ALASKA WORKERS' COMPENSATION BOARD

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

MARY ADEPOJU, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201019561
STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, Self-Insured Employer, Defendant.	)	AWCB Decision No. 14-0051 Filed with AWCB Fairbanks, Alaska on April 9, 2014.

Mary Adepoju's (Employee) December 4, 2013, claim for permanent partial impairment (PPI) and a second independent medical evaluation (SIME) was heard in Fairbanks, Alaska on February 13, 2014, a date selected on January 15, 2014. Employee appeared, represented herself and testified. Attorney M. David Rhodes appeared and represented Employer. The record closed at the hearing's conclusion on February 13, 2014.

ISSUE

Employee disputes a four percent PPI rating for her thoracic compression fractures generated by a referral from her own physician and seeks a SIME for an additional rating. She sets forth two contentions in support of her position. First, she does not think the PPI rating is accurate because when the doctor asked her to "go up" on her heels and toes, she feared she was going to fall and grabbed a doorknob to support herself. She contends, if she did not grab the doorknob, she would have fallen, which would have resulted in a greater rating. Second, Employee disputes she is medically stable because she cannot go back to her former occupation. She contends her physician stopped prescribing pain medication to her, which forced her into retirement, because she can no

longer "grapple" at work. Employee clarified grapple means perform the defensive control tactics required by her former occupation as a juvenile justice officer.

Employer contends Employee's treating physician stopped prescribing pain medication to Employee because of his drug abuse concerns and contends Employee's treating physician has found Employee medically stable on numerous occasions. Employer contends, even though its medical evaluator rated Employee's permanent impairment at zero percent, it nevertheless paid Employee her four percent rating, so there is not a significant dispute that warrants a SIME. It contends there is no legal basis to perform a SIME when the dispute is between Employee and her own treating physician.

Should a SIME be ordered for Employee's thoracic and cervical spine conditions?

FINDINGS OF FACT

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

1) On November 22, 2010, Employee sought treatment at the Fairbanks Emergency Department. She reported injuring her left hip after slipping and falling on ice while she was helping someone out of a car. A left hip x-ray showed no bony abnormalities. Left hip pain and muscle spasm were diagnosed. Employee was prescribed Valium for spasm and Vicodin with Naprosyn for severe pain. (Final Report, November 22, 2010).

2) On November 23, 2010, Employee was working for Employer as a juvenile probation officer. She reported injuring her back and head after slipping and falling on ice while taking out the trash at work the previous day. (Report of Occupational Injury or Illness, November 23, 2010).

3) On November 30, 2010, Employee returned to the Fairbanks Emergency Department for worsening back pain. She reported injuring her right hip, along with her head and back, after slipping and falling on ice on November 22, 2010. Employee was referred back to Victor Bartling, M.D., her primary care physician. (Final Report, November 30, 2010).

4) On December 4, 2010, Employee again presented at the Fairbanks Emergency Department complaining of severe back pain, since slipping and falling on ice on November 22, 2010. She was treated with Dilaudid and Toradol. The report states: "Patient appeared much more comfortable" following the administration of these drugs. Employee requested additional Diluadid on

discharge. An additional dose of Dilaudid was administered and Employee was given a "very short course" of Percocet. (Final Report, December 4, 2010).

5) On December 7, 2010, Employee presented to Dr. Bartling reporting "excruciating back pain" since falling on ice on November 22, 2010. She stated "the pain keeps getting worse" and ran the entire length of her spine from her neck to her buttocks. Employee told Dr. Bartling she was given Diluadid and Percocet at the emergency room, "but they didn't work." She requested Dr. Bartling admit her to the hospital for "uncontrolled pain." Dr. Bartling admitted Employee to the hospital for pain management and to determine the etiology of her pain. (Bartling reports, December 7, 2010 (all quotations in original report)).

6) A December 7, 2010 thoracic magnetic resonance imaging (MRI) study showed T8 and T9 compression fractures with minimal height loss of vertebral body of T9, no bony protrusions, no disc bulges or herniations and no significant foraminal stenosis. Employee's attending physician. Charles Steiner, M.D., noted she was "probably a little over narcotized," and wrote, "[w]e will just dial her PCA [patient controlled analgesia] back a bit." (MRI report, December 7, 2010; Steiner report, December 8, 2010).

7) On December 9, 2010, Dr. Steiner prescribed Employee MS Contin and Percocet for breakthrough pain in order to "get her off PCA."

