ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD L. SORTOR, Employee, Claimant, v. HECLA GREENS CREEK MINING CO., Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201117487 AWCB Decision No. 13-0129 Filed with AWCB Juneau, Alaska on October 17, 2013

Hecla Greens Creek Mining Co.'s (Employer) April 12, 2013 petition to correct prejudicial error was heard on October 8, 2013, in Juneau, Alaska, a date selected on June 19, 2013. Attorney Eric Croft appeared telephonically and represented Richard Sortor (Employee). Attorney Robert Blasco appeared and represented Employer. There were no witnesses. The record closed at the hearing's conclusion on October 8, 2013.

ISSUE

Employer contends *Wolfe v. State of Alaska*, AWCB Decision No. 12-0213 (December 19, 2012) and *Osborne v. Anchorage School District*, AWCB Decision No. 12-0191 (November 6, 2012) found John Cleary, M.D., not a credible witness. On the same day *Wolfe* issued, the designee assigned Dr. Cleary as a second independent medical evaluation (SIME) neurosurgery specialist

in this case, and on January 14, 2013, Dr. Cleary conducted the SIME. Employer contends the Juneau panel has prejudged the issue of Dr. Cleary's credibility, based on its findings in *Wolfe*. Employer also contends appointment of an SIME physician in a case involving board panel members who previously found an SIME physician not credible in another case violates its due process rights. It further contends there is no mechanism in statute or regulation for a party to request disqualification of an SIME physician. Employer contends therefore to have a fair and impartial hearing and be afforded its due process rights, a new SIME neurosurgeon should be assigned in this case to replace Dr. Cleary.

Employee contends the designee properly followed decisional law, statutes and regulations when assigning Dr. Cleary as the SIME neurosurgeon specialist in this case. He further contends Employer's request is untimely because it was made long after Dr. Cleary conducted the SIME and issued his report.

Should a new SIME neurosurgeon be assigned in this case to replace Dr. Cleary?

FINDINGS OF FACT

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

1) On November 2, 2011, Employee was injured while working as an underground miner for Employer. Employee was attempting to pry open a vehicle door with the "jaws of life" during safety training and subsequently felt sharp and burning pain in his low back. (Report of Injury, November 18, 2011; Chart Note, Nathan Peimann, M.D., November 2, 2011).

2) On January 25, 2012, neurosurgeon Kim Wright, M.D., recommended single level fusion to treat Employee's disabling pain. (Chart Note, Dr. Wright, January 25, 2012).

3) On February 16, 2012, chiropractor Richard Rivera, D.C., and orthopedic surgeon Matthew Provencher, M.D., examined Employee for an employer's medical evaluation (EME). Drs. Rivera and Provencher diagnosed: (1) lumbar strain, work-related, (2) preexisting spondylolisthesis of the lumbar spine at L5-S1 with mild neural foraminal stenosis, degenerative, preexisting and temporarily exacerbated by Employee's work injury, and (3) mechanism of injury, low energy type, aggravating Employee's preexisting spondylolisthesis. They opined Employee was not medically stable but stated he would be in approximately two months. Drs. Rivera and Provencher released

Employee to light duty work and recommended conservative treatment, opining fusion surgery is not medically indicated. (EME Report, Drs. Rivera and Provencher, February 16, 2012).

4) On March 6, 2012, Employer controverted low back fusion surgery based on Drs. Provencher's and Rivera's EME report. (Controversion, March 6, 2012).

5) On June 14, 2012, Dr. Provencher, in response to Employer's request for an EME report addendum following Dr. Provencher's receipt of additional medical records, opined Employee's work injury was not the substantial cause of his need for fusion surgery. He opined further treatment may be reasonable, but is not medically necessary and related to Employee's work injury. He opined any inability to return to work is because of Employee's preexisting conditions and not his work injury. (EME Addendum, Dr. Provencher, June 14, 2012).

6) On July 12, 2012, Dr. Wright opined Employee's work injury is the substantial cause of his disability and need for medical treatment and opined Employee is not medically stable. (Dr. Wright Response to Claims Administrator Request for Information, July 12, 2012).

7) On July 20, 2012, Employer controverted temporary total disability benefits (TTD) and temporary partial disability benefits (TPD) benefits as of June 15, 2012, low back fusion surgery, and reemployment benefits, based on Dr. Provencher's EME Addendum. (Controversion, July 20, 2012).

8) On June 20, 2012, the assigned reemployment specialist recommended Employee be found ineligible for reemployment benefits. (Reemployment Benefits Eligibility Evaluation Addendum, Norman Silta, June 20, 2012).

9) On July 24, 2012, Employee filed a workers' compensation claim for TTD, medical and related transportation costs, and review of the reemployment benefit administrator's (RBA) ineligibility determination though no RBA determination had yet been made. Employee subsequently amended his claim to include a request for TPD and attorney fees and costs. (Claim, July 24, 2012; Prehearing Conference Summary, January 10, 2013; Prehearing Conference Summary, March 28, 2013).

