ALASKA WORKERS' COMPENSATION BOARD

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

JEFFREY SONNTAG, Employee, Petitioner, v. GABE'S TRUCKING & AUTO REPAIR, Employer, and COMMERCE & INDUSTRY INS. CO., Insurer, Respondents.	INTERLOCUTORY DECISION AND ORDER AWCB Case No(s). 201006275 AWCB Decision No. 13-0098 Filed with AWCB, Fairbanks, Alaska on August 19, 2013.

Jeffrey Sonntag's (Employee) February 27, 2013 petition for a second independent medical evaluation (SIME) was heard on July 25, 2013, a date selected on June 26, 2013. Employee represented himself. Krista Schwarting represented Gabe's Trucking and its insurer (Employer). There were no witnesses. The record closed at the hearing's conclusion on July 25, 2013.

ISSUES

The parties have agreed to perform a second independent medical evaluation (SIME) to include the issues of treatment, medical stability and degree of impairment. However, they disagree on the appropriate medical specialty to perform the evaluation and whether causation should be included as an issue. Employee contends the SIME should be performed by a panel composed of a pain management specialist and an orthopedic surgeon. He contends a pain management specialist is "critical" to his case because the orthopedic physicians who have examined him have not been able to come to a conclusion on recommended treatment so his future treatment should focus on pain

management. Employee contends he should also be evaluated by an orthopedic surgeon because orthopedic surgeons are "more surgically oriented to fix what's damaged."

Employer contends it is not necessarily opposed to an SIME panel, including a pain management specialist, but contends any panel should include a neurosurgeon since this case "has neuro fingerprints all over it." In support of its position, it contends one of Employee's treating physicians suggested a neurosurgical consultation for a disc excision and another one recommended consideration of a microdiscectomy which, Employer contends, is a procedure performed by a neurosurgeon. Finally, Employer contends Employee has apparently been seen recently by a physician's assistant who works in a neurosurgical practice.

1) Which medical specialist or specialists should perform the SIME?

Following the 2001 injury, Employee contends his treating physician gave him injections and, after the third one, he felt like he could "run a marathon." However, he contends no treatment has been effective for the 2010 injury, so even though the 2010 injury is in the same area as the 2001 injury, he does not think the two injuries are connected and causation should not be an SIME issue.

Employer contends Employee was seriously injured in 2001, which required two years of treatment and involved and significant time loss from work. It also contends the 2001 injury resulted in a substantial PPI rating and permanent work restrictions. Employer contends the 2010 injury involves the same area of the spine as the 2001 injury and its medical evaluator has attributed Employee's condition to a number of factors, including the 2001 injury. It contends the 2010 injury's contribution to Employee's condition needs to be "parsed out" and causation should be an SIME issue because ownership of its business has changed since the 2001 injury and it may have a claim against the second injury fund.

2) Should causation be included as an SIME issue?

FINDINGS OF FACT

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

1) On September 28, 2001, Employee reported feeling a "pop" in his back while removing tires from a jeep at work. (Report of Injury, October 5, 2001).

2) At the time of the injury, Employer was insured for workers' compensation by Umialak Insurance Company and the name of the insured was Cathy Gabriel. (Workers' Compensation Division's electronic database system).

3) On October, 2, 2001, Employee began treating with chiropractic care. (Denali Chiropractic report, October 2, 2010).

4) On December 18, 2002, John Joosse, M.D., an orthopedic surgeon, began an employer's medical evaluation (EME) of Employee. It was his impression Employee's symptoms "relate to a lumbar disc injury similar to what he had in 2001." However, he requested lumbar spine x-rays and magnetic resonance imaging (MRI) before completing his evaluation. (Joosse report, December 18, 2002).

5) A December 23, 2002 MRI showed a bulge at L4-5 with disc desiccation. (MRI report, December 23, 2002).

6) On January 8, 2002, Dr. Joosse issued a supplemental EME report and recommended further treatment to include: a lumbar epidural series, weight loss, and exercise, especially swimming. (Joosse report, January 8, 2002).

