

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

COLE ORIN,)	
)	
Employee,)	
Claimant,)	INTERLOCUTORY
)	DECISION AND ORDER
v.)	
)	AWCB Case No. 202402238
UNALASKA SURIMI,)	
)	AWCB Decision No. 25-0021
Employer,)	
and)	Filed with AWCB Anchorage, Alaska
)	on March 27, 2025.
SOMPO AMERICA FIRE & MARINE)	
INS,)	
)	
Insurer,)	
Defendants.)	

Cole Orin's January 23, 2025, petition for a second independent medical evaluation (SIME) was heard on the written record in Fairbanks, Alaska on February 26, 2025, a date selected on January 28, 2025. Attorney John Franich represented Cole Orin (Employee). Attorney Jeffery Holloway represented Alyeska Seafoods and its insurer (Employer). The record closed on February 26, 2025.

ISSUES

Employee contends a significant medical dispute exists over the "degree of impairment" between his attending physician and Employer's medical evaluation (EME) physician, warranting an SIME.

Employer contends the physician on whose opinion Employee relies is not an "authorized attending physician" and therefore no significant medical dispute exists as required by AS

23.30.095(k). Employer also contends that Employee's SIME petition should be denied because there is no evidence his physician's PPI rating was based on the AMA Guides, 6th Edition (2024).

1. Is Dr. Kalin Employee's attending physician?

2. Shall an SIME be ordered?

FACTUAL FINDINGS

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) On February 13, 2024, while working a seasonal job in Dutch Harbor, Employee sustained a work-injury when a forklift ran over his right foot/ankle. (Report of Injury, February 19, 2024).
- 2) Immediately following the February 13th injury, Employee treated with Iliuliuk Family and Health Services in Dutch Harbor. The chart notes of Gregory Walter, NP, state, "about an hour ago, a forklift ran over [Employee's] right foot, ankle, and proximal half of his tib/fib [tibia/fibula]. When Walter asked his pain level on a scale of 1-10, Employee stated, "a Thousand", and reported "he has never had pain this bad in his life." X-rays of Employee's right foot and ankle revealed no fractures or dislocations, normal ankle alignment, and no suspicious bony lesions or acute bony abnormality. Walter observed, "Moderate edema over the right ankle" ... Very tender to palpation all over the ankle initially" "Skin intact, no palpable deformities of the right ankle." Walter discharged Employee with an ankle immobilizer CAM boot and crutches, instructed him to bear weight only as tolerable, and to remain off work. (Walter, Chart Notes, February 13, 2024).
- 3) On February 15, 2024, NP Walter's chart notes states, Employee reported, "swelling in the foot has gotten worse over the past 2 days ... notes severe pain when he tries to bear any weight on the right foot without the boot." Walter observed, "Range of motion of the ankle is now about 30% flexion and extension, minimal inversion and eversion. Normal range of motion of the toes..." Walter determined Employee needed a "CT of the right ankle ... to rule out tear to the tendons ... and orthopedic surgery consultation after imaging to discuss results and treatment options." Referrals were coordinated by Walter for the CT and orthopedic consultation and Employee was not cleared for work until seen by an orthopedic surgeon. (Walter, Chart Notes, February 15, 2024).
- 4) On February 19, 2024, the Division sent Employee a form letter advising that a file had been opened on his claim, urging him to download a copy of the publication, "Workers' Compensation

and You,” and advising him to call the claim administrator if he had questions or to contact the nearest Division office if he needed further assistance. (Alaska Workers’ Compensation Division Letter, February 19, 2024).

5) On February 21, 2024, Employee treated with Dr. Regina Fiacco, DPM, at Alaska Fracture and Orthopedic Clinic. X-rays of Employee’s right foot and ankle interpreted by Dr. Fiacco showed, “There is no significant joint space widening to suggest ligamentous injury across the midfoot or ankle.... The patient demonstrates active range of motion to the ankle and lesser digits with no skin tenting....” Dr. Fiacco recommended “an MRI and CT scan ... to better evaluate both the bones, ligaments and soft tissues of the ankle and midfoot.” She advised Employee to remain non-weight bearing with the pneumatic CAM boot and that he was “not cleared to work at this time.” A follow-up session was scheduled after the CT and MRI imaging. (Fiacco, Chart Notes, February 21, 2024).

6) On February 21, 2024, MRIs were taken of Employee’s right ankle and foot by Anchorage Imaging Center. (Anchorage Imaging Center, February Feb 21. 2024).

7) Also on February 21, 2024, Employee had a right ankle CT scan taken by Northern Lights Imaging. The CT scan revealed “multiple small fractures throughout the foot and ankle including fractures of the calcaneus, cuboid, medial cuneiform and fifth metatarsal base” and “Prominent and soft tissue edema ... consistent with a crushing injury of the right foot and ankle.” (Northern Lights Imaging, Chart Notes, February 21, 2024).)

