ALASKA WORKERS' COMPENSATION BOARD

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

LINDA JANOUSEK, Employee, Claimant, v. NORTH SLOPE BOROUGH SCHOOL DISTRICT, Employer, and SEABRIGHT INS. CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201105714 AWCB Decision No. 15-0090 Filed with AWCB Fairbanks, Alaska On July 27, 2015

North Slope Borough School District's (Employer) February 3, 2015 petition to strike medical records as a result of unauthorized changes of physician was heard in Fairbanks, Alaska on May 7, 2015, a date selected on March 2, 2015. Attorney Nora Barlow appeared and represented Employer. Attorney Steven Constantino appeared and represented Linda Janousek (Employee), who also appeared and testified on her own behalf. Adjuster Seanne Popp testified on Employer's behalf. At the conclusion of the hearing, the record was held open for one week to afford Employee an opportunity to comment on Employer's statement of facts set forth in its hearing brief. The record closed on June 17, 2015, after receiving Employee's comments on Employer's statement of facts, and was reopened again on June 24, 2015 to receive Employer's petition objecting to Employee's comments, at which point the record again closed.

ISSUES[1]

Given the voluminous medical record in this case, at the conclusion of the hearing, the hearing chair inquired about the possibility of utilizing the statement of facts set forth in Employer's hearing brief, which summarizes Employee's extensive treatment history, as a basis for this decision. Employee did not object to the hearing chair's proposal, but requested a week to review Employer's version and provide the panel with a "redline" version, indicating any factual corrections or disputes. On June 17, 2015, Employee filed her comments to Employer's statement of facts. On June 24, 2015, Employer filed a petition objecting to Employee's comments on the basis she impermissibly used the opportunity to provide further argument on the merits of the case rather than merely reviewing its brief for factual accuracy.

1) Should this decision utilize the parties' statements of facts?

During the hearing, Employer repeatedly entered numerous objections to portions of Employee's testimony on the basis of hearsay. Employee either offered no exceptions to the hearsay rule, or contended the testimony was not hearsay. The hearing chair overruled Employer's objections.

2) Were the hearing chair's rulings on Employer's hearsay objections during Employee's testimony correct?

Employee contends her reasonable expectations for an adjuster to advise her of the rules governing changing physicians are relevant to the issues presented. She contends Employer's adjusters never advised her on these rules and further contends Employer has been receiving her medical reports and bills for seven years, yet only now objects to her choice of doctors. Under these facts, Employee contends, she had a reasonable expectation Employer's adjusters would have either informed her of the rules or previously notified her if she was deviating from them. Employer contends the issue of an adjuster's duties under the Act was not an issue set forth in

[1] In addition to the issues presented here, the February 27, 2015 prehearing conference summary also lists attorney's fees as an issue for hearing. However, the parties neither briefed this issue in advance of hearing, nor did they make any contentions concerning it at hearing. Additionally, Employee did not file an affidavit of fees and costs pursuant to 8 AAC 45.145. Furthermore, given the issues presented, it is unknown on what basis Employee might be entitled to claim fees and costs at this stage of litigation. Therefore, this decision will merely acknowledge it as a potential issue, should Employee seek such an award at the appropriate point in time.

the prehearing conference summary and objects to Employee's testimony on due process notice grounds. It also objects to her testimony on relevancy grounds.

3) Was the hearing chair's ruling to exclude Employee's testimony on her reasonable expectations for Employer's adjusters to adequately inform her of the rules governing changing physicians correct?

Employer contends Employee made numerous unauthorized changes of physicians, and this issue is governed by both statute and regulation, which have been narrowly interpreted by both the board and Commission.

Employee opposes Employer's petition on numerous bases. She denies doctor shopping and contends she has relied on chiropractic treatment and massage therapy throughout her life, not only to treat injuries, but also to relieve work stress, general muscle tightness and the aches and pains of everyday life. Therefore, Employee contends, it was inevitable some of her non work-related chiropractic visits would include treatment that could be work related. She also contends an email from Employer's adjuster, recommending she seek treatment under the 2008 claim, was written consent for her to change physicians. Additionally, Employee contends one of her treating physicians "simply disappeared," "vanished," "evaporated," and since she did not care for his associate, she should be allowed to substitute another physician.

Employee also contends the law is complex and board decisions involving unauthorized changes of physicians are inconsistent. She contends there is a disparity in knowledge and experience between Employer's adjuster and herself, and Employer never advised her about what technically constitutes a change of physician, or explained the technicalities of a referral. Even though she has read the Workers' Compensation Division's (Division) pamphlet, *Workers Compensation and You*, she contends it only states she may have to pay the doctor's bill if she makes more than one change of physician. It did not, Employee contends, inform her important medical evidence could be excluded from her case if she changed physicians without Employer's authorization. She contends, because the regulation limiting an employee to one change of physician is not widely known, complex and harsh, it should be modified or waived in this instance to prevent a manifest injustice.

Employee further contends medical services in Barrow are extremely limited and consist of a small community hospital, a travelling nurse practitioner and a chiropractic clinic. She contends medical care beyond chiropractic and basic medical screening require a flight to Anchorage and at least a two- or three-day trip. Employee contends the relative unavailability of medical services is relevant to the issues presented and she requests this be kept in mind when deciding them. She also contends Employer was aware she received chiropractic care from time-to-time when she was far from home, in Anchorage. Employee contends many of the treatment records Employer now complains of have been in its possession for many years and its failure to previously insist upon its rights under the one-change of physician rule conveyed a message to her it would not treat her away-from-home chiropractic visits as a change of physician. Therefore, Employee contends Employer should now be estopped from asserting its rights under the statute.

4) Did Employee make an unlawful change of physician in violation of AS 23.30.095(a)?

Employer contends medical records that were the product of unauthorized changes of physicians not be forwarded to the second independent medical evaluation (SIME) physician or be considered by the board for any purpose.

Employee contends the parties stipulated to a SIME based on disputed medical opinions and Employer now seeks to exclude medical records she used to establish the dispute. Employee contends the parties' SIME stipulation is binding on Employer, the SIME should proceed, and all medical records should be forwarded to the SIME physician. In the alternative, if the medical records used to establish the dispute are excluded, she requests an SIME be ordered based on a gap in the medical evidence caused by the records' exclusion, and further requests the excluded medical records be forwarded to the SIME physician to fill the gap.

5) If Employee did unlawfully change physicians, should medical reports be stricken from the SIME record?

Employer contends the SIME be stayed pending this decision.

Employee contends the SIME should not be stayed pending this decision.

6) Should the SIME be stayed pending issuance of this Decision and Order?

FINDINGS OF FACT

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

1) Employee treated for neck, upper back, lower back, right shoulder, right elbow and left shoulder pain and headaches at Barrow Chiropractic since at least January 23, 2006. Many of her pain diagrams indicate pain in her left shoulder and the left side of her neck. Chart notes indicate Employee feels "stressed" from her job and her headache pain may be associated with stress. Employee's treatment plans included deep tissue massage and manual therapy techniques. (Barrow Chiropractic chart notes, January 23, 2006 to November 9, 2007; treatment plans, January 23, 2006 to February 20, 2006; March 1, 2006 to March 29, 2006; April 4, 2006 to May 2, 2006; observations).

2) Medical services are limited in Barrow, Alaska and consist of the Samuel Simmons Alaska Native hospital, a travelling nurse practitioner and a local chiropractic clinic. (Janousek dep.; Janousek hearing testimony).

3) The chiropractic clinic in Barrow has operated under the names Barrow Chiropractic and Arctic Chiropractic, and has been staffed with numerous chiropractors over time. (Janousek deposition; Janousek hearing testimony; Record).

4) On March 25, 2008, Employee was employed as a transportation manager and reported injuring the left side of her neck, shoulder, back and hip two days earlier while loading and unloading luggage from a school bus. She designated Robert Kirby, D.C., as her attending physician on the injury report. (Report of Occupational Injury or Illness, March 25, 2008).

5) On March 25, 2008, Employee sought treatment from Dr. Kirby at Barrow Chiropractic for pain in her low back. (Kirby chart notes, March 25, 2008).

6) Employee continued treating with Dr. Kirby for pain in her left scapula, cervical spine and sacroiliac joint. (Kirby chart notes, March 26, 2008; March 30, 2008; March 31, 2008; April 3, 2008; April 4, 2008; April 11, 2008; observations).

7) On April 23, 2008, Employee treated with Edward Foster, D.C. at Alyeska Chiropractic in Anchorage, for pain on the left side of her neck, which she attributed to the work injury. (Workers Compensation Initial Evaluation Report, April 23, 2008; Foster report, April 23, 2008).

8) On May 5, 2008, Employee returned to Dr. Kirby at Barrow Chiropractic for treatment of neck pain. (Kirby chart notes, May 5, 2008; May 6, 2008; May 7, 2008; May 12, 2008; observations).

9) On May 15, 2008, and May 16, 2008, Employee returned to Dr. Foster at Alyeska Chiropractic for treatment of neck pain. (Foster reports, May 15, 2008; May 16, 2008).

10) On May 20, 2008, Employee returned to Dr. Kirby at Barrow Chiropractic with complaints of neck and low back pain. (Kirby chart notes, May 20, 2015).

11) Employer contends Employee discontinued treatment for her March 23, 2008 work injury in May of that year, at which point it closed her claim file. (Employer's Hearing Brief, May 1, 2015).

12) Employer does not contend the medical records above should be excluded because they were created before the effective date of 8 AAC 45.082(c), which authorized the exclusion of medical evidence after unlawfully changing physicians. However, it does contend these records show Employee had already unlawfully changed physician's when she resumed treatment for the 2008 injury. (*Id*., n.2).

13) On October 2, 2008, October 3, 2008, and October 4, 2008, Employee returned to Dr. Kirby with complaints of bilateral foot pain, heel pain and pain in her right hip. Her pain diagram also indicates pain in her left shoulder and the left side of her neck. Employee's treatment plan included deep tissue massage and manual therapy techniques. (Kirby chart notes and massage treatment records, October 2, 2008; October 3, 2008; October 4, 2008; treatment plan, October 2, 2008 to November 31, 2008; observations).

14) On October 6, 2008, Employee received massage therapy at Barrow Chiropractic for complaints of a tight left hip. (Kirby chart notes and message treatment record, October 6, 2008).

15) On November 4, 2008, Employee received massage therapy at Barrow Chiropractic for complaints of tight shoulders. (Kirby chart notes and massage treatment record, November 4, 2008).

16) On November 13, 2008, and November 15, 2008, Employee received massage therapy at Barrow Chiropractic for complaints of left shoulder and left neck pain. (Kirby chart notes and massage treatment record, November 13, 2008).

17) On November 20, 2008, Employee received massage therapy at Barrow Chiropractic for complaints of left hip pain. (Kirby chart notes and massage treatment record, November 20, 2008).

18) On December 16, 2008, Employee received massage therapy at Barrow Chiropractic for complaints of leg pain. (Kirby chart notes and massage treatment record, December 16, 2008).

19) On December 25, 2008, Employee received massage therapy at Barrow Chiropractic for complaints of "going through stress" and tight shoulders. (Kirby chart notes and massage treatment record, December 25, 2008).

