from January 1996 to February 1998, her injuries of July 17, 1996 and February 25, 1997, and her work as a route salesperson from July 1999 to August 28, 2008 a

> substantial factor in symptomatology, aggravating her arthritis condition? If not, on what basis did you rule out the injuries and activities required of her job as a factor contributing to her symptoms?

Dr. Cleary responded: ". . . Multiple factors were involved in the progression of [Employee's] multilevel lumbar osteoarthritis. However, the major factor would be her genetic predisposition to this condition" (*Id.*at p.*3*).

14) Interrogatory No. 18 read:

> Was the work as a route salesperson from January 1999 to August 28, 2008 a factor in the development of her symptomatic degenerative disc disease or making the previous degenerative disc disease condition more symptomatic? Did the work accelerate the degenerative process? If not, what degree of trauma over a prolonged period of time, in your opinion, is required to accelerate a degenerative disc disease or make a degenerative disc disease condition more symptomatic?

Dr. Cleary responded: "Multiple factors play a role in the progression of degenerative disc and joint disease in [Employee's] lumbar spine... Many patients develop severe multilevel degenerative disc and joint disease who have never been employed. It is the natural progression of this condition in some people" (*Id.* at p.8).

15) On May 16, 2012, Employee filed a Report of Injury or Illness incurred while working for Employer III. Employee reported "cumulative effects of work from 8/99 to 3/04, per Dr. Gevaert 04/19/12 letter" and stated her last exposure to injury occurred on March 3, 2004 (Report of Occupational Injury or Illness, May 10, 2012).

16) On June 12, 2012, Jeffrey Holloway filed an Entry of Appearance for Employer III (Entry of Appearance, June 12, 2012).

17) On September 6, 2012, Employee filed a Report of Occupational Injury or Illness incurred while working for Employer II. Employee reported "cumulative effects of work from 2002 to 2003 per Dr. Gevaert's 4/19/12 letter" and stated her last exposure to injury occurred on October 22, 2003 (Report of Occupational Injury or Illness, May 5, 2012).

18) On September 10, 2012, Employee filed a Workers' Compensation claim against Employer III for the March 3, 2004 injury. Benefits sought were TTD, TPD, PPI, medical and transportation costs, interest, attorney's fees and vocational rehabilitation (Employee's Workers' Compensation file).

19) On September 12, 2012, Employee filed a Workers' Compensation Claim against Employer II for an October 22, 2003 injury. The claim was virtually identical to the August 24, 2010 claim,

seeking medical and medical-related transportation costs; TTD from August 29, 2008 – March 6, 2009 and April 4, 2009 – continuing; vocational rehabilitation (to be determined); PPI greater than five percent (to be determined); interest; and attorney's fees and costs. The claim pertained to the right low back and the indicated nature of the injury was postlaminectomy syndrome and arachnoiditis. The claim repeated the earlier language: "The employee suffered compensable injuries due to a [sic] traumatic incidents and/or cumulative trauma in the course and scope of her employment. Timely and proper notice of the injury has been given to the employer" (Workers' Compensation Claim, September 14, 2012).

20) On October 29, 2012, Joseph Cooper filed an Entry of Appearance for Employer II (Entry of Appearance, October 29, 2012).

21) At prehearing on November 13, 2012, parties agreed to administratively join Case Nos. 199612216, 199703124, 2003248750 and 200424614. Case No. 199703124M was designated the master file (Prehearing conference summary, November 13, 2012).

22) On December 11, 2012, Employee was deposed by Employers I, II and III (Deposition transcript, filed January 11, 2013).

23) On January 23, 2013, Employee was evaluated by neurological surgeon Karl Andrew Goler, M.D., at the request of Employer III. Like Dr. Cleary, Dr. Goler concluded work was not a substantial factor in causing Employee's low back condition (Goler Employer Medical Evaluation (EME) at p.33, January 23, 2013).

24) On April 24, 2013, Employee petitioned for a board-ordered SIME based on significant disputes between Employee's and Employer's physicians (Petition, April 24, 2013).

25) On May 13, 2013, Employee filed an affidavit of readiness for hearing (ARH) on the April 24, 2013 petition for an SIME (ARH, May 13, 2013).