8) On February 22, 2024, Dr. Fiacco reviewed the MRI and CT results and diagnosed a “Crushing injury of right ankle. Unspecified fracture of right calcaneus; fracture of unspecified tarsal bones of right foot.” She said, “No concern for compartment syndrome although there was likely significant subcutaneous injury from the pressure applied.” Dr. Fiacco recommended “non-surgical management of [the] fractures due to the minimally displaced nature.” Employee was instructed to continue using the pneumatic CAM boot, remain non weight bearing for 6-8 weeks and to thereafter attempt a progressive return to weight bearing with physical therapy guidance. Dr. Fiacco cleared Employee “to return to seated light duty work where he can elevate the extremity with mandatory use of the pneumatic CAM boot.” She prescribed a knee scooter and referred Employee to physical therapy. (Fiacco, Chart Notes, February 22, 2024).

9) In conjunction with the February 22, 2024, treatment session, Dr. Fiacco responded to a one-page questionnaire relating to Employee’s condition, as submitted by Employer’s agent, Essential

Medical Management LLC. Dr. Fiacco responded: “No” to whether Employee could return to work full duty, (which she estimated would not be for another four months); “No” to whether Employee was medically stable, (which she estimated would not be for another six months); and, “No” to whether Employee was released from care. Regarding whether she anticipated Employee will incur permanent partial impairment from the injury, Dr. Fiacco marked “Unknown.” On a second form which Dr. Fiacco was also requested to complete titled “Providers Return to Work Recommendation,” Dr. Fiacco indicated Employee could perform modified work of a sedentary nature. However, she added specific restrictions including “no periodic ambulation allowed during workday, must be able to elevate leg.” (Fiacco, responses to Essential Medical Management Questionnaire and Providers Return to Work forms, February 22, 2024).

10) On February 26, 2024, Employee returned to Dr. Fiacco. The chart notes state, Employee “reports that pain continues to increase with dependency and with use of the knee scooter” and “Reports pain along outside of right foot has been worsening.” Dr. Fiacco’s chart notes also state:

[Employee] ...is not cleared to return to work and will need periodic re-evaluation. Physical therapy has been prescribed. [He] will need to establish follow-up care in Florida. He will follow up in 6 weeks via telehealth for follow-up evaluation and to ensure that he has established care.” (Fiacco, Chart Notes, February 26, 2024).

11) In conjunction with the February 26, 2024, treatment session, Dr. Fiacco responded to another questionnaire from Employer’s agent, Essential Medical Management. Dr. Fiacco’s responses were materially consistent with her February 22, 2024, responses. She answered “No” to questions whether Employee can work full duty, was medically stable, and whether he was released from care. Dr. Fiacco also answered “No” to whether Employee was released to travel to a remote location such as Dutch Harbor. As to the question whether Employee will incur permanent partial impairment from the injury, this time Dr. Fiacco answered “Yes” and added, “I will refer to Unknown for PPI evaluation.” (Fiacco, February 26, 2024, Essential Medical Management Questionnaire).

12) On another form Dr. Fiacco was also requested to complete on February 26, 2024, titled “Providers Return to Work Recommendation,” this time Dr. Fiacco checked the box corresponding to the statement “patient is totally incapacitated at this time” and wrote, “[Employee] will be reevaluated in Florida once care is established.” Dr. Fiacco recommended Employee have

assistance for traveling due to the non-weight bearing status of his right lower extremity. (Fiacco, February 26, 2024, response to Providers Return to Work Recommendation).

13) On March 6, 2024, Employee filed a claim for temporary total disability (TTD) benefits, attorney fees, penalties for late paid compensation, and interest. He contended Employer's adjuster had agreed TTD payments would be directly deposited but that no payments had been received. (Claim for Workers' Compensation Benefits, March 6, 2024).

14) On March 7, 2024, Employee filed an amended claim, requesting a compensation rate adjustment, attorney fees and costs, and interest. He contended that the calculation of his spendable weekly wage under AS 23.30.220(a)(4) did not fairly approximate his probable earning capacity during the period of disability and urged that AS 23.30.001 and .220(a)(5) be applied to determine a fair spendable weekly wage. (Amended Claim for Workers' Compensation Benefits, March 7, 2024).

15) On April 2, 2024, Employee filed an ARH and requested a hearing. Employer opposed the ARH on April 12, 2024, contending discovery was not complete, and asserting that under AS 23.30.110 the ARH was inoperative because Employee had recently served a request for production. (Employee ARH, April 2, 2024; Employer Opposition, April 12, 2024).

16) On April 8, 2024, Employee had an audiovisual (telehealth) appointment with Dr. Fiacco. Dr. Fiacco's chart notes state Employee:

Reports bruising and swelling has resolved. He has three areas where he continues to get sharp pain if he walks full weight for too long in CAM boot. Along the base of the great toe, mid foot and the outer side of his foot. He reports after this develops he will have lingering pain throughout the day. He feels the range of motion is currently limited. He has not yet started physical therapy. He continues to remain primarily at home and is not currently working.

Dr. Fiacco's chart notes also state:

Physical therapy has been prescribed previously to Florida although he has not yet started this. I will attempt to resend this referral for progressive weight bearing. He will need to establish follow-up care in Florida with a physician for x-ray and in person evaluation and this was explained to him today.