20) On January 7, 2009 Employee treated with Dr. Kirby for foot and lower back pain. (Kirby chart notes, January 7, 2009).

21) On January 28, 2009, Employee began treating with Douglas Luther, D.C. at Luther Chiropractic in Anchorage for pain in her left shoulder and left hip. Employee's patient intake form indicates her treatment was not related to a work accident. (Patient intake form, January 29, 2009; patient history form, January 28, 2009; Luther report, January 28, 2009).

22) On February 20, 2009, Employee returned to Dr. Kirby because her back was "locking up in spasm." Employee's pain diagram indicates headache and pain along the entire length of her spine. (Kirby chart notes, February 20, 2009; observations).

23) On June 1, 2009, Employee treated with Dr. Kirby for foot, lower back and knee pain, as well as headache. (Kirby chart notes, June 1, 2009).

24) On June 3, 2009, Employee treated with Dr. Kirby for headache, neck and lower back pain. (Kirby chart notes, June 3, 2009).

25) On June 8, 2009, Employee treated with Dr. Kirby for unspecified complaints. Employee's pain diagram shows pain along the length of her spine. (Kirby chart notes, June 8, 2009; observations).

26) On October 26, 2009, Employee underwent lower spine and pelvic magnetic resonance imaging (MRI) studies for complaints of bilateral hip pain and back pain. (Alaska Regional radiology report, October 29, 2009).

27) On April 15, 2011, Employee reported injuring her left shoulder and hips after slipping and falling on ice while exiting a Suburban at work the previous day. She also complained of left neck stiffness and began treating with Bart Hunter, D.C., at Barrow Chiropractic. (Report of Occupational Injury or Illness, April 15, 2011; Physician's Report, undated).

28) On April 19, 2011, Dr. Hunter referred Employee to the Alaska Spine Institute for a left shoulder magnetic resonance imaging study (MRI). (Hunter chart notes, April 19, 2011; Hunter memorandum, undated).

29) On April 25, 2011, Robert Valentz, M.D., evaluated Employee's left shoulder at the Alaska Spine Institute in Anchorage. The left shoulder MRI showed a partial tear of the infraspinatus tendon, degenerative changes in the labrum and chronic degenerative changes in the acromioclavicular (AC) joint. Dr. Valentz ordered a left shoulder steroid injection and planned an orthopedic consultation if Employee failed to improve following the injection. (Valentz report, April 25, 2011).

30) On April 27, 2011, Dr. Valentz performed a left shoulder steroid injection. (Procedure note, April 27, 2011).

31) On May 3, 2011, Employee returned to Dr. Hunter at Barrow Chiropractic with complaints of neck and left shoulder pain. Employee continued to treat with Dr. Hunter on a daily or every other day basis through May 16, 2011. Employee's treatment included one-hour massage therapy sessions twice a week throughout this period of time. (Hunter chart notes and massage treatment records, May 3, 2011 through May 16, 2011).

32) On May 18, 2011, Employee returned to Dr. Valentz at the Alaska Spine Institute. Chart notes indicate Employee was a referral from Dr. Hunter. Employee's primary complaint to Dr. Valentz was neck pain. Dr. Valenz ordered a cervical spine x-ray. (Alaska Spine Institute chart notes, May 18, 2011; Valentz report, May 18, 2011).

33) On May 18, 2011, Employee underwent a cervical x-ray, which was interpreted to show degenerative changes with degenerative changes in the discs, particularly at C6 and the facet joints at multiple levels. (Imaging report, May 18, 2011).

34) On May 20, 2011, Employee saw Dr. Valentz. Her primary complaints were neck and left shoulder pain. She reported to Dr. Valentz she developed these symptoms after a fall climbing into a vehicle at work. Dr. Valentz ordered continued physical therapy and a trial of Flector patches. (Valentz report, May 20, 2011).

35) On June 20, 2011, Employee resumed treating every other day with Dr. Hunter in Barrow for neck and left shoulder pain. Employee's treatment included one-hour massage therapy sessions every other day. (Hunter chart notes and massage treatment records, June 20, 2011 through July 5, 2011).

36) On July 15, 2011, Employee returned to Dr. Valentz at the Alaska Spine Institute with back and shoulder pain. She reported her pain was improved with chiropractic manipulation and physical therapy. Dr. Valentz decided to reevaluate Employee in three months. (Valentz report, July 15, 2011).

37) On August 9, 2011, Employee returned to Dr. Hunter at Barrow Chiropractic for left shoulder and neck pain. Employee's treatment included one-hour massage therapy sessions on a weekly basis for complaints of lower back, upper back and neck tightness, in addition to shoulder pain. (Hunter chart notes and massage treatment records, August 9, 2011 through September 7, 2011).

38) On September 20, 2011, Employee treated with Dr. Hunter for pain and tension in her neck, chest, upper back, lower back and hips. She received one-hour massage therapy. (Massage treatment record, September 20, 2011).

39) On October 5, 2011, Employee treated with Dr. Hunter for pain in her "whole body" from working. She received one-hour massage therapy. (Massage treatment record, October 5, 2011).

40) On October 13, 2011, Employee returned to Dr. Valentz at the Alaska Spine Institute for neck pain. Dr. Valentz ordered Employee to continue with her medications and decided to reevaluate her in three months. (Valentz report, October 13, 2011).

41) On September 7, 2011, Employee returned to Dr. Hunter at Barrow Chiropractic with neck and shoulder complaints. Her pain diagram also indicates left hip pain in addition to left neck and left shoulder pain. (Hunter chart notes, September 7, 2011; observations).

42) Between October 20, 2011, and November 2, 2011, Employee continued seeing Dr. Hunter. Although no discernable complaints or chiropractic treatment can be identified from Dr. Hunter's chart notes, Employee's pain diagrams during this period of time indicate bilateral shoulder pain. Employee received one-hour massages for complaints of neck pain, neck tightness, pain between her shoulders, and bilateral shoulder pain. (Hunter chart notes and massage treatment records, October 20, 2011 through November 2, 2011; observations).

43) On November 17, 2011, Employee returned to Dr. Valentz at the Alaska Spine Institute complaining of left-sided neck and shoulder pain. She also reported getting headaches from her neck pain. Dr. Valentz ordered a cervical MRI and started Employee on a trial of Tramadol. (Valentz report, November 17, 2011).

44) On November 23, 2011, a cervical spine MRI was interpreted to show a moderate sized protrusion at C5-6, probably causing mass effect on the left C6 nerve; an early midline protrusion at C6-7; straightening of the lower cervical lordosis, consistent with muscular spasm; and desiccation of disc material at all levels. (MRI report, November 23, 2011)

45) On November 30, 2011, Employee returned to Dr. Hunter at Barrow Chiropractic with complaints of pain between her shoulders and received a one-hour massage. (Massage treatment record, November 30, 2011).

46) On December 8, 2011, Dr. Valentz performed left C5, left C6 and left C7 medial branch blocks. (Valentz chart note, December 8, 2011).

47) On December 19, 2011, Employee returned to Barrow Chiropractic and received a one hour "full body massage" for complaints of neck and shoulder pain by order of Robert Kent, D.C. (Massage treatment record, December 19, 2011).

48) On January 17, 2012, Employee received one-hour massage therapy at Barrow Chiropractic for pain between her shoulders. (Massage treatment record, January 17, 2012).

49) On February 2, 2012, Employee received one hour "full body massage" at Barrow Chiropractic for complaints of left-sided neck and shoulder pain. (Massage treatment record, February 2, 2012).

50) On February 20, 2012, Employee returned to Dr. Valentz complaining of neck and left shoulder pain. She reported the facet nerve block injections did not help with her pain. Dr. Valentz thought Employee might have cervical radiculopathy and referred Employee to Michael Gevaert. M.D., for an electromyography (EMG) study. (Valentz report, February 20, 2014).

51) On February 20, 2012, Dr. Gevaert performed an EMG study which showed old, chronic bilateral carpal tunnel syndrome status post bilateral carpal tunnel release, but no evidence of cervical radiculopathy. (Gevaert report, February 20, 2012).

52) On March 2, 2012, Employee returned to Barrow Chiropractic and received one-hour massage therapy for complaints of neck and low back pain. (Massage treatment record, March 2, 2012).

53) On March 20, 2012, Employee received one-hour of heat and massage therapy for complaints of pain "all over her back." (Massage treatment record, March 20, 2012).

54) On March 22, 2012, Employee received one-hour massage therapy for mid back and foot pain. (Massage treatment record, March 22, 2012).

55) On March 26, 2012, Employee received one-hour massage therapy for pain "all over." (Massage treatment record, March 26, 2012).

56) On April 4, 2012, Employee received one-hour of massage therapy for mid-back pain. (Massage treatment record, April 4, 2012).

57) On April 16, 2012, Employee resumed treating with Luther Chiropractic for left-sided neck and upper back pain. Treatment consisted of spinal adjustments. (Luther reports, April 16, 2012; April 17, 2012; April 30, 2012; May 22, 2012).

58) On May 23, 2012, Dennis Chong, M.D. performed an employer's medical evaluation (EME) for Employee's 2011 work injury. Employee told Dr. Chong her designated attending physician was Dr. Valence. (Chong report, May 23, 2012).

59) On June 5, 2012 and July 19, 2012, Employer controverted all benefits for Employee's 2011 injury based on Dr. Chong's May 23, 2012 EME report. (Incident Claims Expense and Reporting System (ICERS) event entries, June 7, 2012; August 3, 2012).

60) On May 29, 2012, and June 11, 2012, Employee returned to Luther Chiropractic for left sided neck and upper back pain. Treatment consisted of spinal adjustments and massage therapy. (Luther/Kmet reports, May 29, 2012; June 11, 2012).

61) On June 13, 2012, Employee returned to Dr. Valentz for neck and left shoulder pain. Dr. Valentz, started Employee on a trial of Lyrica. (Valentz report, June 13, 2012).

62) For several days, Employee continued treating at Luther Chiropractic on a daily basis, which including one-hour-massage therapy sessions. (Luther/Kmet reports, June 13, 2012; June 14, 2012; June 15, 2012).

63) On July 23, 2012, Employee returned to Luther Chiropractic seeking treatment for lower back, middle back and right hip pain. She was given one-hour massage therapy. (Luther report, July 23, 2012).

64) On August 2, 2012, Employee returned to Luther Chiropractic to treat for "stiffness and poor posture" on her right side, in addition to lower back and right hip pain. (Luther report, August 2, 2012).

65) On September 24, 2012, Employee saw Brian Carino, M.D., at Alaska Hand-Elbow-Shoulder Surgical Specialists in Anchorage for left shoulder pain radiating into her neck, which she attributed to the 2011 work injury. Employee's patient intake form indicates she was referred to Dr. Carino by an X-ray Technician at Alaska Spinal Institute. Dr. Carino assessed a superior labral tear versus rotator cuff tear and ordered a left shoulder MRI. (Carino report, September 24, 2012; Patient Intake form, September 24, 2012).

66) On September 24, 2012, a left shoulder MRI showed high grade partial tears of the infraspinatus and supraspinatus tendons, possible labral tear and intraarticular synovitis. (MRI report, September 24, 2012).

