ALASKA WORKERS' COMPENSATION BOARD

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

DICK PHILLIPS, Employee, Petitioner, v. BILIKIN INVESTMENT GROUP, INC., Employer, and REPUBLIC INDEMNITY CO. OF AMERICA, Insurer, Respondents.	INTERLOCUTORY DECISION AND ORDER ON RECONSIDERATION & MODIFICATION AWCB Case No. 200813169 AWCB Decision No. 14-0060 Filed with AWCB Anchorage, Alaska, on April 24, 2014

Dick Phillips' (Employee) March 6, 2014 petition seeking reconsideration and modification of *Phillips v. Bilikin Investment Group, Inc.*, AWCB Decision No. 14-0020 (February 19, 2014) (*Phillips I*), was initially heard on the written record on March 10, 2014, in Anchorage, Alaska, a date selected on March 10, 2014. Attorney Richard Harren represented Employee. Attorney Richard Wagg represented Bilikin Investment Group, Inc., and its workers' compensation insurer (Employer). As this was a hearing on the written record, there were no witnesses. On March 11, 2014, *Phillips v. Bilikin Investment Group, Inc.*, AWCB Decision No. 14-0032 (March 11, 2014) (*Phillips II*), granted Employee's petition solely to toll the time for seeking appellate review of *Phillips I* and to allow for further briefing and written argument. Employee's March 6, 2014 petition was heard on its merits on April 22, 2014, a date selected on March 26, 2014. The record closed on April 22, 2014.

ISSUES

Employee contends *Phillips I* violated his constitutional right to due process and equal protection, and misconstrued statutes and regulations, when *Phillips I* decided it could not consider reports, opinions or testimony of Thomas Gritzka, M.D., at hearing. He contends since Dr. Gritzka cited and referred to the report of second independent examiner (SIME) Edward Tapper, M.D., in Dr. Gritzka's post-hearing deposition, it would be patently unfair to consider Dr. Tapper's SIME report but not consider Dr. Gritzka's report and deposition. Employee contends Employer stipulated to Dr. Gritzka as Employee's attending physician and he relied upon this stipulation to his detriment. He contends Employer first objected to Dr. Gritzka in its hearing brief, which unfairly prejudiced him by leaving Employee without a witness at hearing. In short, Employee contends waiver prevents Employer from objecting to Dr. Gritzka. He seeks an order reconsidering *Phillips I*'s ruling in respect to Dr. Gritzka.

Employer contends there is no time limitation to assert its legal right to object to an unlawful change of physician under AS 23.30.095(a) and 8 AAC 45.082(c), and thus no waiver. It contends Employee waited until the last possible day to file a hearing request and only then filed Dr. Gritzka's report. As it only had 60 days to request an SIME, Employer contends it had to act fast to request an SIME, or waive its right. Since there is no summary procedure to decide the parties' respective rights to request an SIME absent a hearing, and one was unlikely to be held within the 60 day time limit for requesting the SIME, Employer contends it had to act quickly, and did. Furthermore, it contends the record was unclear as to Dr. Gritzka's status when Employer requested the SIME. Employer contends *Phillips I* correctly disallowed Dr. Gritzka's participation and the decision should not be reconsidered.

1) **Should *Phillips I*'s decision to exclude Dr. Gritzka be reconsidered?**

Employee contends *Phillips I* made numerous factual mistakes and failed to recognize Dr. Gritzka was his substitution physician. He contends he had to hire Dr. Gritzka as an expert medical witness and as a treating physician because his prior physician and surgeon, Erik Kohler, M.D., left Alaska and Dr. Kohler's departure left him stranded without a qualified doctor to assist him. Employee contends Dr. Gritzka's credentials eminently qualify him to be an expert

and treating physician in this case and Employee needed Dr. Gritzka as a "substitution" physician. He also seeks an order modifying *Phillips I* to correct these errors.