Dr. Fiacco further stated, Employee "is not cleared to return to work at this time." and that she had reached out to "Essential Medical Management, to discuss Employee's situation." (Fiacco, Chart Notes, April 8, 2024).

17) On May 28, 2024, the parties filed a partial settlement agreement, resolving Employee's claims for compensation rate adjustment, unfair or frivolous controversion, and associated penalties, and interest. Since all other benefit claims, including medical benefits, remained unaffected, the settlement agreement did not require board approval. (Partial Settlement Agreement, May 28, 2024; AS 23.30.012(a); Judgement/Experience).

18) On June 3, 2024, Employee underwent an orthopedic EME. David Bauer, MD, said Employee sustained a crushing injury to the right foot, substantially caused by the work injury. Dr. Bauer opined Employee "has been immobilized for longer than physiologically necessary and now has stiffness and increased pain with weightbearing;" "will require 6 weeks active exercise based physical therapy;" and "will need to be out of the boot immediately." Dr. Bauer said if Employee "is treated aggressively with physical therapy and weightbearing he should reach medical stability within 8 weeks' time," and "Further imaging is not required given the nondisplaced nature of the fractures and the benign examination today." Because Dr. Bauer determined Employee was not yet medically stable, he did not assess a PPI rating. In terms of Employee's ability to work, Dr. Bauer opined, "At this time without further treatment [Employee] would be capable of light to medium work" and "Once he has further physical therapy and regains some range of motion in his foot and ankle, he will be physically capable of heavy-very heavy work, approximately 8 weeks from now." Dr. Bauer further opined, "[Employee's] subjective complaints are noted but there is no evidence that he has displaced the fractures or experienced any permanent harm." (Bauer, EME, June 3, 2024).

19) On August 7, 2024, after returning to Florida, Employee treated with Dr. Pullen, DO., at University Orthopedic Care. (Experience/Judgment). Dr. Pullen said, Employee described "The pain is 2 out of 10 currently and 8 out of 10 on a bad day. He reports difficulty with ADLs [activities of daily living] and inability to work." Dr. Pullen also noted, "[Employee] is ambulating now but has a lot of pain if on his feet for any period of time. He is used to doing manual labor but is not able to do manual labor now secondary to fact his right foot swells on him and gets painful if he is on it for any period." Dr. Pullen instructed Employee to continue his current treatment regime and to "follow back up in about 2 months – or sooner if having any problems or issues." (Pullen, DO, Chart Notes, August 7. 2024).

- 20) On August 20, 2024, Employer sent a letter to the Reemployment Benefits Administrator (RBA), requesting a vocational reemployment eligibility evaluation for Employee – the equivalent of a 90-day out of work notice. (Wilton Adjustment, Letter, August 20, 2024).
- 21) On August 23, 2024, an RBA designee notified Employee it had assigned rehabilitation specialist Heidi Feder (RS Feder) to conduct a reemployment benefits eligibility evaluation. (Letter, RBA August 23, 2024).
- 22) On August 26, 2024, Employee filed a change of address with the Division, noting his Florida address. (Notice of Change of Address, August 26, 2024).
- 23) On September 5, 2024, RS Feder sent a letter to Dr. Pullen, along with several job descriptions, and inquired whether Employee would be capable of performing the various jobs. The jobs included, “Industrial-Truck Operator, Fish Cleaner, Gate Guard, Soda-Room Operator, Dining Room Attendant, Informal Waiter/Waitress. RS Feder also asked Dr. Pullen if Employee would have a permanent partial impairment rating greater than zero because of the work injury. (RS Feder, Letter, September 5, 2024).
- 24) On September 19, 2024, Dr. Pullen responded to RS Feder’s September 5, 2024, inquiry. For the job descriptions involving Industrial-Truck Operator, Fish Cleaner, Gate Guard and Waiter/Waitress, Dr. Pullen responded “Yes - Employee will have the permanent physical capacities to perform the physical demands.” He responded “No” to the Soda Room Operator and Dining Room Attendant job descriptions. Dr. Pullen also checked the box “yes” to the question whether he predicted Employee will have a PPI greater than zero; however, he did not provide a PPI rating. (Pullen, September 19, 2024, response to RS Feder’s job descriptions).
- 25) On September 23, 2024, RS Feder determined Employee was not eligible for reemployment benefits, “based on the review of Employee’s medical records and Dr. Pullen’s correspondence dated September 19, 2024.” (RS Feder, Eligibility Evaluation, September 23, 2024).
- 26) On October 11, 2024, based on RS Feder’s September 23, 2024, evaluation, the RBA designee notified Employee he was not eligible for reemployment benefits. (RBA Letter, October 11, 2024).
- 27) On October 24, 2024, Employee had a second appointment with Dr. Pullen. The chart notes state Employee reported, “Since the last visit the condition has slightly improved. Standing on the foot for prolonged periods makes his pain worse. Reports difficulties with daily living activities

and hobbies.” Dr. Pullen reported, “Right Hind foot: heel tender to palpation; Midfoot: tenderness over TMT joint(s) and tenderness over 5th metatarsal shaft.” He also stated:

I have watched [Employee] ambulate today. He has an obvious limp favoring his right foot and ankle. Note. [Employee] has been doing a little bit better since last visit but still having some foot and ankle pain.