67) On September 27, 2012, Employee returned to Luther Chiropractic seeking treatment for unspecified complaints. Dr. Luther administered spinal adjustments. (Luther report, September 27, 2012).

68) On October 1, 2012, Dr. Carino recommended Employee undergo an arthroscopic rotator cuff repair. (Carino report, October 1, 2012).

69) On October 30, 2012, Dr. Carino performed arthroscopic surgical repair of Employee's shoulder. (Operative report, October 30, 2012).

70) Following surgery, Employee participated in physical therapy at Avila Integrated Medicine (AIM) in Pueblo, Colorado. (AIM physical therapy reports, December 18, 2012 through December 28, 2013).

71) Employee continued to follow-up with Dr. Carino, both in person and by telephone, following surgery. Employee requested multiple changes in her pain medications and reported ongoing pain, especially at night. During an in person appointment with Dr. Carino, Employee reported continued lateral neck pain for which she had a "followup [sic] appointment" with Orthopedic Physicians Anchorage. (Carino reports, October 31, 2012; November 6, 2012; November 9, 2012; November 12, 2012; November 28, 2012; December 12, 2012; February 13, 2013).

72) On January 8, 2013, Employee returned to Arctic Chiropractic and treated for left shoulder pain, which included one-hour massage therapy sessions. J. Peterson, D.C., also referred Employee for an MRI in Anchorage. (Arctic Chiropractic chart notes and massage treatment records, January 10, 2013, January 11, 2013; January 17, 2013; January 18, 2013; January 22, 2013; January 29, 2013; January 31, 2013).

73) On January 8, 2013, Employee emailed the following to Shannon Butler: "Here is the signed release and doctors as you requested. I will be waiting for the denial letter. . . ." (Employee email, January 8, 2013).

74) On January 15, 2013, Employee emailed Employer's adjuster, Shannon Butler. Her message states: "So am I able to go to the doctor for my neck under workman's comp? I would like to go in Feb. if possible, I'm still having the swelling and headaches." (Employee email, January 15, 2013).

75) On January 18, 2013, Employee emailed the following to Shannon Butler: "I will be going to Anchorage on Feb. 12th for a doctor appt. They want an MRI of my neck so I'll be getting that done. So do I use the claim number from my date of injury, since no one has ever addressed my neck?" (Employee email, January 18, 2013).

76) On January 22, 2013, Employee and Shannon Butler had the following email exchange:

> [Butler] I apologize for the delay in responding. Currently we have the 4/14/11 left shoulder injury, which at this point remains controverted (denied). From my review it appears . . . [the claim] remains denied at this point.
>
> With respect to your question below regarding treatment for your neck, I do see we have a claim on record in which you strained your neck, back & hip loading and unloading luggage off of school bus on 3/23/08. Although the last treatment we have on record for this injury is 5/20/08, it would seem appropriate at this point for you to have medical bills for treatment of this conditions [sic] directed to our office for review and payment processing.
>
> With respect to treatment for your neck please have your medical providers send their medical reports and bills directly to our office using claim number . . . . and date of injury 3/23/08. They may also call here for coverage verification as well. My direct line is . . . .
>
> [Employee] I also complained of the neck pain on my injury that happened on 4/14/11 when I was going to Alaska Spine Institute also and they did you an MRI. My appt. are for Feb. 12 and 13th. . . .
>
> [Butler] I understand, but we will keep them separate and treatment for the neck under the 3/23/08 neck injury claim since the injury report for the 4/14/11 makes no mention of any other injury than the left shoulder.

(Employee and Butler emails, January 22, 2013).

77) Employee contends the above email exchange was Employer's written consent to change physicians. (Employee hearing brief, May 4, 2015).

78) On February 12, 2013, a cervical spine MRI performed at the Alaska Spine Institute showed degenerative disc changes with a slightly left-sided herniation at C5-6. (MRI report, February 12, 2013).

79) On February 13, 2013, Employee was evaluated by Michael Dyches, PA-C, at Orthopedic Physicians Anchorage, for left sided neck pain, which she attributed to the 2011 work injury. PA Dyches' report notes Employee was "self-referred" and was a new patient to the practice. After reviewing the previous day's cervical MRI, PA Dyches decided to try a left-sided selective nerve block at C6, then assess Employee's response. PA Dyches then referred Employee to ASI to perform the selective nerve root block. (Dyches report, February 13, 2013; Alaska Spine Institute Patient referral form, February 13, 2013).

80) On February 18, 2013, Employee underwent a left-sided selective nerve root block at the Alaska Spine Institute. (Gevaert chart note, February 18, 2013; ASI Surgery Center report, February 18, 2013).

81) On April 18, 2013, Employee returned to Orthopedic Physicians Anchorage on a follow-up visit for her neck pain. Employee was evaluated by Brandy Atkins, ANP, and reported the February 15 [sic], 2013 nerve root block did not relieve her neck pain. ANP Atkins suspected Employee may still have a partial rotator cuff tear, asked Employee to update her left shoulder MRI. ANP Atkins also revised Employee's Gabapentin dosage and scheduled her for a surgical consultation with Mark Flanum, M.D. (Atkins report, April 18, 2013).

82) On April 22, 2013, Employee was evaluated by Dr. Flanum at Orthopedic Physicians Anchorage. After reviewing a cervical spine MRI and a left shoulder MRI obtained earlier that day, he diagnosed recurrent rotator cuff tear and cervical disc herniation, stenosis and instability. Dr. Flanum recommended a C4-5 and a C5-6 anterior cervical decompression and fusion. (Flanum report, April 22, 2013).

83) On April 22, 2013, Employee returned to Dr. Carino at Alaska Hand-Elbow-Shoulder Surgical Specialists because she wanted to have her shoulder evaluated before proceeding with her cervical fusion "just to be sure her neck was the only cause of her pain." Dr. Carino decided to order physical therapy for strengthening and planned to reevaluate Employee's shoulder following her cervical fusion. (Carino report, April 22, 2013).

84) Between April 25, 2013 and June 17, 2013, Employee participated in physical therapy in Barrow. (Arctic Therapy and Rehab report, April 25, 2013; discharge report, June 17, 2013).

85) On June 5, 2013, John Swanson. M.D. performed an EME for Employee's 2011 work injury. (Swanson report, Jun 5, 2013).

86) On July 3, 2013, Employer controverted all benefits for Employee's 2008 and 2011 injuries based on Dr. Swanson's June 5, 2013 EME report. (ICERS event entries, July 10, 2013).

87) On July 16, 2013, Dr. Flanum performed C4-5 and C5-6 fusions. (Operative report, July 16, 2013).

88) Employee's follow-up visits at Orthopedic Physicians Anchorage after surgery showed she was "making excellent progress," and x-rays showed "good" fusions and instrumentation placement. (Dyches reports, July 29, 2013 August 29, 2013).

89) Even though Employee "was happy to report that she is doing wonderful in regards to her surgery," she twice visited Orthopedic Physicians Anchorage for a tender lump in the left occipital region of her skull. PA Dyches thought it might be a superficial abscess or folliculitis, prescribed Keflex and recommended warm, moist compresses. On Employee's second visit, PA Dyches unsuccessfully attempted needle aspiration. Later, another physician's assistant at Orthopedic Physicians Anchorage who examined Employee thought it may have been a sebaceous cyst. (Dyches reports, August 1, 2013; August 12, 2013; Glenn report, August 26, 2013).

90) On October 1, 2013, Employee returned to Alaska Hand-Elbow-Shoulder Surgical Specialists to have her left shoulder evaluated, and was seen by Michael McNamara, M.D., who reviewed Employee's April 23 [sic], 2013 left shoulder MRI. Dr. McNamara assessed retracted supraspinatus and infraspinatus tears for at least six months, or failed arthroscopic repair for over one year. At that point, he did not think Employee was a good candidate for additional repair or reconstruction, but rather thought Employee would require a resurfacing arthroplasty. (McNamara report, October 1, 2013).

91) On October 1, 2013, Employee returned to Orthopedic Physicians Anchorage complaining of left-sided neck pain. ANP Atkins obtained cervical x-rays, which showed good bony healing at the C5-6 level, but not at the inferior C4-5 level. ANP Atkins planned to review Employee's films with Dr. Flanum. (Atkins report, October 1, 2013).

92) On October 8, 2013, ANP Atkins telephoned Employee after reviewing the cervical x-rays with Dr. Flanum, who had decided to order a bone stimulator for Employee to facilitate better healing. (Atkins chart note, October 8, 2013).

93) On October 10, 2013, Employee returned to Arctic Chiropractic where she continued one-hour massage therapy treatments on a weekly basis. (Arctic Chiropractic treatment plan, October 10, 2013 to November 7, 2013; Arctic Chiropractic chart notes, October 14, 2013; October 21, 2013; October 28, 2013; November 5, 2013; November 12, 2013, November 19, 2013).

94) On December 23, 2013, Employee returned to Alaska Hand-Elbow-Shoulder Surgical Specialists for left shoulder pain, but her biggest complaint that day was a right thumb trigger, for which she was given an injection. Left shoulder x-rays were taken for surgical planning and Employee was advised to set up an appointment for her shoulder surgery with Dr. McNamara after Dr. Flanum determined her neck had healed. (Thomas report, December 23, 2013).

95) On December 27, 2013, Employee returned to Orthopedic Physicians Anchorage complaining of neck pain, left shoulder pain and right trigger finger. Although the purpose of her appointment was a check-up for her cervical fusion, Employee mentioned she would like a second opinion on her rotator cuff tear. The nurse practitioner referred Employee to Robert Hall. M.D., for a second opinion on her shoulder and also mentioned Dr. Hall might be able to "do her trigger finger tube, but if not we can schedule her with Dr. Kornmesser." (Moates-Atkins report, December 27, 2013).

96) On December 27, 2013, Employee saw Dr. Hall at Orthopedic Physicians Anchorage for her left shoulder. Dr. Hall agreed repair surgery would be difficult, but might be possible. He though Employee should first consider repair surgery with some form of arthroplasty as a back-up plan. Dr. Hall also performed a diagnostic injection into Employee's subacromial space. (Hall report, December 27, 2013).

97) On March 20, 2014, in response to questions posed by Employee's attorney, Dr. McNamara recommended an IME "to iron out causation," since Employee was originally Dr. Carino's patient. (McNamara response, March 20, 2014).

98) On March 31, 2014, in response to questions posed by Employee's attorney, Dr. Flanum attributed Employee's need for cervical fusion to her April 14, 2011 work injury. Dr. Flanum

did not think Employee was medically stable and predicted she would have a permanent partial impairment. (Flanum responses, March 31, 2014).

99) On April 2, 2014, Employee returned to Orthopedic Physicians Anchorage for a follow-up appointment with Dr. Flanum, who obtained cervical spine x-rays that showed "excellent filling in of bone graft" from previous films a year earlier. Dr. Flanum referred Employee to physical therapy to address her neck pain and range of motion limitations. Dr. Flanum's orders also state, if Employee goes to Arctic Chiropractic in Barrow, "no manipulation!!!!!!" (Flanum report, April 2, 2014).