10) On July 30, 2012, Employee petitioned for an SIME, based on the medical disputes between Employee's treating physician Dr. Wright and EME physicians Drs. Rivera and Provencher. (Petition for SIME, July 30, 2012).

11) On August 20, 2012, the RBA found Employee ineligible based on the reemployment specialist's report. (Reemployment Benefits Eligibility Evaluation Addendum, Norman Silta, June 20, 2012; Letter to Employee from RBA, August 20, 2012).

12) On September 18, 2012, Dr. Provencher, in response to Employer's request for an EME report addendum following Dr. Provencher's receipt of additional medical records, opined Employee's work-related strain was medically stable as of August 1, 2012. (EME Addendum, Dr. Provencher, September 18, 2012).

13) On October 9, 2012, the parties appeared at a prehearing conference and stipulated to a panel SIME, with neurosurgery and orthopedics as the required medical specialties. (Prehearing Conference Summary, October 12, 2012).

14) On October 19, 2012, the parties filed an SIME form signed by both parties. The parties agreed to an SIME with neurosurgery and orthopedics specialists on the issues of causation, medical stability, treatment, degree of impairment, and functional capacity. (SIME Form, October 19, 2012).

15) On November 6, 2012, *Osborne*, which was heard by an Anchorage board panel, issued. *Osborne* addressed Dr. Cleary's ability to be impartial in that case, because Dr. Cleary had issued an SIME report before Employee's SIME evaluation had concluded. *Osborne* explained because Dr. Cleary's SIME report made conclusive determinations, prematurely and without a full medical record, his ability to render an impartial decision in that case was called into question. *Osborne* directed the board designee to ask Dr. Cleary questions regarding his ability to be impartial in that case. *Osborne* at 12-17.

16) On December 19, 2012, *Wolfe*, which was heard by a Juneau board panel, issued and factual finding 88 found Dr. Cleary not credible in that case. *Wolfe* explained:

> The reasons Dr. Cleary gives for his headache opinion lack support in the medical record and in basic common knowledge and sense. This lack of support is to such a degree that his credibility is significant undermined. Dr. Cleary's testimony resembled that of an advocate choosing arguments for a preconceived result, not an objective expert. Consequently, the board gives very little weight to Dr. Cleary's opinions on all issues *in this case* because he is not a credible witness.

Wolfe at 26, 38 (emphasis added).

17) On December 19, 2012, the board designee assigned neurosurgeon Dr. Cleary and orthopedic surgeon Sidney Levine, M.D., as SIME physicians in the instant case. The parties were notified the evaluations would occur on January 14, 2013. (SIME Letter to Parties from board designee, December 19, 2012; SIME Letter to Dr. Cleary, December 19, 2012).

18) On January 10, 2013, the parties appeared for a prehearing conference. The parties agreed to continue a February 12, 2013 hearing because they were still in the SIME process, but did not discuss Dr. Cleary's assignment as an SIME physician. Employer did not assert any objection to Dr. Cleary's assignment and did not raise an objection to the lack of a process to make such objection. (Prehearing Conference Summary, January 10, 2013).

19) On January 14, 2013, Employee saw Dr. Cleary for an SIME. (SIME Report, Dr. Cleary, January 24, 2013).

20) On January 24, 2013, Dr. Cleary issued his SIME report. (SIME Report, Dr. Cleary, January 24, 2013).

21) No Juneau panel members have yet reviewed Dr. Cleary's SIME report issued in this case. (Observations).

22) On March 14, 2013, at 7:18 a.m., Employee faxed Employer a settlement letter which cited *Wolfe* and *Osborne*. (Letter from Employee to Employer, March 14, 2013).

23) On March 14, 2013 at 10:00 a.m., the parties appeared for a prehearing conference. The parties still did not discuss Dr. Cleary's assignment as an SIME physician. Employer still did not assert any objection to Dr. Cleary's assignment and did not raise an objection to the lack of a process to make such objection. (Prehearing Conference Summary, March 14, 2013; Prehearing Conference Notice, January 10, 2013).

24) On March 28, 2013, the parties appeared for a prehearing conference and agreed to schedule an August 13, 2013 hearing on the merits of Employee's claims. Once again, the parties did not discuss Dr. Cleary's assignment as an SIME physician. Employer did not assert any objection to Dr. Cleary's assignment and did not raise an objection to the lack of a process to make such objection. (Prehearing Conference Summary, March 28, 2013).

25) On April 1, 2013, Employer requested a copy of Dr. Cleary's board SIME file, which it received on April 10, 2013. (Petition to Correct Prejudicial Error, April 12, 2013).

26) On April 12, 2013, Employer filed a petition to "correct prejudicial error," asserting for the first time that because the Juneau hearing panel found Dr. Cleary not credible in *Wolfe*,

Employer could not obtain a fair and impartial hearing before the Juneau panel, amounting to a denial of due process. Employer requested the alleged error be rectified by assigning a new SIME neurosurgeon to replace Dr. Cleary. (Petition to Correct Prejudicial Error, April 12, 2013).