Dr. Pullen’s chart notes state, “at this point we can place him at maximum medical improvement.” Employee was scheduled to return “on an as needed basis....” Dr. Pullen provided no PPI rating. (Pullen, Chart Notes, October 24, 2024; Observation).

28) Based on Dr. Pullen’s August 7, 2024, and October 24, 2024 chart notes, Dr. Bauer, on November 21, 2024, issued an Addendum to his June 3, 2024 EME and opined Employee had sustained a 0% PPI whole person impairment from the work- injury. Dr. Bauer’s 0% PPI rating was based on the “AMA Guides, 6th Edition (2023 version).” Dr. Bauer did not physically reexamine Employee in connection with his Addendum. (Bauer, EME Addendum, November 21, 2024; Observation).

29) Based on Dr. Bauer’s EME addendum, Employer controverted Employee’s compensation claim on January 1, 2025, and denied PPI benefits. (Controversion Notice, January 1, 2025).

30) On January 6, 2025, Employer treated with David Kalin, MD., M.P.H., in Florida. The report which Dr. Kalin prepared was filed with the Division on January 23, 2025, along with Employee’s Medical Summary. (Employee Medical Summary, January 6, 2025; ICER Event Entry, January 6, 2025). Dr. Kalin’s report consists of 9 pages and is titled “Independent Medical Evaluation;” “Medical Records Review;” PPI Rating According to AMA Guides 6th Edition.” In his report Dr. Kalin stated:

The medical evaluation by David P. Kalin, MD, MPH, is the examinee’s [Employee’s] most recent medical evaluation since his last visit with Dr. Pullen (sic), DO, during 10/2024, and currently, the examinee complains of “3 sharp pains” in the right foot after standing for about 15 minutes, a symptom which recurs throughout the day and is relieved by sitting down. The right ankle develops a similar pain also recurring throughout the day. Stiffness in both the right ankle and foot persists constantly, associated with limited range of motion and abnormal gait.

Since the work-related right foot crush injury, the examinee, who denies having had previous physical limitations or restrictions and had been a sports enthusiast playing basketball, football, and golf, and running, now is unable to run, jump, comfortably climb stairs, stand for longer than 15 minutes without developing pain

requiring release from weightbearing of the right foot, play golf, has difficulty with the accelerator pedal when driving and difficulty with concentration due to recurrent pain.

Upon physical examination, Dr. Kalin stated, “.... Standing and sitting normally with obvious antalgic gait of the right leg. ... medial malleolus... Moderate limited rotation of the right ankle with mild weakness of dorsi and plantar flexion without swelling or deformity.” Later in the report Dr. Kalin stated, “In my opinion, by medical history, physical examination, and review of available pertinent medical records, this examinee’s ... injury ... is causally related to the work-related crush injury of 02/13/2024.” Dr. Kalin advised Employee “to wear comfortable orthotic insoles, use a right foot ankle elastic support bandage as needed, and to continue with routine stretching and strengthening exercises... to stimulate and facilitate increased flexibility and strength.” Dr. Kalin opined Employee suffered a 14% whole person PPI rating “based on the AMA guides to the evaluation of permanent impairment, 6th edition...” In terms of physical limitations and restrictions, Dr. Kalin opined:

[Employee]... is limited to sedentary work, exerting up to 10 pounds of force occasionally, negligible force frequently, involving sitting most of the time, but may involve walking or standing for brief period, up to 1 hour.

For this reason, the examinee is a candidate for vocational rehabilitation.

Should the examinee be unable to find appropriate sedentary work, as he has been out of this prior work for over 11 months and only sustained 1 week of full-time car sales, which he was unable to tolerate, the examinee may be a candidate for Social Security Disability. (Dr. Kalin, January 6, 2025, Report).

31) Dr. Kalin’s January 6, 2025, report reflects that he performed a physical examination of Employee and conducted a medical records review. (*Id*; Observation/Judgement). He also assessed Employee as having sustained a 14% whole person PPI rating, according to the “AMA Guides 6th Edition.” (*Id*).

32) It is unclear from Dr. Kalin’s report whether the 14% PPI rating is based on the AMA’s 6th Edition (2024), or an earlier 6th Edition. (Observation).

33) On January 23, 2024, Employee petitioned for an SIME. In the accompanying SIME form, Employee asserted a dispute exists between his attending physician, Dr. Kalin, and Employer’s EME physician, Dr. Bauer, on the degree of PPI he sustained from the work-injury - 14% as opined

by Dr. Kalin or 0% as opined by Dr. Bauer. (Employee SIME Petition/SIME Form, January 23, 2025).

