ALASKA WORKERS' COMPENSATION BOARD

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

CATHLEEN MILLER, Employee, Respondent , v. NANA REGIONAL CORPORATION, Employer, Petitioner, and ACE INDEMNITY INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200816759 AWCB Decision No. 13-0094 Filed with AWCB Anchorage, Alaska on August 14, 2013

A remaining issue from NANA Regional Corp.'s (Employer) May 13, 2013 petition for a second independent medical evaluation (SIME) was heard in Anchorage, Alaska, on July 18, 2013, a date selected on May 7, 2013. Attorney Robert J. Bredesen appeared and represented Employer and its insurer. Cathleen Miller (Employee) appeared with and was represented by attorney Michael J. Jensen. There were no witnesses. The record closed at the hearing's conclusion on July 18, 2013.

As a preliminary matter, Employee's continuance request was heard. Employer objected to the continuance. The continuance request was denied. This decision examines and memorializes the oral order denying Employee's continuance request and considers whether adding an orthopedic surgeon to the parties' stipulated SIME is appropriate.

ISSUES

As a preliminary matter, Employee orally requested a hearing continuance. Previously, on June 27, 2013, Employee filed a petition to strike Employer's medical evaluators (EME). He contended Employer unlawfully changed physicians. Employee contended the hearing should be continued because if the petition were granted the order may render the SIME issue moot.

Employer objected to Employee's continuance request. It contended continuances are disfavored. Employer contended the hearing was scheduled upon Employee's untimely request to determine if the SIME should be a panel including an orthopedic surgeon, and the parties have fully briefed the issue. Finally, Employer contended no "good cause" existed to grant a continuance under 8 AAC 45.074.

1) **Was the oral order denying Employee's continuance request correct?**

Employee contends the SIME form signed by both parties and filed on or about May 23, 2013, does not contemplate examination by a neurosurgeon to the exclusion of other specialists. She contends she is not seeking to be excused from the stipulation. Employee contends an orthopedic surgeon should be added to form an SIME panel.

Employer contends the May 23, 2013 stipulation agreed the medical specialty required for evaluation is a neurosurgeon. It contends Employee's request for evaluation by an orthopedic physician is untimely. Employer contends an order allowing an SIME by an orthopedic physician is tantamount to modifying the parties' May 23, 2013 SIME stipulation, for which no good cause exists.

2) **Does the parties' stipulation preclude adding an orthopedic surgeon to the SIME?**

Employee contends there are medical disputes between her treating orthopedic surgeon and Employer's orthopedic surgeon EME warranting adding an orthopedic surgeon to the SIME under AS 23.30.095(k). Employee contends James Eule, M.D.'s conclusions contradict EME John Swanson, M.D.'s, opinons regarding causation of Employee's current conditions, symptoms, and need for treatment including additional surgery. Therefore, Employee requests

an orthopedic surgeon be added to the SIME given Employer's reliance on Dr. Swanson's orthopedic EME report.

Employer contends the primary issue in this case remains a neurological one. It contends nothing specific warrants an orthopedic surgeon's examination. Employer contends it would be burdened by unnecessary expense and delay if an orthopedic surgeon is added to the SIME. Employer contends the record as a whole is ripe and the issues ready to be decided. Employer requests an order denying Employee's request for an orthopedic SIME.

3) Should an orthopedic surgeon be added to the SIME?

FINDINGS OF FACT

The following relevant facts and factual conclusions are either undisputed or established by a preponderance of the evidence:

1) On September 3, 2008, Employee claims she injured her low back while working as a pantry helper for Employer (Report of Occupational Injury or Illness, October 9, 2009).

2) Employee reported she injured her back "lifting a 10LB can of produce doing freight, felt pulling of muscles in back, sharp shooting pains in right leg." The body part affected was right "lower back area (lumbar area and lumbo sacral) lower back muscles" (*id.*).