7) Employee contended at hearing he did not immediately proceed with the injections at that time because his nurse case manager told him he should not receive them. (Record).

8) On January 22, 2003, Employee underwent his first epidural injection. (McGregor report, January 22, 2003).

9) On January 27, 2003, Employer's adjuster informed Dr. Joosse's office Employee wanted to change his treating physician to Dr. Joosse and Employer had approved Employee's change of physician. (Joosse chart note, January 27, 2003).

10) On February 26, 2003, Dr. Joosse took Employee off work until he could be re-evaluated. (Work/School Status note, 26 February, 2003).

11) On February 22, 2003, Employee received a second epidural injection. (Valentz report, February 22, 2003).

12) On March 22, 2003, Dr. Joosse prescribed a three month health club membership for Employee to swim and walk. (Joosse prescription, March 22, 2003).

13) On March 22, 2003, Employee received a third epidural injection. (Valentz report, March 22, 2003).

14) On May 6, 2003, Dr. Joosse released Employee back to work starting May 12, 2003 with a 50 pound lifting restriction. (Work/School Status note, May 6, 2003).

15) On September 4, 2003, Dr. Joosse opined Employee was medically stable and gave him an 8 percent whole person PPI rating based on "a significant low back pain problem related to degenerative disc disease aggravated by his employment, and radicular symptoms without documented radiculopathy . . ." (Joosse Rating Evaluation, September 4, 2003).

16) There is a break in the medical records until the 2010 work injury.

17) On May 11, 2010, Employee was standing on a milk crate while working on a car for Employer and slipped off. He felt a pull or a tug and experienced pain in his right back-hip area. (Report of Injury, May 14, 2010).

18) At the time of the injury, Employer was insured for workers' compensation by Commerce & Industry Insurance Company and the insured is Gabe's Truck & Auto Repair, LLC. (Workers' Compensation Division's electronic database system).

19) On May 14, 2010, Employee sought treatment at Fairbanks Urgent Care and was referred for a four week course of physical therapy. (Hager chart notes, May 4, 2010; Hager referral, May 4, 2010).

20) On May 25, 2010, an MRI showed L4-5 spondylosis with a small osteophyte complex and disc desiccation at multiple levels. (MRI report, May 25, 2010).

21) On May 28, 2010, Fairbanks Urgent Care referred Employee for pain management. (Fairbanks Urgent Care report, May 28, 2010).

22) On June 9, 2010, Peter Jiang, M.D. began pain management treatment and administered an epidural steroid injection. (Jiang report, June 9, 2010).

23) On June 21, 2010, Employee saw Dr. Jiang complaining of continued right-sided lumbrosacral pain with occasional leg pain and numbness and reported the last epidural injection caused his pain to worsen for a couple of days with "sharp shooting cramping sensation" in his right thigh for a couple of days. He was referred to Ross Brudenell, M.D., an orthopedic surgeon, for a surgical evaluation. (Jiang report, June 21, 2010).

24) On June 23, 2010, Dr. Brudenell examined Employee and noted Employee was using a transcutaneous electrical nerve stimulation (TENS) unit for pain management. He diagnosed

possible cauda equine syndrome and recommended continued physical therapy. Dr. Brudenell also referred Employee to Paul Jensen, M.D., a neurosurgeon, for a final surgical determination. (Brudenell report, June 23, 2010).

25) On June 24, 2010 and July 8, 2010, Dr. Jiang administered additional epidural steroid injections. (Jiang reports, June 24, 2010; July 8, 2010).

26) On July 21, 2010, Dr. Jensen evaluated Employee and generally agreed with Employee's current course of treatment but recommended trying a L3-4 injection and lumbar traction. He thought Employee should continue with his current treatment because surgery would be risky given Employee's weight. If Employee made "absolutely no progress" after a "longer" period of time, he might consider a lateral transcannular microdiscectomy; however, he thought even a minimally invasive procedure would be risky, as well. (Jensen report, July 21, 2010).

