ALASKA WORKERS' COMPENSATION BOARD

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

CATHLEEN MILLER, Employee, Respondent , v. NANA REGIONAL CORPORATION, Employer, Petitioner, and ACE INDEMNITY INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200816759 AWCB Decision No. 13-0169 Filed with AWCB Anchorage, Alaska on December 26, 2013

Cathleen Miller's (Employee) June 26, 2013 Petition to Strike EIME Doctors and NANA Regional Corporation's (Employer) October 1, 2013 Petition for Social Security Offset were heard on November 19, 2013, in Anchorage, Alaska, a date selected on October 30, 2013. Attorney Michael J. Jensen appeared and represented Employee who appeared and testified. Attorney Robert J. Bredesen appeared and represented Employer and its insurer. Arwen Arnold appeared telephonically and testified for Employer. The record remained open seven days to allow Employer to submit additional evidence and closed on November 26, 2013.

ISSUES

Employer's contends it is entitled to a Social Security disability offset under AS 23.30.225(b) retroactive to September 2009, and filed its offset petition out of an "abundance of caution" just in

case Employee is entitled to additional benefits, which have now been controverted. Employer requested a Social Security offset be awarded in advance of any possible award of temporary total disability (TTD).

Employee contended there were no factual disputes concerning the Social Security offset. She had no opposition to the requested offset amount.

1) Is Employer's request for a Social Security disability offset ripe?

Employee contends Employer required her to see Tim Atkinson, PA-C, at the IMED clinic shortly after her injury, this was an employer's medical evaluation (EME) and was Employer's first choice of an EME physician under AS 23.30.095(e) and 8 AAC 45.082(b)(3). She further contends her subsequent evaluation by EME Thomas Dietrich, M.D., constituted Employer's one allowable change of EME physician. Employee contends Employer unlawfully exceeded its change of physician under AS 23.30.095(e) and 8 AAC 45.082(b)(3) when it required her to see an EME panel with John Swanson, M.D., Gary Olbrich, M.D., and Eric Goranson, M.D. Employee contends any EME reports issued after Dr. Dietrich saw Employee should be stricken.

Employer contends it did not make an excessive or unauthorized change of physician. It contends there is no evidence it selected PA-C Atkinson as an EME physician. Instead, Employer contends its first physician choice was Dr. Dietrich. Employer contends it subsequently properly selected Dr. Swanson as its change of EME physician, who then referred Employee to Drs. Goranson and Olbrich. Therefore, Employer contends, there is no basis to exclude any EME opinions from the record.

2) If Employer made an unauthorized, excessive change of physician should it be excused?

Employee further contends if he prevails on the unlawful change of physician issue, it may affect the pending second independent medical evaluation. She contends there may no longer be a medical dispute if reports from the unlawful EME doctors are stricken from the record.

Employer contends there is no unlawful EME change. Nevertheless, it contends this decision should review the SIME status to avoid unnecessary expenses should Employee prevail on his petition.

3) Should the SIME go forward as scheduled?

Lastly, Employee requested an award of attorney and paralegal fees and costs for successfully pursuing his petition to strike the EME reports.

Employer contended Employee is not entitled to interim attorney's fees, paralegal fees or costs. It contends even if Employee prevails on the instant petition. It contends Employee's counsel's services have accrued no "benefit" to Employee justifying an award of fees at this time.

4) Is Employee entitled to attorney and paralegal fees and costs at this time?

FINDINGS OF FACT

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

1) When Employee was a new hire with Employer, she recalled going to Work Safe for urinalysis and for a bending and lifting test to make sure she was capable of performing her work duties. This evaluation occurred at a different location than the exam to which Employer sent her after her September 3, 2008 work injury, as discussed below (Employee).

2) On September 3, 2008, Employee injured her low back while working as a pantry helper for Employer at its remote location in Milne Point, Alaska (Report of Occupational Injury or Illness, October 9, 2009; Deposition of Cathleen Miller, June 19, 2013, at 49).

3) Employee reported she injured her back "lifting a 10LB can of produce doing freight, felt pulling of muscles in back, sharp shooting pains in right leg." The body part affected was right "lower back area (lumbar area and lumbo sacral) lower back muscles" (Report of Occupational Injury or Illness, October 9, 2009).

4) Employee went to the medical clinic in the same building in which she worked, operated by British Petroleum (BP) when her pain did not subside. The medical provider at the clinic gave

Employee Tylenol and gave her no additional advice or recommendations (Deposition of Cathleen Miller, June 19, 2013, at 53; Recorded Statement of Cathleen Miller, October 28, 2008, at 11).

5) The administrative record contains no medical records from BP's clinic at Milne Point (record).

6) The parties agree Employee's visit to the BP clinic is not at issue and is neither Employee's nor Employer's selection of a physician under the appropriate statutes and regulations (parties' hearing statements).

7) Employee continued to work following her injury for about seven days and completed her normal shift (Employee).