3) On October 7, 2008, Kim Wright, M.D., a neurosurgeon, evaluated Employee. Dr. Wright's report stated:

> . . . [Employee] presents with what appears to be an extruded disc to the right extending into the L4 neuroforamen. I told the patient that she might ultimately improve through convalescence and tincture and time, but she is extremely anxious to seek earlier relief. I have therefore proposed a micro discectomy and I will certainly keep you informed on her progress. . . . (Wright, October 7, 2008).

4) On October 27, 2008, Employer controverted Employee's right to benefits arising from the September 3, 2008 injury. The controversion notice stated:

> Employee originally informed her employer that this was not a work related injury. Employee has [sic] significant pre-existing back condition for which she has sought treatment regularly. Employee filed a report of injury on 10.09.08 for a date of injury of 09.03.08. Employee filed the report of injury alleging a work related injury

> after surgery was recommended. Employer/Carrier will scheduled [sic] an independent medical examination to address compensability (Controversion Notice, October 27, 2008).

5) On November 22, 2008, Thomas Dietrich, M.D., a neurosurgeon, evaluated Employee at Employer's request (Dietrich EME Report, November 22, 2008).

6) Dr. Dietrich's report stated:

> [Employee's] present complaints are related to the injury of 09/03/08, but she had a pre-existing, more centrally located protrusion, which was also causing symptoms.
> . . .
>
> A surgical approach to decompress the nerve root in the foramen would be reasonable at this time. In my view, injection procedures are unlikely to result in lasting relief. . . .
> . . .
>
> The estimated date of medical stability would be 90 days following surgery. . . .
> . . .
>
> In my opinion, she would be able to return to her job at injury as a remote pantry worker. . . . *Id*. at 9-10.

7) On December 5, 2008, Dr. Wright performed a right L4-5 micro lumbar laminotomy and discectomy on Employee (Procedure Report, December 5, 2008).

8) On January 13, 2009, Dr. Wright evaluated Employee and reported:

> This is a brief note to update you on [Employee] who returned to my office today reporting significant residual pain primarily in her right calf which has distended lower than when she was last seen. She does not report significant radicular pain arising from her back. I therefore recommend laboratory studies investigate the neuropathy. For the sake of completeness, I've also ordered a repeat MRI to make sure we're not overlooking recurrent nerve root compression from recurrent disc herniation. . . . (Wright, January 13, 2009).

9) On January 20, 2009, Dr. Wright evaluated Employee again and reported:

> This is a brief note to keep you informed on [Employee] who returns to the office after suffering a rather large recurrent disc herniation. I'm obviously concerned about the potential for an underlying discitis. I've offered her reexploration for decompression of her nerve root and culture of her disc. . . . (Wright, January 20, 2009).

10) On January 22, 2009, Larry Kropp, M.D., an interventional spine specialist, evaluated Employee and said: "[Employee] returns with her EMG. The study showed some membrane instability with peripheral neuropathy" (Kropp, January 22, 2009).

11) On January 26, 2009, Dr. Wright performed a second surgery on Employee -- a re-entry L4-5 laminotomy and discectomy (Procedure Report, January 26, 2009).

12) On February 24, 2009, Dr. Wright again evaluated Employee and stated:

> This is a brief note to keep you updated on [Employee] who returned to the office following L4-5 laminotomy discectomies. As you probably know her initial surgery was complicated by a recurrent herniation that required a second procedure. Currently, she is doing reasonably well still has some complaints of lower back discomfort. . . . (Wright, February 24, 2009).

13) On October 6, 2009, John Swanson, M.D., an orthopedic surgeon, evaluated Employee at Employer's request (Swanson, October 6, 2009).