Employer contends Dr. Gritzka's credentials have nothing to do with *Phillips I*'s decision to exclude him. It contends Employee violated the law and made a tactical, but incorrect, decision to hire a medical expert and is now simply unhappy with the results. Employer contends none of the facts have changed and Employee cites to no fact justifying a different result. It contends the time it took Employee's legal staff to compile medical records for the SIME, or prepare for and attend a deposition is irrelevant to the unlawful-change-of-physician issue. Lastly, Employer contends Employee is not unduly prejudiced as he could still call his pre-injury physician, who also treated him extensively post-injury, as that doctor probably has a better basis upon which to provide relevant medical opinions in this case. It contends Employee's modification petition should also be denied.

2) Should *Phillips I*'s decision to exclude Dr. Gritzka be modified?

FINDINGS OF FACT

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

1) Barbara Doty, M.D., has been Employee's "family physician" off and on since at least 1994 (Doty chart note, February 1994; October 21, 2003).

2) Employee complained of back pain since at least 2003 (AIC Urgent Care Report, November 5, 2003).

3) On September 12, 2005, Employee saw Grant Roderer, M.D., for the first time on referral from Adam Greathouse, D.O., whom he had been seeing for a 2004 back injury (Consultation, September 12, 2005).

4) Dr. Roderer regularly treated Employee for the 2004 injury from fall 2005 through mid-2008 (Roderer medical records, 2005 through July 21, 2008).

5) On August 15, 2008, Employee went to the emergency room for the injury subject of this decision and order and reported he hurt his back while lifting a 250 pound barrel while at work for Employer (Emergency Room Report, August 15, 2008).

6) On August 18, 2008, Employee saw providers at Mat-Su Health Services, Inc., who referred him to Dr. Roderer (Physician's Report, August 18, 2008).

7) Mat-Su Health Services, as a clinical entity, was Employee's first choice of attending physician for this injury (experience, judgment and inferences drawn for the above).

8) On August 18, 2008, Employee also saw Dr. Roderer for this injury and Dr. Roderer referred him to physical therapy, and for a magnetic resonance imaging (MRI) scan and electro-diagnostic testing (Roderer Progress Note, August 18, 2008; October 13, 2008).

9) Dr. Roderer is a pain-control specialist and became a referral, attending physician (experience, judgment and inferences drawn for the above).

10) On October 23, 2008, Employee on his own referral saw Vaughn Gardner, M.D., who performed another evaluation for this injury. Dr. Roderer did not refer Employee to this physician (Gardner, October 23, 2008).

11) Dr. Gardner was Employee's first change in his choice of attending physician. However, Dr. Gardner immediately declined to take over Employee's care, refused to provide further services, and considered Employee's workers' compensation case "governance" to remain with Dr. Roderer (experience, judgment and inferences from the above; *id*.).

12) There is no evidence Employee saw another physician for this injury between October 23, 2008 and October 27, 2008 (SIME records, October 23, 2008 through October 27, 2008).

13) On October 27, 2008, Dr. Roderer saw Employee for this injury, evaluated him and referred him to Erik Kohler, M.D. (Progress Note, October 27, 2008).

14) When Employee saw Dr. Roderer on October 27, 2008, Dr. Roderer was the first physician Employee saw for this injury after Dr. Gardner refused to provide services. Dr. Roderer became Employee's substitution physician (experience, judgment and inferences from the above).

15) On November 20, 2008, Employee saw Douglas Bald, M.D., and Lynne Adams Bell, M.D., for an employer's medical evaluation (EME) (EME report, November 20, 2008).

16) On December 1, 2008, Dr. Kohler performed lumbar surgery on Employee (Operative Report, December 1, 2008).

17) Dr. Kohler was a specialist surgeon referral who became an attending physician for Employee (experience, judgment and inferences from the above).

18) On December 9, 2008, Employee returned to Dr. Doty for a physical examination and complained of swelling in his legs. Dr. Doty noted Employee's recent back surgery and diagnosed possible "silent mi" (myocardial infarction) and possible "CHF" (congestive heart failure). Dr. Doty prescribed a diuretic and ordered lab work. Though this record mentions

Employee's back surgery, this visit was not specifically related to Employee's work injury claim and Dr. Doty was not a referral physician, change in Employee's choice of attending physician or a substitution physician. She was simply acting as Employee's family doctor who recorded a medical history which included his back surgery (Doty chart note, December 9, 2008; experience, judgment and inferences from the above).

