ALASKA WORKERS' COMPENSATION BOARD

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

CRAIG L. RANG, Employee, Claimant, v. MARATHON OIL CO., Employer, and OLD REPUBLIC INSURANCE CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201105830 AWCB Decision No. 14-0153 Filed with AWCB Anchorage, Alaska on November 26, 2014

Craig L. Rang's (Employee) August 14, 2014 petitions to exclude documents from the Second Independent Medical Evaluation (SIME) binders and to extend AS 23.30.110(c) deadlines until the SIME process is complete were heard on October 29, 2014, in Anchorage, Alaska, a date selected on September 3, 2014. Attorney Christopher Beltzer appeared and represented Employee. Attorney Krista Schwarting appeared and represented Marathon Oil Co. and Old Republic Insurance Co. (Employer). There were no witnesses. As a preliminary matter, Employee sought to submit into hearing evidence supplemental SIME records consisting of Employee's Medicare set-aside allocation recommendation and the transcript from Employee's June 11, 2012 deposition. Employer objected to the inclusion of the Medicare documentation as hearing evidence, since it had not been filed under a Notice of Intent to Rely, and Employer had not seen it before. The objection was sustained. The record closed at the hearing's conclusion on October 29, 2014.

ISSUES

Employee contended three types of documents -- "check the box" letters, interoffice notes, and log notes -- should be removed from the SIME binders because they are hearsay, are not medical reports generated in the ordinary course of business, have little to no probative value, and are prejudicial to Employee and the SIME process.

Employer contended all records it received from medical providers' offices in response to medical records requests should be included in the SIME binders. Employer further contended the admissibility of evidence is an unripe issue to be deferred until a hearing on the merits.

1) Should Employee's petition to exclude documents from the SIME binders be granted?

Employee contended the AS 23.30.110(c) deadline to request a hearing on his September 20, 2012 claim should be extended until the SIME process is finished and any subsequent discovery completed.

Employer contended *Rang I*'s determination the AS 23.30.110(c) two-year period was tolled on August 27, 2013 applies to both the November 3, 2011 and September 20, 2012 claims. Employer further contended the tolling should cease when the SIME report is received.

2) Should Employee's AS 23.30.110(c) deadline to request a hearing on his September 20, 2014 claim be extended and, if so, for how long?

FINDINGS OF FACT

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

1) On January 24, 2011, Employee slipped on steps while at work for Employer, fell and hurt himself. A factual and procedural case history is recorded in *Rang v. Marathon Oil Co.*, AWCB Decision No. 14-0090 (June 27, 2014) (*Rang I*), which denied Employer's petition to dismiss Employee's November 3, 2011 claim under AS 23.30.110(c) because the parties stipulated to an SIME on August 27, 2013, thereby tolling the statute's two-year period. *Rang I* ordered Employee to provide discovery within 14 days, and Employer to file and serve the completed

SIME form within seven days of the decision. *Rang I* also ordered an SIME to proceed promptly in accordance with the parties' stipulation. This factual recitation incorporates the relevant findings of *Rang I* and addresses only the issues currently disputed.

2) *Rang I* calculated the AS 23.30.110(c) deadline for Employee's November 3, 2011 claim as follows:

> Employer controverted the claim on December 29, 2011, when it filed its December 27, 2011 controversion notice. It served the notice on Employee by mail. When computing time periods prescribed by the Act or regulations, the day of the action after which the designated period of time begins to run is not included. Therefore, the two-year "statute of limitations" under AS 23.30.l10(c) began to run on December 30, 2011. 8 AAC 45.063(a). When service is done by mail, as was the case with Employer's controversion notice and a right may be exercised or an act is to be done, like requesting a post-controversion hearing, three days must be added to the prescribed period. Two years from December 30, 2011, is December 30, 2013. Three days from December 30, 2013, is January 2, 2014. Thus, Employee had until January 2, 2014, to file a hearing request or to request more time in which to file his hearing request. AS 23.30.110(c); 8 AAC 45.060(b); *Kim*.

(*Rang I* at 32.)

3) *Rang I* factual finding 8 was: "On September 20, 2012, Employee filed another claim seeking TTD for specific periods, PPI and a finding Employer made an unfair or frivolous controversion. The claim does not state it amended a prior claim (Workers' Compensation Claim, September 13, 2012)." (*Id.* at 5.)