8) On December 14, 2010, Employee was discharged with instructions to follow-up with physical therapy. Her pain was "reasonably well controlled" at discharge. Dr. Bartling discussed allowing Employee "a little more Percocet" to control pain spikes. (Bartling report, December 14, 2010).

9) On May 16, 2011, Employee telephoned her physical therapist after missing an appointment and reported she had been "hurting very badly" and had taken more pain medication, which sedated her too much to return to therapy. (Phone message, May 16, 2011).

10) On May 16, 2011, Employee's physical therapist considered discharging Employee from physical therapy after speaking with Dr. Bartling. (Phone call note, May 16, 2011).

11) On May 17, 2011, Employee was discharged from physical therapy. (Discharge summary, May 17, 2011).

12) On May 18, Dr. Bartling evaluated Employee for continuing thoracic pain and ordered a bone scan. Employee's pain continued to be managed with Percocet. (Bartling report, May 18, 2011).

13) On a June 22, 2011 thoracic x-ray, Employee's T8 and T9 compression fractures were not "well evaluated" on the study. (X-ray report, June 22, 2011).

14) A June 23, 2011 thoracic computed tomography (CT) study was performed and compared to the December 7, 2010 MRI. Edema present at the T8 and T9 endplates on the December 7, 2010 MRI was not present on the CT scan. Evidence of fracture was not noted. (CT report, June 23, 2011).

15) On June 27, 2011, Employee followed-up with Dr. Bartling. He directed Employee to continue with Percocet "no more than twice per day." (Bartling report, June 27, 2011).

16) On July 27, 2011, Dr. Bartling evaluated Employee for continuing thoracic pain. He directed Employee to continue Percocet "no more than three times per day." (Bartling report, June 27, 2011).

17) On October 31, 2011, Dr. Bartling evaluated Employee, who stated she did not feel she could return to work because of her thoracic spine condition. Dr. Bartling advised Employee to use Percocet sparingly along with Motrin for her thoracic pain. (Bartling report, October 31, 2011).

18) On October 31, 2011, Dr. Bartling authored a "To Whom It May Concern" letter stating no further testing or procedures were indicated for Employee's chronic, mid thoracic back pain. He did not see Employee's mid thoracic pain improving in the "foreseeable near future." (Bartling letter, October 31, 2011).

19) On November 4, 2011, Dr. Bartling completed a physician statement questionnaire indicating Employee had shown no significant improvement in the past year and opined further improvement was unlikely. (Bartling responses, November 4, 2011).

20) On January 16, 2012, Dr. Bartling evaluated Employee. Employee's thoracic spine condition was "stable" with no obvious pain on examination. (Bartling report, January 16, 2012).

21) On February 23, 2012, Employee saw Dr. Bartling for an evaluation. Employee requested a refill of her Percocet prescription. A urine test was positive for Oxycodone and Methadone. Employee explained her husband has been on Methadone for many years due to severe cervical and lumbar spondylosis and she denied taking her husband's Methadone. Dr. Bartling declined to prescribe Percocet and ordered a confirmation test for the Methadone. Employee's thoracic spine condition was "currently stable/minimal symptoms noted at this time." (Bartling report, February 23, 2012).

22) On March 1, 2012, Employee saw Dr. Bartling regarding her pain management treatment. The February 23, 2012 confirmation test was positive for Methadone and Dr. Bartling had a "frank discussion" with Employee and her husband. Employee admitted to taking a "friend's" Methadone, but denied taking her husband's. Dr. Bartling discharged Employee for management of her chronic pain with instructions she was not to receive narcotics from any providers in his practice. He diagnosed opioid abuse and referred Employee to other pain specialists in Fairbanks. (Bartling report, March 1, 2012).

23) On May 2, 2012, a thoracic magnetic resonance imaging (MRI) study showed spondylosis with no other acute findings. (MRI report, May 2, 2012).

24) On May 23, 2012, Dennis Chong, M.D., performed an employer's medical evaluation and opined Employee suffered a left hip contusion as a result of the work injury. He did not think Employee's thoracic compression fractures resulted from the work injury because of her preexisting history of similar complaints, inconsistencies in the medical reports regarding the mechanism of injury and the gap between the work injury and diagnosis. However, if the work injury had resulted in the fractures, Dr. Chong stated they did not need further treatment and Employee was medically stable. He opined Employee had incurred a zero percent PPI rating as a result of the work injury. (Chong report, May 23, 2012).

25) On November 21, 2012, Dr. Bartling predicted it was "unlikely" Employee could return to work at her previous occupation as a substance abuse counsellor. (Bartling report, November 21, 2012).