26) On May 14, 2013, Employers II and III opposed the SIME petition (Answers to April 24, 3013 petition).

27) At prehearing on May 30, 2013, Employee and the three Employers stipulated to a July 23, 2013 hearing on Employee's April 23, 2013 petition to order an SIME (Prehearing Conference Summary, May 30, 2013).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter.
It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

(3) this chapter may not be construed by the courts in favor of a party;

(4) 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.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

Prior to amendments to the Act in 2005, AS 23.30.010 read in its entirety:

AS 23.30.010. Coverage.
Compensation is payable under this chapter in respect of disability or death of an employee.

The amended statute applies to claims for injuries occurring on or after November 7, 2005:

AS 23.30.010. Coverage.
(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of

> different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
> . . .

In construing the last two sentences of amended §010(a), the Commission noted for many years prior to 2005, the Supreme Court routinely held "workers' compensation liability is to be imposed 'whenever employment is established as a causal factor in the disability.' A 'causal factor' is a legal cause if 'it is a substantial factor in bringing about the harm' at issue." *City of Seward and Alaska Municipal League v. Hansen*, AWCAC Decision No. 146 (January 21, 2011) at 10, citing *Doyon Universal Services v. Allen*, 999 P.2d 764, 770 (Alaska 2000); and *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 597-98 (Alaska 1979). For injuries prior to November 7, 2005, the Court applied the same standard when the dispute was over employer liability for medical treatment. *See Hansen* at 10, citing, *e.g.*, *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-96 (Alaska 2003).

> **AS 23.30.095. Medical treatments, services, and examinations**
> . . .
> (e) 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. . . .
> . . .
>
> k) 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 by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded.
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> **AS 23.30.110. Procedure on claims.**
> . . .

> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.

In *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), the Alaska Workers' Compensation Appeals Commission (Commission) addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the Commission confirmed, "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer." *Id.* Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence, or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an opinion would help the board. *Id.* at 5.

The Commission further stated that before ordering an SIME it is necessary to find the medical dispute significant or relevant to a pending claim or petition. *Id.* at 4. AS 23.30.095(k) and AS 23.30.110(g) are procedural in nature, not substantive, for reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3; and *Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Wide discretion exists under AS 23.30.110(g) for the board to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." *Hanson v. Municipality of Anchorage*, AWCB Decision No. 10-0175 at 18 (October 29, 2010).

The purpose of an SIME is to have an independent expert provide an opinion to the board about a contested issue, thereby helping the board resolve the dispute. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). An SIME is not intended, under either AS 23.30.095(k) or AS 23.03.110(g), to give an employee an additional opinion at the expense of an employer when the employee disagrees with his own physician's opinion. *Bah* at 4.

Similarly, a second SIME is not intended to provide a "do-over" in situations where an employee does not agree with the results of the first SIME. In *Mitchell v. United Parcel Service*, AWCB Decision No. 05-0224 (September 1, 2005), the employee alleged the SIME physician made

factual errors and failed to consider certain medical records. The evidence in question was provided to the physician for review, and a supplemental SIME report prepared, thereby curing any perceived procedural defect in the evaluation process. Under 8 AAC 45.092, the employee was authorized to communicate with the SIME physician after receiving the report, and to ask questions about any alleged mistakes. At a hearing on the merits, the employee was entitled to argue the weight of the SIME evidence, including challenging the physician's opinions and credibility. The employee was denied an evaluation by a different SIME physician. *Id.* at 5-6.

In *Nunn v. Lowe's*, AWCB Decision No. 08-0111 (June 16, 2008), the SIME physician was asked questions based on the wrong legal standard ("a substantial factor" as opposed to "the substantial cause"), and gaps existed in the questions and the physician's responses. Analogous to *Mitchell*, the appropriate method to resolve alleged errors or deficiencies in the SIME report was found to be asking additional, revised questions using the correct legal standard and focusing on the unaddressed issues. *Id.* at 10.

> **AS 23.30.122. Credibility of witnesses.**
> The 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. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.
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> **AS 23.30.128. Commission proceedings.**
> **. . .**
> (b) . . . The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. . .