27) On September 9, 2010, Employee saw Dr. Jiang, who recommended a spinal cord stimulator trial because interventional therapy had been unsuccessful and because Employee was a "suboptimal surgical candidate." He thought the stimulator would give Employee some pain relief, help him rehabilitate and give Employee a "significant . . . improvement" in his lifestyle. (Jiang report, September 9, 2010).

28) On September 11, 2010, Douglas Bald, M.D., an orthopedic surgeon, evaluated Employee for an EME. He opined Employee's condition was caused by a combination of factors, including severe overweight body habitus, preexisting degenerative disc disease, and a symptomatic exacerbation of the degenerative disc disease resulting from the 2010 work injury. Dr. Bald did not think Employee was medically stable and stated Employee was "severely symptomatic," and had "severely limited" physical capacities. He did not think Employee was capable of returning to work in any capacity and declined to predict future physical capacities. Dr. Bald expressed a number of opinions on treatment. He concurred with Dr. Jensen's suggestion for a L3-4 injection and also suggested exercise, like water aerobics, to begin mobilization. Dr. Bald suggested prescription for Topamax and a "more aggressive multidisciplinary rehabilitation approach directed towards [Employee's] lumbar spine." However, he did not concur with Dr. Jiang's recommendation for a spinal cord stimulator. (Bald report September 11, 2010).

29) Dr. Bald reiterated his opinion the 2010 injury was a substantial cause of Employee's condition and need for treatment in subsequent EME reports. (Bald reports, August 6, 2011; March 17, 2012; July 14, 2012; November 17, 2012).

30) Dr. Jiang provided Employee with a prescription for Topamax. (Brudenell report, September 15, 2010).

31) On September 15, 2010, Dr. Brudenell saw Employee for a follow-up evaluation. He ordered continued physical therapy and prescribed aquacise classes as suggested by Dr. Bald. Dr. Brudenell also suggested a surgical consultation with Jon Chiu, M.D., a neurosurgeon in Thousand Oaks, California for an opinion on arthroscopic disc excision. (*Id.*).

32) The record does not contain a subsequent report from Dr. Chiu. (Record; observations).

33) On September 23, 2010, a multidisciplinary team headed by Niriksha Malladi, M.D., evaluated Employee at United Back Care (UBC) in Seattle for an inpatient return to work / pain management program. It was determined Employee did not currently possess the physical capacities to participate in the program since he could not walk for fifteen minutes or participate in a six-hour treatment day. (UBC, Inc. report, September 23, 2010).

34) On October 25, 2010, Dr. Brudenell saw Employee and noted Employee's physical therapy sessions had reached a point of "maximum benefit," and Employee's symptoms remained steady. Because Employee had been not approved by UBC for their rehabilitation program, Dr. Brudenell decided to proceed with a "limited" rehabilitation and strengthening program in Fairbanks. He ordered gym memberships for exercise training and water aerobics. (Brudenell report, October 25, 2010).

35) On July 12, 2011, Dr. Brudenell saw Employee and found Employee's strength and aerobic training had resulted in relatively few episodes of right hip and leg pain, but these symptoms were easily triggered with lumbar flexion. He ordered continued exercise training at the gym and contemplated referring Employee back to UBC for an inpatient work hardening program after January 1, 2012. (Brudenell report, July 12, 2011).

36) On August 6, 2011, Dr. Bald conducted a follow-up EME. He opined Employee was not medically stable and recommended continuing the exercise program. However, Dr. Bald disagreed with Dr. Brudenell's suggestion for an inpatient work hardening program. (Bald report, August 6, 2011).

37) On January 17, 2012, Dr. Brudenell saw Employee and predicted Employee's treatment regimen would last at least another 18 months. (Brudenell report, Juanuary 17, 2012).

38) On March 17, 2012, Dr. Bald saw Employee for a follow-up EME. He opined Employee was not medically stable but stated Employee would "certainly" be medically stable by December

2012. Dr. Bald recommended continued exercise, physical therapy and weight loss. (Bald report, March 17, 2012).

39) On June 18, 2012, Dr. Brudenell saw Employee and stated facet injections by Dr. Jiang had been "manifestly unsuccessful," but Employee does get "some relief" with epidural steroid injections. He ordered a discography with Dr. Jiang and considered medical marijuana because of Employee's concerns over the long-term effects of narcotics and valium. Dr. Brudenell stated he would "project perhaps potential" for a rating during the first part of 2013. (Brudenell report, June 18, 2013).