8) Before she left the North Slope, Employee's immediate supervisor Carlos Trinidad, Employer's employee, told her to go see the camp manager, "Mark," who is also Employer's employee. "They" "had an appointment set up" for her with Tim Atkinson at IMED on September 16, 2013. Mark told Employee she had to see PA-C Atkinson and had to have a medical release before she could return to work on her next shift (*id.*).

9) Following the end of her normal shift, Employee returned home to Big Lake, Alaska, and received medical care for her work injury, which she described as follows:

> Q. How long was it before you went and saw a doctor?
>
> A. They made an appointment for me at Milne Point to see Dr. Tim Atkinson here in Anchorage. And I didn't get in to see him, I don't believe, till the 15th.
>
> Q. And is that -- where is Dr. Atkinson or Mr. Atkinson?
>
> A. He's in Anchorage. I don't know. He works for NANA.
>
> Q. Okay. And did you go see him?
>
> A. Yes.
>
> Q. Did anyone else show up for the appointment?
>
> A. No.
>
> Q. And at that time did you know you -- whether you had a right to pick your own physician?
>
> A. Yes.

> Q. Okay. In your own words, why didn't you pick your own physician at that particular moment?
>
> A. I did. I went and saw Brian Larson --
>
> Q. Okay
>
> A. -- like two days before I saw Atkinson.
>
> Q. . . . And so let's start with Dr. Larson. What did he do for you?
>
> A. Did x-rays.
> . . .
>
> . . . and he suggested an MRI (*id.* at 57-58).
>
> Q. Okay. And how long did you treat with Dr. Larson?
>
> A. I didn't treat with him. When I saw Tim Atkinson, he recommended an MRI. So I went with him and did the MRI through him, and then he suggested an orthopedic surgeon.
>
> Q. Okay. And who did -- was there anyone in particular he suggested?
>
> A. He wouldn't.
>
> Q. And how about Dr. Larson?
>
> A. He recommended Peterson.
>
> Q. Okay. And did you follow up with Dr. Peterson?
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> A. I tried but it took too long to get into him, so I saw Kim Wright.
>
> Q. And he's the neurosurgeon?
>
> A. Yes (*id.* at 58-59).

10) Employee did not make her own appointment with IMED and had never heard of it or PA-C Atkinson (Employee).

11) IMED and PA-C Atkinson are medical "providers" as defined in 8 AAC 45.082(l), (2) (experience, judgment and inferences drawn from all the above).

12) On September 12, 2008, Employee saw Brian Larson, D.C. (chart note, September 12, 2008).

13) On September 16, 2008, Employee saw PA-C Atkinson, who examined her, told her she may have a herniated disc in her low back and referred her to diagnostic health Anchorage for a magnetic resonance imaging (MRI) scan. PA-C Atkinson also suggested Employee may need to see an orthopedic surgeon, but declined to make a specific referral. He did refer Employee for an MRI and the referral note has the date and time for the appointment and includes basic information about Employee and her symptoms. It is signed and dated by PA-C Atkinson and includes PA-C Atkinson's handwriting, which says: "Bill to IMED" and includes a phone number. Employee said she knew what PA-C Atkinson's role was in her case by his referral to diagnostic health Anchorage. Employee understood from PA-C Atkinson that Employer would pay the bills related to these evaluations (Employee; diagnostic health Anchorage referral form, September 16, 2008).

14) Employee never heard anything from IMED or PA-C Atkinson concerning the MRI results and never saw a bill from either IMED, diagnostic health Anchorage, or PA-C Atkinson and assumes Employer paid for those medical services (Employee).

15) Though the camp manager informed her of the IMED appointment, Employee has no idea how the IMED appointment was scheduled. She does not know whether the appointment was scheduled by telephone, or facsimile, and has no idea who initiated the communications to schedule the appointment. Employee told Dr. Larson about her appointment with PA-C Atkinson, and Dr. Larson said he, Dr. Larson, would request an MRI. She never returned to PA-C Atkinson after the MRI, which PA-C Atkinson recommended. Dr. Larson did not treat Employee at her first visit, because he was concerned about Employee's back and did not want to treat her until after an MRI was completed (*id.*).

16) The parties agree IMED no longer exists and its "successor is Beacon" (Employer's Brief for 11/19/13 Hearing, November 15, 2013, at 2 n. 1).

17) Other than the above-mentioned referral to diagnostic health Anchorage, the administrative record contains no medical records after the September 3, 2008 injury from PA-C Atkinson, IMED or its successor Beacon Health Services (record; observations).

18) Employer agrees it paid the bill associated with Employee's visit to IMED and PA-C Atkinson, and believes the record was originally associated with the bills, when the bills were paid but the records are no longer found (Employer's hearing statements).

19) On September 17, 2008, Employee had an MRI completed at diagnostic health Anchorage on referral from PA-C Atkinson, and the report was sent to PA-C Atkinson (radiology report, September 17, 2008).

20) On September 22, 2008, Dr. Larsen removed Employee from work pending an orthopedic surgeon evaluation (Authorization for Absence, September 22, 2008).