34) On January 23, 2025, Employee petitioned to reconsider/modify the RBA's October 11, 2024, decision denying reemployment benefits. As the basis of the petition, he relies on Dr. Kalin's January 6, 2025, report which said he can only perform sedentary work. (Petition for Reconsideration, January 23, 2025).

35) On January 28, 2025, the Division scheduled a written record hearing for February 26, 2025, on Employee's SIME petition - with briefs due February 19, 2025. (Written Record Hearing Notice, January 28, 2025).

36) Employer opposed Employee's SIME petition on February 13, 2025, contending Employee failed to identify a significant dispute between Employer's IME physician and an "authorized attending physician." Employer asserts Dr. Kalin is not Employee's "authorized attending physician" and therefore Employee cannot rely on Dr. Kalin's report (or the opinions therein) to establish a dispute. Employer also asserts there is no evidence that Dr. Kalin's 14% PPI rating was based on the AMA Guides 6th Edition (2024). (Employer Opposition to SIME, February 13, 2025).

37) On February 14, 2025, Employee filed two ARHs. One requesting a hearing on his January 23, 2025, compensation claim, and the second requesting a hearing on both his SIME petition and his petition for reconsideration/ modification of the RBA's October 11, 2024 reemployment benefits decision. (Employee ARHs, February 14, 2025).

38) Employer opposed Employee's ARH filings on February 19, 2025, contending discovery is not complete as evidenced by Employee's SIME petition. Employer asserted a prehearing conference was needed. (Employer Opposition, Feb. 19, 2025).

39) On February 19, 2025, Employer filed a request to cross-examine Dr. Kalin regarding his January 6, 2025, Independent Medical Examination. (Notice, February 19, 2025).

40) In its February 19, 2025, hearing brief, Employer contended an SIME is unnecessary since no dispute exists between Employee's "authorized attending physician" and Employer's IME physician. Employer asserts Dr. Kalin is not Employee's authorized attending physician, did not treat employee, and was hired by Employee, without a referral, to perform an "Independent Medical Examination." Employer asserts only employers have the right to retain expert IMEs. Employer also requests Employee's SIME petition be denied because there is no evidence Dr.

Kalin used the AMA Guides, 6th Edition (2024) in determining Employee's 14% PPI rating. (Employer Hearing Brief, February 19, 2025). Employee did not file a hearing brief. (Observation).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

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

....

The Board may base its decision on not only direct testimony 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. . . . 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.

....

(k) In the event of a medical dispute regarding . . . causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. . . .

The Alaska Workers' Compensation Appeals Commission in *Bah v. Trident Seafoods Corp.*, AWCAC Dec. No. 073 (February 27, 2008) addressed the Board's authority to order an SIME under §095(k). *Bah* stated in *dicta*, that before ordering an SIME it is necessary to determine whether the medical dispute is significant or relevant to a pending claim or petition. *Bah* further held, when deciding whether to order an SIME, the Board should consider three criteria:

- 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? (*Id.*).

The term "significant dispute" includes considering the cost and extent of benefits at stake given the claims and medical disputes. *Betts v. Greenling Enterprises, LLC*, AWCAC Appeal No. 22-0013, Order on Petition for Review (November 30, 2022).

In *Geister v. Kid's Corps, Inc.*, AWCAC Dec. No. 045 (June 6, 2007), the Commission held that in deciding whether a qualifying conflict in opinions exist for purposes of ordering an SIME, "The board is not asked to decide which physician's opinion is more persuasive ... it will only do that when deciding the merits of the claim. ... the opinions are offered solely to establish that a difference of medical or scientific expert opinion exists."

AS 23.30.110. Procedure on claims. ... (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.

Under §110(g) the Board may order an SIME when there is a significant "gap" in the medical evidence, or a lack of understanding of the medical or scientific evidence prevents the Board from ascertaining the rights of the parties, and an SIME opinion would help. *Bah*.

An SIME's purpose is to have an independent medical expert provide an opinion for the board's purposes about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). The decision to order an SIME rests with the discretion of the Board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Dec. No. 06-0301 (October 25, 2007). Although a party has a right to request an SIME, a party does not have a right to an SIME if the Board decides one is not necessary for the Board's purposes. *Id.* at 8. An SIME is

not a discovery tool exercised by the parties; it is an investigative tool exercised by the Board to assist by providing a disinterested opinion. *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 board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

AS 23.30.135. Procedure before the board. (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. . .

AS 23.30.155. Payment of compensation. . .

(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

Under §135(a) and §155(h), the board has broad discretion to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues, to best "protect the rights of the parties."

AS 23.30.395. Definitions. In this chapter,
....

(3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
(A) a licensed medical doctor;
(B) a licensed doctor of osteopathy;
(C) a licensed dentist or dental surgeon;

- (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
- (E) a licensed advanced practice registered nurse; or
- (F) a licensed chiropractor;

....

8 AAC 45.082. Medical Treatment.

....

- (b) A physician may be changed as follows:

....

- (2) an employee. ... 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. ...

....

- (4) 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 ...; 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 employee thereafter is a substitution of physicians and not a change of attending physicians. ...