14) Dr. Swanson's report stated: "In all medical probability, the symptoms following 09/03/08 have been due to the work incident on that date combining with the pre-existing spondylosis of the lumbar spine. . . ." *Id.*

15) On November 10, 2009, after viewing additional MRI and diagnostic studies, Dr. Swanson recommended possible further surgery would be necessary. Dr. Swanson's report stated:

> Based on the 10/6/09 independent medical examination, the follow-up EMG studies, and the MRI with and without contrast, the medical probability is that this examinee has a recurrent herniated disc on the right L4-5 to account for her current symptoms in the right lower extremity. Because of the degree of symptoms present . . . this examinee is a candidate for repeat lumbar laminotomy and disc excision on the right at L4-5 (Swanson, November 10, 2009).

16) On February 10, 2010, Timothy Cohen, M.D., neurosurgeon, performed Employee's third surgery, which included L4-5 bilateral laminectomies, facetectomies, bilateral discectomies, anterior interbody fusion, and segmental posterior lateral fusion (Procedure Report, February 10, 2010).

17) On October 18, 2010, Dr. Kropp again evaluated Employee and reported:

> [Employee] returns after her injection at L2/3, L3/4, L5/S1. Unfortunately, she didn't get any better. . . . The other things I would have for this would be a caudal catheter, and perhaps a dorsal column stimulator. . . . (Kropp, October 18, 2010).

18) On February 21, 2011, a panel EME was performed by Dr. Swanson, addictionologist Gary Olbrich, M.D., and psychiatrist Eric Goranson, M.D. (record).

19) Dr. Swanson's report stated in pertinent part:

> The significance that this injury has is as follows: As a result of her developmental history and genetic makeup, [Employee] has developed psychiatric vulnerabilities about being in control. . . . The injury and its prolonged resolution have raised issues around the lack of control she has around her pain. She is not being helped by using primarily passive modes of treatment such as narcotic medication… With respect to whether she is a candidate for a spinal cord stimulator, she is clearly not (Swanson, February 21, 2011).

20) Dr. Swanson also opined Employee had a preexisting spinal condition, which was unaffected be her work for Employer. He stated Employee had a "possible aggravation" of this preexisting condition on September 3, 2008, which was temporary. The work injury did not produce a herniated disc and was not the substantial cause of the first lumbar surgery. The work injury was not the substantial cause for the need for Employee to take any prescription medications. Employee was not a candidate for a spinal cord stimulator. Dr. Swanson opined Employee should be weaned off all narcotics. He further stated Employee's lumbar spine was medically stable and all medical care after September 29, 2010 was "palliative." However, Dr. Swanson provided an eight percent permanent partial impairment (PPI) rating attributable to the work injury. Lastly, Dr. Swanson stated Employee could return to her employment at the time of her injury (*id.* at 16-22).

21) On March 31, 2011, Employer controverted stating:

> Per the independent medical evaluation with Dr. John Swanson . . . of 2/21/11, the injured worker has reached medical stability with 8% whole person impairment according to the AMA Guides, 6th edition. Dr. Swanson indicated that the injured worker can return to her occupation at injury. Dr. Swanson also opined that the injured worker has pre-existing conditions, i.e., depression, anxiety, etc., which would contradict the use of a Spinal Cord Stimulator. (Controversion Notice, March 29, 2011).

22) On August 10, 2011 Employer controverted and stated:

> Per the IME report of Dr. Gary Olbrich dated February 21, 2011, and addendum report of April 10, 2011 . . . the work injury or work activities are not the substantial cause of the current need for any prescription medications. By letter to you of May 11, 2011, you were provided a tapering schedule for these medications and were

advised that all medications would be denied after 60 days. (Controversion Notice, August 10, 2011).