100) On April 11, 2014, Employee returned to Orthopedic Physicians Anchorage for a follow-up appointment with Dr. Hall to discuss left shoulder surgery options. Dr. Hall thought if Employee's rotator cuff was repairable, that was her best option. Employee decided to have Dr. Hall attempt shoulder repair surgery in June, and if repair was not possible, then Dr. Hall would perform a reverse total arthroplasty. (Hall report, April 11, 2014).

101) On April 17, 2014, Employee returned to Arctic Chiropractic with complaints of limited range of motion in her cervical spine. She received additional massage therapy twice per week. Arctic Chiropractic chart notes, April 17, 2014; April 24, 2014; April 25, 2014; April 29, 2014; May 1, 2014).

102) On April 25, 2014, Dr. Flanum prescribed twelve sessions of massage therapy for muscle spasms. (Flanum prescription, April 25, 2014).

103) On June 2, 2014, Employee saw Dr. Hall in advance of her planned shoulder surgery. Dr. Hall reviewed the surgery plan with Employee. (Hall report, June 2, 2014).

104) On June 4, 2014, Dr. Hall performed a left shoulder diagnostic arthroscopy followed by a reverse total shoulder arthroplasty. (Operative report, June 4, 2014).

105) On June 19, 2014, Employee returned to Orthopedic Physicians Anchorage for a follow-up appointment after her left shoulder surgery. Employee was visiting with her son for a few weeks and physical therapy was ordered to help with her range of motion. (Murphy report, June 19, 2014).

106) On July 10, 2014, Employee returned to Orthopedic Physicians Anchorage for a follow-up with Dr. Hall before returning back home to Barrow. Employee was doing "quite well for one month," and had no specific restrictions. (Hall report, July 10, 2014).

107) On August 11, 2014, Employee had a telephone appointment with Dr. Hall, during which she reported working 14-16 hours per day, and by the end of the day, her shoulder was markedly painful. Employee thought her pain was the same she had prior to surgery. Dr. Hall restricted Employee to eight hours work per day and thought Employee would require at least six months for a full recovery. (Hall chart note, August 11, 2014; Disability work status form, August 15, 2014).

108) On August 19, 2014, Employee began physical therapy at Arctic Therapy and Rehab in Barrow. (Initial evaluation, August 19, 2014).

109) On September 4, 2014, Dr. Hall prescribed massage therapy two to three times per week. (Hall prescription, September 4, 2014).

110) On September 4, 2014, Employee resumed receiving massage therapy at Arctic Chiropractic in Barrow. (Arctic Chiropractic chart notes, September 4, 2014; September 12, September 15, 2014; October 2, 2014).

111) On September 25, 2014, Employee returned to Orthopedic Physicians Anchorage for a follow-up with Dr. Hall and reported her pain was different than previous – it was more over the acromion laterally. Dr. Hall wrote: "Apparently she has been working very long, hard days which is giving her problems with her shoulder." Employee's incision was well healed and she had no tenderness to palpation over the acromion. X-rays obtained that day showed arthroplasty components in good alignment with no evidence of dislocation, loosening or stress fracture. Dr. Hall concluded, "She is not specifically tender right there, although she is describing pain in that area." He recommended "relative rest involving the shoulder" and gave Employee a small prescription for Dilaudid to help her with pain. (Hall report, September 25, 2014).

112) On October 7, 2014, Employee returned to Arctic Chiropractic with complaints of shoulder and neck pain and received additional massage therapy. (Arctic Chiropractic chart notes, October 7, 2014; October 15, 2014; October 16, 2014).

113) Employee continued to complain of pain over the acromion and Dr. Hall's physician's assistant decided to order a computerized tomography (CT) study to rule out a stress fracture of her acromion. The CT study did not show evidence of stress fracture and Employee reported most of her problems were associated with her heavy work schedule, which she found "fairly stressful." The physician's assistant "filled out paperwork" stating Employee was unable to

return to work for the next two months and gave Employee a refill on her Dilaudid. (Murphy reports, October 10, 2014; October 23, 2014).

114) On October 24, 2014, in response to questions posed by Employee's attorney, Dr. Hall attributed Employee's left shoulder arthroplasty to the April 14, 2011 work injury. (Hall responses, October 24, 2014).

115) On November 4, 2014, Employee returned to Arctic Chiropractic, where she received an hour of massage therapy. (Arctic Chiropractic chart notes, November 4, 2014).

116) On December 23, 2014, the parties agreed to an SIME based on disputed opinions between Employee's physicians, Drs. Flanum and McNamara, and its physician, Dr. Swanson on the issues of causation, treatment, degree of impairment and medical stability. (SIME form, December 23, 2014).

117) On December 23, 2014, Dr. Hall released Employee back to full time work. (Disability status form, December 23, 2014).

118) On February 3, 2015, Employer served the instant petition alleging Employee had unlawfully changed physicians, and seeking the exclusion of medical records from Orthopedic Physicians Anchorage and "all treatment generated referrals" from that practice. Employer contended when "employee left Dr. Carino, who was her one change in physician, and switched to Dr. Flanum at Orthopedic Physicians Anchorage she made an unlawful change of physician under AS 23.30.095(a)." (Employer's Petition, February 3, 2015).

119) On February 24, 2015, Employee answered Employer's February 3, 2015 petition, contending:

> In January 2013, the employee contacted the employer's Claims Manager, regarding how she could receive medical care for her neck.
>
> On 01/22/13, the employer's Claims Manager wrote to the employee that the 04/14/11 injury remained controverted, but she could secure treatment for 03/23/08 work injury including her neck under that claim.
>
> At the employer's urging, the employee changed physicians for her 03/23/08 injuries from the chiropractic clinic to Orthopedic Physicians Anchorage ('OPA'). . . .
>
> Mark Flanum MD at OPA performed cervical disc replacement surgery on 07/16/13.

> In December 2013, the employee learned that Dr. Carino was no longer practicing medicine at Alaska-Hand-Elbow Shoulder Surgical Specialists clinic.
>
> Despite diligent inquiry, the employee has been unable to ascertain the whereabouts of her former physician, Dr. Brian Carino. . . .
>
> On 01/27/14 the employee was seen by Robert Hall MD at OPA for evaluation and treatment of her shoulder pursuant to an "in-house" referral.
>
> The employee substituted Dr. Hall for Dr. Carino, after Dr. Carino disappeared and was no longer able to provide medicals services to the employee.
>
> Dr. Flanum is not an excessive change of physician.
>
> Dr. Hall was also a referral from within OPA through Dr. Flanum. . . .
>
> The employee reasonably relied on the the employer's conduct and statements in her choice of OPA and Dr. Flanum for treatment of her neck and the employer is estopped from asserting that medical evidence from a treating physician from within OPA clinic physicians should be excluded.

(Employee's Answer, February 24, 2015).

120) At a February 27, 2015 prehearing conference, the parties agreed to set Employer's February 3, 2015 petition for hearing on May 7, 2015. The summary states:

> Parties agree that the issues for the May 7, 2015 hearing are:
>
> 1) ER's Petition to strike records re: unauthorized change of physician;
>
> 2) If the board finds that there is an unauthorized change of physician then it is ER's position that the records from those physician(s) should be excluded from the SIME medical binders. EE's position is that even if the board finds there is an unauthorized change of physician(s) the medical records should remain in the SIME medical binders.
>
> 3) Should the board suspend the SIME process until the D&O is issued?
>
> 4) Attorney's fees and costs.
>
> Parties agreed to add the issues of suspending the SIME process and attorney's fees and costs to the May 7, 2015 hearing. EE's atty stated for the record that he has no objection to adding the issues; however, he objects to the SIME process being stayed.

> ER's atty stated for the record that they have identified another medical provider seen by Ms. Janousek during the relevant time. This information was obtained from a lien provided by a third party carrier. ER is in the process of requesting those records. This additional provider may expand the scope of the records to be excluded due to the excessive change of physician(s).

(Prehearing Conference Summary, February 27, 2015).

121) On April 21, 2015, Employer controverted benefits for Employee's 2011 injury based on Dr. Chong's May 23, 2012 EME report and Dr. Swanson's June 5, 2013 EME report. It also controverted benefits for Employee's 2008 injury based on Dr. Swanson's report. (Controversion Notices, April 21, 2015).

122) On May 1, 2015, Employer served its hearing brief contending, between Employee's 2008 and 2011 injuries, she made at least 20 unauthorized changes of physicians dating back to June 13, 2012. (Employer's Hearing Brief, May 1, 2015).

123) On May 4, 2015, Employee served her hearing brief, a portion of which states:

> The employee believes that when an unrepresented employee is not given notice by the Board or the adjuster that evidence from an excessive change of physician will be excluded from the record, and the employer is fully informed regarding employee's treating physicians and remains silent, it would be manifestly unjust to strictly apply the exclusion sanction . . . .
>
> However, at no time has the employer or any of its various adjusters advised her about the rules as to what technically constituted a "change" of physicians or the technicalities of a "referral." Nor has anyone ever been advised her what would otherwise be reasonable and prudent actions in medical pursuing care, like seeking a second opinion (which her private health insurer encourages), or seeking a chiropractic massage for pain relief when she is far from home for long durations, could be construed as an unlawful "change" of physicians. . . .
>
> An insurance adjuster also has a legal duty to provide an unrepresented employee with written instructions and assistance that is reasonable for the employee to be able to comply with the law and reasonable claims handling requirements. [citing 3 AAC 26.100(c)]. In workers compensation there are complex rules that can carry significant consequences. The law on changes of physicians is a minefield for the unschooled and incautious typically unsophisticated injured worker who is just trying to recover from an injury. The Court has noted, "It is hard to ignore the disparity in information and knowledge that an experience insurance adjuster may possess compared with an unrepresented claimant." [citing *Seybert*].
>
> The employee's adjuster never advised her in writing or otherwise regarding the rule relating to changes of physician or possibility the Board would exclude

> relevant, probative and credible evidence if it came from a technically unauthorized physician. . . .
>
> It is fundamental to "fairness" and due process that a person has notice of the law and the potential sanction for violating that law. . . . At a minimum, before the exclusionary sanction can be applied the employee is entitled to notice that an unlawful change of physicians can result in the exclusion of the treating physician's evidence.
>
> In *Thurston* the Appeals Commission stated [sic] Board's power to enforce a exclusionary rule was derived from its "equitable power" to fashion an equitable sanction. It found the rigid application the exclusionary rule, without regard to the egregiousness of the violation, the notice of right to protest to the opposing party, or possible waiver of the right to withhold consent, elevates form over substance in enforcement of the law. If the power of the Board to exclude evidence whether by Board decision or Board regulation is equitable power, it must be applied equitably and be subject to the employee's other equitable remedies. . . .

She also contends: "The employee does not dwell on her medical problems. Unless a medical condition is serious and requires care beyond chiropractic, she tends to push them out of her mind, focus on her work, and [tries] to forget about them." (Employee Hearing Brief, May 4, 2013).