40) On July 14, 2012, Dr. Bald saw Employee for a follow-up EME and opined Employee would be medically stable by the end of November 2012. He further opined Employee's regimen of exercise, physical therapy and weight loss was appropriate, but denied discographs, microdiscetomy, facet injections, nerve root blocks and medical marijuana were indicated. (Bald report, July 14, 2012).

41) On November 17, 2012, Dr. Bald saw Employee for a follow-up EME and stated Employee "could be considered to be medically stable and stationary as of December 15, 2012." He further stated "[n]o further treatment of any kind beyond that point is felt to be reasonable or necessary . . ." He opined Employee had incurred a 7 percent whole person impairment rating, but attributed only 2 percent to the 2010 work injury.

42) On January 18, 2013, Duane Frampton, PA-C, from Dr. Brudenell's office, saw Employee for a follow-up evaluation and stated "it does not appear that the patient has reached medical stability." PA-C Frampton recommended a neurosurgical evaluation and opined Employee should continue treating with Dr. Jiang and with his physical therapy. He also stated Employee's treatment needed to be transferred to a "spine specialist," who could also "determine if indeed medical stability has been reached." (Frampton report, January 18, 2013).

43) Employee stated at hearing Dr. Brudenell is no longer in practice. (Record).

44) On February 12, 2013, Dr. Jiang evaluated Employee and recommended an additional surgical consultation with Dr. Jensen. He stated: "[g]iven the fact that he has failed facet an [sic] epidural injection, nerve root block, physical therapy and pain medications, I think a spinal cord stimulation trial should be attempted as a measure of pain management . . ."

45) On February 27, 2013, Employee filed a petition for an SIME and an SIME form listing treatment, degree of impairment and medical stability as issues and requesting a panel comprised

of an orthopedic surgeon and a pain management specialist. (Employee's petition, February 27, 2013; SIME form, February 27, 2013).

46) On March 7, 2013, Dr. Jensen saw Employee for a surgical evaluation. He opined Employee should be cautious about surgery because he may have lateral femoral cutaneous syndrome and stated: "[a]ll in all I have told [Employee] I did not feel I would be the one to carry the ball in terms of his ongoing status," and "I have ruled out the necessity of spinal surgery from my perspective." Dr. Jensen also expressed specific concerns over Employee's kidney conditions. (Jensen report, March 7, 2013).

47) At a May 6, 2013 prehearing conference, Employer tentatively agreed to an SIME, but wanted to review the SIME form before signing it. (Prehearing Conference Summary, May 6, 2013).

48) On June 4, 2013, Jan DeNapoli, PA-C, authored a letter that stated Employee would require a travel companion for an upcoming EME. Physician's assistant DeNapoli works at the neurosurgical practice of Kim Wright, M.D. (DeNapoli letter, June 4, 2013).

49) On June 12, 2013, the parties agreed on using a neurosurgeon for the SIME and to submit a question asking whether any additional medical specialists were required to complete the evaluation. (Prehearing Conference Summary, June 26, 2013).

50) On June 14, 2013, Employer filed notice of a possible claim against the second injury fund. (Employer Notice, June 12, 2013).

51) Employer has paid Employee at least 135 weeks of disability. (Compensation Report, April 30, 2013).

52) At a June 26, 2013 prehearing conference, it was noted the parties disagreed on whether or not causation should be added as an SIME issue. Employee did not want to add causation as an issue and did not want to "waive" a pain management specialist for the evaluation. The parties agreed to a hearing on the instant issues. (Prehearing Conference Summary, June 26, 2013).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

Employment may still be the substantial cause of an employee's disability or need for medical treatment even though the employee had a preexisting condition.