23) On January 18, 2013, James Eule, M.D., orthopedic surgeon and Employee's treating physician, responded to questions regarding Employee as follows:

> . . .
>
> (2) In your opinion is [Employee's] September 3, 2008 injury and any subsequent surgery or surgeries the substantial cause of her current back conditions and/or symptoms? Was the injury the substantial cause in aggravating, accelerating or making more symptomatic any preexisting back conditions resulting in the need for treatment?
>
> [Dr. Eule checked the "yes" line]
>
> (3) Was the September 3, 2008 injury the substantial cause in combining with any preexisting back condition thereby resulting in the need for continuing treatment?
>
> [Dr. Eule wrote: "Probably"]
>
> (4) In your opinion, do [Employee's] back conditions require ongoing medical treatment? If so, what additional medical care and treatment is recommended? Please address the need for physical therapy, surgery, including the recommended L3-4 fusion, injections, spinal cord stimulator, prescription medications, and any other invasive or non-invasive procedures.
>
> [Dr. Eule checked the "yes" line and wrote: "Stop smoking; weight loss assessment"]
>
> (5) Do you agree that [Employee's] back condition is not medically stable? When do you anticipate that [Employee's] condition will reach maximum improvement as far as the condition will permit? If she is presently medically stable, please indicate the date when stability was reached for each condition.
>
> [Dr. Eule checked the "yes" line]
>
> (6) I would also like you to address the extent of [Employee's] disability. Please state the restrictions placed on [Employee's] return to full time gainful employment.
> . . . .
>
> [Dr. Eule wrote: "Very difficult for any employment"] (Eule, January 18, 2013).

24) On March 18, 2013, Employee filed a workers' compensation claim and described her injury as:

> The employee suffered compensable injuries due to a traumatic incident and/or cumulative trauma in the course and scope of her employment. . . . Part of body injured: Low Back. . . . Nature of injury or illness: Low back injury. . . . (claim, March 18, 2013).

25) On May 7, 2013, the parties attended a prehearing conference; the prehearing conference summary states:

> The parties discussed an SIME. [Counsel for Employer] stated his client had mentioned an updated EME, but would consider proceeding directly to an SIME. . . . The parties agreed to another prehearing on 6/18/2013 at 9:00 a.m. to address the SIME and EE's petition for a protective order if necessary. . . . (Prehearing Conference Summary, May 7, 2013; record).

26) On or about May 23, 2013, the parties submitted a jointly executed SIME form. The form, signed by counsel for Employee and counsel for Employer, stated: "What medical specialty is required for the SIME? Neurosurgeon." The parties also stipulated there were medical disputes about "causation," "treatment," "functional capacity," and "medical stability." They also agreed to the SIME addressing a non-disputed issue -- PPI. The parties agreed these disputes were based upon opinions offered by Drs. Eule and Cohen on Employee's side versus Drs. Dietrich and Swanson on Employer's side (SIME form, signed May, 13, 2013 and May 16, 2013).

27) On May 24, 2013, counsel for Employee filed and served a letter which stated: "When selecting an SIME physician, an orthopedic SIME should also be selected, since Dr. Eule and the defense medical expert, Dr. Swanson, are both orthopaedic physicians" (Jensen letter, May 24, 2013; record).

28) On May 29, 2013, counsel for Employer filed and served a letter, which stated:

> The parties recently submitted an SIME form stipulating to an evaluation by a neurosurgeon. Claimant counsel asks that an orthopedic surgeon be added. The request is untimely and should be ignored -- the parties have already stipulated (Bredesen letter, May 29, 2013; record).

29) On June 18, 2013, the parties attended a second prehearing conference; the prehearing conference summary states:

> Parties were in agreement that an SIME was necessary but were unable to come to an agreement with regards to the appropriate SIME physician(s). EE and ER both agree that a Neurosurgeon is necessary with EE requesting the addition of an

> Orthopedic Specialist to form an SIME panel. ER opposes the addition of an Orthopedic Specialist and parties agreed to allow the AWCB to decide at a procedural hearing on the issue. . . . (Prehearing Conference Summary, June 18, 2013; record).

30) On June 27, 2013, Employee filed a "Petition to Strike EIME Doctors." Employee's petition states, in pertinent part:

> The employee petitions the Alaska Workers' Compensation Board to strike any reports of Drs. Swanson, Goranson, and Olbrich. The employee has attended employer requested evaluations by PA-C Atkinson, RN Arndt, and Drs. Dietrich, Swanson, Goranson and Olbrich. The EIMEs performed by Drs. Swanson, Goranson and Olbrich were obtained as a result of excessive change in employer selected physicians. The Board should strike the EIME reports of Drs. Swanson, Goranson and Olbrich. . . . (Petition to Strike EIME Doctors, June 26, 2013).

