ALASKA WORKERS' COMPENSATION BOARD

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

DICK PHILLIPS, Employee, Claimant, v. BILIKIN INVESTMENT GROUP, INC., Employer, and REPUBLIC INDEMNITY CO. OF AMERICA, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200813169 AWCB Decision No. 14-0020 Filed with AWCB Anchorage, Alaska, on February 19, 2014

Dick Phillips' (Employee) October 20, 2010 claim, as amended on October 10, 2013, was heard on February 18, 2014, in Anchorage, Alaska, a date selected on October 10, 2013. Attorney Richard Harren appeared and represented Employee. Attorney Richard Wagg appeared and represented Bilikin Investment Group, Inc., and its workers' compensation insurer (Employer). Laurie Phillips appeared and testified on Employee's behalf. The panel heard Employer's preliminary objection to Employee's witness Thomas Gritzka, M.D. After taking evidence and arguments, the panel orally sustained Employer's objection and concluded it could not consider Dr. Gritzka's reports or opinions. However, as Employee had relied upon Dr. Gritzka's availability as a witness, and given Employer's very recent objection, the panel left the record open for 45 days for Employee, at his option, to depose any valid attending, referral or substitution physician who had seen him as of the hearing date, in lieu of Dr. Gritzka.

During the hearing, Employee decided he needed immediate medical attention for his swollen leg, and he and his wife left the hearing. Later during the hearing, Employee's attorney expressed difficulty focusing and requested a continuance. Employer did not object so long as the parties agreed to "freeze" the case in status quo, with exception of optional medical depositions, as ordered in this decision. The parties agreed to the continuance under this condition and further agreed Employee could add two more lay witnesses to his current witness list and could depose Grant Roderer, M.D., even though Dr. Roderer was not listed as a witness for the February 18, 2014 hearing. This decision examines the oral orders declining to consider Dr. Gritzka and continuing the hearing, and memorializes the parties' other stipulations.

ISSUES

Employer as a preliminary matter contended Employee made an unlawful change in his choice of physician when he hired Dr. Gritzka as an expert medical witness. It contended Employee's lawyer selected Dr. Gritzka expressly as an expert and, therefore, Dr. Gritzka was not a "change," "referral" or "substitution" physician. Employer contended the panel cannot consider Dr. Gritzka's reports and opinions for any purpose under AS 23.30.095(a) and 8 AAC 45.082(c).

Employee's attorney stipulated he selected Dr. Gritzka and arranged and paid for Dr. Gritzka's examination of Employee, and for his reports. Nonetheless, Employee contended an injured worker is entitled to hire a medical expert outside the limits set forth in the Act and the regulations. He further contended his due process rights were violated by Employer's silence on this issue until the last minute.

1) **Was the oral order declining to consider Dr. Gritzka's reports and opinions and allowing Employee time to depose other physicians correct?**

After the panel issued its oral order concerning Dr. Gritzka, Employee's counsel contended he had difficulty focusing on the hearing. Furthermore, Employee and his wife contended they needed to leave the hearing so Employee could get immediate medical attention. Lastly, Employee's counsel contended he wanted to consider his options, including possibly seeking appellate review of the oral order. Accordingly, Employee requested a hearing continuance.

Employer did not oppose a hearing continuance, provided the hearing preparation was kept in "status quo." It acknowledged the panel was holding the record open to allow Employee to depose physicians who had previously seen him, in lieu of Dr. Gritzka's opinions being considered. With that exception, Employer contended Employee should not be allowed to gain an advantage through the continuance, and it stipulated to a continuance.

2) Was the oral order continuing the hearing on the merits correct?

FINDINGS OF FACT

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

1) Prior to 1988, parties to workers' compensation cases routinely sought numerous medical opinions to support a claim or defense. This was called "doctor shopping." In 1988, the legislature amended the Act to prevent this practice (experience).