26) On February 11, 2013, the parties participated in mediation that resulted in a partial compromise and release of Employee's claim. Employee agreed to a release of reemployment and permanent total disability (PTD) benefits in exchange for $25,000.00. The agreement left open future medical and transportation as well as other indemnity benefits. (Compromise and Release Agreement, March 11, 2013).

27) On July 26, 2013, as a result of a referral from Dr. Bartling, Shawn Johnston, M.D., evaluated Employee for permanent impairment. His report sets forth the following:

> Permanent Partial Impairment Rating: This was done according to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition, First Printing. According to table 17-3, page 568, she falls into class 1, which is 4% whole person impairment, as she has multiple compression fractures

> without displacement and non-verifiable radicular complaints. This again is 4% whole person impairment.
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> The functional history adjustment table 17-6, page 575, she has pain and symptoms with normal activities and a moderate PDQ score. This is a grade 2 modifier. Imaging study is confirmatory, therefore is not used as a grade adjustment. Lastly, physical exam adjustment table 17-7, she has negative straight leg raising test; she has symmetric reflexes, strength, and sensation. These are grade 0 modifiers. The grade 0 and the grade 2 modifier average to a grade 1 modifier, which would keep her still at the 4% whole person impairment on table 17-6, page 566, and again, this would still keep her in class I table 17-3, page 568, and this is 4% whole person impairment. Once again, she has suffered 4% whole person impairment.

(Johnston letter, July 26, 2013).

28) On August 27, 2013, a prehearing conference was held at Employee's request. At that conference, Employee requested a SIME for another PPI rating. Employer contended if it agreed with and paid Dr. Johnston's rating, there would not be a dispute that warrants a SIME. (Prehearing conference summary, August 27, 2013).

29) On August 29, 2013, Employer paid Employee's four percent PPI. (Compensation report, September 4, 2013).

30) On December 4, 2013, Employee filed her instant claim seeking temporary total disability (TTD), medical costs, permanent partial impairment "in excess of 4%," and a SIME. She described her injured body part as "[m]iddle upper back" and the nature of her injury as "[b]ack." (Claim, December 4, 2013).

31) Prehearing conference summaries do not indicate a withdrawal of Employee's December 4, 2013, claims for medical costs and TTD. (Prehearing conference summaries, December 4, 2013; January 15, 2014; observations).

32) On December 26, 2013, Employer answered Employee's December 4, 2013 claim. (Employer's answer, December 26, 2013).

33) On January 15, 2014, the parties participated in a prehearing conference. Employee contended her PPI rating was not performed by her treating physician. She stated her treating physician does not perform PPI ratings and he referred her to another physician. Employer contended no TTD was due, there were no unpaid medical bills and it had paid Employee's four percent PPI rating. The parties agreed to a limited issue hearing without an affidavit of readiness for hearing (ARH). The summary states the "limited issue for hearing is whether or not EE is

entitled to an SIME for a PPI rating for her back and neck." (Prehearing conference summary, January 15, 2014).

34) Many treating physicians, like Dr. Bartling, do not perform PPI evaluations. (Experience, knowledge).

35) On January 27, 2014, Employee filed a reply to Employer's December 26, 2013 answer. Employee contended she began treating with Paul Jensen, M.D., after Dr. Bartling stopped prescribing pain medication to her. She contended Dr. Jensen noticed a "bruise" on her neck that she attributes to the November 22, 2010 work injury, but she told Dr. Jensen her neck does not bother her "yet." Employee contends she cannot return to her job as a juvenile justice officer or other jobs like it because they require her to "grovel" with others, which is "out of the question" because she hurt her back. She contended she continues going to the Fairbanks Memorial Hospital "in between" looking for pain management treatment. She further contended she had run out of pain medication and she will need pain medication "the rest of my life." Employee contended she would have earned over $540,000 had she continued working and she only receives $640.00 per month in retirement. She contended her electric bill for January was over $700.00 and she can't afford heating oil or food. Finally, Employee contended she paid $1,351.00 for her PPI rating out of pocket. (Employee's reply, January 27, 2014).