31) On July 10, 2013, Employee filed his hearing brief in which he argued:

> The employer utilized the services of orthopedic physician, Dr. John Swanson four times in an effort to determine the compensability of [Employee's] claim and need for treatment. The employer relies on Dr. Swanson's opinions in denying [Employee's] time loss and medical benefits. [Employee's] treating physician, orthopedic surgeon Dr. James Eule, has provided conclusions which contradict Dr. Swanson's opinions regarding the causal relationship of [Employee's] current conditions and symptoms and the need for treatment, including further surgery (Employee's Hearing Brief, July 10, 2013).

32) On July 15, 2013, Employer filed a hearing brief opposing Employee's request to add an orthopedic surgeon to the SIME. Employer's hearing brief concluded:

> Adding an orthopedist will result in an unnecessary expense to be paid by [Employer]. It will effectively double the cost of the SIME, and perhaps double the possible need for depositions, and so on. It will also take more of the Board's time. If the neurosurgeon is unable to fully address the disputes, which seems highly unlikely, then the SIME neurosurgeon could easily provide a referral. SIME specialist referral evaluations can be quickly arranged. This is the most prudent and cost-effective course of proceeding, so the employer and carrier respectfully request that the Board decline to add an orthopedic surgeon and require a panel SIME at this time (Employer's Brief for 07/18/13 Hearing, July 15, 2013).

33) There are only three approved neurosurgeons listed on the board's list of independent medical examiners through November 1, 2013 (Alaska Workers' Compensation 2013 Second Independent Medical Examiner Selection Panel Resolution, July 29, 2013).

34) Employee lives in the Wasilla, Alaska area. The relatively small number of approved neurosurgeons will likely preclude Employee from being seen by a neurosurgeon within the next few months, as the wait for an appointment will likely be long (record; experience, judgment, observations, and inferences from the above).

35) On July 18, 2013, the parties attended a hearing limited to Employee's request to add an orthopedic surgeon to the SIME. As a preliminary matter, Employee contended her June 26, 2013 petition to strike Employer's EME physicians should be heard first, as resolution of that issue may obviate the need for an SIME. Employee contended she discovered the alleged unlawful change of physician shortly before Employer filed its July 10, 2013 hearing brief. Employee was concerned SIME physicians might improperly consider unlawfully obtained EME physicians' opinions. As Employee's petition to strike was not an issue set for hearing, Employee requested a continuance so the June 26, 2013 petition could be decided. Employer objected to the continuance request. The panel issued an oral order denying the continuance request and the June 26, 2013 petition to strike was not addressed (record).

36) Employee's June 26, 2013 petition to strike can be addressed well before the SIME will be scheduled and completed. If the petition is resolved in a way that obviates the need for an SIME, the SIME process can be halted with minimal effect on the parties. Therefore, Employee did not present "good cause" to continue the hearing (experience, judgment, observations, and inferences from the above).

37) At hearing on the SIME issue, Employee argued she was not seeking relief from the terms of the SIME stipulation. She argued the agreement to include a neurosurgeon did not preclude her from later seeking the board's discretion to add another specialty. Employer argued Employee was bound by the term of the parties' stipulation to use only a neurosurgeon. The parties otherwise argued consistent with their hearing briefs (record).

38) As the parties stipulated to an SIME, the only issue for this decision is whether or not to add another specialist -- an orthopedic surgeon (observations).

39) There are medical disputes between Dr. Eule and Dr. Swanson, both orthopedic surgeons. The disputes are significant. An independent orthopedic surgeon's opinion would help the fact finders resolve this case (experience, judgment, observations, and inferences from the above).