- (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. ...

8 AAC 45.090. Additional examination.

- (b) Except as provided in (g) of this section, ..., the board will require the employer to pay for the cost of an examination AS 23.30.095(k), AS 23.30.110(g), or this section.

8 AAC 45.092. Second independent medical evaluation. . . .

. . . .

(g) If there exists a medical dispute under AS 23.30.095(k),

. . . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

(A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or

(B) the board on its own motion determines an evaluation is necessary.

. . . .

Tobar v. Remington Holdings, LP, 447 P.3d 747 (Alaska 2019) held the Act authorizes the board to order an SIME when requested under AS 23.30.095(k) and AS 23.30.110(g), and that under 8 AAC 45.092(g), the board can also order an SIME on its own motion. Citing *Bah*, the *Tobar* Court also affirmed the board's 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.

ANALYSIS

1) Is Dr. Kalin Employee's attending physician?

Employer contends Employee's physician, Dr. Kalin, is not Employee's "authorized attending physician" and therefore his opinions cannot be relied on to establish a significant medical dispute for purposes of AS 23.30.095(k). Employer also asserts Dr. Kalin "did not treat Employee" and

instead, “was hired by Employee, without referral, to perform an “Independent Medical Evaluation,” which Employer contends is a right reserved exclusively to employers.

An “attending physician” is defined as a “licensed medical doctor” – a definition which Dr. David P. Kalin, M.D., M.P.H., clearly meets. AS 23.30.395(3). Further, 8 AAC 45.082(b)(2) states in relevant part that “an employee ... designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury....” By engaging Dr. Kalin to perform an Independent Medical Evaluation, a Medical Records Review and a PPI rating, all relating to his work-injury, Employee designated Dr. Kalin as his attending physician. *Id.*

Dr. Kalin, in addition to performing a detailed medical records review, also physically examined Employee. The following January 6, 2025, entry makes that point clear:

The medical evaluation by David P. Kalin, MD, MPH, is the examinee’s most recent medical examination since his last visit with Dr. Pulen, (sic) DO, during 10/2024, and currently, the examinee complains of “3 sharp pains: in the right foot after standing for about 15 minutes, a symptom that recurs throughout the day and is relieved by sitting down.... (Dr. Kalin, January 6, 2025).

Further his report states:

.... Standing and sitting normally with obvious antalgic gait of the right leg. ... medial malleolus... Moderate limited rotation of the right ankle with mild weakness of dorsi and plantar flexion without swelling or deformity.

Dr. Kalin not only physically evaluated Employee but also provided him medical advice about what he should do going forward and additionally opined both as to Employee’s physical capabilities and to his impairment. *Rogers & Babler*. In treating with Dr. Kalin, Employee made his one permissive physician change. AS 23.30.095(a).

The fact Dr. Kalin referred to his physical examination of Employee as an “Independent Medical Evaluation,” “Medical Records Review,” and “PPI Rating...” as opposed to simply a “physical examination,” or by some other descriptor, does not change the nature of the treatment given or advice Employee received. *Rogers & Babler*. Arguing otherwise is a matter of form over substance. By “getting treatment, advice, an opinion, or any type of service from a physician for

his injury,” Employee thereby designated Dr. Kalin as his attending physician. AS 23.30.095(a); AS 23.30.395(3)(A); 8 AAC 45.082(b)(2). Employee may rely on Dr. Kalin’s January 6, 2025, report as a basis for requesting an SIME under AS 23.30.095(k). *Rogers & Babler*.

Although not explicitly argued by the parties, the fact Employee first treated with Dr. Pullen after returning to Florida from Alaska, does not constitute a change of attending physician. Instead, under 8 AAC 45.082(4), since Employee had “moved a distance of 50 miles or more” (from Alaska to Florida), his treatment with Dr. Pullen constituted a “substitution of physicians.” *Rogers & Babler*. Accordingly, notwithstanding the fact he first treated with Dr. Pullen, he retained the right to make one change in his choice of attending physician without the written consent of Employer, which he did when he treated with Dr. Kalin. AS 23.30.095(a).

Shall this decision order an SIME?

Having determined that Dr. Kalin is Employee’s attending physician, the second issue to decide is whether an SIME should be ordered. Whether to order a SIME depends on whether a significant medical dispute exists between Employee’s attending physician and the Employer’s EME physician which an SIME will assist in resolving. An SIME petition may be granted, or one may be ordered on the board’s own motion. AS 23.30.095(k); 8 AAC 45.092(g)(2) and (3)(B); *Bah; Smith*. Alternatively, in the absence of a medical dispute, an SIME may be ordered if there is a significant gap or a lack of understanding in the medical or scientific evidence, and the board, in its discretion, determines having an SIME opinion will assist to resolve the issues before it. AS 23.30.110(g); *Bah; Tobar*.