27) On June 14, 2013, the parties filed a stipulation to continue the August 13, 2013 hearing to October 8, 2013, which the board approved on June 19, 2013. (Stipulation and Order for Continuance, June 19, 2013).

28) On September 12, 2013, the parties appeared for a prehearing conference and agreed to bifurcate the hearing issues. The parties agreed Employer's petition to correct prejudicial error would be heard on October 8, 2013, and agreed the merits of Employee's claim, including its petition for review of the RBA's ineligibility determination, would be heard on December 10, 2013. Specifically, the parties agreed the October 8, 2013 hearing issue would be whether a new SIME neurosurgeon should be assigned in this case to replace Dr. Cleary, or in the alternative, whether the hearing panel assigned for the December 10, 2013 merits hearing should consist of members not involved in *Wolfe* and *Osborne*. The board designee explained to the parties the board panel decides credibility on a case by case basis and opinions are formed based on the record and merits of each case. For example, although Dr. Cleary was found not credible in *Wolfe*, he was found credible in *Marin v. Klawock City School District*, AWCB Decision No. 12-0087 (May 14, 2012) and *Barger v. City of Wrangell*, AWCB Decision No. 12-0153 (September 6, 2012). *Marin* supported its credibility determinations, including the finding made relating to EME physician M. Sean Green, M.D., with the language, "(experience, judgment, observations)." The parties were reminded 8 AAC 45.106 sets forth the procedures for determining whether board panel member recusal is appropriate. (Prehearing Conference Summary, September 12, 2013; *Marin*).

29) "The Board" is composed of eighteen members, who are equally divided between representatives of labor and industry. Board hearing panels are comprised of one or two board members and a hearing officer acting as panel chair. AS 23.30.005.

30) The board's SIME list includes forty-nine physicians with various specialties. Three of the SIME physicians list neurosurgery as a specialty. (Department of Labor and Workforce Development Bulletin No. 12-04, Workers' Compensation Board's List of Independent Medical Examiners, November 26, 2012).

31) At hearing on October 8, 2013, Employer clarified its contentions. Employer clarified it is not contending Dr. Cleary is biased or that the designee did anything wrong or failed to follow proper procedures when appointing Dr. Cleary to the SIME in this case. Instead, it clarified its contention is Employer will not get a fair hearing because the Juneau panel determined under AS 23.30.122 that Dr. Cleary is not a believable witness. Employer cited *Cowen v. Wal-Mart*, 93 P.3d 420 (Alaska 2004) to support its contention there is a difference between determining the weight of the evidence and calling a witness not credible. It stated *Wolfe* went beyond just giving less weight to Dr. Cleary's opinion and instead determined Dr. Cleary was not believable. It contends by finding Dr. Cleary not believable under AS 23.30.122, the Juneau panel has prejudged the issue of Dr. Cleary's credibility and at a minimum this creates an appearance of unfairness. Employer contended it is unlikely a witness who was previously found not believable would later be found believable. Employer contends once a witness is found not credible, "you can't un-ring that bell." Employer also contends *Marin*'s reference to the board panel's "(experience, judgment, observations)," supports its contention the Juneau panel judges credibility based on its past experience with a witness. Employer withdrew its request for hearing panel recusal and the parties agreed the only issue for hearing was whether a new SIME neurosurgeon should be assigned in this case to replace Dr. Cleary. (Record).

32) Also at hearing, the panel members stated they could be fair and impartial, have not prejudged or formed any opinion on any issue in the case, and any opinions formed in this case would be based on the records and merits of the case. (Record).

33) The panel members can be and will be fair and impartial. The panel makes factual determinations on a case by case basis, and opinions are formed based on the record and merits of each case. Any opinions formed in this case will be based on the records and merits of this case. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . .
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> (f) Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board.

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . .
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> (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 ....

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g*., *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, Alaska Workers'

Comp. App. Comm'n Dec. No. 087 at 11 (Aug. 25, 2008). The board can choose not to believe its own expert. *Rosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013).

AS 23.30.122's legislative history states its intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." Section 122 clarifies and emphasizes the board's role in determining witnesses' credibility and weight to be accorded medical testimony and reports. *Rosario*, 297 P.3d 139, at 146. The board may determine witness credibility, even if the witness did not testify orally. *Id*., at 146, n. 17.

