ALASKA WORKERS' COMPENSATION BOARD

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

JOHN L. JEVONS, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201203193
FIRST STUDENT SERVICES, Employer,	)	AWCB Decision No. 13-0163
and	)	Filed with AWCB Anchorage, Alaska on December 10, 2013
NEW HAMPSHIRE INSURANCE CO., Insurer, Defendants.	)	

John Jevons' October 1, 2013 oral petition for review of the board designee's ruling on questions to be sent to the second independent medical evaluator (SIME) was heard on November 26, 2013 in Anchorage, Alaska. This hearing date was selected on October 1, 2013. Attorney Michael Flanigan appeared and represented John L. Jevons (Employee). Attorney Krista Schwarting appeared and represented First Student Services and New Hampshire Insurance Co. (Employer). No witnesses testified. The record closed at the hearing's conclusion on November 26, 2013.

ISSUE

Employee contends the board designee abused his discretion by striking a definition that Employee wished to send to the second independent medical evaluation (SIME) physician with his questions. Employer contends the definition was properly stricken and the board designee's decision was not an abuse of discretion.

Did the board designee abuse his discretion by striking Employee's proposed definition?

FINDINGS OF FACT

The following findings of fact and factual conclusions, limited to those necessary to address the single issue in dispute, are established by a preponderance of the evidence:

1. On March 7, 2012, Employee was working as a bus driver for Employer, when another driver collided with the bus he was driving. (Report of Injury, March 7, 2012).
2. The impact of the collision sheared the bolts attaching the driver's seat to the bus. Employee was taken to the emergency room complaining of pain in his cervical and lumbar spine, left shoulder, and pelvis. (Central Peninsula Hospital, Emergency Room Note, March 7, 2012).
3. Employee had a prior history of shoulder and cervical surgery. (*Id.*).
4. On May 24, 2012, Peter Ross, M.D. diagnosed Employee with a left shoulder supraspinatus tendon tear. (Kenai Peninsula Orthopaedics, chart note, May 24, 2012).
5. On July 28, 2012, Employee was seen by Dr. Anthony Woodward, M.D., for an employer's medical evaluation (EME). Dr. Woodward opined Employee suffered a cervicothoracic strain as a result of the collision, but his shoulder condition was not attributable to the accident. (Dr. Woodward, EME Report, July 28, 2012).
6. At the May 30, 2013 prehearing conference, the parties stipulated to an SIME and agreed to file an SIME form. The board designee stated that the parties could submit up to three questions per issue to be submitted to the SIME physician. (Prehearing Conference Summary, May 30, 2013).
7. On June 28, 2013, the parties filed the SIME form, which indicated causation was one of the issues for the SIME physician. (SIME Form, June 28, 2013).
8. Also on June 28, 2013, Employee submitted his proposed questions for the SIME physician. Included with Employee's questions was the following:

> *The substantial cause* in regard to an aggravation or acceleration of a pre-existing condition is defined in accord with the Alaska Supreme Court decisions in *Rivera v Walmart Stores, Inc.*, 247 P.3d 957 n. 18 (Alaska 2011), *Deyonge v Nana/Marriott*, 1 P3d 90 (Alaska 2000) and *Thurston v Guys with Tools*, 217 P.3d 824, 828 (Alaska 2009) as follows:
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> An injury is *the substantial cause* of an aggravation or acceleration of a pre-existing condition if (1) a disability would not have happened at the time it did, 'but for' an aggravation or acceleration of a pre-existing condition, and (2) reasonable people would regard the injury as the most important cause of

> the aggravation or acceleration of the pre-existing condition that brought about the disability and need for surgery.
>
> In rendering your opinion, pursuant to AS 23.30.120(a)(1), you should assume that it is presumed that the (sic) Mr. Jevon's (sic) 3/7/2012 motor vehicle accident was in fact ***the*** ***substantial cause*** of an injury or an aggravation or acceleration of Mr. Morrison's (sic) pre-existing condition leading to symptoms in his left shoulder and that subsequent proposed surgery on the left shoulder would be reasonable treatment for Mr. Jevon unless there is substantial evidence to the contrary. (Employee's Questions for SIME Physician, June 28, 2013).