21) On September 24, 2008, Dr. Larson referred Employee to an orthopedic specialist, Davis Peterson, M.D. (fax cover sheet, September 24, 2008).

22) When Employee could not see Dr. Peterson promptly, Dr. Larson referred her to Kim Wright, M.D., neurosurgeon (Wright letter, October 7, 2008).

23) On October 7, 2008, Dr. Wright evaluated Employee (Wright, October 7, 2008).

24) On October 7, 2008, Dr. Wright also completed Employer's return to work (RTW) program form stating Employee was totally incapacitated from work and needed surgery (Attending Physician's Return to Work Recommendations, October 7, 2008).

25) On October 27, 2008, Employer controverted Employee's right to benefits arising from the September 3, 2008 injury. The controversion notice stated in pertinent part: "Employer/Carrier will scheduled [sic] an independent medical examination to address compensability" (Controversion Notice, October 27, 2008).

26) On November 18, 2008, Dr. Larson referred Employee to "Peter Cropp," M.D., for a surgical consult (prescription form and chart note, November 18, 2008).

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

28) Employer states Dr. Dietrich was its first selected employer's choice of a physician in this case (Employer's Hearing Brief for 11/19/13 Hearing, November 15, 2013, at 7).

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

30) On or about December 2, 2008, Karen Arndt, RN, Employer's nurse case manager, interviewed Employee. Employee told nurse Arndt she was called into her boss' office prior to leaving her work shift with Employer and told not to return to work without a work release. Employee was also told she had an appointment with PA-C Atkinson at IMED clinic. Employee reported she returned home, saw chiropractor Larson, and then saw PA-C Atkinson as scheduled (Progress Report #1 for Cathleen Miller, December 2, 2008).

31) On January 22, 2009, Larry Kropp, M.D., interventional spine specialist, evaluated Employee and said: "[Employee] returns with her EMG. The fact his report says Employee "returns" implies Dr. Kropp had been seen Employee previously but an earlier record could not be found in the file. (Kropp report, January 22, 2009).

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

33) On February 24, 2009, Dr. Wright referred Employee back to Dr. Larson (Wright letter, February 24, 2009).

34) On June 19, 2009, Dr. Kropp referred Employee to specialist Timothy Cohen, M.D., neurosurgeon (Kropp referral, June 19, 2009).

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

36) Employer concedes Dr. Swanson was its second choice of a physician in this case (Employer's Hearing Brief for 11/19/13 Hearing, November 15, 2013, at 8).

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

38) In or around September 2010, Employee applied for Social Security disability (Deposition of Cathleen Miller, June 19, 2013, at 86).

39) On November 22, 2010, Lisa Jacobson, RN, Employer's nurse case manager, sought and obtained from EME Dr. Swanson a referral for a psychiatric and addiction medicine EME (Progress Report #16, November 22, 2010).

40) On December 10, 2010, Social Security notified Employee she was entitled to Social Security disability benefits and would receive $11,100.00 around December 16, 2010. The notice also advised Employee she would receive $740.00 a month in Social Security disability benefits thereafter, beginning January 2011 (Notice of Award, December 10, 2010).

41) On or about December 17, 2010, Employee provided Social Security paperwork to Jacobson, who provided it to the adjuster (Jacobson e-mail, December 17, 2010).

42) On February 21, 2011, Dr. Swanson, addictionologist Gary Olbrich, M.D., and psychiatrist Eric Goranson, M.D. performed a panel EME (EME report, February 21, 2011).

43) On March 31, 2011, Employer controverted Employee's case based on Dr. Swanson's February 21, 2011 EME report (Controversion Notice, March 31, 2011).

44) On April 1, 2011, Employer filed a report showing it had paid Employee temporary total disability (TTD) from September 16, 2008 through February 20, 2011, when these benefits were controverted. It also paid Employee $14,160.00 in a lump-sum permanent partial impairment award, adjusted for an alleged TTD overpayment, on March 11, 2011 (Compensation Report, March 29, 2011).

45) On August 10, 2011 Employer controverted Employee's case based on Dr. Olbrich's February 21, 2011 and April 10, 2011 EME reports (Controversion Notice, August 10, 2011).

46) Employer has paid Employee no TTD or PPI since early 2011 (Compensation Report, March 29, 2011; inferences drawn from all the above).

47) On June 18, 2012, Dr. Cohen referred Employee back to Dr. Kropp for facet blocks (Consultation Request, June 18, 2012).

48) On March 18, 2013, Employee filed a workers' compensation claim (claim, March 8, 2013).

49) On or about May 23, 2013, the parties submitted a jointly executed SIME form, which stipulated to an SIME (SIME form, signed May, 13, 2013, and May 16, 2013).

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

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

51) On August 14, 2013, *Miller v. Nana Regional Corp.*, AWCB Decision No. 13-0094 (August 14, 2013) (*Miller I*) issued and granted Employee's request to add an orthopedic surgeon to the pending SIME panel (*Miller I* at 19).