Hanson v. Municipality of Anchorage, AWCB Decision No. 10-0175 (October 29, 2010) (*Hanson I*) and *Hanson v. Municipality of Anchorage*, AWCB Decision No. 12-0031 (February 21, 2012) (*Hanson II*) addressed the credibility issue. *Hanson I* found an EME physician not credible, stating the EME appeared to advocate for Employer rather than provide impartial medical opinions. *Hanson II* relied on the same EME physician's opinion for a subsequent issue in the same case. The employee moved for reconsideration of *Hanson II*, contending it erred by relying on the EME's opinion when *Hanson I* had found the EME not credible because the EME sounded at that time like an advocate for a party. *Hanson* on reconsideration explained the EME did not act in *Hanson II* as a party's advocate and *Hanson* relied on the EME's opinion because it was supported by the record.

> **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 44.64.050. Hearing Officer Conduct**.
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> (b) … The following fundamental canons of conduct shall be included in the code: in carrying out official duties, an administrative law judge or hearing officer shall
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> (1) uphold the integrity and independence of the office;

(2) avoid impropriety and the appearance of impropriety;

(3) perform the duties of the office impartially and diligently;

(4) conduct unofficial activities in ways that minimize the risk of conflict with the obligations of the office; and

(5) refrain from inappropriate activity in seeking employment with another agency or employer or in seeking reappointment.

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...

(b) The list of physicians will be created as follows:

(1) The board or its designee will ask the Alaska Chiropractic Society, Alaska Dental Society, Alaska Optometric Society, and Alaska State Medical Association to make recommendations from within their respective specialty. The recommendations must be received by the board on or before November 1, 1989 and on or before November 1 of each year after that.

(2) By December 15 of each year, the board will publish a bulletin for the *Workers' Compensation Manual*, published by the department, listing the names of the physicians recommended by the Alaska Chiropractic Society, the Alaska Dental Society, the Alaska Optometric Society, and the Alaska State Medical Association as well as the names of independent medical examiners whose terms of appointment will expire in the following year. A copy of the bulletin is available upon request from the State of Alaska workers' compensation division, P.O. Box 25512, Juneau, Alaska 99802-5512.

(3) An attorney who meets the following criteria may, by March 1 of each year, submit a letter to the commissioner volunteering to serve on a panel to select physicians for inclusion on the board's list as described in (5) of this subsection. The attorney must

(A) be admitted to the practice of law in this or another state;

(B) have personally presented a total of five cases, no more than two of which were resolved by agreed settlements, for board decision during the calendar year preceding volunteering to serve on a panel; and

(C) in the calendar year preceding volunteering, have represented one class of litigants, either employee or employer, 90 percent of the time; based on the class of litigant that was represented 90 percent of the time,

the commissioner will classify the attorney as either an employee or employer attorney.

(4) By May 1 of each year, the commissioner shall choose, from the attorneys who volunteered in accordance with (3) of this subsection, two employee attorneys and two employer attorneys to serve on a panel to select physicians for inclusion on the board's list of physicians. The panel shall meet and select physicians by August 1 of each year. The commissioner shall provide staff to schedule the panel's meetings, publish notice of the meetings, and arrange facilities or other support for the meeting to assist the panel, but the panel members may not be paid for their work or expenses for participating on the panel.

(5) The panel members shall vote, or abstain from voting, upon the physicians whose names were listed in the bulletin published under (2) of this subsection or are suggested by a panel member, even if the physician's name did not appear in the bulletin. A physician who receives three affirmative votes will be sent by the board or its designee an application and a letter asking if the physician is interested in performing second independent medical examinations. Unless the board determines that good cause exists to extend the time, within 60 days after the date of the board's letter the physician must submit

(A) a completed application listing the physician's education, training, work experience, specialty, and the particular discipline in which the physician is licensed, as well as the names and addresses of professional organizations that have certified the physician or in which the physician is an active member;

(B) a copy of or proof of the physician's current license from the appropriate licensing agency in the state in which the physician practices;

(C) a certificate of insurance for the physician's current and enforceable professional liability insurance for the services performed; the certificate of insurance must provide for 30-day prior notice to the board of cancellation, nonrenewal, or material change of the policy; and

(D) a certificate of insurance for the physician's workers' compensation insurance if the physician has employees; the certificate of insurance must provide for 30-day prior notice to the board of cancellation, nonrenewal, or material change of the policy.

(6) If the physician complies with (5) of this subsection, the physician's name will be added to the board's list of independent medical examiners, effective November 1 of that year. Except as provided in (7) of this subsection and (c) of this section, the physician's name will remain on the list for three years.

After three years, the physician must be reselected in accordance with (5) of this subsection. If reselected, the physician will remain on the list unless

(A) three members of the panel described in (4) of this subsection recommend that the physician be removed from the list and the department determines that the removal of the physician is not inconsistent with this chapter; or

(B) the physician is removed from the list under (7) of this subsection or (c) of this section.

(7) Notwithstanding (d) of this section, the board may remove a physician's name from the list compiled in accordance with (6) of this subsection

(A) upon receipt of the physician's written notification that the physician no longer wants to perform second independent medical evaluations; or

(B) if, within 30 days after receipt of a written request, the physician does not annually submit a copy of or proof of licensing by the appropriate state agency, a certificate of insurance for professional liability insurance and, if required under AS 23.30, workers' compensation insurance.