9. On July 2, 2013, Employer objected to the statement of law and definitions included in Employee's proposed questions and asked that the only definitions submitted to the SIME physician be those of the board. (Employer letter to board designee, July 2, 2013).
10. At the October 1, 2013 prehearing conference, the board designee noted the board's letter to SIME physicians includes the definition of "the substantial cause," and ordered Employee's proposed definition be stricken. The designee ordered that the questions proposed by both Employee and Employer be submitted to the SIME physician with the board's referral letter. (Prehearing Conference Summary, October 1, 2013).
11. The board's standard referral letter to SIME physicians for post November 7, 2005 injuries includes the following instruction and questions:

> There are some legal concepts peculiar to Alaska workers' compensation law, which you should keep in mind in answering the board's questions. Under Alaska law, the employer hired [Employee] with whatever pre-existing conditions [he OR she] had. Thus, a pre-existing condition may be fully compensated if the employment aggravated, accelerated, or combined with the pre-existing condition to result in disability or the need for medical care. To be considered an aggravation, acceleration, or to have combined with the pre-existing condition, employment must have been "the substantial cause" producing the disability or need for medical treatment. "The substantial cause" means, in relation to all different causes to which a reasonable person could assign responsibility, employment is more than any other cause, the cause of the employee's disability, death, or need for medical treatment. In determining "the substantial cause," the board is required to evaluate the relative contribution of different causes of an employee's death, disability, or need for medical treatment. "Disability" means incapacity because of injury to earn the wages the employee was receiving at the time of injury in the same or any other employment.
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> . . . .

> 1. Please list all causes of [Employee's] disability, or need for medical treatment.
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> 2. If, in your opinion, one cause of [Employee's] disability, or need for medical treatment is a pre-existing condition, did the [Injury Date] employment injury aggravate, accelerate, or combine with the pre-existing condition to cause disability or need for treatment?
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> 3. If so, did the [Injury Date] injury aggravate, accelerate, or combine with the pre-existing condition to produce a temporary or permanent change in the pre-existing condition?
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> 4. Please evaluate the relative contribution of different causes of [Employee's] disability, or need for medical treatment identified in question one.
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> 5. Which of the different causes identified in question one is "the substantial cause" of [Employee's] disability, or need for medical treatment? Please provide the basis for your opinion.
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> 6. If, in your opinion, the [Injury Date] injury was "the substantial cause" of [Employee's] disability, does the work-related disability continue? (Template, letter to SIME physicians for post-November 7, 2005 injuries).

12. Employee agreed this was an "aggravation or acceleration" case rather than a "combination" case. (Hearing representations).

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.

AS 23.30.005. Alaska Workers' Compensation Board.

. . . .

(h) The department shall adopt rules for all panels, and . . . shall adopt regulations to carry out the provisions of this chapter. The department may by regulation provide for procedural, discovery, or stipulated matters to be heard and decided . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. . . . .

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.

AS 23.30.095. Medical treatments, services, and examinations.

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

(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. . .

The purpose of an SIME is to have an independent expert provide an opinion to assist the board in deciding a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). The SIME physician is the board's expert. *Church v. Arctic Fire and Safety*, AWCAC Decision No. 126 (December 31, 2009) at 13; *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 3. An SIME is not intended to give the parties an additional medical opinion. *Bah* at 5.

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, 533-534 (Alaska 1987).

> **23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
> . . . .
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

AS 23.30.108(c) gives the board designee authority and responsibility to decide all discovery issues at the prehearing conference level, with the right of both parties to seek Board review. *Smith v. CSK Auto, Inc.*, AWCAC Decision No. 002 (January 27, 2006). The abuse of discretion standard applies when reviewing a designee's decisions regarding SIMEs. *See, e.g., Zimmerman v. Aurora Well Service, LLC*, AWCB Decision No. 12-0074 (April 16, 2012).

An "abuse of discretion" has been defined to include "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive," failing to apply controlling law or regulation, or failing to exercise sound, reasonable and legal discretion. *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, n. 13 (Alaska 1999); *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979; *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The Administrative Procedure Act (APA) includes reference to a "substantial evidence" standard when reviewing decisions for abuse of discretion:

> **AS 44.62.570. Scope of review.**
> …
> Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record.

On appeals to the Alaska Workers' Compensation Appeals Commission or the courts, decisions reviewing board designee determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570, incorporating the "substantial evidence test." Concerned with meeting that standard on appeal, the board also applies a substantial evidence standard when reviewing a board designee's discovery determination. *Augustyniak v. Safeway Stores, Inc*., AWCB No. 06- (April 20, 2006). When applying a substantial evidence standard, "[the reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978).

> **AS 23.30.120. Presumptions.**
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> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter; . . . .
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> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter,* 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations,* 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. For injuries after November 7, 2005, the date AS 23.30.010 was amended to require an injury be "the substantial cause" of the need for benefits, the three steps are as follows: First, an employee must establish "a causal link" between employment and his or her disability, need for medical treatment, etc. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 2. Second, if the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom* at 7. Third, if the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