> It is a fundamental principle in workers' compensation law that the employer must take the employee "as he finds him." A pre-existing condition does not disqualify a claim if the employment aggravates, accelerates or combines with the preexisting condition to produce the disability for which compensation is sought."

Keays v. Amerigas, Inc., AWCB Decision No. 11-0178 (December. 19, 2011) (citations omitted).

> **AS 23.30.095. Medical treatments, services, and examinations.** . . . . (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .
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> **AS 23.30.110. Procedure on Claims.** . . . . (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .

8 AAC 45.090(b) provides for orders requiring an employer to pay for an employee's examination pursuant to AS 23.30.095(k) or §110(g). Section 095(k) and §110(g) are procedural in nature, not

substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties."

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

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the board in resolving the dispute. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), at 4.

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

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

Id. at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and is not intended to give employees an additional medical opinion at the expense

of employers when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

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

2) Is the dispute significant? and

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

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

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

Bah at 8.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **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.
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> **AS 23.30.205. Injury combined with preexisting impairment.** (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability. . . .
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> (c) In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge. . . .
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> (e) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier has knowledge of the injury or death.
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> (f) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a "permanent physical impairment" unless . . . .
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> > (2) it would support a rating of disability of 200 weeks or more if evaluated according to standards applied in compensation claims.

The legislative intent of the secondary injury fund is to equate workers' compensation insurance premiums for handicapped employees with those of able-bodied workers and that intent is carried out by limiting the liability of an employer to the amount of compensation which would be due an able-bodied employee, whether or not the worker was already suffering from a disability caused by an earlier injury. *Alaska Workmen's Compensation Brd. v. H & M Logging Co.*, 492 P.2d 98, 100 (Alaska 1971). The Alaska Supreme Court announced the last injurious exposure rule in *Ketchikan Gateway Burough v. Saling,* 604 P.2d 590 (Alaska 1979). Where employment with two successive employers contributed to a worker's compensation claimant s disability, the employer at

the time of the most recent injury bearing a causal relation to the disability is solely liable for payment of workers' compensation benefits. *Id*. at 595-597. The last injurious exposure rule, in conjunction with the second injury fund provisions, provides a reasonably equitable approach that is easier to administer than a judicially adopted rule of apportionment. *Id*. at 597. The employer is responsible for providing all compensation due the worker, but the employer is to be reimbursed for any payments made after 104 weeks without regard to the extent the employment contributed to the disability. *Id.*

Under AS 23.30.205, the preexisting impairment must combine with the subsequent injury to produce a disability substantially greater than the subsequent injury alone. *Employers Commercial Union Ins. Group. v. Christ*, 513 P.2d 1090; 1094 (Alaska 1973). A subsequent employer is not liable for aggravation of a prior injury unless there is evidence there was an actual aggravation and the aggravation was the cause of the disability. *United Asphalt Paving v. Smith*, 660 P.2d 445; 447 (Alaska 1983). The last injurious exposure rule is inapplicable to cases involving disabilities caused by successive injuries if the employer and the insurer are the same at the time of the injuries. *Wells v. Swalling Constr. Co.*, 944 P.2d 34; 37 (Alaska 1997).

ANALYSIS

1) Which medical specialist or specialists should perform the SIME?

Employee contends an orthopedic surgeon should perform the evaluation because they are "more surgically oriented to fix what's damaged." Meanwhile, Employer contends the evaluation should be performed by a neurosurgeon because this case "has neuro fingerprints all over it." The purpose of an SIME is to assist the board in resolving disputes, not to provide treatment to employees. Furthermore, as Employee himself points out, the orthopedic surgeons in this case have met with limited success in effectively treating his condition. Moreover, Employee's treating physician, Dr. Brudenell, recommended surgical evaluations with Dr. Jensen and Dr. Chiu, both neurosurgeons. PA-C Frampton from Dr. Burdenell's office also suggested a neurosurgical evaluation. Employee's pain management specialist, Dr. Jiang, referred Employee to a neurosurgeon. Finally, Employee has recently sought treatment for his condition with Dr. Wright's office. Dr. White is a neurosurgeon. Since Employee's own treating providers have universally recommended neurosurgical evaluations for his spinal condition, a neurosurgeon is the most appropriate medical

specialty to assist the board in resolving significant disputes in this case, including treatment and medical stability, in order to protect the rights of the parties. AS 23.30.095(k); AS 23.30.110(g); *Bah.* Additionally, as a potential incidental benefit to Employee, a neurosurgeon might also identify more effective treatment options for Employee than those that have been offered so far by the orthopedic surgeons.