A prerequisite to ordering an SIME is a “medical dispute” regarding one or more enumerated issues “between the employee’s attending physician and the employer’s independent medical evaluation. . .” AS 23.30.095(k). In other words, an attending physician and the Employer’s EME physician must disagree on one or more specific significant points. The issues physicians might disagree on include causation, medical stability, ability to enter a reemployment plan, compensability, degree of impairment, functional capacity, the amount and efficacy of continued

treatment, and/or the necessity of treatment. *Id.* Without a medical dispute, however, or at least a gap in medical evidence, a SIME is neither necessary nor appropriate. *Bah.*

The panel has broad discretion to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in claims and to protect the parties' rights. AS 23.30.135(a); AS 23.30.155(h); *Northern Construction; Hanson.* The panel is not limited to reviewing only the records cited by the parties but rather has discretion too, and prudently, should review all medical records when determining whether to order an SIME. *Id.* The decision to order an SIME is properly based on current medical evidence. *Northern Construction.*

In deciding whether to order an SIME, the Commission in *Bah* outlined three considerations:

- 1) Is there a medical dispute between Employee's physician and Employer's IME?
- 2) Is the dispute significant? and
- 3) Will an SIME physician's opinion assist the Board in resolving the disputes?

These considerations will be addressed in order:

(1) There is a medical dispute.

Employer's physician, Dr. Bauer, was unequivocal in his June 3, 2024, opinion that Employee suffered no "permanent harm or change to the structure of the body" and that, as of June 3, 2024:

... without any further treatment [Employee] would be capable of light to medium work. Once he has further physical therapy and regain some range of motion in his foot and ankle, he will be physically capable of heavy-very heavy work, approximately 8 weeks from now.

In his November 21, 2024, addendum, Dr. Bauer opined Employee suffered a "0% whole person impairment" based on the AMA Guides, 6th Edition (2023 version). *Id.*

In contrast to Dr. Bauer's opinions, Employee's attending physician, Dr. Kalin, during his January 6, 2025, physical examination, observed Employee "Standing and sitting normally with obvious

antalgic gait of the right leg.” An antalgic gait is an abnormal walking pattern that results from pain and causes a limp. *Rogers & Babler*. Ironically, Dr. Pullen, with whom Employee treated prior to Dr. Kalin, and on whose chart notes Dr. Bauer relied for his addendum, stated similarly, “I have watched [Employee] ambulate today. He has an obvious limp favoring his right foot and ankle.” Further, in contrast to Dr. Bauer’s opinion that Employee would “be physically capable of heavy-very heavy work, approximately 8 weeks from now,” (8 weeks from his June 3, 2024, IME), Dr. Kalin opined:

[Employee] is limited to sedentary work, exerting up to 10 pounds of force occasionally, negligible force frequently, involving sitting most of the time, but may involve walking or standing for brief periods, up to 1 hour.

Dr. Kalin further opined that “for this reason, the [Employee] is a candidate for vocational rehabilitation...” and “... may be a candidate for Social Security Disability.”

Dr. Bauer opined Employee sustained a “0% whole person impairment” based on AMA Guides, 6th Edition (2023 version). In contrast, Dr. Kalin opined Employee sustained a 14% whole person permanent impairment “based on the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition.” It is unclear, however, from Dr. Kalin’s report what version of the AMA Guides 6th Edition he used in determining Employee’s PPI rating – whether the AMA Guides 6th Edition (2024 version) applicable to PPI ratings done after January 1, 2025, or, like Dr. Bauer, the earlier 2023 version. Employer contends that since there is no clear evidence Dr. Kalin used the 2024 version of the AMA 6th edition, Employee’s SIME petition should be dismissed. However, in determining whether to order an SIME, the focus is not on determining which physician is more credible or which opinion is more persuasive, but rather simply on whether a significant medical dispute exists between the physicians. *Geister*. Accordingly, although Dr. Kalin’s failure to clearly identify what AMA version he relied on might ultimately impact Employee’s compensability, if not rectified, it does not prevent the panel from finding a dispute exists. In fact, assuming as Employer’s argument seems to indicate, that instead of relying on the 2024 version of the AMA guides, Dr. Kalin relied on the earlier 2023 version, the same version Dr. Bauer relied on, the existence of a dispute regarding degree of impairment is even more apparent. *Id.*

(2) The medical dispute is significant.

The term “significant dispute” includes considering the cost and extent of benefits at stake given the claims and medical disputes. *Betts*. Employees seeks PPI, TTD benefits, and reconsideration/modification of the RBA’s decision denying reemployment benefits. The difference between whether Employee has a PPI or not is relevant to whether he may be entitled to reemployment benefits, which are a valuable benefit for injured workers who are not able to return to the job of injury or any positions held in the 10 years prior to injury. *Rogers & Babler*. Further, the difference between a 0% PPI rating and a 14% PPI rating is significant. So also, is the dispute over whether Employee has the physical capabilities to resume the type of work he was involved in at the time of injury – heavy-very heavy work - as Dr. Bauer opines or is capable of only sedentary work as Dr. Kalin opines. Employee’s claims, if he prevails at hearing could result in substantial benefits. Thus, the dispute is “significant” and satisfies *Bah* requirement two to order an SIME. *Id.*

(3) An SIME will assist the panel in deciding this case.