36) On February 13, 2014, Employee testified as follows at hearing: She did not choose the physician who performed her PPI rating. During the evaluation, she "went up on" her heels and toes, she felt herself falling and she grabbed a door knob to support herself. The PPI rating is not accurate because she would have fallen if she did not grab the door knob. Employee is also not medically stable because her bone "healed wrong" and the problem is not operable. She had to pay rent and fuel with her previous settlement proceeds. Employee was "forced" into retirement. Employer sent her to Dr. Chong, who told her to lose weight and go back to her job, but she cannot go back to her job because she cannot "grabble" anymore. Employee clarified grabble means perform the defensive control tactics required by her former occupation as a juvenile justice officer. On cross-examination, Employee testified she is not licensed to practice medicine. Dr. Bartling found "something" in her system and Dr. Bartling's policy is "no drugs" that are not prescribed by him. She explained, because she and her husband take so many medications between the two of them, there are a lot of medications on the kitchen table, and speculated, perhaps, either she accidently took her husband's Methadone or, a "friend" put Methadone in her

iced tea, so Dr. Bartling referred her to another physician. Employee denied Dr. Bartling was concerned about her opiate use, but explained he was just trying to wean her off the Percocet. She did receive Employer's payment for her four percent PPI. In response to questioning by panel members, Employee could not cite a gap in the medical evidence but rather explained she disagrees with Dr. Johnston's rating. When asked to point to a dispute in medical opinions, Employee stated she was just doing what board staff told her to do. On Employer's re-cross, Employee agreed her back had not improved in the last 45 days and, "as far as [she] is concerned," she does not think she will ever be medically stable. (Employee).

37) With respect to the bill for Employee's PPI rating, Employer contends Employee was "double billed" and represented it is processing a refund for Employee's out-of-pocket expense. (Record).

38) Permanent impairment ratings are routine evidence in workers' compensation cases. They do not require expert medical testimony to interpret or apply. (Experience, judgment).

39) The medical record primarily consists of treatment for Employee's thoracic spine condition and includes management of other common, chronic conditions typical of Employee's age, such as hypertension, hyperlipidemia, general osteoarthrosis, etc. (Record, observations, experience, knowledge) (*See e.g.*, Bartling report, July 14, 2011).

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;
> . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

In *Suh v. Pingo Corp.*, 736 P.2d 342; 344 (Alaska 1987), the Alaska Supreme Court explained the purposes of the Workers' Compensation Act:

> The primary goal of the Workers' Compensation Act is to provide workers with modest but certain compensation for work-related injuries, regardless of fault.

> (citation omitted). The compensation scheme embodied in the Act is the injured worker's exclusive remedy against his employer. (citation omitted). The exclusiveness of the remedy reflects a *quid pro quo* exchange of rights and liabilities for both workers and employers. Workers gain an assured remedy without the burden of proving fault, but lose the right to sue their employers in tort. Employers gain relief from large tort damage awards and enjoy an absolute limit on liability under the Act, but are liable without fault for injuries covered under the Act. (citation omitted).

Id.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job . . . for
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> > (1) the employee's job at the time of injury; or
> >
> > (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market . . . .
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> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires . . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians.
> . . . .
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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 23.30.110. Procedure on Claims.**
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> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .

The regulations provide for orders requiring an employer to pay for an employee's examination pursuant to AS 23.30.095(k) or §110(g). 8 AAC 45.090(b). Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties."

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

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

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

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

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

Id. at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

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

2) Is the dispute significant? and

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

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

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

Bah at 8.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as

> provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

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).

In worker's compensation cases, a party vouches for the credibility of its own witness. *Frazier v. H.C. Price/Ciri Construction JV*, 794 P.2d 103; 105 (Alaska 1990).

When a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice it may be filed at a later date when it becomes timely. *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000) (applied in *Bankhead v. Yardarm Knot, Inc.*, AWCB Decision No. 13-0084 (July 18, 2013).

The doctrine or ripeness pertains to whether there is an actual controversy between the parties. *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Decision No. 153 (June 14, 2011) at 5 (citing *Brause v. State, Dept. of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001)). "Ripeness asks whether there yet is any need for the court to act." *Id*.

> The concept of ripeness can be explained in both abstract and practical formulations. The abstract formulation is that ripeness depends on 'whether ... there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' On a more practical level, our ripeness analysis fundamentally 'balances the need for decision against the risks of decision.' We examine 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'

Settje at 5 (quoting *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (citations omitted)). Consideration of the "risks of the decision" refers to the risks of deciding hypothetical cases. *Settje* at 6 n.76.