Employee is also quite adamant in his contention a pain management specialist should perform the SIME. Employer does not necessarily oppose a panel SIME, including a pain management specialist, so long as the panel includes a neurosurgeon. Having just decided a neurosurgeon will perform the SIME, the issue of whether the evaluation will also include a pain management specialist will now be examined.

On this issue, Employee's point is well taken. Dr. Brudenell has called facet injections in this case "manifestly unsuccessful." Dr. Jiang has noted facet injections, epidural steroid injections, nerve root blocks, physical therapy and pain medications have all failed. Dr. Jensen has twice declared Employee is not a surgical candidate, the second time rather emphatically. Employee's TENS unit did not adequately control his pain. At this point it is unknown whether there are more effective treatment options for Employee or not. It may well be that there are not, in which case Employee's treatment will necessarily concentrate on managing his chronic pain. Additionally, there are numerous medical disputes over treatment, including the need for a spinal cord stimulator, additional injections and medical marijuana. A pain management specialist would likely assist the board in understanding and resolving these treatment disputes. Under these circumstances, Employee's request is not only reasonable, it is also quite appropriate. The SIME will be performed by a panel to include both a neurosurgeon and a pain management specialist. *Id.*

2) Should causation be included as an SIME issue?

Employer cited a possible claim against the second injury fund as the basis for its request to include causation as an SIME issue and contends the 2010 injury's contribution to Employee's condition needs to be "parsed" with the 2001 injury. However, the standard for second injury fund liability is set forth at AS 23.30.205, which was succinctly summarized by the Alaska Supreme Court in *Christ*: the preexisting impairment must combine with the subsequent injury to produce a

disability substantially greater than the subsequent injury alone. *Id.* at 1094. Thus, the question Employer wants addressed is not the cause of Employee's disability, but rather the effects of the injury.

Just as an SIME is not intended to give employees an additional medical opinion when they disagree with their own physician's opinion, neither is it intended to give employers an additional medical opinion when they disagree with their physicians. Employer's EME has repeatedly opined the 2010 work injury is the substantial cause of Employee's condition and need for treatment. There is no dispute or gaps in the evidence concerning causation. Therefore causation will not be an SIME issue. Furthermore, Employer's EME has also "parsed out" the effects of the two work injuries in his November 17, 2012 evaluation, where he assigned Employee a seven percent whole person impairment and attributed two percent of the rating to the 2010 work injury. Since then, the parties have agreed degree of impairment will be an SIME issue. The SIME will present an opportunity for the board's physician to opine on whether the 2010 injury combined with a preexisting impairment to produce a disability substantially greater than the 2010 injury alone. Employer's stated purpose, to ascertain whether it is entitled to second injury fund contribution, can be achieved by simply posing the above question to the SIME physician.

CONCLUSIONS OF LAW

1) The SIME will be performed by a panel composed of a neurosurgeon and a pain management specialist.

2) Causation will not be an SIME issue but the SIME physicians will be asked if the 2010 injury combined with a preexisting impairment to produce a disability substantially greater than the 2010 injury alone.

ORDER

The SIME will be performed as set forth above.

Dated in Fairbanks, Alaska on August 19, 2013.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

_____
Krista Lord, Member

/s/_____
Zeb Woodman, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Decision and Order in the matter of JEFFREY SONNTAG employee / petitioner v. GABE'S TRUCKING & AUTO REPAIR, employer; COMMERCE & INDUSTRY INS. CO., insurer / respondents; Case No. 201006275; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, on August 19, 2013.

/s/_____
Nicole Hansen, Office Assistant