19) At regular intervals from December 22, 2008 through June 22, 2009, Dr. Roderer followed Employee's work injury and subsequent back surgery (Roderer chart note December 22, 2008 through June 22, 2009).

20) On August 14, 2009, Dr. Roderer dropped Employee as a patient because Employee violated his pain contract with Advanced Medical Centers of Alaska, by "overtaking" his pain medications without physician permission. Dr. Roderer advised Employee to contact his primary care physician "for a referral" to a new physician (Roderer letter, August 14, 2009).

21) On August 14, 2009, attending physician Dr. Roderer refused to provide services to Employee for this injury (experience, judgment and inferences from all the above).

22) On August 17, 2009, Employee saw Providence Matanuska Health Care (PMHC) for this injury. Lea Abernathy, ANP, performed a pre-op physical examination and ordered testing so Dr. Kohler could implant a spinal cord stimulator to address Employee's back symptoms (PMHC chart note, August 17, 2009).

23) When Employee saw PMHC on August 17, 2009, PMHC was the first provider Employee saw for this injury after Dr. Roderer refused to provide services. PMHC became Employee's second substitution physician (experience, judgment and inferences from the above).

24) On August 28, 2009, Dr. Kohler implanted a spinal cord stimulator into Employee's thoracic region (Operative Report, August 28, 2009).

25) On or about September 9, 2009, Dr. Kohler learned Employee was no longer seeing Dr. Roderer. Though he had been managing Employee's post-surgical medications, Dr. Kohler recommended Dr. Doty, a general practice specialist, take over medication management "until an alternative can be worked out." This recommendation was a referral from Dr. Kohler to Dr. Doty for pain medication management (Kohler letter, faxed September 10, 2009; experience, judgment and inferences from the above).

26) On September 15, 2009, Employee saw Dr. Doty to "reestablish" care and to obtain prescription pain killers to address his back and leg pain. Dr. Doty became a general practice

specialist referral physician (Doty chart note, September 15, 2009; experience, judgment and inferences from the above).

27) On December 21, 2009, Employee returned to PMHC and saw ANP Abernathy for another pre-op physical so Dr. Kohler could make revisions to the implanted spinal cord stimulator used to address Employee's back and leg pain (PMHC chart note, December 21, 2009).

28) On December 30, 2009, Dr. Kohler performed surgery on Employee to change his stimulator leads and battery but also performed "a laminectomy" with "extensive adhesiolysis, microdissection, and lumbar scar plastic revision" (Operative Report, December 30, 2009).

29) On January 1, 2010, Employee complained he could not feel from his waist down and could not evacuate his bladder (Physical Therapy Report, January 1, 2010).

30) On January 1, 2010, Dr. Kohler performed emergency surgery to remove a hematoma around Employee's surgical site to address his "acute paraplegia," which developed two days following the surgery to change the stimulator leads and battery (Operative Report, January 1, 2010).

31) There is not a good facsimile of Dr. Kohler's signature in Employee's medical records, and signatures on Employee's medical reports are not easily identified. It appears Dr. Kohler may have continued to follow Employee while he was hospitalized in Mat-Su Regional Medical Center for his January 1, 2010 surgery until he was transferred to Providence Alaska Medical Center in Anchorage. However, the medical records do not show Dr. Kohler's direct involvement in this case after January 1, 2010 (SIME records).

32) On March 13, 2010, however, Andrew Jaconette, M.D., saw Employee on Dr. Kohler's referral for pain management (Jaconette report, March 18, 2010).

33) Dr. Kohler's referral to pain specialist Dr. Jaconette was made to eventually replace Dr. Doty as the pain management physician, as Dr. Kohler had previously recommended, and Dr. Jaconette became a specialist referral attending physician. This is the last indirect reference in the medical records to Dr. Kohler's involvement in Employee's care (experience, judgment and inferences from the above; SIME records).

34) Employee continued to see Dr. Jaconette off and on for several months (Plan of Care, June 10, 2010).

35) On July 6, 2010, Dr. Doty directed Employee to cease using Dr. Jaconette for pain management so only one physician was prescribing medication (Doty chart note, July 6, 2010; inferences drawn from all the above).