52) On October 2, 2013, Employer filed a petition for a Social Security disability offset. Employee's petition sought a retroactive offset to September 2009, and requested a reduced weekly disability rate established at $368.85 (Petition, October 1, 2013).

53) On October 18 through October 31, 2013, Dr. Dietrich provided another EME through a chart review (Dietrich EME report, October 18 - 31, 2013).

54) Arwyn Arnold is Employer's workers' compensation manager. She has about 20 years' experience handling workers' compensation programs. Arnold handles both employee health issues, including work injuries, and "fit for duty" programs. At the time of Employee's injury, Employer had about 30 to 40 employees located at Milne Point. Employer's policy for workers sick or injured while at Milne Point, requires immediate notification of supervisors. Employees are then referred to the BP clinic on-site and examined by a physician's assistant. When an injured worker needs to leave the site, and the employee requests it, they are allowed to leave. When the PA decides they must leave, the physician's assistant makes that decision. Employer did not and does not operate the clinic at Milne Point. The physician's assistant will give the injured employee specific instructions, and that information will be shared with the camp safety manager. The camp manager is the general manager in charge of the entire operation, while the camp safety manager has a different role and reports to Employer's safety department. Both are Employer's employees. Camp managers do not make medical appointments for employees. Arnold does not know who scheduled the appointment for Employee to see PA-C Atkinson (Arnold).

55) There was more than one Camp Manager in 2008. They work on rotation. Neither current camp manager is named Mark; and Arnold does not know if there was a camp manager or other supervisor at Milne Point in 2008 named Mark. Arnold occasionally sends employees to IMED for immunizations when they are being hired, or for a "fit for duty" examination to return to work. Employer does not direct injured workers to go to IMED; it is against company policy. To Arnold's knowledge, Employer has never directed an injured worker to go to IMED. If an injured worker does not have a doctor and seeks advice, Employer will sometimes provide names of places where the injured worker could go. Arnold is the person who would make the suggestion if the injured worker did not know where to go. If Arnold ever made such a suggestion, she would speak to the injured employee directly, and would not advise the injured worker about the appointment through the camp manager. She has no idea why Mark told Employee to go see PA-C Atkinson. Arnold does not recall ever seeing a report for Employee from IMED. She does not dispute the fact Employer paid the IMED bill, but does not recall seeing it. She has no idea how Employee ended up at IMED and no idea how the bill was paid, though she could research the question (*id.*).

56) Arnold has the ability to obtain records from the BP clinic if the clinic saw one of Employer's employees for a work injury. She did not have a copy of any BP clinic notes in her file for Employee. Similarly, she had no evidence of any reports or correspondence from IMED for Employee. Employer also used IMED for respirator fittings and drug testing. "Fit for duty" examinations are used to determine if a person is physically able to perform the essential functions of their job. This applies to new hires and for those who have been off work "for a significant period of time" or has a significant medical condition. This is similar to a physical capacities evaluation. This also includes employees who were injured on the job and off work for a significant period. A camp manager would not normally decide if a person needed a fit for duty exam. However, if a worker is observed having physical problems on the job, a camp manager would document this and would contact Arnold's department. A panel would review the documentation, and determine if there was enough evidence to refer the party to a fit for duty evaluation (*id.*).

57) Arnold conceded it is possible Employee's supervisor Mark observed her having difficulty performing her duties and referred her for a "fit for duty" evaluation. If that were the case, this information, however, would not be in Employee's workers' compensation file because this kind of observation frequently concerns personal health or other issues, though it could address a work-related injury as well. A separate file is kept for personal, medical information not necessarily connected to a work injury. This is called a "health file." Fit for duty examinations are sometimes used for people returning from work-related injuries. Arnold did not have immediate access to files that could contain information related to non-work related evaluations. However, the file available to Arnold during her hearing testimony did not contain such information. If Employer wanted Employee to have a fit for duty evaluation, from Employer's perspective, this would not be an evaluation to determine anything in respect to Employee's workers' compensation case, but rather, would be an evaluation to determine if she could fulfill the essential duties of her position upon her return to work on the next shift (*id.*).

58) Arnold agreed to research all of Employee's files to determine if there was any evidence how or why she was referred to IMED. The record was left open for one week for Employer to review Employee's files for this purpose (*id.*).

59) The camp manager would not have scheduled a "fit for duty" appointment. If he believed Employee needed one, he would have referred the fit for duty request to Employer's human

resources department. This was not Arnold's department. The department would have made the decision and any such records would be in Employee's "health file" (*id.*).

60) Arnold could not recall precisely when she first became aware Employee claimed a work injury in September 2008, but it would have been on or after October 7, 2008, when Employee completed her injury report (*id.*).

61) Employer or its agents have at least four files for Employee: personnel, workers' compensation, health files and the adjuster's file (*id.*).

62) Employee never spoke to Arnold. However, she and her boyfriend spoke to Cory Like, the adjuster. She does not recall Like discussing the IMED appointment. Employee and her boyfriend met with Like upon returning home from the slope (*id.*).