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g.*, *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005).

The board alone is charged with determining a physician's credibility, which impacts the weight accorded medical evidence presented at hearing. *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 793 (Alaska 2007). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008) at 11.

> **AS 23.30.145. Attorney Fees.**
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Subsection 145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Harnish.* Attorney's fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990).

In *Adamson v. University of Alaska*, 819 P.886 (Alaska 1991), the Alaska Supreme Court held the language of AS 23.30.145(b) makes it clear that to be awarded attorney's fees and costs, the employee must "be successful on the claim itself, not on a collateral issue. . . The word

'proceedings' also indicates that the Board should look at who ultimately is successful on the claim, as opposed to who prevails at each proceeding." Citing *Adamson*, board decisions have held an employee must be successful on a claim on the merits, not a collateral issue such as discovery, to be entitled to an award of attorney's fees and costs. *See, e.g., Hacking v. Chugach Electric Ass'n.*, AWCB Decision No. 13-0059 (May 28, 2013); *Syren v. Municipality of Anchorage*, AWCB Decision No. 06-0004 (January 6, 2006).

On the other hand, a board-ordered SIME has been considered a "related benefit" under AS 23.30.145(b). Where an employer opposes an employee's petition for an SIME, and the petition is granted, an award of fees under AS 23.30.145(b) is appropriate. *See, e.g., McCain v. NANA Regional Corp.,* AWCB Decision No. 11-0025 (March 4, 2011); *Crawford v. Graff Construction LLC*, AWCB Decision No. 10-0038 (February 23, 2010); *Stepanoff v. Bristol Bay Native Corp.*, AWCB Decision No. 09-0041 (February 26, 2009).

> **8 AAC 45.092. Selection of an independent medical examiner.**
> . . .
> (j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to
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> (1) submit interrogatories or depose the examiner, the party must
> (A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves interrogatories; and
> (B) initially pay the examiner's charges to respond to the interrogatories or for being deposed; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155 (d), the charges may be awarded as costs to the prevailing party;
> (2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or
> (3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155 (d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.

> (k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing and may not consider it in connection with an agreed settlement.

The opinions expressed in an SIME report are examined for content, regardless of whether or not they incorporate the Act's exact legal terminology. The Supreme Court stated "the compensation process is not a game of 'say the magic word' in which the rights of injured workers depends on the use of specific terms, rather than substance." *Smith v. UAF* at 791.

ANALYSIS

1. Should an SIME be ordered?

As the Commission noted in *Bah*, there are three requirements before an SIME can be ordered under AS 23.30.095(k). First, there must be a medical dispute between an employee's attending physician and an EME physician. Second, the dispute must be significant. Third, it must be determined an SIME physician's opinion would assist the board in resolving the dispute. Here there is no question significant medical disputes exist between Employee's and Employer's physicians, so this analysis focuses on the third requirement.

After receiving an SIME report, an employee is authorized to (1) schedule a deposition with the SIME physician or submit interrogatories to him within 30 days; (2) communicate with him in writing; or (3) question him at hearing. 8 AAC 45.092(j). Here Dr. Cleary issued a 75-page SIME report, and Employee sent him 20 interrogatories. Dr. Cleary replied in a ten-page response in which he explained and maintained his original opinions. Employee remains dissatisfied with the SIME results, asserting Dr. Cleary failed to take into consideration all relevant evidence, used the wrong legal standard, and lacks credibility.

Employee did not file a Report of Occupational Injury or Illness with either Employer II or Employer III until over a year after the SIME. Nonetheless, in both the SIME questions and the interrogatories Employee specifically asked Dr. Cleary about Employee's work from July 1999 to August 2008, the period of her work for the subsequent employers. Employee asserts

Dr. Cleary was unfamiliar with Employee's job duties for Employers II and III, but there is no reason Employee could not have brought this information to Dr. Cleary's attention. Dr. Cleary's alleged lack of familiarity is not good cause to order another SIME under either AS 23.30.095(k) or AS 23.30.110(g). It is, however, an argument Employee may raise at a substantive hearing.