36) Employee's medical records are poorly identified by the providers, and do not clearly state which physicians or other providers are affiliated with which clinics. It appears Dr. Doty may have been associated with PMHC, at least by mid-2010 (PMHC chart note, July 10, 2010).

37) On September 26, 2012, at Employee's lawyer's direction, Dr. Gritzka saw Employee for a medical evaluation, and Dr. Gritzka issued a report. The report's substance is not relevant to the narrow issues reached in this decision. No substitution or attending physician referred Employee to Dr. Gritzka (Employee's hearing stipulation; experience, judgment; SIME records).

38) On December 10, 2012, Employer petitioned for a second independent medical evaluation (SIME) based on a medical dispute between Dr. Gritzka and Employers' EME physicians. Employer's lawyer signed the SIME form and stipulated: "Based on the above information, an SIME dispute exists under AS 23.30.095(k)." The "information" to which the stipulation referred included "Thomas Gritzka, M.D." as Employee's "Attending Physician" (SIME form, December 10, 2012).

39) On May 9, 2013, Employee's counsel signed the SIME form, creating a stipulation between the parties agreeing to the SIME (*id*., May 9, 2013).

40) On August 16, 2013, Dr. Tapper saw Employee for an SIME (SIME report, August 16, 2013).

41) The parties at hearing agreed Dr. Tapper did not agree with Dr. Gritzka's causation opinions (experience, judgment; parties' hearing stipulation).

42) On or about February 10, 2014, Employer for the first time advised Employee it objected to Dr. Gritzka's report as arising from an unlawful change in Employee's choice of physician under AS 23.30.095(a) and 8 AAC 45.082(c), and said it planned to seek an order stating the board would not consider it for any purpose (Prehearing Conference Summary, February 13, 2014).

43) Employer said it was unaware Dr. Gritzka was an unlawful change of physician until late in litigation (Employer's hearing statements, February 18, 2014).

44) Until February 18, 2014, Employee incorrectly believed he could rely upon Dr. Gritzka's reports and testimony at hearing and the board would consider them (Employee's hearing statements; inferences drawn from all the above).

45) At the *Phillips I* hearing on February 18, 2014, Employer reiterated its objection to Dr. Gritzka's report and testimony being considered in this case. It contended Dr. Gritzka was not a valid change, referral or substitution physician so his reports and opinions were inadmissible for any purpose (Employer's hearing arguments).

46) At the *Phillips I* hearing, Employee contended he was entitled to hire a medical expert notwithstanding the limitations set forth in AS 23.30.095(a) and 8 AAC 45.082(c). He further contended his surgeon Dr. Kohler had lost some privileges to practice medicine in Alaska and apparently had left the state and could not be located, notwithstanding Employee's diligent efforts to find him to obtain causation opinions. Employee implied the inability to locate Dr. Kohler played some role in hiring Dr. Gritzka. However, Employee said his attending physician for this injury and the person who currently prescribes his medication is Barbara Doty, M.D. (Employee's counsel's hearing statements).

47) Employer's *Phillips I* hearing arguments and Employee's hearing admissions, on their face supported Employer's request for a finding that Dr. Gritzka was an unlawful change of physician. Employee did not provide evidence at hearing demonstrating Dr. Gritzka was a change, referral or substitution physician and conceded he was a hired medical expert (Employee's and Employer's counsels' hearing statements).

48) Employee did not specify a date when Dr. Kohler allegedly refused to provide services to him, by his absence (experience, judgment, observations).

49) At the *Phillips I* hearing, the panel issued an oral order sustaining Employer's objection to Dr. Gritzka and stating it would not consider Dr. Gritzka's report for any purpose. However, the panel also ordered the record left open for 45 days so Employee could depose any physicians he had seen as of the hearing date, to use in lieu of Dr. Gritzka's inadmissible reports and testimony. This remedy addressed Employee's due process rights given Employer's very recent notice it was objecting to Dr. Gritzka and Employee's reliance on Employer's previous silence on the issue (record).

50) Employee and his wife left the *Phillips I* hearing early to take him to his doctor to have Employee's reportedly painful, swollen leg evaluated. Thereafter, Employee's lawyer expressed

confusion and difficulty focusing on his arguments (Employee's hearing statements; observations).