SIME reports are useful in deciding cases and assist the Board to best ascertain the parties’ respective rights. *Rogers & Babler*; AS 23.30.135(a). The SIME’s purpose is to have an independent expert provide an opinion about a contested issue. *Seybert*. Although familiar with most orthopedic injuries and the resulting potential physical limitations, the panel is not sufficiently familiar with how an individual who exhibits “an obvious limp favoring his right foot and ankle” and an “obvious antalgic gait of the right leg” would have sustained a 0% whole person impairment rating. Similarly, how a right ankle/foot injury might impact an individual’s physical capacity to perform heavy-very heavy work versus sedentary work. Employee seeks disability, reemployment and medical benefits, which are significant benefits if found compensable. An SIME by an orthopedist will assist the panel to decide the degree of impairment Employee sustained, Employee’s physical/functional capacity, and whether continuing treatment is reasonable and necessary. An SIME with an orthopedist will also assist in best ascertaining the parties’ rights and resolving the parties’ disputes. *Bah*; AS 23.30.135(a); *Rogers & Babler*. Accordingly, the third *Bah* consideration for ordering an SIME is satisfied. An SIME with an orthopedist will be ordered.

CONCLUSION OF LAW

1. Dr. Kalin is Employee's attending physician.
2. This decision shall order an SIME.

ORDER

- 1) Dr. Kalin is Employee's attending physician and Employee may rely on Dr. Kalin's January 6, 2025, report as a basis for his SIME petition.
- 2) Employee's January 23, 2025, SIME petition is granted.
- 3) An SIME will be performed by an orthopedist selected from the board's list of qualified orthopedic physicians. If, at the time of processing, the board's designee determines that no physician on the board's list is available and/or qualified to perform the examination under 8 AAC 45.092(e), the board's designee will notify the parties and request that they provide the names, addresses, and curriculum vitae of physicians in accordance with 8 AAC 45.092(f).
- 4) The medical disputes to be addressed by the SIME include, degree of impairment, functional capacity, disability, and the efficacy and need for additional medical treatment, if any.
- 5) All filings regarding the SIME must be sent to workerscomp@alaska.gov and served on opposing parties.
- 6) Employer will make two copies of all employee's medical records in its possession, including medical providers' depositions, a written job description (if there is a dispute regarding the employee's ability to return to work) or the written physical demands of the employee's job as described in the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (if there is a dispute regarding functional capacities or the employee's eligibility for reemployment benefits), put the copies in chronological order by treatment date, starting with the first medical treatment and proceeding to the most recent medical treatment, number the pages consecutively. This must be done on or before April 15, 2025. Employer must serve one binder on Employee and one with the Division, with an affidavit verifying the binders contain copies of all medical records in his/her possession no later than 5:00 PM on April 15, 2025.
- 7) The binders may be returned for reorganization if not properly Bates stamped and prepared in accordance with this prehearing summary.

8) Not later than 10 days after receipt of the binders, Employee must review the binder to determine if it contains all Employee's medical records in Employee's possession. If the binder is complete, Employee must file an affidavit with the Division verifying the binder contains copies of all medical records in Employee's possession. If the binder is incomplete, Employee must make two copies of the additional medical records missing from the first binder. Each copy must be put in a separate binder (as described above). One supplemental binder and an affidavit verifying the medical records completeness must be filed with the Board. The remaining supplemental binder must be served upon Employer together with an affidavit verifying that it is identical to the binder filed with the Board. Employee is directed to file with the Division and serve the binder on the opposing party within 10 days of receipt.

9) Any party who receives additional medical records or physicians' depositions after the binders have been prepared and filed with the Division, is directed to make two supplemental binders as described above with copies of the additional records and depositions. Within seven days after receiving the records or depositions, the party must file one supplemental binder with the Division and serve one supplemental binder on opposing party, together with an affidavit verifying that it is identical to the binder filed with the Division.

10) The assigned workers' compensation officer will review, prepare, and submit to the SIME physician questions in accordance with 8 AAC 45.092(h).

11) The parties may review their rights under 8 AAC 45.092(j) to question an SIME physician after the parties receive the physician's report.

12) The parties are advised that a failure to comply with the above orders may result in the SIME going forward notwithstanding a party's noncompliance.

13) SIME physicians are often located outside of Alaska and long-distance travel may be required. If Employee requires travel accommodations, he must request an accommodation from the Employer. The accommodation request must be accompanied by a letter from Employee's attending physician in their workers' compensation case, pursuant to and within the constraints of AS 23.30.095(a) and 8 AAC 45.082(b), detailing the necessary accommodation.

Dated in Fairbanks, Alaska on March 27, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
John Burns, Designated Chair

/s/
Randy Beltz, Member

Unavailable for Signature
Bronson Frye, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 Cole Orin, employee / claimant v. Unalaska Surimi, employer; Sompo America Fire & Maries, insurer / defendants; Case No. 202402238; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on March 27th, 2025.

/s/
Rochelle Comer, Workers' Compensation Technician