124) On direct examination at hearing, Employee testified as follows: She has resided in Barrow, Alaska for 26 years and is employed as a transportation manager. Her job involves technical policies and procedures. There is a "PHS" hospital in Barrow, an itinerant physician's assistant and a chiropractor. The first chiropractor Employee saw in Barrow was Dr. Foster. Dr. Foster is no longer in Barrow, but he is the owner of the chiropractic clinic. Employee first saw Dr. Foster 20 years ago when he did not have an office and would see patients at the Top of the World Hotel. She has availed herself of chiropractic treatment most of her life, and does not just use chiropractic treatment to treat work injuries, but also to treat other conditions, like tension and knots in her back and hips. She has to see a chiropractor first before she can get a massage. Employee has had other work injuries and injuries to her neck and shoulders that she has treated for. In 2008, Employee was driving a bus in Anchorage because the kids "went to State," and they were tossing bags at her. Employee was loading and unloading bags for a week, which caused her pain. After that injury, she sought care at the chiropractic clinic in Barrow, but cannot remember the doctor's name because the clinic went through several doctors. Employee could not remember how long she sought treatment for the 2008 injury, but she thought she did

so for "months." When Employee goes to a chiropractor, she circles what parts of her body are hurting and they try to make it better. However, the chiropractors do not just treat the parts of the body she circles. They go over her whole body and see if she has "something" here or there. The 2008 injury involved her shoulders, neck and lower back, and she continued to treat with chiropractors for pain in these areas after she stopped treating for the effects of the work injury. In 2011, Employee was at the airport in Barrow, and when she exited a Suburban, she slipped and fell because there was ice on the berm. Employee hit her shoulder and the left side of her head. She filed a report of that injury and sought treatment at Barrow Chiropractic with Dr. Kirby or Hunter, who then sent her to Alaska Spine Institute for a MRI, where she treated with Dr. Valentz for pain management. When Employee travelled to Anchorage for medical care, she would contact her workers' compensation adjuster, either Jody Jones or Shannon Butler, and traveled arrangements were agreed upon. Sometimes Jody or Shannon would arrange the travel. Sometimes, Employee would buy her own airline ticket and get reimbursed later. Employee would oftentimes stay with her son in Anchorage where she had her own car and sometimes she would save her gas receipts for reimbursement and receive per diem expenses. Employee did not always get compensated by Employer's adjuster and sometimes she would use her sick leave from work. The adjuster was aware Employee used her sick leave from work and it was agreed she would use her sick leave and not make a claim for compensation. Employee's relationship with Employer's adjusters was "not hostile;" she thought they were "very good," and she had a good relationship with them. Dr. Valentz treated her with pain pills and shots, which did not help her since the relief did not last very long. Employee reported the short term relief to Dr. Valentz but she did not want to take four pills at a time because she worked in transportation. She had a diagnostic shoulder scan at Alaska Spine Institute. The x-ray tech at ASI discussed the results of the MRI with her and told her she had a torn rotator cuff, needed surgery and advised her she should go to Dr. McNamara. Employee went to Dr. McNamara's clinic and saw Dr. Carino. Employee travels to Anchorage for work, typically Thursdays through Sundays, although sometimes her travel to Anchorage lasts a week. With respect to the 2008 work injury, Employee also treated with Dr. Luther, but not for the effects of the work injury. Dr. Luther would ask her where her aches and pains were, and at that point, they were primarily in her hips. With respect to the 2011 work injury, she treated with Dr. Hunter and Dr. Valentz. Employee would return to Dr. Hunter between treatments with Dr. Valentz. Dr. Carino's rotator cuff repair

surgery was not successful and she told him she still had symptoms. Then she saw Dr. McNamara because she could not find Dr. Carino. When Employee returned to see Dr. Carino, he said he was moving to New York, but would be returning periodically; when Employee returned again to see Dr. Carino, she saw Dr. McNamara, who told her Dr. Carino had not returned. Dr. McNamara evaluated Employee and advised her she needed another surgery. Employee also saw Dr. McNamara for her thumb, which was not part of the 2011 work injury. She did not continue seeing Dr. McNamara because she did not "have good feelings about Dr. McNamara." She did not want him to treat her. Employee tried to get a number for Dr. Carino and asked several times, but his office told her "they would not talk about it." The last time Employee saw Dr. Carino, she learned the "hooks" in her shoulder were no longer in place. Employee still had a lot of pain and swelling, and Dr. Carino thought she should get her neck "fixed" first, so he sent her to Dr. Flanum. Dr. Carino's office was an orthopedic practice that specialized in shoulders. They do not provide orthopedic neck treatment. Employer also performed an EME and controverted her medical benefits under the 2011 claim, so she had conversations and exchanged emails with Shannon Butler, who advised her to seek treatment for her neck under the 2008 claim. Employee and Ms. Butler never discussed the rules governing changes of doctors, or cautioned her about changing doctors. Employee was not informed evidence would be excluded if she made too many changes of doctors. Employee sought treatment with Dr. Flanum at the same clinic Dr. Carino used to practice. Treatment with Dr. Flanum consisted of a three-level fusion, and Dr. Flanum sent Employee to Dr. Hall for her shoulder. Treatment with Dr. Hall consisted of a reverse shoulder replacement. Employee's shoulder is better now. Private health insurance and workers' compensation covered her treatment for a while then, after an EME, workers' compensation did not cover it. Even though Employee has health insurance, she is seeking workers' compensation benefits to "fight for what's right." She does not want anyone else to support her and she is still employed. On cross-examination, Employee testified as follows: Employee is familiar with referrals and she believes massage therapy requires a referral. Employee's primary care provider had made referrals for her hips, x-rays and blood work. When Employee had carpal tunnel surgery, her providers "set up" the physical therapy appointment. She did read the pamphlet *Workers' Comp and You*, but the portion of it informing her she may change physicians once did not mean anything to her at the time. Employee did not think she treated in Barrow for the 2011 injury, but rather she was

referred because she could not be treated in Barrow. Employee went to the chiropractic clinic in Barrow because she was in pain, and the chiropractor performed adjustments to help her. Bills for this treatment were submitted to and paid by Employer's insurer. With respect to the instructions concerning changing physicians attached to Employer's hearing brief as Exhibit "L," Employee does not remember reading them, but she cannot say the insurer did not give her the information, either. Jody [Jones] never advised Employee to call her regarding changing doctors. Employee considers herself a "professional," but does not expect someone to read her letters every time she sends one. Employee always follows up after writing a letter and asks for confirmation her letter was read. In response to Employer's question, whose fault is it Employee does not remember reading about the one change of physician rule, Employee replied, "It seems it's going to be mine." Dr. Valentz referred Employee for an MRI and EMG studies. Employee thinks Dr. Valentz expected her to keep coming back. She stopped seeing Dr. Valentz because he just wanted to treat her with pills, and she then treated Dr. Luther, but not for the 2011 work injury. Employee treated with Dr. Luther on April 16, 2012 for cervical pain, which was related to the 2011 work injury even though she did not tell him it was related. She then stopped seeing Dr. Valentz and occasionally treated with Dr. Luther through August 2012. Employee then saw Dr. Carino in September 2012, who performed her shoulder surgery and referred her to physical therapy in Colorado. She thinks the reason for the referral for physical therapy was so the physical therapist would know what kind of surgery she had undergone and what king of physical therapy she needed. In January 2013, Employee was seeing Dr. Kirby for massage and he referred her for a cervical MRI. She was also treating with Dr. Carino until February 2013, so she was treating with Dr. Kirby and Dr. Carino concurrently. In April 2013, Orthopedic Physicians Anchorage referred Employee for a shoulder MRI, but she did not tell OPA she was already treating with Dr. Carino for her shoulder because it did not occur to her to do so. She did not go to Dr. Hall until Dr. Carino was "gone," and she went to OPA in April 2013 because her neck hurt. Employee was seen at both Orthopedic Physicians Anchorage and by Dr. Carino during her trip to Anchorage in April 2013. She did not tell either provider she was being treated by the other because it never occurred to her to do so. She does not recall Dr. Flanum evaluating her neck and shoulder, but she does recall Dr. Flanum performing her cervical fusion in July 2013. In October 2013, Employee saw Dr. McNamara for her shoulder and she saw him again for her shoulder in December 2013. During the same trip to Anchorage in December 2013,

Employee was seen at Orthopedic Physicians Anchorage for her shoulder. Her private health insurer did not advise her to seek treatment from two different doctors for the same condition. When Employee travelled to Anchorage for her appointments, she used sick leave and was not restricted from work. Employee talked to the Alaska Workers' Compensation Board right after she got injured in 2011, and also called Jody [Jones] and Shannon [Butler] regarding how benefits worked, but she never asked about changing doctors. After the x-ray tech at Alaska Spine Institute referred her to Dr. NcNamara, Employee did not follow up with Dr. Valentz about orthopedic referrals. Although Employee testified at her deposition she did not recall why she originally sought treatment at Orthopedic Physicians Anchorage, later, when she got home, she thought about it, and while looking through her address books and notes, she remembered Dr. Carino told her to go see Dr. Flanum. Employee did not correct the deposition transcript. Shannon [Butler] advised Employee she could have her providers bill their services under the 2008 claim, but Ms. Butler did not make any other representations at the time. Regarding the email exchanges attached to Employee's hearing brief as Exhibit Number "3": Employee explained her private health insurer would not pay her medical bills until it had a denial letter under her workers' compensation claim. Employee does not know why Employer's adjuster requested a list of doctors from her and she does not remember compiling such a list for Employer's adjuster. Shannon [Butler] told Employee her 2011 injury was controverted and there was an open claim on her neck. Ms. Butler directed Employee to have medical bills for her neck directed to her office for processing and payment. Employee understood Ms. Butler's instruction to mean she should pursue treatment for her neck, but there were no discussions about where Employee would seek treatment for her neck. Employee does not think chiropractors render treatment if a patient needs surgery because they do adjustments. Employer's adjusters did not influence the doctors Employee selected for treatment. Employee did not pay attention to the portion of *Workers' Comp and You* that advised her to talk to her adjuster before making a change of physician. Concerning the instructions regarding changing physicians attached to Employer's hearing brief as Exhibit "L," Employee thinks Employer's insurer sent them to her to make sure she understood it was her obligation to talk to her adjuster before changing physicians. On re-direct examination, Employee testified as follows: She has signed several releases of information and has never refused to sign a release. Employee assumed Employer's insurer was getting medical bills and reports and it had all her records. There has been a physical therapist in

Barrow, off and on, for the last one to two years, and Employee has been referred to physical therapy several times, other than in Anchorage and other than in Colorado. The physical therapist in Barrow did not want to too much with her shoulder because of the swelling in the left side of her neck. Dr. Flanum wanted to evaluate the swelling in Employee's neck and eventually found out it was because Employee had an enlarged thyroid, which Employee had removed. Dr. Carino wanted Employee's neck evaluated before he did any further surgery on her shoulder. No one ever informed Employee if she violated the rules about changing physicians, she would have evidence excluded. Employee never refused to give information to the workers' compensation board or attorneys and she has tried to do everything asked of her. In response to questions from the board, Employee testified as follows: Not all of her travel to Anchorage is work-related. She also has a son in Anchorage. Sometimes Employee will travel to Anchorage for the sole purpose of receiving medical treatment. The 2008 and 2011 work injuries are not the only injuries Employee has suffered while working for Employer for the last 26 years. She can recall a couple of falls and was hurt when a large button maker fell on her and hit her in the head. Employee was also bitten by a dog at work. Employee did not think she was going to Dr. Luther for a work injury, rather she went to him because she was visiting with her son and her hips hurt. Drs. Hall and Flanum thought Employee was working too much so they took her off work again. (Janousek hearing testimony).