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. . . .

The board may base its decision not only on 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 23.30.005. Alaska Workers' Compensation Board.**
> . . .
>
> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**.
> . . .
>
> (k) In the event of a medical dispute regarding determinations of causation . . . the amount and efficacy of the continuance of or necessity of treatment,. . . 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. . . .

> **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. The place or places shall be reasonably convenient for the employee. . . .

AS 23.30.095(k) and AS 23.30.110(g) are procedural in nature, not substantive, for reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3; see also *Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Wide discretion exists under AS 23.30.110(g) for the board to consider any evidence available

when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." *Hanson v. Municipality of Anchorage*, AWCB Decision No. 10-0175 at 18 (October 29, 2010).

The Alaska Workers' Compensation Appeals Commission (AWCAC), in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the AWCAC confirmed "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer." *Id.* Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an opinion would help the board. *Id.* at 5. The AWCAC further stated that 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 would assist the board in resolving the dispute. *Id.* at 4.

Under either AS 23.30.095(k) or AS 23.03.110(g), the purpose for ordering an SIME is to assist the board. It 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.*

> **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 in 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. . . .
>
> **AS 23.30.155. Payment of compensation**. . . .
> . . .
>
> (h) The board may upon its own initiative . . . where the right to compensation is controverted . . . cause the medical examinations to be made . . . which it considers will properly protect the rights of the parties. . . .
>
> **8 AAC 45.050. Pleadings**. . . .
> . . .

(f) **Stipulations**.

. . .

(2) 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.

(3) 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. . . .

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;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

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

(E) the hearing was set under 8 AAC 45.160(d) ;

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

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041 (d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(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;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing. . . .

8 AAC 45.092. Selection of an independent medical examiner. (a) The board will maintain a list of physicians' names for second independent medical evaluations. . .
. . .

(e) . . . The board or its designee will consider these factors in the following order in selecting the physician:

(1) the nature and extent of the employee's injuries;

(2) the physician's specialty and qualifications;

(3) whether the physician or an associate has previously examined or treated the employee;

> (4) the physician's experience in treating injured workers in this state or another state;
>
> (5) the physician's impartiality; and
>
> (6) the proximity of the physician to the employee's geographic location.

By law, the board may require an SIME "by a physician or physicians" selected from a list established and maintained for such purposes. The board may also order an "investigation or inquiry" in "the manner by which it may best ascertain the rights of the parties." AS 23.30.135. If an employee's claim has been controverted, the board may "cause the medical examinations to be made," and take discretionary action to "properly protect the rights of all parties." AS 23.30.155(h). The law gives discretion to the board to order the specialty to conduct an SIME, and to empanel one or several doctors for an SIME if necessary to ensure "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to employer. *Mazurenko v. Chugach Alutiiq JV*, AWCB Case No. 11-0064 (May 17, 2011). In short, the board has broad discretion to order a medical evaluation and to select one or more specific physicians from the SIME list, and their specialties, for an SIME. *Lindeke v. Anchorage Grace Christian School*, AWCB Decision No. 11-0040 (April 8, 2011).

ANALYSIS

1) Was the oral order denying Employee's continuance request correct?

At the July 18, 2013 hearing on Employee's SIME request, Employee orally requested a hearing continuance so her June 26, 2013 petition to strike Employer's doctors could be decided first. Employer objected. The panel orally denied the continuance and the June 26, 2013 petition was not addressed. Employee's June 26, 2013 petition to strike can be heard and decided before Employee attends an SIME. This is true because the parties stipulated to a neurosurgeon SIME. The limited neurosurgeons on the SIME list will preclude Employee from being seen by a neurosurgeon within the next few months, as the wait for an appointment will be long.