Previous decisions have addressed whether certain issues were ripe for hearing. For examples, PPI was an issue ripe for hearing when the EME physician opined the employee did not suffer a work injury, when the SIME physician opined the employee did not sustain a permanent impairment and when Employee understood she needed a rating to obtain PPI benefits but failed to obtain one. *Settje* at 6. The issue of a reemployment benefits evaluation was not ripe for hearing when neither party requested an evaluation and the Reemployment Benefits Administrator had not ruled on any request. *Kha Do v. Kuykendall, Inc.*, AWCB Decision No. 09-0185 (December 4, 2009) at 21. Compensation rate adjustment was not an issue ripe for hearing when the prehearing conference summary did not list it as an issue for hearing. *Id*. The issue of PPI was not ripe for hearing when Employee was not yet medically stable. *Id*. Similarly, PPI and reemployment benefits were not issues ripe for hearing when the employee had not yet undergone recommended surgery. *Ramondino v. Sportsman's Warehouse Inc.*, AWCB Decision No. 12-0214 (December 20, 2012) at 2-3.

> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . .
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> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.
> . . . .

In Alaska, PPI ratings for workers' compensation cases are performed in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Sixth Edition* (*Guides*). (Bulletin 08-02, January 15, 2008).

> **AS 23.30.395. Definitions.**
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> (27) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment . . .; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
> . . . .

ANALYSIS

Should an SIME be ordered for Employee's thoracic and cervical spine conditions?

As preliminary matters, this decision will first address two procedural issues. First, although the January 15, 2014 prehearing conference summary sets forth a limited issue for this hearing - whether a SIME should be performed for Employee's "back and neck," it is unclear from the record how a potential cervical condition became an issue. The medical record primarily consists of treatment for Employee's thoracic spine condition and includes management of other common, chronic conditions typical of Employee's age, such as hypertension, hyperlipidemia, general osteoarthrosis, etc. Employee's December 4, 2013 claim is for her "back" and "[m]iddle upper back" condition, not a "neck" condition. The first mention of a potential cervical condition appears in the January 15, 2014, prehearing conference summary, itself. The next mention of a potential cervical condition appears in Employee's January 27, 2014 reply, where she contends Dr. Bartling found a "bruise" on her neck that she attributes to the November 22, 2010 work injury. Employee also contends she told Dr. Bartling that condition does not bother her yet. Therefore, even though the January 15, 2014 prehearing conference summary includes "neck" as a potential SIME issue, there does not appear to be an actual controversy between the parties with respect to any cervical condition and any decision addressing such a condition would be premature. *Egemo*; *Settje*.

Similarly, the prehearing conference summaries do not indicate a subsequent withdrawal of Employee's December 4, 2013, claims for medical costs and TTD. Therefore, this decision will refer Employee's claims for medical costs and TTD back to a prehearing officer for a determination of whether or not a dispute still exists between the parties on those issues.

On the issue presented for determination, whether to order a SIME, Employee disputes a four percent PPI rating generated by a referral from her own physician and seeks a SIME for an additional rating. In *Bah*, the Commission has set forth the criteria for ordering a SIME. Additional evaluations may be ordered under AS 23.30.095(k) when there is a significant medical dispute between an employee's and an employer's physicians; under AS 23.30.110(g) when there is a significant gap in the medical evidence, or when the parties' rights cannot be ascertained because the medical evidence in not understood. *Bah.* Under the instant case, none of these criteria are met.

Regarding disputed medical opinions for Employee's thoracic spine condition, Employer's EME opined Employee had incurred no permanent partial impairment as a result of the work injury. On the other hand, Employee's evaluator opined she had incurred a four percent rating. Notwithstanding the difference in ratings between its own physician and Employee's, Employer paid Employee's four percent rating. Thus, whatever dispute initially existed between the two physicians was rendered moot by Employer's payment. Any difference now is entirely academic and, as Employer contends, not significant to the determination of a party's right. *Bah*.

With respect to a gap in the medical evidence on Employee's thoracic spine condition, none is apparent. Here, there are not one, but two, PPI ratings in the record. Additional evidence is not necessary to determine Employee's entitlement to a PPI amount, especially since she was paid the more favorable of the two ratings. *Bah*. Finally, permanent impairment ratings are routine evidence in workers' compensation cases. They do not require expert medical testimony to interpret or apply. Therefore, determination of a party's right is not impeded in this case by the medical evidence not being understood. *Id.*

Even though there is no factual basis to order a SIME in this case, since Employee is an unrepresented claimant, this decision will also address her specific contentions. First, Employee contends if she had not grabbed the doorknob during Dr. Johnston's evaluation, she would have fallen, which would have resulted in a higher rating. It is noted Dr. Johnston began his PPI evaluation by initially placing Employee into "class 1" for her multiple compression fractures,

which translated to four percent whole person impairment. Then, Dr. Johnston considered modifiers according to the correct Sixth Edition of the *Guides*. (Bulletin 08-02, January 15, 2008). He added a "grade 2" modifier for "pain and symptoms with normal activities and a moderate PDQ [pain disability questionnaire] score." Employee has acknowledged she is not licensed to practice medicine. Here, she has not introduced substantial evidence that would call into question the reliability of Dr. Johnston's PPI rating. To the contrary, Dr. Johnston's grade 2 modifier for "symptoms with normal activities" tends to indicate he did consider Employee's difficulty when he told her to "go up" on her heels and toes.