63) Employee argues Employer selected PA-C Atkinson as its first choice, changed to Dr. Dietrich as its second choice, and thereafter unlawfully changed to Dr. Swanson who referred Employee to Drs. Olbrich and Goranson. Accordingly, Employee contends opinions from Drs. Swanson, Olbrich and Goranson must be stricken, though Dr. Dietrich's most recent EME report would be admissible (Employee's hearing arguments).

64) Employer argues Employee has absolutely no idea who scheduled the appointment for her with IMED or how it was scheduled. Arnold had no idea how the appointment was scheduled either. Therefore, Employer contends there was no direct evidence how this appointment was established. It contends an EME is an important decision and is usually scheduled by an adjuster or attorney in consultation. Employer further argues, since this appointment did not go through normal protocol as Arnold described it, it was most likely the BP clinic staff told the camp manager to advise Employee to see PA-C Atkinson before she could return to work. Lastly, Employer contends once Employer designated a physician, and subsequently changed its physician, it could go back to its initial physician for additional opinions or for any EME purpose. In other words, Employer argues it had two physicians and could flip-flop back and forth between them without making a "change" in Employer's choice of its physician (Employer's hearing arguments).

65) Employee argues the "presumption of compensability" applies to this issue, Employee raised it with her testimony, and Employer did not rebut it because Arnold admitted she had no idea how Employee ended up being seen by PA-C Atkinson (Employee's hearing arguments).

66) Employer argues the presumption of compensability does not apply to this issue, and even if it did, Employee failed to raise it because she had no idea who scheduled the appointment with PA-C

Atkinson. Even if the presumption were raised, Employer contends it rebutted the presumption with Arnold's testimony stating camp managers do not set EME appointments (Employer's hearing arguments).

67) On December 23, 2013, Employer filed a letter stating it could find no additional medical or other records shedding any light on Employee's appointment with PA-C Atkinson (Bredesen letter, December 23, 2013).

68) Employer's EMEs are expensive (experience, judgment).

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

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

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . .
>
> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**. .(a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . .

> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. . . .

Notice of an injury given to an employee's supervisor is notice to the employer. *Cogger v. Anchor House*, 936 P.2d 157, 161-62 (Alaska 1997). Timely written notice of injury is required because it lets the employer provide immediate medical diagnosis and treatment to mitigate its possible losses. *Dafermo v. Municipality of Anchorage*, 941 P.2d 114, 118 (Alaska 1997).

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter; . . . .

An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, the employee must establish a "preliminary link" between the claim and his employment. In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The employee need only adduce "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

Second, in claims arising after November 5, 2005, employment must be the substantial cause of the disability or need for medical treatment. AS 23.30.010(a). In *Runstrom v. Alaska Native Medical Center,* AWCAC Decision No. 150 (March 25, 2011), the commission stated "if the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable" (*id*.). This test would also apply to claims for benefits other than

"disability or need for medical treatment," based on the commission's use of "etc." in *Runstrom*. "Neutral" evidence is not adequate to rebut the raised presumption. *Harp v. ARCO, Alaska, Inc*., 831 P.2d 352 (Alaska 1992).

> **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 credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc*., 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

This statute's language makes it clear an employee must be successful on the claim itself, not on a collateral issue. The word "proceedings" also indicates the board should look at "who

ultimately is successful on the claim, as opposed to who prevails at each proceeding" when awarding attorney fees. *Adamson v. University of Alaska*, 819 P.2d 886, 895 (Alaska 1991).

> **AS 23.30.225. Social security and pension or profit sharing plan offsets**. . . .
> . . .
>
> (b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury. . .

"[W]hen a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely." *Egemo v. Egemo Construction Co*., 998 P.2d 434, 441 (Alaska 2000).

> **8 AAC 45.082. Medical treatment** (a) The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers, unless otherwise ordered by the board after a hearing or consented to by the employer. The board will not order the employer to pay expenses incurred by an employee without the approval required by this subsection.
>
> (b) A physician may be changed as follows:
> . . .
>
> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service
>
> (A) at a hospital or an emergency care facility;
>
> (B) from a physician
>
> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;

> (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or
> (iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;
>
> (3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records. . . .
>
> (4) regardless of an employee's date of injury, the following is not a change of an attending physician:
> . . .
>
> (C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician; . . . .
> . . .
>
> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095 (a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.
> . . .
>
> (*l*) In this section,
> . . .
>
> (2) 'provider' means any person or facility defined as a 'provider' in AS 47.08.140 and licensed under AS 08 to furnish medical . . . services. . . .
>
> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

"Change" is defined as:

> (1) to put or take (a thing) in place of something else; substitute for, replace with, or transfer to another of a similar kind [to *change* one's clothes, *change* jobs]. . . .

As for synonyms:

> [C]hange denotes a making or becoming distinctly different and implies either a radical transmutation of character or replacement with something else [I'll *change* my shoes]. . . . Webster's *New World Dictionary*, Second College Edition, 1979, at 237.