4) On October 15, 2012, Employer filed a controversion of all benefits. (Controversion Notice, October 12, 2014.)

5) On March 24, 2014, Employee filed an Affidavit of Readiness for Hearing (ARH), which generated *Rang I.* (ARH, March 22, 2014.)

6) On March 26, 2014, Employer filed six pages of documents, described as "Response to Letter with attachments" under a medical summary form 07-6103 indicating the documents were faxed to Employer by the office of orthopedic specialist Steven Humphreys, M.D., on February 14, 2014. (Rang medical summary and reports, March 25, 2014.)

7) On March 28, 2014, Employee filed a Request to Cross-Examine Dr. Humphreys with regard to the documents filed March 26, 2014. (Request for Cross-Examination, March 27, 2014.)

8) On May 8, 2014, Employer filed 112 pages of documents under a medical summary form 07-6103 indicating the source and date of each document. (Rang medical summary and reports, May 7, 2014.)

9) On May 15, 2014, Employee filed a Request to Cross-Examine Douglas Bald, M.D., with regard to his June 7, 2011 employer's medical evaluation (EME) report filed under the May 8, 2014 medical summary. (Request for Cross-Examination, May 15, 2014.)

10) On May 15, 2014, Employee petitioned to "remove irrelevant and non-medical records filed by employer on medical summaries from Board file." Employee did not specify which records he wanted removed. (Petition, May 15, 2014; observation.)

11) At a prehearing on July 24, 2014, SIME deadlines were set: (1) Employer was to serve binders on Employee by August 4, 2014; (2) Employee was to serve binders on Employer and file with the board by August 14, 2014; (3) If either party received additional medical records or doctor's depositions after the binders were filed with the board, supplemental binders were to be filed within seven days after receipt of the additional documents. (Prehearing conference summary, July 24, 2014.)

12) On July 25, 2014, Employer filed supplemental SIME records numbered 0113-0134. Employee acknowledged the supplemental binders contained no records not previously filed. (Employer's supplemental SIME records, July 25, 2014; Employee hearing brief, October 21, 2014.)

13) On August 14, 2014, Employee petitioned for:

> Board review of medical records to be submitted to SIME. [Employer] filed an affidavit on 07/25/2014 stating that it was filing supplemental medical records. Some of the records submitted are not medical records. [Employee] has previously filed a petition to remove such records from the medical file. [Employee] requests a suspension of the SIME process until the Board decides [Employee's] petitions. (Petition, August 14, 2014.)

14) On August 14, 2014, Employee also petitioned for:

> an extension of .110(c) deadlines until the SIME process is complete. [Employee] filed a [workers' compensation claim] on 09/20/2012. [Employer] appears to have filed a post [sic] controversion on 10/12/2012. [Employee] requests a hearing on this claim and on all claims for benefits. However he will not be ready for hearing on this claim or any of his claims for benefits until after the SIME process. (Petition, August 14, 2014.)

15) On September 3, 2014, Employer answered Employee's August 14, 2014 petition for the removal of allegedly irrelevant information from the SIME records. Employer contended it had three times, beginning May 21, 2014, requested Employee provide a specific list of the records he wanted removed from the file, but Employee "declined to do so beyond saying that they were records concerning discussions between the employee and a physician's receptionist." Employer asserted these records were contained in the physician's file and therefore were appropriately included in the SIME binders. Employer also asked that Employee be ordered to provide a specific list of records to be reviewed. (Answer, September 3, 2014.)

16) On September 3, 2014, Employer answered Employee's August 14, 2014 petition for an extension of the AS 23.30.110(c) deadline, contending the extension was inappropriate because Employee was simultaneously requesting delays in the SIME process in his other petition, and also under the theory of laches. (Answer, September 3, 2014.)

17) The summary from a September 3, 2014 prehearing conference stated Employee requested a hearing on two petitions, date unspecified, to exclude documents from the SIME binder, and to extend AS 23.30.110(c) deadlines until the SIME process is complete. A hearing was scheduled for October 29, 2014. (Prehearing conference summary, September 3, 2014.)