(c) The board will, in its discretion, remove a physician's name from the list for

(1) the physician's repeated failure to

(A) timely file medical reports for treatment of injured workers;

(B) timely file written treatment plans when required by AS 23.30.095(c); or

(C) provide medical services and examinations to injured workers;

(2) the physician's failure to comply with an order of the board;

(3) revocation by the appropriate licensing agency of the physician's license to provide services;

(4) decertification of or disciplinary action against the physician by an applicable certifying agency or professional organization;

(5) disciplinary action taken against the physician by the State Medical Board, a representative of Medicare or Medicaid, or a hospital, for fraud, abuse, or the quality of care provided;

(6) fraudulent billing or reporting by the physician;

(7) knowingly falsifying information on the physician's application;

(8) conviction of the physician in a state or federal court of any offense involving moral turpitude or drug abuse, including excessive prescription of drugs;

(9) unprofessional conduct or discriminatory treatment by the physician in the care and examination of patients;

(10) use of treatment by the physician which is not sanctioned by the physician's peers or national provider associations as beneficial for the injury or disease under treatment;

(11) declaration of the physician's mental incompetency by a court of competent jurisdiction;

(12) failure by the physician to maintain professional liability insurance or, if required, workers' compensation insurance; or

(13) failure by the physician to annually submit a certificate of insurance for professional liability insurance and, if required, workers' compensation insurance.

(d) Before removing a physician's name from the list,

(1) the board will notify the physician, in writing, either by personal service or by certified mail of the proposed removal and the reason for it;

(2) a physician who receives a notification under (1) of this subsection may, within 30 days after the receipt of the notice, file a written request with the board for a hearing in accordance with AS 23.30.110;

(3) the board will issue a written decision within 30 days after the hearing, or, if no hearing is requested, the board will issue a written decision within 45 days after the written notice of proposed removal; the board's decision will be served on the physician personally or by certified mail, and will state whether the physician's name was removed from the list and the reason for the removal.

(e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095(k), the board or its designee may select a physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as an independent medical examiner to perform the evaluation. 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.

(f) If the board or its designee determines that the list of independent medical examiners does not include an impartial physician with the specialty, qualifications, and experience to examine the employee, the board or its designee will notify the employee and employer that a physician not named on the list will be selected to perform the examination. The notice will state the board's preferred physician's specialty to examine the employee. Within 10 days after notice by the board or its designee, the employer and employee may each submit the names, addresses, and curriculum vitae of no more than three physicians. If both the employee and the employer recommend the same physician, that physician will be selected to perform the examination. If no names are recommended by the employer or employee or if the employee and employer do not recommend the same physician, the board or its designee will select a physician, but the selection need not be from the recommendations by the employee or employer.

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

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

. . .

(i) The report of the physician who is serving as an independent medical examiner must be done within 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. The board will presume the evaluation ended after the injured worker was examined. If the evaluation ended at a later date, the physician must state in the report the date the evaluation was done. An examiner's report must be received by the board within 21 days after the evaluation ended. If an examiner's report is not timely received by the board, a party may file a petition asking that another physician be selected to serve as an independent medical examiner. The board or its designee will, in its discretion, select another physician to serve as an independent medical examiner, and will make the selection in accordance with this section.

…

(j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to

(1) submit interrogatories or depose the examiner, the party must

(A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves interrogatories; and

(B) initially pay the examiner's charges to respond to the interrogatories or for being deposed; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155 (d), the charges may be awarded as costs to the prevailing party;

(2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or

(3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155 (d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.

(k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing and may not consider it in connection with an agreed settlement.

8 AAC 45.105. Code of Conduct. (a) Nothing in this section relieves a board member's duty to comply with the provisions of AS 39.52.010 - 39.52.960 (Alaska Executive Branch Ethics Act) and 9 AAC 52.010 - 9 AAC 52.990. A board member holds office as a public trust, and an effort to benefit from a personal or financial interest through official action is a violation of that trust. A board member is drawn from society and cannot and should not be without personal and financial interests in the decisions and policies of government. An individual who serves as a board member retains rights to interests of a personal or financial nature. Standards of ethical conduct for a board member distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) The provisions of this section do not prevent a board member from following other independent pursuits, if those pursuits do not interfere with the full and faithful discharge of a board member's public duties and responsibilities under AS 23.30 and this chapter.

(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a conflict of interest that is substantial and material; or

(2) shows actual bias or prejudgment.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a personal or financial interest that is substantial and material; or

(2) shows actual bias or prejudgment.

(e) Unethical conduct is prohibited, but there is no substantial impropriety or substantial appearance of impropriety if, as to a specific matter, the standards of AS 39.52.110(b) would permit participation.