125) In response to questions by the board panel and the parties' attorneys, Seanne Popp has been responsible for Employee's claims since January of this year. Jody [Jones] and Shannon [Butler] are no longer employed by Employer's adjuster. Ms. Popp is the only adjuster "left." Ms. Popp has handled Employee's claims since Shannon [Butler] left her employment on January 31, 2015. Employee's 2008 and 2011 claims have been controverted during the entire period of time Ms. Popp has been responsible for them. (Popp hearing testimony).

126) The document attached to Employer's hearing brief as Exhibit "L" is titled "Alaska Workers' Compensation Fact Sheet," and states, in pertinent part:

> If for any reason you wish to change your original treating physician, you must do so in accordance with the rules prescribed by the Alaska Workers' Compensation Board. Should this situation arise, please contact your adjuster regarding the change of physician prior to doing so.

> If you leave your home city for medical treatment, tell us before you go so that we both have a clear understanding of what will be paid. . . .

(Employer's Exhibit "L," undated).

127) The Workers' Compensation Division's publication *Workers' Compensation and You* provides information to injured workers. It states the following regarding changing doctors:

> Choice of Doctors. . . . You may change your treating doctor once, but tell the insurer before you change. . . . If you want to change doctors a second time, you MUST obtain the insurer's written approval. If you change doctors more than once without the insurer's written approval, you may have to pay the doctor's bills.

(Worker's Compensation Division, *Workers Compensation and You*, rev. August 31, 2012).

128) During the hearing, Employer repeatedly entered objections to portions of Employee's testimony on the basis of hearsay. The hearing chair overruled Employer's objections. (Record).

129) During the hearing, Employer's attorney twice objected, on the bases of relevance and due process, to Employee testifying on her opinion regarding the scope of any duty the adjuster may have had to advise her on the rules governing changing physicians. Employer's attorney contended the issue does not appear on the prehearing conference summary and she was unprepared to address the scope of her client's duties under the Act. She further contended, if the issue had been identified as one for hearing, she would have researched her client's duties in this regard. (*Id*.).

130) In response to Employer's objections Employee's attorney contended his client's reasonable expectations for an adjuster to adequately advise her of the rules governing changing physicians are relevant to the issues presented. He contended, after receiving Employee's medical report and bills for seven years, Employer now objects to Employee's choice of doctors. Meanwhile, he contended, his client had a reasonable expectation that Employer's adjusters would have informed her if she was deviating from the rules. (*Id*.).

131) The hearing chair overruled Employer's first objection because at the time Employee was being asked about policies in her own workplace, but sustained Employer's second objection while acknowledging Employee had raised the issues of waiver and estoppel prior to hearing. (*Id*.).

132) In its closing arguments, Employer emphasized its petition only sought the exclusion of medical reports based on Employee's alleged unauthorized physician changes, not a relief from liability for Employee's medical care on that basis. It pointed out Employee's 2008 injury was not controverted until July 3, 2013, and her 2011 injury was not controverted until June 5, 2012, and those controversions were not based on unauthorized physician changes. (*Id*.).

133) At the conclusion of the hearing Employer contended Dr. Carino "can be found" in Honolulu, Hawaii and his phone number is available. (*Id.*).

134) At the conclusion of the hearing, the hearing chair requested Employee to identify documents she contends show Employer paid for her travel to Anchorage for medical treatment. Both parties clarified those payments predate medical treatment for the instant injuries. (*Id*.).

135) Given the voluminous medical record in this case, at the conclusion of the hearing, the hearing chair inquired about the possibility of utilizing the statement of facts set forth in Employer's hearing brief as a basis for this decision. Employee did not object to the hearing chair's proposal, but requested a week to review Employer's version and provide the panel with a "redline" version, indicating any factual corrections or disputes. (*Id*.).

136) On June 17, 2015, Employee filed her comments to Employer's statement of facts. In her comments, Employee agrees with certain facts set forth in Employer's brief, disputes others, suggests more accurate statements, and objects to certain statements as disputed legal conclusions, not statements of fact. (*Id*.).

137) On June 24, 2015, Employer filed a petition objecting to Employee's comments on the basis she impermissibly used the opportunity to provide further argument on the merits of the case rather than reviewing its brief for factual accuracy. (Employer's Petition, June 22, 2015).

138) An SIME appointment has not yet been scheduled. (*Id*.; observations).

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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .

> (2) Workers' compensation cases shall be decided on their merits except where otherwise provided by statute.
> . . . .
>
> (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 crux of due process is the opportunity to be heard and the right to adequately represent one's interest. *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980). While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." *Groom v. State, Department of Transportation*, 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm'n.*, 522 P.2d 711, 714 (Alaska 1974)). Defects in administrative notice may be cured by other evidence that the parties knew what the proceedings would entail. *North State Tel. Co.*

The board's authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties or the agency upon notice given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). The board has discretion to raise questions *sua sponte* with sufficient notice to the parties. *Summers v. Korobkin Const.*, 814 P.2d 1369, 1372 n.6 (Alaska 1991). But, absent findings of "unusual or extenuating circumstances," the board is limited to deciding the issues delineated in the prehearing conference, and, when such "unusual or extenuating circumstances" require the board to address other issues, sufficient notice must be given the parties that the board will address these issues. *Alcan Electrical & Engineering, Inc. v. Redi Electric, Inc.*, AWCAC Decision 112 (July 1, 2009).

The workers' compensation board has limited jurisdiction and can only adjudicate in the context of a workers' compensation case. *Alaska Public Interest Research Group v. State*, 167 P.3d 27; 36 (Alaska 2007). Delegation to an administrative agency is upheld as long as the administrative tribunal stays within the bounds of its authority. *Id*. The Alaska Supreme Court has recognized the Board may be required to apply equitable or common law principles in a specific case, *id*.,

and has explicitly held the Board has authority to invoke equitable principles top prevent an employer from asserting statutory rights, *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584; 588 (Alaska 1993) (affirming board decision holding the employer had waived its statutory ability to take a social security offset).

An implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. *Id*. To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. *Id*. (citing *Milne v. Anderson*, 576 P.2d 109 (Alaska 1978). The elements of estoppel are: assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Id*. (citing *Jamison v. Consolidated Utilities*, 576 P.2d 97; 102 (Alaska 1978).

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).

> **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. . . . The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . . .
>
> (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. 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. . . .
> . . . .
>
> (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. . . .

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette v. Arctic Lights Electric, Inc.*, AWCB Decision No. 05-0135 (May 19, 2005). One of the purposes of the "one change of physician" rule is to curb potential abuses, especially doctor shopping. *Bloom v. Tekton, Inc*., 5 P.3d 235, 237 (Alaska 2000). However, the statute has been consistently interpreted to allow an employee an opportunity to "substitute" a new physician in cases where the current treating physician is either unwilling or unable to continue providing care. *Id*. at 238. These substitutions do not count as changes in attending physicians. *Id*. Allowing an employee to substitute an attending physician under these circumstances is consistent with the well-settled rule under the statute an injured worker is presumed entitled to continuing medical treatment. *Id*. The substitution policy ensures that the employee's right to continuing care by a physician of his choice will not be impeded by circumstances beyond the employee's control. *Id*.

In *Guys with Tools v. Thurston*, AWCAC Decision No. 062 (November 8, 2007), the Alaska Workers' Compensation Appeals Commission (Commission) discussed the role and purpose of a designated attending physician. The attending physician is explicitly charged with responsibility for all "medical and related care," which includes making referrals to a specialist. *Id*. at 10. Requiring the attending physician to make referrals furthers the policy of preventing costly,

abusive over-consumption of medical resources through duplication of services when an employee's care is directed by an ever-expanding number of specialists. *Id*. Imposing responsibility to make referrals on the attending physician ensures the attending physician is fully informed of all the medical and related care the employee receives. *Id*. The statute represents a compromise between preventing costly overtreatment and protecting an employee's free choice of physician. *Id*. at 11. At the time *Guys with Tools* was decided, the remedy for an excessive change of physician was the employer is not liable to pay for the care because it was not provided pursuant to the workers' compensation statutes. *Id.*

The statute preserves an employee's right to choose a physician, but limits the number of times the right can be exercised at the expense of the employer. *Witbeck v. Superstructures, Inc.,* AWCAC Decision No. 014 (July 13, 2006) at 10. If the statute has been followed, there is no need to examine an employee's motive for changing physicians. *Id*. If the statute and regulation have not been followed, the change is excessive as a matter of law. *Id*. The board may address motive when an allegation of "doctor shopping" is made. *Id*. Notice of the change must be given before the change. *Id*. at 9.

The Alaska Supreme Court has strictly interpreted subsection (c) of AS 23.30.095. In *Grove v. Alaska Construction and Erectors*, 948 P.2d 454, 457 (Alaska 1997), the employee argued the employer had waived its ability to object to statutory treatment limits because it initially disputed the employee's entitlement to benefits. The Court noted the board had adopted regulations defining circumstances where treatment frequency may exceed the standards and concluded an employer's initial decision to controvert benefits was not within these circumstances. *Id*. at 457. The Court held an employer does not has the burden of objecting to the frequency of an employee's medical treatments because the legislature intended to place the burden on the health care provider to furnish a conforming treatment plan if the provider wanted to paid for visits in excess of the treatment standards. It further stated:

> Grove's position, if adopted, would put the burden on the employer to object to the frequency of an employee's medical treatments, if they exceed the standard. The statute is clear that it is the employee's health care provider who must take steps if the statutory frequency of that treatment is exceeded.

Id. In a similar case involving AS 23.30.095(c), the board used the statute and its regulation at 8 AAC 45.195 to excuse a provider's failure to provide a written treatment plan. *Crawford & Co. v. Baker-Withrow*, 73 P.3d 1227; 1229 (Alaska 2003). The employer appealed. While the Court found the statute expressly provides for excusing a failure to furnish notice of treatment, it does not provide for excusing a failure to furnish a treatment plan. *Id*. at 1228-29. The Court also added 8 AAC 45.195 can only be used to excuse regulatory, but not statutory, requirements. *Id*. at 1229. In a third case, the Court rejected an employee's estoppel defense under AS 23.30.095(c) and held an employer does not have a duty to inform a provider of deficiencies in its treatment plan. *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851; 861 (Alaska 2010) (citing *Grove*).