ANALYSIS

1) Is Employer's request for a Social Security disability offset ripe?

Employer's request for a Social Security disability offset is akin to a "claim" for benefits because it seeks both a past offset and recovery and future diminution of Employee's ongoing disability benefits, if any. AS 23.30.225. Employer has not paid Employee any disability benefits since early 2011. Employee's claim is currently controverted. Even if Employer is entitled to a Social Security disability offset there is currently nothing to reduce. Similarly, there is nothing from which any past offset could be recovered as Employee is not currently receiving any benefits. It remains to be seen whether or not Employee is entitled to any additional disability benefits. Therefore, Employer's petition for Social Security disability offset determination is not yet ripe. It will be held in abeyance until such time as it is becomes ripe. *Egemo*.

2) If Employer made an unauthorized, excessive change of physician should it be excused?

This case raises interesting factual and legal questions. Factually, Employee contends she raised the presumption of compensability on the question whether or not PA-C Atkinson was Employer's first choice of physician. She argues she raised the presumption through her testimony and PA-C Atkinson's referral form. As it is undisputed Dr. Dietrich was Employer's physician choice, Employee contends Employer could not later change to Dr. Swanson who then unlawfully referred her to additional EME physicians. Employee suggests a strict reading of AS 23.30.095(e) and the related regulation 8 AAC 45.082(b)(3).

By contrast, Employer argues Employee cannot even raise the presumption because she has no idea who scheduled her appointment with PA-C Atkinson. Furthermore, even if the presumption

were raised, Employer contends it rebutted the presumption through Arnold's testimony describing the proper protocol for such evaluations, and additional evidence showing no one knows how or why Employee ended up seeing PA-C Atkinson.

There is no question the statute requires Employee, at reasonable times if requested by Employer, to submit to an examination by a physician "of the employer's choice." Referrals to specialists by Employer's physician are not considered a "change" in physician. AS 23.30.095(e). However, the statute does not describe in detail what constitutes an employer's selection of a physician, a physician change, and so forth. These details are covered by the applicable regulation. 8 AAC 45.082(b)(3).

This issue raises factual questions to which the statutory presumption applies. *Sokolowski*. Employee raises the presumption Employer sent her to PA-C Atkinson with her testimony. She stated the camp manager, Employer's employee, told her she had an appointment with PA-C Atkinson. Employee saw PA-C Atkinson who then provided at least one medical record on which he made a referral for an MRI. This raises the presumption, causes it to attach and shifts the burden of production and persuasion to Employer. *Cheeks*.

Employer cannot rebut the presumption with substantial evidence. *Runstrom*. The only evidence Employer offered was Arnold's testimony describing how fit for duty evaluations and EME referrals are normally handled. Because Arnold is unaware of any correspondence or other evidence suggesting how this appointment with PA-C Atkinson was arranged or why it occurred, all she can say is that she does not know how it came about. This "neutral" evidence is inadequate as a matter of law to rebut the raised presumption. Ordinarily, the inquiry would end here and Employee would prevail on the raised but unrebutted presumption. AS 23.30.120. But even if the presumption did not apply to this issue, or Employee could prove Employer sent her to see PA-C Atkinson by a preponderance of the evidence, the majority under the extraordinarily unique facts in this case would not hold PA-C Atkinson was Employer's first physician choice for several reasons. Employer's unlawful change will be excused through the waiver process.

PA-C Atkinson will not count as Employer's first choice of physician for purposes of AS 23.30.095(e) or 8 AAC 45.082(b)(3) for several reasons. First, there is no evidence who made the "choice" of PA-C Atkinson to evaluate Employee. Furthermore, it is not clear from the evidence why PA-C Atkinson was evaluating her. The facts show Employer's agent, the camp manager, informed Employee who to see and when to see him, but there is no evidence who made the selection. No one knows who told the camp manager to tell Employee to see PA-C Atkinson.

Oddly, there are no medical records for this injury from the BP clinic. Similarly, there are no medical records from IMED or PA-C Atkinson other than the diagnostic health Anchorage pad upon which he hand wrote notes and a referral for Employee to obtain an MRI. Employer paid for services provided to Employee by IMED and PA-C Atkinson. Though Arnold does not recall ever seeing the records or bills, she does not dispute the fact Employer paid them. Employee never received the bills and she did not pay them. Employer's counsel conceded at hearing the medical records were probably originally associated with the bills, implying Employer would never have paid them without having both the medical record and related bills. Though these missing records raise a specter, and cause one to wonder how records that could shed considerable light on who selected and scheduled the appointment with PA-C Atkinson could go missing, Arnold's testimony was credible and there is no evidence to suggest Employer is withholding these records to bolster its position on this issue. AS 23.30.122. Occasionally medical records do get mis-filed or lost, and this appears to be one of those instances.