51) For several reasons, the parties stipulated to a hearing continuance so long as the evidence and witness lists were frozen in status quo. The parties stipulated Employee could add two lay witnesses to his witness list and could depose Dr. Roderer at his option, even though Dr. Roderer was not listed on Employee's witness list (observations; parties' hearing stipulations).

52) On February 19, 2014, *Phillips I* was issued reiterating the oral orders (*Phillips I* at 12).

53) On March 6, 2014, Employee filed a timely petition for reconsideration, which also raised questions about *Phillips I*'s factual findings (Employee's Petition for Reconsideration, March 6, 2014; experience, judgment, observations).

54) Employee's post-hearing petition raised legal and factual issues. It gave enough detail to provide the facts upon which *Phillips I* was based, the facts in *Phillips I* alleged to be erroneous and the petition suggested the effect the alleged mistakes would have on the order disallowing Dr. Gritzka's opinions (*id*.).

55) On March 11, 2014, *Phillips II* granted Employee's petition for reconsideration and modification to toll the time for any party to seek appellate review of *Phillips I* and to allow for further briefing (*Phillips II* at 10).

56) In his post-hearing briefing, Employee contends Employer, by signing the SIME form, waived its right to later object to Dr. Gritzka's report. He also argued Dr. Gritzka's post-hearing deposition should be considered as he is well qualified to answer the complex medical questions in this case, and Employee went to great pains to obtain and organize the SIME medical records upon which Dr. Tapper relied. He further contends he is prejudiced by his reliance on Employer's stipulation and lack of objection to Dr. Gritzka until the eve of hearing (Employee's Hearing Brief, April 17, 2014).

57) Employer contends in its post-hearing brief that there is no time limit to object to an unlawful change of physician and thus there was no waiver. It contends the legal limitation on a party's right to change doctors may not be waived or overlooked (Reconsideration Reply Brief of Bilikin Investment Group, April 22, 2014).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

> 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

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(a). 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. . . .

AS 23.30.130. Modification of awards. (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974) stating: "The plain import of this amendment [adding 'mistake in a determination of fact' as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted"(*quoting O'Keeffe v.*

Aerojet-General Shipyards, Inc., 404 U.S. 254, 256 (1971)). An examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back-door route to retrying a case because one party thinks he can make a better showing on the second attempt" (*id*. at 169; *citing* 3 Larson, *The Law of Workmen's Compensation* §81.52, at 354.8 (1971)).

In the case of a factual mistake, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). AS 23.30.130 confers continuing jurisdiction over workers' compensation matters (*id*.). A petition for reconsideration, by contrast, has a fifteen day time limit for the request and the board's power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied" (*id*. at n. 36).

Nothing in AS 23.30.130 limits the "mistakes in determination of fact" basis for review to issues relating solely to disability. "We hold . . . there is no limitation as to the type of fact coming within the ambit of the statutory 'mistake in its determination of a fact' review criterion." *Fischback & Moore, Inc.*, 453 P.2d 478, 484 (Alaska 1969).

> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.
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> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. . . .

AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 n. 36 (Alaska 2005).

8 AAC 45.082. Medical treatment. . . .

(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;

. . .

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

. . .

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians. . . .

(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. . . .

In *Grove v. Alaska Construction and Erectors*, 948 P.2d 458 (Alaska 1997), the Alaska Supreme Court addressed the treatment plan required under AS 23.30.095(c). Grove was injured on the job and saw his chiropractor. The chiropractor exceeded the frequency standards set forth in the law and failed to file the proper treatment plan. The employer nonetheless paid the bills until it sent the employee to an EME. The EME opined the employee's injuries were not caused by the work injury with the employer and the employer controverted the claim. The board awarded the employee benefits but the employer objected to the chiropractor's bills that exceed the frequency of treatment standards. The board limited the employee's recovery for his medical care to the frequency of treatment limits and the employee appealed, challenging the employer's ability to invoke the frequency limitations.