The board has strictly applied the one-change of physician rule at AS 23.30.095(a) and the corresponding regulation at 8 AAC 45.082. (*E.g. Augustyniak v. Safeway Stores, Inc.*, AWCB Decision No. 07-0199 (July 12, 2007) (finding unauthorized change when physician's report lists "chief complaint" as "[p]atient is self referred for back pain."). However, in a case involving "extraordinarily unique facts," a board panel excused an authorized change "through the waiver process" under 8 AAC 45.195 because there was no evidence who made the employee's first choice of physician and because "it would be extremely unfair and an unreasonable cost to employer to strike [physician's reports] given [the] confounded evidence." *Miller v. NANA Regional Corp.*, AWCB Decision No. 13-0169 (December 26, 2013) (*But see Phillips v. Bilikin Investment Group, Inc.*, AWC Decision No. 14-0020 (February 19, 2014); *Hudak v. Yes Bay Lodge*, AWCB Decision No 15-0022 (February 24, 2015) (noting AS 23.30.095 and 8 AAC 45.082 do not expressly provide for waiver of the one-change of physician rule, nor do they impose a time limit to object to an unlawful change)).

In *Wolde v. Westward Seafoods*, AWCB Decision No. 00-0236 (November 21, 2000), a board panel held an employer's "unjustifiable refusal" to pay for medical treatment constitutes grounds to "substitute" a new physician under AS 23.30.095(b). Following *Wolde*, at least two other board decisions also declined to exclude medical reports based on an unauthorized change of physician when the employer was denying the compensability of an employee's medical care. *Sawicki v. Great Northwest*, AWCB Decision No. 06-0029 (February 6, 2006); *Clifton v. Swensen Construction*, AWCB Decision No. 06-0311 (November 24, 2006). A more recent board decision

declined to follow *Wolde*, *Sawicki* and *Clifton*, instead finding no statutory basis existed for those decisions under AS 23.30.095(b). *Hudak*.

In *Seybert v. Cominco Alaska Exploration*, 182 P.2d 1079 (Alaska 2008) the Alaska Supreme Court evaluated whether an employee's settlement agreement should have been set aside on the basis of material misrepresentations by the employer's adjuster. It recognized the adjuster's failure to mention stipend as an available reemployment benefit before settlement might have amounted to a material misrepresentation when the agreement settled reemployment benefits. *Id*. at 1094-95. The Court also thought the adjuster's statements employee had used his statutorily permitted change of physician could have been materially misleading when other evidence showed the "change" might have been a referral. *Id*. at 1095. It remanded the case back to the board to make additional findings.

> **AS 23.30.110. Procedure on Claims.** (a) . . . the board may hear and determine all questions in respect to the claim.
> . . . .
>
> (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. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .

8 AAC 45.090(b) provides for orders requiring an employer to pay for an employee's examination pursuant to AS 23.30.095(k) or §110(g). Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997), at 3; *see also Harvey v. Cook Inlet Pipe Line Co*., AWCB Decision No. 98-0076 (March 26, 1998). Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(g) 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."

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under §095(k) and §110(g). With regard to §095(k), the Commission referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8, in which it 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.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the board in resolving the dispute. *Bah* at 4.

The Commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Id. at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?

2) Is the dispute significant? and

3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal v. Municipality of Anchorage (ATU), AWCB Decision No. 97-0165 (July 23, 1997), at 3. *See also*, *Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991). Accordingly, an SIME pursuant to §095(k) may be ordered when there is a medical dispute, or under §110(g) when there is a significant gap in the medical or scientific evidence. Further the Commission holds an SIME may be ordered when, because of a lack of understanding of the medical evidence, the parties' rights cannot be ascertained. It stated:

> Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board.

Bah at 8.

The decision to order an SIME rests in the discretion of the board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Decision No. 06-0301 (October 25, 2007), at 6. Although a party has a right to request an SIME, a party does not have a right to an SIME if the board decides an SIME is not necessary for the board's purposes. *Id*. at 8. A party does not have "veto" rights over the board's choice of physician. *Id*. at 10. An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the board to assist it by providing disinterested information. *Id*. at 15.

> **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.

The legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id*. The Alaska Supreme Court defers to board's credibility determinations. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial

evidence, it may rely on one opinion and not the other. *Id*. at 147. The board may choose not to rely on its own expert. *Id*.

> **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. . . .

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). The board may use relaxed evidentiary standards while conducting its hearings. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249; 1257 (Alaska 2007). AS 23.30.135 gives the workers' compensation board wide latitude in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29 (Alaska 1970).

> **8 AAC 45.050. Pleadings.**
> . . . .
>
> (f) **Stipulations.**
>
> (1) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.
>
> (2) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .
>
> (4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.
>
> **8 AAC 45.070. Hearings**.
> . . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.
. . . .

(j) If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence, legal memoranda, or oral arguments, the board will set a date for the completion of the hearing.
. . . .

8 AAC 45.074. Continuances and cancellations.
. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
. . . .

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
. . . .

(F) a second independent medical evaluation is required under AS 23.30.095(k);
. . . .

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
. . . .

8 AAC 45.082. Medical treatment.
. . . .

(b) Physicians may be changed as follows:
. . . .

(2) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician. An employee does not designate a physician as an attending physician if the employee gets service

(A) at a hospital or an emergency care facility;

(B) from a physician

(i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;

(ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

(iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician.

(3) For an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records. To constitute a panel, for purposes of this paragraph, the panel must complete its examination, but not necessarily the report, within five days after the first physician sees the employee. If more than five days pass between the time the first and last physicians see the employee, the physicians do not constitute a panel, but rather a change of physicians.

(4) Regardless of an employee's date of injury, the following is not a change of an attending physician:

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employer thereafter is a substitution of physicians and not a change of attending physicians;

> (C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;
>
> (D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.
>
> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

Prior to the regulation, the Commission was critical of the board practice of excluding medical evidence that resulted from an unauthorized change of physician. *Guys with Tools*. It thought the exclusion of evidence did not serve the board in obtaining the best and most thorough record upon which to base its decision and questioned the practice's effectiveness of preventing doctor shopping. *Id*. at 10. The Commission concluded:

> If the board wishes to adopt a rule excluding evidence improperly obtained, the board should consult with the department to develop and adopt such a rule by regulation. Until then, we cannot support the blanket exclusion of medical reports solely because the reports were written by physicians chosen in excess of an allowable change.

*Id.*at 13. Following *Guys with Tools*, the Board amended 8 AAC 45.082 on July 9, 2011, to include the exclusionary rule.

> **8 AAC 45.120. Evidence.**
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not

> sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999) (citing Alaska Evid. R. 401).

> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.
>
> **AS 21.36.125. Unfair claim settlement practices.**
> . . . .
>
> (c) The director of insurance shall adopt regulations to implement, define, and enforce this section.
>
> **3 AAC 26.100. Additional standards for prompt, fair, and equitable settlements of workers' compensation claims.** Any person transacting a business of insurance who participates in the investigation, adjustment, negotiation, or settlement of a workers' compensation claim:
> . . . .
>
> (2) shall provide necessary claim forms, written instructions, and assistance that is reasonable so that any claimant not represented by an attorney is able to comply with the law and reasonable claims handling requirements;
> . . . .

ANALYSIS

1) Should this decision utilize the parties' statements of facts?

Given the voluminous medical record in this case, at the conclusion of the hearing, the hearing chair inquired about the possibility of utilizing the statement of facts set forth in Employer's hearing brief, which provides a brief synopsis of Employee's visits to her numerous providers, as a basis for this decision. Employee did not object to the hearing chair's proposal, but requested a week to review Employer's version and provide the panel with a "redline" version, indicating any factual corrections or disputes. On June 17, 2015, Employee filed her comments to

Employer's statement of facts. On June 24, 2015, Employer filed a petition objecting to Employee's comments on the basis she impermissibly used the opportunity to provide further argument on the merits of the case rather than merely reviewing its brief for factual accuracy.

Although the proposal for an agreed-upon statements of facts was initially intended to facilitate a resolution of the parties' disputes, in retrospect, it clearly had the opposite effect and precipitated additional litigation. Therefore, this decision will not adopt either party's statement of facts, or any portion of them, and will instead be based on the panel's independent review of Employee's medical record. AS 23.30.001(1); AS 23.30.135(a).

2) Were the hearing chair's rulings on Employer's hearsay objections during Employee's testimony correct?

During the hearing, Employer repeatedly entered numerous objections to portions of Employee's testimony on the basis of hearsay. Employee either offered no exceptions to the hearsay rule, or contended the testimony was not hearsay. The hearing chair overruled Employer's objections.

While conducting its hearings, the workers' compensation board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as otherwise provided under the Act. AS 23.30.135(a). 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. *Id*. Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided under the board's regulations. 8 AAC 45.120(e). Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. *Id*. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. *Id*.

As the statute and regulation above indicate, workers' compensation proceedings are conducted under relaxed evidentiary standards. *Thoeni*. The Act affords the workers' compensation board

wide latitude in making its investigations and conducting its hearings. *Cook.* Since the board is authorized to receive and consider not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it, the hearing chair's rulings were correct. *Id.*

3) Was the hearing chair's ruling to exclude Employee's testimony on her reasonable expectations for Employer's adjusters to adequately inform her of the rules governing changing physicians correct?

Employee contends her reasonable expectations for an adjuster to advise her of the rules governing changing physicians are relevant to the issues presented. She contends Employer's adjusters never advised her on these rules and further contends Employer has been receiving her medical reports and bills for seven years, yet only now objects to her choice of doctors. Under these facts, Employee contends, she had a reasonable expectation Employer's adjusters would have either informed her of the rules or previously notified her if she was deviating from them. Employer contends the issue of an adjuster's duties under the Act was not an issue set forth in the prehearing conference summary and objects to Employee's testimony on due process notice grounds. It also objects to her testimony on relevancy grounds.

The March 19, 2015 prehearing conference summary sets forth Employer's February 3, 2015 petition to strike medical records based on an unauthorized change of physician as an issue for hearing. Employee answered Employer's petition on February 24, 2015, denying she had made unlawful physician changes, and presented defenses based on "manifest injustice" if 8 AAC 45.082(c) were strictly applied, as well as the equitable doctrine of estoppel. She presented these defenses again in her hearing brief, and further contended Employer's adjusters never advised her on the rules governing changing physicians and pointed out certain records now in dispute have been in Employer's possession since 2008. In support of the arguments set forth in her brief, Employee cited both 3 AAC 26.100(c) and *Seybert*.

The regulation at 8 AAC 26.100(c) provides an adjuster "shall provide necessary claim forms, written instructions, and assistance that is *reasonable* so that any claimant not represented by an attorney is able to comply with the law and *reasonable* claims handling requirements." *Id*. (emphasis added). Meanwhile, *Seybert* involved an injured worker who attempted to set aside

his settlement agreement. He contended the adjuster's failure to mention the stipend allowance during the reemployment process as one of the reemployment benefits available to him amounted to a material misrepresentation in advance of the settlement agreement. The Alaska Supreme Court agreed the adjuster's non-disclosure of a fact may be equivalent of an assertion, and it remanded the case back to the board to determine what the adjuster's duty was to an unrepresented employee under the circumstances. *Id*. at 1094-95; 1196.