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. (a) Before conducting a hearing on a case, each board panel member shall be given the names of the

> parties involved in the hearing and any other appropriate information necessary for the board panel member to determine if the individual member, or another member, has a conflict of interest as described in 8 AAC 45.105.
>
> (b) If a board panel member determines that the member has a potential conflict of interest, the potential conflict of interest must be disclosed to the board panel chair before the hearing.
>
> (c) Upon notification by a board panel member of potential conflict of interest under (b) of this section, the board panel chair shall request that the board panel member recuse oneself or refer the matter to the remainder of the board panel to determine if recusal is appropriate.
>
> (d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

In *Pride v. Harris*, 882 P.2d 381, 384-85 (Alaska 1994), Pride, a party in a personal injury case, contended a judge was biased because the judge had previously presided over a separate custody case involving Pride. In making determinations in the custody case, the judge reached some negative conclusions regarding Pride. Pride argued that by presiding over the custody case, the judge had necessarily prejudged Pride's character and credibility in the personal injury case. The Alaska Supreme Court disagreed, stating:

> There is no rule *requiring* recusal or disqualification of a judge who previously has presided over a case involving the party seeking disqualification or recusal. Indeed, "every judge, when he hears a case or writes an opinion must form an opinion on the merits and ... [often] an opinion relative to the parties involved. But this does not mean that the judge has a 'personal bias or prejudice.' " *State v. City of Anchorage,* 513 P.2d 1104, 1113 (Alaska 1973) (quoting *Tucker v. Kerner,* 186 F.2d 79, 84 (7th Cir.1950)). Accordingly, Judge Gonzalez concluded: "The fact that Mr. Pride may feel that Judge Rowland is biased against him is not sufficient to lead this Court to conclude that there is, in fact, an appearance of ... partiality on the part of Judge Rowland." This decision did not constitute an abuse of discretion.

Pride at 385. The court stated disqualification "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made." *Id.*

The Alaska Workers' Compensation Board performs a quasi-judicial function resembling a trial court. The board may be required to apply equitable or common law principles in a specific case, but it can only adjudicate in the context of a workers' compensation case. Administrative agencies do not have jurisdiction to decide constitutional law issues. *Alaska Pub. Interest Group v. State,* 167 P.3d 27, 36-37 (Alaska 2007).

A case is justiciable only if it has matured to a point that warrants decision. A court should not issue advisory opinions or resolve abstract questions of law. *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368-69 (Alaska 2009).

ANALYSIS

Should a new SIME neurosurgeon be assigned in this case to replace Dr. Cleary?

A review of the prior proceedings is helpful to understanding the basis for Employer's petition. Employer and Employee stipulated to an SIME panel consisting of a neurosurgeon and orthopedist. On December 19, 2012, *Wolfe*, which was heard by a Juneau panel, found Dr. Cleary not credible in *Wolfe*. *Wolfe* declined to rely upon Dr. Cleary's opinions because it found they fell below the realm of what *Wolfe* considered common sense and the medical evidence. *Wolfe's* credibility findings were limited to *Wolfe*.

On the date *Wolfe* issued, the designee assigned Dr. Cleary, neurosurgeon, and Dr. Levine, orthopedist, to conduct SIMEs in the instant case. On April 12, 2013, Employer for the first time asserted Dr. Cleary was unfairly appointed as an SIME physician in this case because *Wolfe* and *Osborne* found him not credible. Employer also contended the Juneau panel prejudged Dr. Cleary's credibility, based on *Wolfe's* determination Dr. Cleary was not credible in *Wolfe*. Based on this history, Employer requests the assignment of a new SIME neurosurgeon to replace Dr. Cleary.

At hearing, Employer clarified it is not contending Dr. Cleary is biased or that the designee did anything wrong. Instead, it contends by finding Dr. Cleary not believable under AS 23.30.122 in

Wolfe, the Juneau panel prejudged the issue of Dr. Cleary's credibility and at a minimum this creates an appearance of unfairness. Specifically, Employer contends it cannot obtain a fair and impartial hearing and will be denied due process because: 1) the panel already determined Dr. Cleary is not believable notwithstanding credibility is judged on a "case by case basis," and 2) there is no mechanism for a party to disqualify an SIME physician under these circumstances. It also contends there are no deadlines in SIME statutes or regulations for objecting to the SIME appointment, so its petition is not untimely.

1) The decision-makers have not prejudged Dr. Cleary's credibility.

Employer fails to point to any objective evidence decision-makers in this case prejudged Dr. Cleary's credibility. The hearing on Employer's petition is the first hearing in this case. Until this instant decision, the panel members did not issue any opinions relating to this case. No panel member has yet reviewed Dr. Cleary's report in this case. Other than pointing to *Wolfe*'s factual findings, Employer points to no evidence supporting its prejudgment allegation. The legal authority Employer cites in support of its contention is either not relevant or not analogous to this case's facts.