The Alaska Supreme Court found AS 23.30.095(c) requires a treatment plan in certain situations. *Grove* also noted the board adopted exceptions to the standard treatment frequencies. It was undisputed Grove did not provide the treatment plan in accordance with the statute or the regulations. The board had held it had no authority to excuse this as Grove failed to comply with the statute. On appeal, Grove argued the employer could not invoke the statute as it had controverted his claim on other grounds and because it had "impliedly authorized" the treatments by "failing to object" to them (*id*. at 457). In essence, Grove argued the employer had waived its objection. Rejecting this argument, *Grove* held the statutory limits on treatments may not be ignored, the burden is on the employee to comply with the statute, the burden is not on the employer to object and the fact the employer controverted on other grounds is irrelevant (*id*.).

> **8 AAC 45.150. Rehearings and modification of board orders** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
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> (b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.
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> (c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects

> which a finding of the alleged change of conditions would have upon the existing board order or award.
>
> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
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> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

ANALYSIS

1) Should *Phillips I*'s decision to exclude Dr. Gritzka be reconsidered?

Employee's reconsideration petition contends *Phillips I* made a legal error when it disallowed Dr. Gritzka's opinions because it held Employee made an unlawful change in physician. Employee contends *Phillips I* violated his due process and equal protection rights. He further contends it is unfair and unjust to allow Employer to rely upon its evaluators but not allow Employee to rely upon his orthopedic expert given his surgeon's untimely unavailability. Employee suggests *Phillips I's* interpretation and application of the relevant statute and regulations constituted legal error under this case's facts. AS 44.62.540.

Employee's medical records are difficult to read as they are poorly identified by the providers. But, this much is clear: Emergency room treatment does not count as Employee's choice of an attending physician. AS 23.30.095; 8 AAC 45.082(b)(2)(A). Employee's first treatment after

his initial emergency room visit for this injury, and his first choice of an attending physician was Mat-Su Health Services, which is a clinic. All physicians at this clinic count as his first choice of an attending physician for this injury. 8 AAC 45.082(b)(2). This clinic referred Employee to Dr. Roderer, who became an attending physician when Employee received care from him. 8 AAC 45.082(b)(2). Employee then made his one allowable change in his choice of attending physician when he saw Dr. Gardner without a referral. AS 23.30.095(a). Dr. Gardner became his attending physician when he evaluated Employee and gave him advice. 8 AAC 45.082(b)(2). However, Dr. Gardner immediately refused to provide Employee any additional services when he declined to assume his care. 8 AAC 45.082(b)(4)(B). Meanwhile, Dr. Roderer was still a valid, referral physician with a pain management specialty. Nothing Employee or his other attending physicians did to this point affected Dr. Roderer's status. As it turned out, the next physician Employee saw after Dr. Gardner refused to provide services was Dr. Roderer. Dr. Roderer, therefore, also became Employee's "substitution" physician. 8 AAC 45.082(b)(4)(B).

As Employee's attending, substitution physician, Dr. Roderer referred Employee to a specialist surgeon, Dr. Kohler. This was a proper referral. AS 23.30.095(a). Dr. Kohler became an attending physician when he provided advice and treatment to Employee. 8 AAC 45.082(b)(2). In August 2009, Dr. Roderer refused to see Employee any further, thus refusing to provide him services. 8 AAC 45.082(b)(4)(B). This entitled Employee to a second substitution physician. The next provider Employee saw after Dr. Roderer refused to provide further services was PMHC, which became Employee's second substitution physician when its staff saw him and provided advice. 8 AAC 45.082(b)(2). Meanwhile, Dr. Kohler, still a valid, referral physician, referred Employee to Dr. Doty for medicine management. Though she is a general practice "family" physician, such is also a medical "specialist." Dr. Kohler thought it was more appropriate for a physician other than Employee's surgeon to follow his prescription medications, so he referred Employee to Dr. Doty until a pain management specialist could be found. This too was a valid referral from an attending physician. AS 23.30.095(a). When she treated Employee and gave him advice and prescriptions, Dr. Doty became an attending physician. 8 AAC 45.082(b)(2). Dr. Kohler eventually referred Employee to Dr. Jaconette, a pain management specialist. When he prescribed medication, Dr. Jaconette provided medical services and became a valid, referral attending physician. 8 AAC 45.082(b)(2). Eventually, Dr.