18) On September 4, 2014, Employee filed an Affidavit of Readiness for Hearing (ARH) on his petition dated May 15, 2014 and his two petitions dated August 14, 2014. (ARH, September 3, 2014.)

19) On October 21, 2014, Employee filed a hearing brief identifying the specific records he wished removed from the SIME binders: (1) "check the box" letters (SIME 0126-0129, 0133-0134) and log notes (SIME 0113, 0117-0125). The brief certified it was hand delivered to Employer on October 20, 2014. (Employee hearing brief, October 20, 2014.)

20) At hearing on October 29, 2014, when asked why he didn't identify the specific records he wanted excluded from the SIME binders until October 20, 2014 (two days before Employer's brief was due), Employee gave three reasons: (1) he didn't identify them in his petition because he hadn't looked through all the medical records at the time; (2) it was his position that the person who files the record must first do the analysis to determine whether it is a "medical record that belongs on a medical record, or something else" and Employer did not make that effort; and (3) the parties "clearly disagree" about whether the disputed documents are medical records that

should go to the SIME physician, and that issue was not going to be resolved before hearing. (Beltzer.)

21) At hearing Employer credibly asserted all documents Employee was contesting were obtained from providers responding to a medical records request, and were filed under medical summaries in accordance with 8 AAC 45.052: i.e., listing each medical report in its possession that "is or may be relevant" to the claim or petition at issue. Moreover, Employer credibly asserted it fulfilled its duty under 8 AAC 45.092(h) to provide Employee and the board all the medical reports in its possession relating to Employee. (Schwarting.)

22) On October 29, 2014, Employee filed supplemental SIME records numbered 0135-0199, consisting of Employee's Medicare set-aside allocation recommendation, prepared November 10, 2013, and the transcript from Employee's June 11, 2012 deposition. Employee presented the same documents at hearing. The Medicare documentation had not previously been filed, and Employer's objection to considering it at hearing was orally sustained. Employer had no objection to the inclusion of the deposition as hearing evidence, because it was already on file with the board. (Employee's supplemental SIME records, October 29, 2014.)

23) At hearing on October 29, 2014, the parties agreed the hearing issues were the two August 14, 2014 petitions to exclude specific documents from the SIME binders, and to extend the AS 23.30.110(c) deadline until the SIME process is complete. (Beltzer; Schwarting.)

24) At hearing Employer and Employee agreed they did not want to delay the SIME process any longer than necessary. (*Id.*)

25) Administrative notice is taken that all records received from a physician's office and filed under a medical summary, including "check the box" letters, interoffice notes, and log notes, are routinely included in SIME binders. At hearing Employee stated he knew of no legal authority "per se" for the removal of records from a SIME binder. (Experience; observations; Beltzer.)

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 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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> . . .

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). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
> (h) . . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . .
> (h) upon the filing with the division by a party in interest of the claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of a pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the report shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during dependency of the preceding.
> . . .
> (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. . .

The Alaska Workers' Compensation Appeals Commission (commission) in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008) at 5 noted "the purpose of ordering an SIME . . . is to assist the board. . ." Citing *Olafson v. State, Dep't of Trans. & Pub. Facilities*, AWCAC Decision No. 061 (October 25, 2007) at 23, *Bah* reiterated the SIME physician is the *board's expert*, not the employee's or employer's expert. *Id*., emphasis in original.

> **AS 23.30.110. Procedure on claims.**
> . . .
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied. . . .
> . . .

Statutes with language similar to AS 23.30.110(c) are referred to in Professor Arthur Larson's treatise as "no progress" or "failure to prosecute" rules. "[A] claim may be dismissed for failure to prosecute it or set it down for hearing in a specified or reasonable time." 7 Arthur Larson & Lex K. Larson, *Workers' Compensation Law*, §126.13[4], at 126-81 (2002). The statute's object is to bring a claim to the board for a decision quickly so the goals of speed and efficiency in board proceedings are met. *Providence Health System v. Hessel,* AWCAC Decision No. 131 (March 24, 2010).

AS 23.30.110(c) requires an employee to timely prosecute a claim once the employer controverts. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). In *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-13 (Alaska 1996), the Alaska Supreme Court said AS 23.30.110(c) requires an employee to request a hearing within two years of the controversion or face claim dismissal. However, *Tipton* said the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it" (*id.*).

Technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska, 2008), *accord*, *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007) (remanded to the board to determine whether the circumstances as a whole constituted compliance sufficient to excuse failure to comply with the statute). The Alaska Supreme Court stated because §110(c) is a procedural statute, its application is "directory" rather than "mandatory," and substantial compliance is acceptable absent significant prejudice to the other party. *Kim* at 196. However, substantial compliance does not mean noncompliance, (*id.* at 198), or late compliance. *Hessel* at 6. And, although substantial compliance does not require the filing of a formal affidavit, it

nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing, (*id.*), or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 (March 10, 2011).

"Rare situations" have been found to toll the limitation statute, for example when a claimant is unable to comply with §110(c) because the parties are awaiting receipt of necessary evidence such as an SIME report. *Aune v. Eastwood, Inc.,* AWCB Decision No. 01-0259 (December 19, 2009). Following *Aune*, decisions began to routinely toll §110(c) in every case where an SIME was performed, regardless of whether the SIME was completed or not. *See Almendarez v. Compass Group USA*, AWCB Decision No. 11-0146 (September 21, 2011) (citations omitted). Difficulties arose determining what events "bracketed" the "SIME process" for tolling purposes. *Dennis v. Champion Builder's*, AWCB Decision No. 08-0151 (August 22, 2008); *see also, Alaska Mechanical v. Harkness*, AWCAC Decision No. 12-0013 at 12 (February 12, 2013) (addressing whether the SIME process was "initiated"). Parties were even requested to advise the board of the tolling period when it could not be readily ascertained. *Dennis*. The AWCAC questioned the SIME tolling practice. *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007); *Alaska Airlines v. Nickerson*, AWCAC Decision Nos. 06-0021 (October 19, 2006) and 07-0040 (April 30, 2007).

Board decisions generally hold the SIME process tolls the §110(c) deadline for the period the parties are actively in the SIME process. *Snow v. Tyler Rental, Inc.*, AWCB Decision No. 11-0015 (February 16, 2011); *McKitrick v. Municipality of Anchorage*, AWCB Decision No. 10-0081 (May 4, 2010); *Aune v. Eastwood, Inc.*, AWCB Decision No. 01-0259 (December 19, 2009); *Turpin v. Alaska General Seafoods*, AWCB Decision No. 09-0054 (March 18, 2009); *Rollins v. Icicle Seafoods, Inc.*, AWCB Decision No. 07-0071 (April 3, 2007); (*but see*, *Almendarez v. Compass Group USA*, AWCB Decision No. 11-0146 (September 21, 2011), relying on *Kim* for the proposition the SIME process does not toll the §110(c) deadline). However, identifying the "brackets" defining the SIME timeline is not fully settled. *See, e.g., Rollins* (holding the board's order for an SIME is the definitive tolling act under *Aune); Turpin* (holding the deadline began tolling when Employee filed a claim requesting an SIME); *Snow* (holding the tolling commenced when the parties filed the signed SIME form). In *Harkness*, the

commission refused to toll the §110(c) deadline when substantial evidence did not support the board's finding the parties had stipulated to an SIME. The commission noted even if it had accepted the board's finding of a stipulation, the fact that the parties never filed an SIME form or followed through with the SIME process demonstrated the parties were not actively in the SIME process and tolling was not appropriate. *Harkness*, at 21-23. The board has generally held the tolling ceases and the time in which to request a hearing recommences when the parties receive the SIME report. *McKitrick* at 12 (citations omitted).

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 23.30.155. Payment of compensation.
. . .
(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

8 AAC 45.052. Medical summary.
(a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

(b) The party receiving a medical summary and claim or petition shall file with the board an amended summary on form 07-6103 within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. In addition, the party shall serve the amended medical summary form, together with copies of the reports, upon all parties.

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

. . .

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

. . .

(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

. . .

(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.

(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

. . .

8 AAC 45.060. Service.

. . .