For example, Employer cites *Fletcher v. Commission on Judicial Performance*, 968 P.2d 958, 976-977 (CA 1998), a California Supreme Court case, to support its prejudgment assertion . In *Fletcher*, a judge presiding over a preliminary hearing in a criminal case expressed prejudgment of the criminal defendant's credibility in that case. The judge informed the parties the criminal defendant had appeared many times before the judge and had "broken many promises to this court…. And I hope you don't expect the court to regard his testimony like any other citizen in the community." Here, no statements, opinions or decisions relating to Dr. Cleary's credibility have been made in this case. The panel members each confirmed they can be, and will be, fair and impartial and have not prejudged or formed an opinion regarding Dr. Cleary's credibility in this case. They will make factual determinations on a case by case basis, and any opinions formed in this case will be based on the records and merits of this case.

Employer also cites *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007). In *Orchitt*, the Alaska Supreme Court held AT&T made no showing a hearing officer prejudged any facts in the

case or was motivated by actual bias in ruling on procedural issues. *Orchitt* explained administrative agency personnel are presumed honest and impartial until a party shows actual bias or prejudgment, stating: "To show hearing officer bias, a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence." Ruling against a party is not sufficient to show a predisposition. *Orchitt* at 1246. *Orchitt* does not support Employer's position in this case.

Another criminal case Employer cites, *Coffey v. State*, 585 P.2d 514 (Alaska 1978), is also distinguishable. In *Coffey*, a judge found a criminal defendant not credible in a pretrial ruling. Later the judge stated he was not comfortable subsequently ruling on issues of fact in light of his prior decision in *Coffey*. *Coffey* at 525-26. Here, no credibility determinations have been made and the panel members have stated they can, and will, be fair and impartial.

Employer also cites *Amerada Hess Pipeline Corp. v. Regulatory Commission of Alaska*, 176 P.3d 667, 673-677 (Alaska 2008) as support. *Amerada Hess* involved intemperate public remarks by a decision maker, which created a constitutionally impermissible appearance of outcome-determinative prejudgment. Employer does not contend *Wolfe* panel members made intemperate remarks.

Employer cites a federal law treatise regarding neutral decision makers which states personal bias is a disqualification when it is strong enough and when the bias has an unofficial source. However, Employer does not contend *Wolfe* and *Osborne* made "strong" remarks other than stating Dr. Cleary is "not credible." Employer contends "unofficial source" means a source outside the bounds of the present case, citing *Fletcher*. Alaska decisional law suggests otherwise. For example, *Pride* said there is no rule requiring recusal or disqualification of a judge who previously presided over a case involving the party seeking disqualification or recusal. Every judge must form an opinion on the merits and an opinion relative to the parties involved. But doing so does not mean that the judge has a "personal bias or prejudice." *Pride* at 385. The court stated disqualification "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made." *Id.*

Employer also points to *VanDort v. Greatland Foods*, AWCB Decision No. 13-0102 (August 28, 2013) to support its prejudgment contention. *VanDort* is distinguishable. *VanDort* declined to make a credibility finding at a procedural hearing in a case because it could create prejudice on the merits in the same case. This is inapposite to this case, where no credibility determinations have been made. Employer's prejudgment contention is not supported by the record or Alaska legal authority, including the law governing panel member conduct.

Employer also contends *Marin*'s reference to the panel's "experience, judgment, observations," supports its contention the Juneau panel judges credibility based on its past experience with a witness. Employer misunderstands this language, which is from *Rogers & Babler*. The cite refers to the Alaska Supreme Court's statement panel members are not required to rely on any particular witness' testimony but are free to rely on their own experience, observation and judgment in connection with all the evidence before them. For example, in *Marin*, this "experience, judgment, observations" language was cited not only to support *Marin*'s credibility finding regarding Dr. Cleary, but also the credibility finding for Dr. Green, who was appearing for the first time before the panel. Another example is if a medical witness opines only people age 70 or over have herniated discs, a panel member may choose to disbelieve that witness based on the panel member's knowledge of people under age 70 who have had documented, herniated discs. When read in context with *Rogers & Babler* and cases therein, this "experience, judgment, observations" phrase does not refer to the panel's experience with a specific witness. It refers to the panel's experience with the subject matter of the witness' testimony.

Furthermore, though Employer at hearing withdrew its request for panel recusal, by contending a new SIME physician must replace Dr. Cleary, Employer is really still questioning the panel's ability to be fair and impartial in this case. 8 AAC 45.105 and 106 set forth conduct standards and procedures for panel members to avoid conflict of interest, impropriety, and an appearance of impropriety. These regulations state recusal of a panel member to avoid impropriety or the appearance of impropriety may occur only if the recusal is based on "clear and convincing evidence" the panel member either (1) has a personal or financial interest that is substantial and material; or (2) shows actual bias or prejudgment. Employer demonstrated none of that here. All panel members stated they can, and will, be fair and impartial in this case.