In *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 11-0175 (August 21, 2013), the commission explained the application of "the substantial cause" in cases where a work injury "aggravates or accelerates" or "combines" with a preexisting condition. When an employee asserts a work injury caused the aggravation or acceleration of a preexisting condition, the board must evaluate the relative contribution of both the preexisting condition and the work injury. To establish causation, the employee must show the work injury played a greater role in the disability or need for medical treatment than did the preexisting injury. *Olsen, 17-18.* When an employee asserts his disability or need for medical treatment arose as a result of a combination of his work injury and a preexisting condition, the employee must establish two additional facts to prevail, first, that the disability or need for treatment would not have happened "but for" the work injury, and second that reasonable persons would regard the work injury as the substantial cause of the disability or need for medical treatment. *Olsen, 18-19.*

> **AS 23.30.135. Procedure before the board**.
> (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties.
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> **8 AAC 45.092. Selection of an independent medical examiner**.
> (a) The board will maintain a list of physicians' names for second independent medical evaluations . . .
> . . .
> (h) If the board requires an evaluation under AS 23.30.095(k), the board will, in its discretion, direct
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> (1) a party to make two copies of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copies in chronological order by date of treatment with the initial report on top and the most recent report at the end, number the copies consecutively, and put the copies in two separate binders;
> . . .
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> (5) that, within 10 days after a parties filing of verification that the binders are complete, each party may submit to the board designee up to three questions per medical issue in dispute under AS 23.30.095(k), as identified by the parties, the board designee, or the board, as follows:

(A) if all parties are represented by counsel, the board designee shall submit to the physician all questions submitted by the parties in addition to and at the same time as the questions developed by the board designee;

(i) The report of the physician who is serving as an independent medical examiner must be done within 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker. . . . Until the parties receive the second independent medical examiner's written report, communications by and with the second independent medical examiner are limited, as follows:

(1) a party or party's representative and the examiner may communicate as needed to schedule or change the scheduling of the examination;

(2) the employee and the examiner may communicate as necessary to complete the examination;

(3) the examiner's communications with a physician who has examined, treated, or evaluated the employee must be in writing, and a copy of the written communication must be sent to the board and the parties; the examiner must request the physician report in writing and request that the physician not communicate in any other manner with the examiner about the employee's condition, treatment or claim.

(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

(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. . . . .

Estes v. Sears Roebuck & Co., AWCB Decision No. 12-0141 (August 17, 2012), held that the parties' questions under 8 AAC 45.092(h)(5) should be limited to simple (non-compound) questions, without legal definitions.

ANALYSIS

Did the board designee abuse his discretion by striking Employee's proposed definition?

The board designee's decision must be upheld unless he failed to apply controlling law or regulation, or failed to exercise sound, reasonable and legal discretion or was arbitrary, capricious, manifestly unreasonable, or had an improper motive.

A party's right to submit questions to an SIME physician before the physician's report is filed arises from 8 AAC 45.092(h)(5). It allows each party up to three questions per medical issue. On its face, the regulation does not permit parties to submit definitions, explanatory facts, or other material to the physician, and *Estes* previously held the parties' questions should not include definitions. Consequently, the board designee did not fail to apply controlling law, exercise sound, reasonable discretion, and the decision was not arbitrary, capricious, or manifestly unreasonable.

Additionally, Employee acknowledged this was an "aggravation or acceleration" case, and not a "combination" case. Given the commission's holding in *Olsen*, that the "but for" and "reasonable person" factors in Employee's proposed definition only apply in "combination" cases, it would have been, at best, misleading to send the proposed definition to the SIME physician, and the board designee correctly struck the material.

To preserve the value of an SIME as a report by the board's expert, questions by the parties under 8 AAC 45.092(h)(5) should be limited to simple, non-compound, questions, without legal definitions. Should parties need to inquire further, or ask the SIME physician about legal definitions, they should do so under 8 AAC 45.092(j) after the physician's report has been received.

The purpose of an SIME is to assist the board, not to give the parties an additional medical opinion. Including a legal definition that differs even slightly from the legal definition provided to the SIME physician by the board designee creates a risk that the SIME physician will be confused or misled, diminishing the value of the SIME to the board. Parties are certainly free to argue the designee's definition is wrong or inadequate or that their proposed definition is better. Those questions, however, are best addressed by interrogatories to, or deposition of, the SIME physician and by argument at hearing.

CONCLUSION OF LAW

The board designee did not abuse his discretion in striking Employee's proposed definition.

ORDER

1. Employee's October 1, 2013 oral petition is denied.
2. The definitions in Employee's proposed questions to the SIME physician will be stricken. Employee's proposed question, without definitions, shall be sent to the SIME physician.

Dated in Anchorage, Alaska on December 10, 2013.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel , Designated Chair

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Ronald Nalikak, Member

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Patricia Vollendorf, 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 Interlocutory Decision and Order in the matter of JOHN L JEVONS, employee / claimant; v. FIRST STUDENT SERVICES, employer; NEW HAMPSHIRE INSURANCE CO., insurer / defendants; Case No. 201203193; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 10, 2013.

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Kimberly Weaver, Office Assistant