Employee was concerned SIME physicians might improperly consider prior EME physicians' opinions, which are later stricken. To properly address this possibility, Employee can request and obtain a hearing on her petition to strike the EMEs before the SIME examination occurs. The risk

of irreparable harm to Employee is slight when viewed in light of the potentially significant cost and substantial delay likely to result from multiple additional hearings on what is essentially a single, or at most collateral, issue. 8 AAC 45.074(b)(1)(N). Continuances or cancellations are not favored and will not be routinely granted. 8 AAC 45.074(b). The alleged unlawful change of EME physician issue did not fit under the circumstances listed in 8 AAC 45.074(b). Therefore, under these facts, Employee provided no "good cause" to continue the hearing and the oral order denying her request was correct. 8 AAC 45.074(b).

2) Does the parties' stipulation preclude adding an orthopedic surgeon to the SIME?

Employee contends the May 23, 2013 stipulation does not contemplate examination by a neurosurgeon to the exclusion of any other doctor or specialist. Employer contends the SIME form signed by both parties and filed on May 23, 2013, stipulated the medical specialty required for evaluation is a neurosurgeon. It contends Employee's request to add an orthopedic physician is "untimely."

Stipulations are binding on parties and have the effect of an order, unless "good cause" exists to relieve a party from the stipulations' terms. 8 AAC 45.050(f)(3). Employee does not seek relief from the stipulation. She seeks an additional doctor for the SIME. In other words, Employee does not renege on her agreement to be seen by a neurosurgeon; she wants to add another specialist to the mix. She therefore denies her request is "untimely." Employee's argument is persuasive because on May 24, 2013, one day after the parties' SIME stipulation was filed Employee's counsel sent a letter stating Employee wanted to add an orthopedic physician as an examiner. Thus, it cannot be said Employee unduly delayed or neglected to preserve the issue until the SIME was completed. The parties acknowledged in the June 18, 2013 prehearing conference summary: "The issue to be addressed [at the July 18, 2013 hearing] is the necessity of an orthopedic specialist for the SIME." The orthopedic SIME issue was acknowledged, even if unresolved, by both parties. In short, the parties' stipulation remains intact -- Employee will be seen by a neurosurgeon SIME. The remaining question is independent of the parties' stipulation. The question for this decision is: Should an orthopedic surgeon also participate in the SIME? Therefore, Employee's request for an orthopedic SIME will not be denied based on the parties' May 2013 stipulation.

3) Should an orthopedic surgeon be added to the SIME?

Employee wants an orthopedic physician as an additional SIME examiner. During the June 18, 2013 prehearing conference, the parties stipulated an SIME is necessary and agreed on a neurosurgeon. The parties also agreed to the SIME and non-SIME issues. They were unable to agree on Employee's request for an orthopedic surgeon SIME physician. The issue to be addressed in this decision is the necessity of an orthopedic surgeon for the SIME. Therefore, the SIME test articulated by the AWCAC in *Bah* is applied. As the parties stipulated to a neurosurgical SIME, and the dispute is over an orthopedic surgeon, this analysis will focus on the orthopedic issues.

a) Are there medical disputes between Employee's orthopedic physician and an orthopedic EME?

Employer controverted Employee's right to benefits, citing a pre-existing condition. Dr. Swanson, an orthopedic physician, evaluated Employee at Employer's request. Dr. Swanson opined Employee had a preexisting spinal condition; Employee had a "possible aggravation" of this preexisting condition on September 3, 2008; it was temporary; the work injury did not produce a herniated disc and was not the substantial cause of the first lumbar surgery; the work injury was not the substantial cause for the need for Employee to take prescription medications; she was not a candidate for a spinal cord stimulator; Employee should be weaned off all narcotics; Employee's lumbar spine was medically stable; all medical care after September 29, 2010, was "palliative"; and Employee could return to her employment at the time of her injury. Employer controverted Employee's claim based on these opinions.

On January 18, 2013, Dr. Eule, an orthopedic surgeon and Employee's treating physician, offered opinions about Employee. Dr. Eule's report disagreed with Dr. Swanson's assessments and stated Employee needed more treatment, was not medically stable and would have difficulty returning to work.