Second, since the statute does not give specific instructions how an employer's physician choices are made in these instances, this issue requires a resort to the regulations. Clearly it could be credibly argued Employer chose PA-C Atkinson to evaluate Employee to mitigate its losses by having her promptly examined and treated. *Cogger*. For example, Employee's notice to her supervisor that she injured herself at work constitutes notice of the injury to Employer. As a physician's assistant qualifies as a physician under the law, PA-C Atkinson's selection could be considered Employer's first choice because PA-C Atkinson examined Employee, gave a written albeit brief report and made a referral for an MRI, which is an "opinion" she needed and MRI. In other words, regardless who told the camp manager to tell Employee to appear at IMED for

her evaluation, Employer's agent told her to go and she went. *Dafermo*. However, the strict regulatory application Employee seeks is particularly harsh and unfair in this instance, because no one knows for sure who chose PA-C Atkinson, there is no resultant medical record other than the referral form, and he provided no information affecting Employer's defense of Employee's claim.

Third, Employer has already expended significant funds to acquire an opinion from Dr. Swanson's who then referred Employee to two specialists for their opinions. Given the uncertain and unknown facts in this case, it would be extremely unfair and an unreasonable cost to Employer to strike these physicians given this confounded evidence. Furthermore, even if these physicians were stricken from the record, nothing would prevent Dr. Dietrich, as Employer's second selected physician, from referring Employee to other physicians of the same specialties. AS 23.30.095(e). This would further unnecessarily delay Employee's claim and result in an unreasonable cost to Employer. AS 23.30.001(1).

In summary, though Employer cannot rebut the raised presumption, Employee's harsh remedy will not be applied in this instance and requirements for Employer selecting a physician will be waived as they pertain to PA-C Atkinson only. AS 23.30.195. There is no evidence Employer gained any litigation advantage by having the camp manager tell Employee to attend an evaluation with PA-C Atkinson. By contrast, manifest injustice to Employer would result from strict application of 8 AAC 45.082(b)(3). Employer has made significant financial expenditures to obtain opinions from Dr. Swanson and then Drs. Olbrich and Goranson, which would be completely wasted if these reports and opinions were excluded from evidence. AS 23.30.001(1). This remedy best fulfills the legislature's intent in these cases by ensuring quick, efficient, and fair delivery of benefits to Employee if she is entitled to them, at a reasonable cost to Employer. It further makes this process and procedure as summary and simple as possible, as it negates the requirement for Employer to simply have Dr. Dietrich refer Employee to additional specialists. AS 23.30.005(h). As Employee will be going to an SIME, her rights are further protected because there will be two more medical opinions addressing her situation. AS 23.30.135.

This decision should not be read to hold an employer does not make a physician "selection" under AS 23.30.095(e) or 8 AAC 45.082(b)(3) by having his supervisor insist that an employee seek immediate medical care from a physician of the employer's choosing. Similarly, it should not be read to hold an employer's choice of physician may only be found when an examination results in a lengthy EME report addressing questions from an adjuster or attorney and providing associated answers. By contrast, the regulation only requires that a physician selected by an employer give an oral or written opinion and advice after examining an employee, her records, or an oral or written summary of her records. This decision does not change that regulation. Employer did select PA-C Atkinson, but this decision waives the selection regulation as to that selection only. 8 AAC 45.195. This decision is limited to its peculiar facts.

Lastly, as Employee did not designate PA-C Atkinson in writing as her attending physician, the fact she saw him and followed his instructions to obtain an MRI will not count against her either and is not considered her physician selection. AS 23.30.095(a). Given the peculiar facts in this case, Employee's petition to strike Drs. Swanson, Olbrich and Goranson will be denied.

However, under this decision's analysis, Dr. Dietrich becomes Employer's first physician selection. Employer changed to Dr. Swanson. AS 23.30.095(e). Employer admitted this in its brief and at hearing. However, contrary to Employer's argument, it cannot change back to Dr. Dietrich or switch back and forth between its selected physicians. The word "change" has a plain, simple meaning, and includes "to put or take (a thing) in place of something else; substitute for, replace with, or transfer to another of a similar kind." Webster's *New World Dictionary*. The statute expressly prohibits Employer from making more than one "change" in Employer's choice of physician. AS 23.30.095(e). Therefore, because Employer admittedly selected Dr. Dietrich as its first choice, and concededly changed to Dr. Swanson as its second choice, it has run out of "choices." It cannot go back and forth between Dr. Dietrich and Dr. Swanson. Following Dr. Swanson's referrals, Dr. Dietrich performed an extensive record review EME and issued another report. Therefore, it follows Dr. Dietrich's most recent EME report is, under the facts of this case, an unlawful change and will be stricken. However, to be clear, the regulation only seeks to strike reports and opinions obtained *unlawfully* in violation of

AS 23.30.095 and 8 AAC 45.082. Consequently, Dr. Dietrich's reports and opinions offered prior to Employer's change to Dr. Swanson will not be excluded. 8 AAC 45.082(c).

3) Should the SIME go forward as scheduled?