Unlike in *Nunn*, here both the SIME questions and interrogatories were based on the correct legal standard for injuries incurred prior to November 7, 2005. AS 23.30.010; *Hansen.* Dr. Cleary was asked if employment was "a substantial factor" in causing Employee's back problems. The fact Dr. Cleary used both "a substantial factor" and "the major factor" in his responses does not invalidate his medical conclusions, much less justify a board-ordered SIME; it again merely raises an issue Employee may address at a hearing on the merits.

Under 8 AAC 45.092(j)(1), Employee could have deposed Dr. Cleary rather than submit interrogatories. A deposition would have given Employee an interactive opportunity to address in detail his concerns as to whether Dr. Cleary adequately considered the job duties for Employers II and III, and whether he understood the proper legal standard. Deposing Dr. Cleary would also have allowed Employee to inquire about medical questions raised in Employee's November 23, 2010 deposition, which is not a document an SIME physician would normally review. By addressing these factual concerns at deposition, Employee could have acquired additional evidence supporting his accusation Dr. Cleary is not credible. However, Employee chose instead to send interrogatories, and now is time barred from requesting a post-SIME deposition.

Under 8 AAC 45.092(j)(3), Employee is authorized to question Dr. Cleary at a hearing, and that testimony will bear on Dr. Cleary's credibility and the weight accorded his opinions and conclusions. However credibility determinations are typically made at substantive hearings, not procedural ones. Moreover, addressing Dr. Cleary's credibility now would severely prejudice Employers II and III, who have the right to depose Dr. Cleary but have not yet done so.

Although significant medical disputes exist between treating and EME physicians, the disputes are no different than they were when Employee and Employer I stipulated to an SIME on December 13, 2010. Employee's argument that a new SIME is needed to assist the board is based not on new evidence, but on his disagreement with Dr. Cleary's conclusions, which were seconded by subsequent EME Dr. Goler.

Employee has not convincingly argued a second SIME will assist the board resolve the dispute. Merely disagreeing with an SIME report is not just cause to start over the SIME process. *Smith v. UAF; Mitchell.* A second SIME would delay progress and cause undue hardship and expense to Employers, thereby contravening the Act's intent to provide quick, efficient, fair and predictable benefits at a reasonable cost. AS 23.30.001. Employee's April 24, 2013 petition for a board-ordered SIME will be denied.

2. Is Employee entitled to attorney's fees and costs, and, if so, in what amount?

When an employer delays or otherwise resists compensation payments and the employee hires an attorney who successfully prosecutes his claim, the employee is entitled to attorney's fees. *Harnish.* In making fee awards under AS 23.30.145(a), the nature, length and complexity of the professional services performed on the injured worker's behalf are considered, as well as the benefits resulting from those services. The experience and skills exercised on an injured worker's behalf are taken into account to compensate their attorneys accordingly. *Id.*

Here awarding attorney's fees and costs is premature, because Employee has not yet successfully prosecuted a claim or obtained a benefit in this proceeding. *Adamson, Hacking, Syren.* If Employee is ultimately successful at a hearing on his claim, or in the event the parties resolve the case, Employee will be entitled to an attorney's fee award, and the parties may argue what constitutes an appropriate award at that time. The attorney's fee issue is not yet ripe for decision and will be held in abeyance until Employee is awarded benefits by board order or the parties settle the case through a compromise and release agreement.

CONCLUSIONS OF LAW

1. A second SIME will not be ordered.
2. Employee is not entitled to attorney's fees and costs at this time.

ORDER

1. Employee's petition for a second SIME is denied.
2. Employee's request for attorney's fees and costs is denied without prejudice.

Dated in Anchorage, Alaska on August 28, 2013.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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Linda F. Hutchings, Member

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Mark Talbert, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Decision and Order in the matter of Christina R. VanDort employee / applicant; v. Greatland Foods, Inc., employer, and Royal Insurance Co. of America and Arrowood Indemnity Co., insurers; and Fred Meyer Stores, Inc., employer; and Frito-Lay, Inc., employer, and Fidelity Guaranty Insurance Co., insurer / defendants; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on August 28, 2013.

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Sertram Harris, Clerk