Employer contends "you can't un-ring that [credibility] bell." This contention is not supported by any relevant Alaska legal authority. A panel makes factual determinations on a case by case basis and forms opinions based on the record and merits of each case. Though Dr. Cleary was found not credible in *Wolfe* he was found credible in *Marin* and *Barger*. Panels may choose to believe its own expert based on facts of one case, but disbelieve the same expert based on facts of a different case. SIME physicians are the panel's experts, but the panel can choose not to believe its own expert. *Rosario*, 297 P.3d at 147. A physician may even be found to be acting as an advocate in one proceeding in a case but relied on in a later proceeding in the same case. *Hanson I* and *Hanson II*. These are just a few examples showing how a panel makes factual determinations on a case-by-case, and sometimes an issue-by-issue, basis and forms opinions based on each case's record and merits.

The Act must be interpreted to ensure "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers." AS 23.30.001. Employer's contention, if accepted, would thwart this intent. Any determination not to believe a treating, EME or SIME physician would require either a different panel to hear any subsequent case involving the physician or require appointment of a different SIME physician. The number of panel members and SIME physicians is limited. Of 18 panel members, only three sit in the First Judicial District and only three may sit in any judicial district. Of 49 physicians on the SIME list, only three list neurosurgery as a specialty. The designee would quickly run out of SIME physicians to appoint and panel members to hear cases. Also, if a determination to disbelieve a witness warrants these procedures, so does a determination to believe a witness. Employer's requested relief would bring workers' compensation cases to a standstill. The Act's procedures are based on the premise panel members have the ability to decide, and do decide, issues on a case by case basis, including witness credibility. If a panel member feels he or she cannot be fair and impartial in a case, 8 AAC 45.105 and 106's recusal procedures are applied.

Employer also contends there is a difference between determining evidence weight and calling a witness not credible and asserts credibility findings must be based on in-person testimony. Employer does not explain how this contention relates to its instant petition. The parties do not dispute *Wolfe* found Dr. Cleary not believable. No witness has yet testified in this case. Any

opinion provided now on whether there is a difference between determining evidence weight and calling a witness not credible, or whether credibility findings must be based on in-person testimony, would be merely advisory and thus impermissible. *American Civil Liberties Union of Alaska*, 204 P.3d at 368-69. These contentions will be held in abeyance until the merits hearing, where Employer's arguments relating to witness testimony will be applied to the facts of this case.

2) There is no mechanism for a party to disqualify an SIME physician under these circumstances.

8 AAC 45.092 governs the SIME physician selection process. The workers' compensation division maintains a list of SIME physicians' names. The decision of which SIME physicians are included on the SIME list is made by a panel of two "employee" attorneys and two "employer" attorneys. Regulation 8 AAC 45.092(e) sets forth considerations a panel or "its designee" will consider in selecting an SIME physician. Employer does not explain how this process warrants appointment of a new SIME neurosurgeon in this case. There is nothing in the Act prohibiting a panel "or its designee" from appointing an SIME physician a panel may have chosen to disbelieve in a prior case or proceeding.

"The board" is composed of 18 members, who are equally divided between representatives of labor and industry. Each hearing panel consists of a chair and at least one board member. AS 23.30.005. As discussed above and as evident from decisional law, each panel makes factual determinations on a case by case basis and opinions are formed based on the record and merits of each case. Employer argues the existing SIME process violates his due process rights. A panel is required to provide parties with a fair hearing. A panel may be required to apply equitable or common law principles in a specific case, but it can only adjudicate in the context of a workers' compensation case and lack jurisdiction to decide constitutional claims. *Alaska Public Interest Group*, 167 P.3d at 36-37. A hearing panel also does not have authority to invalidate a regulation. Employer's argument is noted here to preserve it.

3) There are no deadlines in SIME statutes or regulations for objecting to the SIME appointment, so its petition is not untimely.

Employer is correct there is no specific statute or regulation setting forth procedures for a party to disqualify an SIME physician and no specific statutory or regulatory deadlines for objecting to an SIME appointment. Therefore, Employer's request for disqualification is not untimely.

In summary, Employer's request for assignment of a new SIME neurosurgeon in this case to replace Dr. Cleary is not supported by relevant legal authority or the record in this case. Accordingly, Employer's petition will be denied.

CONCLUSION OF LAW

A new SIME neurosurgeon will not be assigned in this case to replace Dr. Cleary.

ORDER

Employer's request for assignment of a new SIME neurosurgeon in this case to replace Dr. Cleary is denied.

Dated in Juneau, Alaska on October 17, 2013.

ALASKA WORKERS' COMPENSATION BOARD

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Marie Y. Marx, Designated Chair

_____

Bradley S. Austin, Member

_____

Charles M. Collins, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of RICHARD L. SORTOR, employee / applicant v. HECLA GREENS CREEK MINING CO., employer; ZURICH AMERICAN INSURANCE COMPANY, insurer / defendants; Case No. 201117487; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, on October 17, 2013.

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Samantha Sanbei, Workers' Compensation Technician