Miller I ordered an SIME and added a specialty to the SIME panel. Nothing in this decision alters the necessity for the SIME. Therefore, the SIME will go forward as directed in *Miller I*.

4) Is Employee entitled to attorney and paralegal fees and costs at this time?

This decision addresses novel and interesting factual and legal arguments. However, Employee has not prevailed on the preliminary issue set forth in her petition to strike several EME physicians. *Adamson*. Therefore, Employee has not succeeded in deriving any benefit at this time. Therefore, she is not entitled to an attorney fee or cost award at this time. AS 23.30.145.

CONCLUSIONS OF LAW

1) Employer's request for a Social Security disability offset is not ripe.
2) Employer made an unauthorized, excessive change of physician but it will be excused.
3) The SIME will go forward as scheduled.
4) Employee is not entitled to attorney and paralegal fees and costs at this time.

ORDER

1) Employer's petition for a Social Security disability offset is held in abeyance as not ripe.
2) Employee's petition to strike Employer's EME physicians Drs. Swanson, Olbrich and Goranson is denied.
3) Dr. Dietrich's most recent EME report will not be relied upon in this case pursuant to 8 AAC 45.082(c).
4) The SIME will go forward as ordered in *Miller I*.
5) Employee's request for attorney's fees and costs is denied at this time.
6) Employee's request for interim attorney's fees and costs is denied at this time.

Dated in Anchorage, Alaska on December 26, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Dave Kester, Member

RICK TRAINI, MEMBER, CONCURRING IN PART AND DISSENTING IN PART

The dissent agrees the Social Security disability offset petition is not ripe. It also agrees Employee is not entitled to attorney's fees or costs at this time. The dissent further agrees Employer cannot change back and forth between its first and second selected physician under AS 23.30.095(e) and 8 AAC 45.082(b)(3). However, the dissent disagrees with the majority's decision on the main issue in dispute and would strike records and opinions from Drs. Swanson, Olbrich and Goranson. Therefore, under the dissent's analysis, the question whether to strike Dr. Dietrich's last EME report would become moot. However, given the majority opinion, the dissent agrees Dr. Dietrich's last EME report should be stricken under 8 AAC 45.082(c).

The presumption of compensability correctly applies to this factual dispute. *Sokolowski*. As the majority found, Employee raised the presumption with her testimony stating the camp manager, Employer's employee, told her she must go see PA-C Atkinson before she could return to work. Employee dutifully followed her supervisor's instructions and saw the physician's assistant. As the majority also found, Employer cannot rebut the raised presumption. AS 23.30.120. If Arnold does not know how or why Employee went to see PA-C Atkinson, her testimony is at best "neutral" and inadequate to rebut the presumption. All she could say is essentially "I don't know" how the appointment came to be. The dissent would hold this visit with PA-C Atkinson constituted Employer's initial choice of physician. 8 AAC 45.082(b)(3). The majority agrees.

There is no mystery here. Employee never heard of IMED or PA-C Atkinson before the camp manager directed her to see the physician's assistant for evaluation. Employer had Employee seen by a physician's assistant -- a medical "provider" undisputedly licensed in Alaska to provide medical services -- who gave a written opinion and advice after examining Employee. He referred

her for an MRI, which she obtained. On its face, this is Employer's first selected physician. The majority should have stopped its analysis here and then found Employer changed to Dr. Dietrich, and any change thereafter was therefore unlawful as Employee correctly argued. AS 23.30.095(e).

Instead, the majority inappropriately waived the regulatory requirements and allowed Employer to have another bite at the EME apple. The majority cites "unfairness" to Employer because it would be required to incur additional expenses obtaining more doctors' opinions. What about the majority decision's unfairness to Employee? It is unfair to Employee to allow Employer as many changes of its selected physicians as it desires. This is the functional result of the majority's opinion. Any "manifest injustice" on Employer in this instance was brought upon Employer through its own actions. The dissent would apply the regulations as written and grant Employee's petition.

The inappropriateness of the majority's decision to waive the regulatory requirements in this case is highlighted by the missing medical records. It is inconceivable that neither the BP clinic records nor IMED's or PA-C Atkinson's medical records are available. While one record could become misplaced or mis-filed, it is highly unlikely all the records that could have shed considerable light on how the IMED appointment ended up missing. Given these questionable circumstances, and the undisputed testimony that Employer's supervisor sent Employee to PA-C Atkinson for a medical evaluation directly related to her work injury, the dissent would not waive the procedural requirements for Employer selecting its first physician simply because it might cost Employer more money to remedy the situation Employer got itself into in the first instance. The dissent would grant Employee's petition and would strike reports and opinions from Drs. Swanson, Olbrich and Goranson. 8 AAC 45.082(b)(3).

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Rick Traini, Member

PETITION FOR REVIEW

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

reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CATHLEEN MILLER Employee / applicant v. NANA REGIONAL CORPORATION, Employer / defendants; Case No. 200816759; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties on December 26, 2013.

_____

Anna Subeldia, Office Assistant