(b) . . . Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

8 AAC 45.063. Computation of time.
(a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

8 AAC 45.092. Selection of an independent medical examiner.
. . .
(h) If the board requires an evaluation under AS 23.30.095 (k), the board will, in its discretion, direct

(1) a party to make two copies of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copies in chronological order by date of treatment with the initial report on top and the most recent report at the end, number the copies consecutively, and put the copies in two separate binders;

(2) the party making the copies to serve the two binders of medical records upon the opposing party together with an affidavit verifying that the binders contain copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binders to review the copies of the medical records to determine if the binders contain copies of all the employee's medical records in that party's possession. . . .

8 AAC 45.120. Evidence.
. . .
(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10

> days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.
>
> (g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.
> . . .

The commission has stressed the importance of the board reaching its decisions based on a complete record of both the employer's and employee's evidence:

> The exclusion of evidence, whether offered by the employee or the employer, does not serve the interest of the board in obtaining the best and most thorough record on which to base its decision. It results in efforts to exclude relevant evidence based on whether the party complied with formalities, instead of examining the relevance of the evidence to the dispute and, if admitted, the merits of the evidence. . . . Proceedings before the board are to be "as summary and simple as possible." AS 23.30.005(h). The board is not bound by "common law or statutory rules of evidence or by technical or formal rules of procedure." AS 23.30.135(a).
>
> The fundamental rule is that "any relevant evidence is admissible." 8 AAC 45.120(e). The result of an exclusionary rule is inherently contrary to the open access to all relevant information regarding the claimant's injury that the workers' compensation statutes are designed to promote. . .

Guys with Tools v. Thurston, AWCAC Decision No. 062 at 21-22 (November 8, 2007).

ANALYSIS

1. Should Employee's petition to exclude documents from the SIME binders be granted?

Many of the parties' actions with regard to the SIME binders were undertaken in full compliance with the Alaska Workers' Compensation Act (Act):

- The parties stipulated to an SIME on August 27, 2013. On March 24, 2014, Employee filed an ARH. Under AS 23.30.095(h), Employer timely (within five days after service of a pleading) filed six pages of documents, described as "Response to Letter with attachments" under a medical summary form 07-6103 indicating the documents were received from orthopedic specialist Steven Humphreys, M.D. In accordance with 8 AAC 45.052(c)(3)(B),

Employee timely (within 10 days after service) filed a Request to Cross-Examine Dr. Humphreys.

- A similar scenario occurred approximately six weeks later. On May 8, 2014, Employer filed 112 pages of documents under a medical summary form indicating the source and date of each document. Again, in accordance with 8 AAC 45.052(c)(3)(B), Employee timely exercised its right to Request to Cross-Examine an author of a medical report, in this case EME physician Douglas Bald.
- Employer credibly asserted all documents Employee was contesting were obtained from providers responding to a medical records request, and were filed under medical summaries in accordance with 8 AAC 45.052: i.e., listing each medical report in Employer's possession that "is or may be relevant" to the claim or petition at issue. Employer further credibly asserted it fulfilled its duty under 8 AAC 45.092(h) to provide Employer and the board all the medical reports relating to the employee in her possession.

However, Employee exceeded the scope and intent of the Act when, on May 15, 2014, it petitioned to remove unspecified "irrelevant and non-medical records filed by employer on medical summaries from Board file." At hearing Employee acknowledged he knew of no legal authority "per se" for the removal of records from SIME binders. The three types of documents Employee ultimately identified as objectionable -- "check the box" letters, interoffice notes, and log notes received from a physician's office – are routinely included in SIME binders. Employee's argument that they should be removed is untimely. Not everything a medical office sends in response to a release or a letter from an attorney may ultimately be found to be admissible evidence. But the admissibility issue is properly argued, and a decision made, at a hearing on the merits. At the SIME stage, it is premature to exclude any evidence from the record, which needs to be as complete as possible to ensure a correct final decision. *Thurston.*

If, as Employee contends, the party filing records under a medical summary had the duty to determine whether each document is a "medical record that belongs on a medical record, or something else," the filing party would in essence become an evidentiary decision-maker before the presumption analysis on the claims' merits even begins. In the process, the filer would both abrogate its responsibility to provide a complete record under 8 AAC 45.092(h), and contravene the

Act's mandate under AS 23.30.005 that process and procedure be as summary and simple as possible. The regulation eliminates the risk the filing party might be inclined to exclude evidence adverse to its position as irrelevant.