There are medical disputes between Drs. Swanson and Eule regarding Employee's back injury. The parties stipulated there were medical disputes about "causation," "treatment," "functional capacity,"

and "medical stability." Employer's counsel completed the SIME form and relied upon Drs. Eule's and Swanson's contradictory opinions to support each disputed issues. AS 23.30.095(k). *Bah*.

b) Are the disputes significant?

The medical disputes are significant because if the work injury is not the substantial cause of Employee's back injury, need for treatment, disability, lack of medical stability or any additional PPI, Employer will not be responsible for these benefits. On the other hand, if the work injury is the substantial cause of the disputed benefits related to Employee's back injury, treatment to address those conditions and related benefits can be significant and costly to Employer. They can also be of great benefit to Employee. Though Employee may ultimately need surgery to bring her back to medical stability, which may or may not be compensable under the Act, she may also benefit from more conservative treatment, such as physical therapy combined with appropriate lifestyle adjustments, which also may or may not be work-related. Therefore, these disputes are significant.

c) Will an orthopedic SIME opinion assist in resolving the claim?

An orthopedic SIME will provide a causation opinion for the need and scope of additional treatment or therapy, which could result in considerable differences in costs, disability, and impairment. Having an orthopedic SIME opine on the current medical disputes will provide another expert medical opinion, which will assist in quickly, efficiently, and fairly ascertaining and protecting the rights of all parties in this controverted case. AS 23.30.155(h).

In some cases, the back and spine are medically complex body parts. There is substantial, conflicting medical opinion in the instant case concerning the cause and extent of Employee's back injury. Given this dispute, an orthopedic SIME opinion will assist in resolving Employee's claim for medical and other benefits by providing another opinion on this key aspect. *Bah*. If Employee's work as a pantry helper caused, aggravated, or combined with Employee's back condition, the benefits to which Employee may be entitled from Employer may be significant. Further, if an orthopedic SIME opinion on the back injury's causation is delayed, with the passage of time Employee may be exposed to various potentially aggravating factors including slips and falls, or physical deterioration which may potentially worsen her symptoms. Delay will

make future litigation more complicated by introducing more potential "causes" of any disability or need for surgery or other treatment and this will not result in a simple, summary remedy. AS 23.30.005(h). However, an orthopedic SIME performed now may yield an objective medical opinion describing the medical care and treatment Employee needs for all symptoms and conditions associated with her back injury, and will result in an opinion whether or not the September 3, 2008 work injury is "the substantial cause" of any disability or need for medical treatment for the work injury. An orthopedic SIME will provide an additional objective medical assessment, which will ultimately benefit the fact finders. *Bah*. Therefore, Employee's request for an order adding an orthopedic surgeon to the SIME will be granted. AS 23.30.135.

CONCLUSIONS OF LAW

1) The oral order denying Employee's continuance request was correct.
2) The parties' stipulation does not preclude adding an orthopedic surgeon to the SIME.
3) An orthopedic surgeon will be added to the SIME.

ORDER

1) The oral order denying Employee's continuance request was correct.
2) Employee's request for an SIME with an orthopedic physician is granted.
3) An SIME will be conducted with a neurosurgeon and an orthopedic surgeon.
4) Unless the parties otherwise stipulate to SIME doctors, the neurosurgeon and orthopedic surgeon will be selected by the appropriate designee in conformance with the division's policy for selecting SIME doctors from the authorized list.
5) The designee will use her discretion and the normal selection process, including the criteria set forth in 8 AAC 45.092(e).
6) The designee will arrange for the SIME forthwith.

Dated in Anchorage, Alaska, on August 14, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William J. Soule, Designated Chair

_____
Stacy Allen, Member

_____
Robert C. Weel, 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 CATHLEEN MILLER Employee / applicant v. NANA REGIONAL CORPORATION, Employer / defendants; Case No. 200816759; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties on August 14, 2013.

_____
Kimberly Weaver, Office Assistant