Doty directed Employee to stop seeing Dr. Jaconette, as his services were redundant. It appears Dr. Doty is affiliated with PMHC and she and this clinic remain his second substitution physician, and his attending physician responsible for directing his care in respect to this case.

With this background in mind, it is clear Employee used his one change of attending physician when he saw Dr. Gardner. AS 23.30.095(a). There is no evidence Employee sought or received Employer's permission to see Dr. Gritzka. There is no evidence any attending or substitution physician referred Employee to Dr. Gritzka. Employee conceded he hired Dr. Gritzka as a medical expert. Consequently, as a matter of law, Dr. Gritzka is an unlawful change of physician, Employee violated AS 23.30.095(a) and neither Dr. Gritzka's report nor his post-hearing deposition can be considered in this case. 8 AAC 45.082(c).

Employee's waiver and stipulation arguments are not well taken. Employee is presumed to know the law, which clearly limits his ability to doctor shop. AS 23.30.095(a). His waiver arguments are similar to those made by the employee in *Grove*. The statute and regulation in each instance are the same, though the sub-sections at issue were different. *Grove* addressed frequency of treatment limitations and a treatment plan, which were ignored. Here, Employee ignored the statutory limit on his right to change his choice of attending physician. The fact Employer stipulated to the SIME does not mean it waived its right to object to Employee's statutory violation. Employer is correct that there is no time limit within which a party must object to a §095 violation. *Grove* rejected a very similar argument. The regulation specifically says the fact-finders will not consider the unlawful physician's reports and deposition. It does not say the parties may not consider the reports for litigation reasons. 8 AAC 45.082(c).

Furthermore, Employee's position, if adopted, would chill employers' willingness to stipulate to SIMEs even though there may not technically be a medical dispute between the employee's legally valid "attending physician" and the employer's EME. Employee's position would encourage litigation and require procedural hearings to determine the employee's doctor's legal status under AS 23.30.095(a) before the parties could amicably agree to an SIME. As stipulations to litigation-resolving SIMEs are encouraged, Employee's position lacks merit as it does not promote quick, predictable and efficient resolution of these cases at a reasonable cost to

employers and does not promote summary and simple process and procedure. AS 23.30.001(1); AS 23.30.005(h). For all these reasons, Employee's petition for reconsideration will be denied.

2) Should *Phillips I*'s decision to exclude Dr. Gritzka be modified?

Employee's March 6, 2014 petition implied *Phillips I* made factual errors or evinced a lack of understanding or clarity about the alleged necessity for Employee to hire Dr. Gritzka. AS 23.30.130; 8 AAC 45.150. However, a further file review confirms there is no relevant factual error in *Phillips I.* The physician progression Employee followed is set forth in the factual findings, above. He made his one change in his choice of attending physician when he saw Dr. Gardner without a referral. By law he has a right to only one change. AS 23.30.095(a). There was no referral to Dr. Gritzka, no consent from Employer to change and Dr. Gritzka is not a substitution physician. Nothing in Employee's post-hearing briefing demonstrates *Phillips I* erred in its finding of any relevant fact in respect to Dr. Gritzka. AS 23.30.130; 8 AAC 45.150. Therefore, Employee's petition for modification will also be denied.

This decision is not intended to be, and is not, a reflection on Dr. Gritzka. His willingness to see Employee, his report and deposition and his credentials are in no way impugned by this decision. In fact, they are completely irrelevant to this legal issue. They will just not be considered.

CONCLUSIONS OF LAW

1) *Phillips I*'s decision to exclude Dr. Gritzka will not be reconsidered.
2) *Phillips I*'s decision to exclude Dr. Gritzka will not be modified.

ORDER

1) Employee's request for reconsideration of *Phillips I* is denied.
2) Employee's request for modification of *Phillips I* is denied.
3) *Phillips I* remains in effect in all respects.

Dated in Anchorage, Alaska, on April 24, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Stacy Allen, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of DICK PHILLIPS, employee / claimant; v. BILIKIN INVESTMENT GROUP, INC., employer; REPUBLIC INDEMNITY CO. OF AMERICA, insurer / defendants; Case No. 200813169; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 24, 2014.

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Anna Subeldia, Office Assistant