AS 23.30.135(a) and AS 23.30.155(h) confer broad authority to make investigations and inquiries, and conduct hearings, in the manner by which the rights of the parties board may best be ascertained and protected. The purpose of the SIME is to assist the board, and the SIME physician is the *board's expert. Bah.* All records filed under medical summaries will be ordered included in the SIME binders.

At hearing the parties agreed they did not want to delay the SIME process any longer than necessary, and they are admonished not to do so. In the interest of ensuring the quick, efficient, fair and predictable benefits to Employee, if he is entitled to them, at a reasonable cost to Employer, the parties will be ordered to file and serve any medical records not already included in the SIME binders within seven days of this decision and order. Additionally, the designee will be ordered to schedule the SIME as soon as possible. AS 23.30.001(1).

2. Should Employee's AS 23.30.110(c) deadline to request a hearing on his September 20, 2014 claim be extended and, if so, for how long?

Because there have been two post-claim controversions in this case, two AS 23.30.110(c) deadlines need to be examined. *Rang I* established Employee had until January 2, 2014, either to file a hearing request on his November 3, 2011 claim, or request more time in which to file his hearing request.

Rang I's calculation methodology is adopted here to calculate the §110(c) deadline for the September 20, 2012 claim. Employer controverted the claim on October 15, 2012, when it filed its October 12, 2012 controversion notice. It served the notice on Employee by mail. When computing time periods prescribed by the Act or regulations, the day of the action after which the designated period of time begins to run is not included. Therefore, the two-year "statute of limitations" under AS 23.30.l10(c) began to run on October 16, 2012. 8 AAC 45.063(a). When service is done by mail, as was the case with Employer's controversion notice and a right may be

exercised or an act is to be done, such as requesting a post-controversion hearing, three days must be added to the prescribed period. Two years from October 16, 2012, is October 16, 2014. Three days from October 16, 2014, is October 19, 2014. However, because October 19, 2014 was a Sunday, Employee had until October 20, 2014, to file a hearing request on his September 20, 2012 claim, or to request more time in which to file his hearing request. AS 23.30.110(c); 8 AAC 45.060(b); *Kim*.

However both the January 2, 2014 and the October 20, 2014 deadlines were rendered inoperative by tolling during the period the parties remain actively involved in the SIME process. *Snow; McKitrick; Aune; Turpin; Rollins. Rang I* held the parties' August 27, 2013 stipulation to an SIME initiated the tolling. Following longstanding board practice, tolling will cease on the date the report is filed with the board. *McKitrick.* Consequently, the January 2, 2014 and the October 20, 2014 §110(c) deadlines will each be extended by the number of days in the period from August 28, 2013 through the day the board receives the SIME report. Employee's request for additional time to complete any post-SIME depositions or interrogatories will be denied, because Employee will have substantially complied with the statute if, before the deadline passes, he opts to file a request for additional time to prepare for hearing in place of an affidavit of readiness. *Kim; Colrud.*

CONCLUSIONS OF LAW

1) Employee's petition to excluded documents from the SIME binders should be denied.

2) Employee's AS 23.30.110(c) deadline to request a hearing on his September 20, 2014 claim should be extended by number of days in the period from August 28, 2013 through the day the board receives the SIME report.

ORDER

1) Employee's May 15, 2014 and August 14, 2014 petitions to remove records from the SIME binders are denied.

2) Employee's August 14, 2014 petition to extend the AS 23.30.110(c) deadlines for his November 3, 2011 and September 20, 2012 claims is granted in part and denied in part: each deadline will be extended by the number of days from August 28, 2013 through the date the board

receives the SIME report, but will not be further extended to allow for subsequent depositions or interrogatories.

3) Parties are ordered to file and serve any medical records not already included in the SIME binders within seven days of this decision and order.

4) The designee is ordered to schedule the SIME as soon as possible.

Dated in Anchorage, Alaska on November 26, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Margaret Scott, Designated Chair

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Amy Steele, Member

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Donna Phillips, 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 CRAIG L. RANG, employee / claimant; v. MARATHON OIL CO., employer; OLD REPUBLIC INSURANCE CO., insurer / defendants; Case No. 201105830; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on November 26, 2014.

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Elizabeth Pleitez, Office Assistant