Employer contends it did not have proper notice of the issues because the prehearing conference summary did not explicitly set forth each of Employee's numerous defenses to its petition. However, the purpose of prehearing conference summaries is to put the parties on notice of issues for hearing so they can prepare their cases. *Groom*. Prehearing conference summaries provide just what their name implies - a summary of issues for hearing. They need not, and cannot, set forth every possible contention a party may make either in support or in opposition to an issue at hearing. The question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings. *North State Tel. Co.*

Here, if Employee was offering her testimony an effort to further a defense based on alleged misrepresentations by Employer's adjusters, the hearing chair's ruling was correct. Neither Employee's answer, nor her brief, explicitly sets forth misrepresentation as a defense. Mere footnote citations to a single regulation and decision involving potential misrepresentations were not sufficient to put Employer on notice she was presenting misrepresentation as a defense to its petition. *Id*.

However, just as Employer set forth the basis for its petition in that document, Employee set forth her defenses in her answer, which she further clarified and refined in her hearing brief. Employee explicitly pleaded estoppel as a defense in her answer, a defense she reiterated and expounded upon in her hearing brief. She repeatedly contended in her hearing brief Employer's adjusters had not informed her of the rules governing changing physicians; and further contended records to which Employer now objects have been its possession for years. On these bases, Employee contended, the evidence Employer now seeks to exclude should not be. Employer is represented by an experienced workers' compensation defense attorney. Employee's expressly

pleaded estoppel defense, along with her contentions set forth in advance of hearing, in both her answer and in her hearing brief, sufficiently informed Employer it may wish to either present rebuttal evidence to establish it had adequately advised Employee of the rules, or present evidence it was not required to do so under the circumstances.[2] *Id.*

Employer also objected to Employee's testimony on relevancy grounds. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Granus*. Here, Employee pleaded estoppel as a defense to Employer's petition, and one of the elements of estoppel is a party's *reasonable* reliance on the other parties' assertion of a position by word or conduct. *Van Biene*. Employee's reasonable expectations for Employer's adjusters to have advised her on the rules governing changing physicians might well be a "fact of consequence" in this case. Therefore, Employee's proffered testimony was also relevant.

As the foregoing analysis demonstrates, the hearing chair's ruling excluding the testimony at issue was incorrect with respect to Employee's plainly pleaded estoppel defense. "In workers' compensation, where there are complex rules that can carry significant consequences, it is hard to ignore the disparity in information and knowledge that an experienced insurance adjuster may possess compared with an unrepresented claimant." *Seybert*. In order to ensure a complete hearing record, Employee will be afforded an opportunity to complete her testimony at a time mutually convenient to the parties. 8 AAC 45.070(j); 8 AAC 45.074(b)(1)(A), (b)(1)(D), (b)(1)(F) (*see also* (b)(1)(H) (hearing unable to be completed because of "malfunctioning equipment" required for taking evidence)). The parties are further advised, since Employer had sufficient notice of Employee's estoppel defense, and her arguments in support of them, the hearing record will be reopened to receive only Employee's testimony as set forth above.

[2] During its cross-examination, Employer questioned Employee on a document titled "Workers' Compensation Fact Sheet," which was attached to its hearing brief as Exhibit "L." The documents states: "If for any reason you wish to change your original treating physician, you must do so in accordance with the rules prescribed by the Alaska Workers' Compensation Board. Should this situation arise, please contact your adjuster regarding the change of physician prior to doing so." These facts further indicate Employer was aware the duty of its adjusters was at issue for hearing.

As an ancillary note, this decision is mindful of the Supreme Court's decisions in *Grove*, *Crawford & Co.* and *Burke*. Each of these decision involved AS23.30.095(c), which provides "the physician or health care provider *shall furnish* a written treatment plan . . . . *If the treatment plan is not furnished* . . . neither the employer nor the employee may be required to pay for treatments . . . ." However, §§095(c) and 095(a) govern two entirely different subject matters and these decisions should not be applied to §095(a). Whereas §095(c) governs treatment plans in excess of frequency standards, §095(a) governs an employee's entitlement to medical benefits under the Act, which includes the right to choose a physician. Whereas §095(c) is prescriptive in nature and imposes an affirmative duty for providers to furnish of treatment plans for treatment in excess of frequency standards, §095(a) is proscriptive in nature and prohibits an employee from more than one change of physician without the employer's written consent. However, most significantly, §095(c) provides a remedy for violation of that subsection, whereas §095(a) does not. Thus, while decisions from other panels have concluded the requirements of §095(a) cannot be waived because that subsection does not expressly provide for waiver of the statute's requirement, this decision does not adopt those conclusions because the very purpose of equitable defense such as estoppel is to provide a remedy where the law does not. For these reasons, Employee's arguments in this case are far more akin to those in *Van Biene* and *Seybert*, than those in *Grove*, *Crawford & Co.* and *Burke*, and estoppel will lie as a viable defense under AS 23.30.095(a).

4) Did Employee make an unlawful change of physician in violation of AS 23.30.095(a)?

For the reasons just set forth above, and for reasons to be set forth below, Employer's February 3, 2015 petition will be continued until such time as the hearing record is complete and additional evidence is obtained. 8 AAC 45.070(j); 8 AAC 45.074(b)(1)(A), (b)(1)(D), (b)(1)(F) AS 23.30.135(a); 8 AAC 45.070(j).

As an ancillary note for later analysis, at hearing, Employer emphasized its petition only sought the exclusion of medical reports based on Employee's alleged unauthorized physician changes, not a relief from liability for Employee's medical care on that basis. It pointed out Employee's 2008 injury was not controverted until July 3, 2013, and her 2011 injury was not controverted until June 5, 2012, and those controversions are not based on unauthorized physician changes.

5) If Employee did unlawfully change physicians, should medical reports be stricken from the SIME record?

Employer contends medical reports that are a product of an unauthorized physician should be stricken from the SIME record, which in this case includes records dating back to June 13, 2012. In addition to Employee's defenses discussed above, she contends, even if she did make an unauthorized change of physician, the affected medical reports should still be included in the SIME record on a couple of bases. She contends the parties entered into a stipulation to perform an SIME based on disputes in reports Employer now seeks to exclude, but since the parties' stipulation is binding between them, the records must still be forwarded. She also contends striking the medical reports that Employer seeks to exclude would create a "gap" in the medical evidence such that those reports should still be forwarded to the SIME physician under AS 23.30.110(g) to fill the gap created by their exclusion.

Here, the parties stipulated to an SIME based on disputed opinions between Employee's physicians, Drs. Flanum and McNamara, and Employer's physician, Dr. Swanson, on the issues of causation, treatment, degree of impairment and medical stability. The stipulation is binding on the parties. 8 AAC 45.050(f)(3). However, the "board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding." 8 AAC 45.050(f)(4). Furthermore, the statutes are clear, SIMEs are to benefit the board and only it may order one. AS 23.30.095(k); AS 23.30.110(g). Thus, while the parties' stipulation may be binding on them, it is not binding on the board, and Employee's contention the board must forward all records to the SIME physician because the parties stipulated to doing so is not well taken. *Olafson*.

Irrespective of whether Employee unlawfully changed physicians, and regardless of whether certain records are subsequently excluded from either the board's consideration, the record at this particular point in time contains disputed medical opinions on the issues of causation, course of treatment, degree of impairment and medical stability. These disputes are significant.

AS 23.30.095(k). Simply striking medical reports that document the parties' disputes will neither eliminate their disputes, nor assist the board in resolving them. To the contrary, striking reports potentially dating back to June 13, 2012 would decimate most of the medical record in this case, including reports relating to Employee's two shoulder surgeries, her cervical fusion, and the numerous diagnostic tests and medical evaluations leading up them. How can an SIME physician possibly render an opinion on whether a cervical fusion was related to a work injury when there is no record one was even performed? Striking even a portion of the medical reports Employer seeks to exclude would amount to asking the SIME physician to conjure medical opinions based on mere divination alone. Such an exercise will not be ordered.

Here, the parties have important rights at stake and excluding such a vast swath of medical evidence would render any final decision on the merits in this case not more reliable than a coin toss. The likelihood of manifest injustice for either, or both, parties would be immense. Therefore, a waiver of procedure, limited to the SIME, is justified under 8 AAC 45.195. Once the hearing record and SIME are complete, it will be decided whether employee made unauthorized physician changes and whether "reports, opinions, or testimony of the physician" will be considered "in any form, in any proceeding, or for any [other] purpose." 8 AAC 45.082(c).

Furthermore, Employee contends she does not dwell on her medical problems. Unless a medical condition is serious and requires care beyond chiropractic, Employee contends she tends to push them out of her mind, focus on her work, and tries to forget about them. However, a review of Employee's voluminous medical record shows otherwise. She frequently and regularly sought treatment for both work and non-work related conditions, particularly massage therapy, for complaints of aches and pains over her entire body, literally from head to foot. Additionally, many of Employee's chiropractic notes fail to set forth her subjective complaints. Given this, it is oftentimes unclear whether Employee's treatment was for effects of a work injury, a condition unrelated to a work injury, a combination of both, or for any identifiable medical condition at all. Employee's extensive treatment history also begs the question of how much of it was truly "reasonable and necessary" to the process of recovery from her 2008 and 2011 work injuries. *Bockness*; AS 23.30.095(a). Not only will an SIME assist the board in resolving the significant

medical disputes currently in the record, but it will also facilitate an understanding of the medical evidence and aid in the determination of other issues as well, including whether Employee made an unauthorized change of physicians in violation of AS 23.30.095(a). For these reasons, an SIME is appropriate under both AS 23.30.095(k) and AS 23.30.110(g), and one will be ordered based on the entire medical record. *Bah*.

6) Should the SIME be stayed pending issuance of this Decision and Order?

Since an SIME has not yet been scheduled, and since it had been decided the SIME will be based on the entire medical record, this issue is now moot.

CONCLUSIONS OF LAW

1) This decision will not utilize the parties' statements of facts.
2) The hearing chair's rulings on Employer's hearsay objections during Employee's testimony were correct.
3) The hearing chair's ruling to exclude Employee's testimony on her reasonable expectations for Employer's adjusters to adequately inform her of the rules governing changing physicians was incorrect.
4) The issue of whether Employee made an unlawful change of physician in violation of AS 23.30.095(a) will be continued until the hearing record is complete and the SIME report has been filed with the board.
5) Medical reports will not be stricken from the SIME record.
6) The issue of whether the SIME should be stayed pending issuance of this Decision and Order is moot.

ORDER

1) Employer's February 3, 2015 petition to strike records based on an unauthorized change of physician is denied in part.
2) An SIME shall be performed pursuant to AS 23.30.095(k) and AS 23.30.110(g).
3) Medical reports shall not be stricken from the SIME record.

4) Employee will be afforded an opportunity to complete her testimony regarding her reasonable expectations for Employer's adjusters to advise her on the rules governing changing physicians at the convenience of the parties.

5) This issues of whether Employee made an unauthorized change of physician and whether certain medical reports should be considered by the board are continued until the hearing record is complete and the SIME report has been filed with the board.

Dated in Fairbanks, Alaska on July 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Julie Duquette, Member

/s/_____
Jacob Howdeshell, 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 LINDA JANOUSEK, employee / respondent; v. NORTH SLOPE BOROUGH SCHOOL DISTRICT, employer; SEABRIGHT INS. CO., insurer / petitioners; Case No. 201105714; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 27, 2015.

/s/_____
Darren Lawson, WC Technician