Employee also apparently contends, since Dr. Johnston was not her *treating* physician, his report is somehow unreliable. However, Employee acknowledged at the January 15, 2014 prehearing conference her treating physician does not perform PPI evaluations. Consequently, Dr. Bartling referred Employee to Dr. Johnston. Employee is reminded workers' compensation proceedings are adversarial in nature. AS 23.30.001. They also must be fair and impartial. *Id.* However, nothing in the Act requires a PPI rating be performed by a treating physician. AS 23.30.190. In fact, many treating physicians, like Dr. Bartling, do not perform them. Therefore, even though Dr. Bartling referred Employee to Dr. Johnston for her PPI evaluation, and notwithstanding Dr. Johnston not being Employee's treating physician, he was, nevertheless, still her physician in the adversarial process, as opposed to Dr. Chong, who was Employer's. *See* AS 23.30.095(a) (referral by attending physician to a specialist is not an unlawful change of physician). Here, the requirements for fairness and impartiality have been met. Furthermore, since a party vouches for the credibility of its own witness, the fact Dr. Johnston was Employee's physician in an adversarial process is yet further basis for not ordering a SIME in this case. *Frazier*. As Employer contends, a dispute with one's own physician is not a basis for a SIME. *Bah.*

Finally, Employee contends she is not medically stable and, "as far as [she] is concerned," she will never be medically stable because she cannot return to work. Here, Employee confuses numerous concepts and benefits under the Act. However, it is again recognized Employee is an unrepresented claimant and this decisions will endeavor to clarify her understandings.

Medical stability is a term of art under the Act and occurs when further, objectively measurable improvement is not expected notwithstanding additional medical treatment. AS 23.30.395(27). It is also presumed to have occurred when there has been no objectively measurable improvement for 45 days. *Id*. Here, Employee directly testified her back has not improved in the last 45 days. Additionally, as Employer points out, Employee's treating physician, Dr. Bartling, has repeatedly opined Employee is medically stable. Employer's physician, Dr. Chong, finds her medically stable, as well. Employee is decidedly medically stable under the Act. *Id*.

With respect to Employee's contention she is unable to return to work, it is noted the Act provides for both job retraining benefits and permanent total disability compensation. AS 23.30.041; AS 23.30.180. However, Employee waived any potential, future entitlement to these benefits in exchange for her C&R settlement proceeds. Employee now contends she had to pay rent and fuel with her settlement proceeds and she now only receives $640.00 per month in retirement. She contends her electric bill for January was over $700.00 and she cannot afford heating oil or food.

Employee's circumstances are truly unfortunate and not unfamiliar to those who routinely work with injured workers. However, the legislature never intended workers' compensation to serve as wage replacement. Instead, the Act emphasizes providing injured employees with prompt medical treatment and returning them to work. *E.g.*, AS 23.30.001(1); AS 23.30.041(k) and AS 23.30.095(a). As the Alaska Supreme Court pointed out in *Suh*, the Act provides for modest but certain compensation for work related injuries. *Id.* at 344. Injured workers gain assured remedies without the burden of having to prove fault. *Id.* Though Employee may now find it regrettable she chose to compromise some of hers, in this case, the system has functioned as the legislature intended.

CONCLUSIONS OF LAW

A SIME will not be ordered.

ORDER

1) Employee's claim for PPI and a SIME is denied.

2) Employee's December 4, 2013, claims for medical costs and TTD are referred back to a prehearing officer for a determination of whether or not a dispute still exists between the parties on those issues.

Dated in Fairbanks, Alaska on April 9, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

/s/_____
Zeb Woodman, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005, proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

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 Final Decision and Order in the matter of MARY ADEPOGU, employee / claimant v. STATE OF ALASKA, DEPT. OF HEALTH & SOCIAL SERVICES, self-insured employer / defendant; Case No. 201019561; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, on April 9, 2014.

/s/_____
Darren Lawson, Office Assistant II