2) On August 15, 2008, Employee claims to have been injured when a large, heavy trash barrel he was trying to empty into a dumpster hit the dumpster and fell onto him, causing a spinal injury (Report of Occupational Injury or Illness, August 18, 2008).

3) On November 20, 2008, and November 22, 2008, respectively, Employer's medical evaluators (EME) Douglas Bald, M.D., and Lynne Adams Bell, M.D., examined Employee and provided a report supporting Employer's right to controvert Employee's right to benefits. The report's substance is not relevant to the narrow issues reached in this decision (EME report, November 20, 2008; experience, judgment).

4) 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 (Employee's hearing stipulation; experience, judgment).

5) On December 10, 2012, Employer petitioned for a second independent medical evaluation (SIME) based on a medical dispute between Dr. Gritzka and EME physicians, Drs. Bald and Bell. 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" (Second Independent Medical Evaluation (SIME) Form, December 10, 2012).

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

7) On August 16, 2013, Edward Tapper, M.D., saw Employee for an SIME (SIME report, August 16, 2013).

8) The SIME report's substance in general is not relevant to the narrow issues reached in this decision. However, the parties at hearing agreed Dr. Tapper did not agree with Dr. Gritzka's causation opinions (experience, judgment; parties' hearing stipulation).

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

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

11) On February 13, 2014, the parties called the designated chair for an unscheduled prehearing conference. Employee expressed concern over Employer's recent revelation it would object to Dr. Gritzka's reports and testimony, and sought direction on how to proceed. The chair advised the parties Employer's objection would be heard as a preliminary matter at hearing and Employee had the burden to demonstrate Dr. Gritzka was a valid physician under the Act and regulations (*id.*).

12) Employer agreed Employee could depose Dr. Gritzka post-hearing as Dr. Gritzka was not going to be available for hearing, subject to Employer's 8 AAC 45.082(c) objection (parties' prehearing and hearing statements).

13) 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).

14) In some cases, parties have hired unauthorized medical experts without objection from the other party and these experts' opinions have been considered (experience).

15) At 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).

16) At 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 Erik Kohler, M.D., had lost his license 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 agreed his attending physician for this injury and the person who currently prescribes medication is Barbara Doty, M.D. (Employee's counsel's hearing statements).

17) At hearing, Employee's wife Laurie Phillips testified about her knowledge of Employee's injury, its sequelae and his narcotic consumption among other topics. She also explained how Employee came to be seen by Drs. Roderer, Doty and Kohler (Phillips).

18) Laurie Phillips' testimony did not provide a chronology of Employee's physicians or explain how he came to be seen by each. She provided no evidence about how Dr. Gritzka fit into the statutory or regulatory workers' compensation scheme (judgment).

19) Employee did not provide evidence demonstrating Dr. Gritzka was a change, referral or substitution physician and conceded he was a hired medical expert (*id*.).

20) Employee did not specify a date when Dr. Kohler allegedly refused to provide services to him, by his absence. Consequently, it is not possible to identify which physician first provided services to Employee after Dr. Kohler became unavailable and it is impossible to tell if Dr. Gritzka filled that role (experience, judgment, observations).

21) Employee provided no evidence he was changing his attending physician to Dr. Gritzka and failed to show he gave Employer notice of any such change "before the change" (record).

22) Dr. Gritzka was not a change, referral or substitution physician, but was a hired medical expert retained outside the limitations of AS 23.30.095(a) and 8 AAC 45.082(c) (experience, judgment, observations and inferences drawn from all the above).

23) At hearing, the panel issued an oral order sustaining Employer's objection and stating it would not consider Dr. Gritzka's report for any purpose. However, the panel also ordered the record be 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 adjusted Employee's due process rights given Employer's late notice it was objecting to Dr. Gritzka and Employee's reliance on Employer's previous silence on the issue (record).

24) At hearing, Employee appeared uncomfortable and eventually stated his wife needed to take him to his doctor to have his painful, swollen leg evaluated. Employee and his wife left (observations).

25) At hearing, after the panel issued its oral order addressing Employer's objection to Dr. Gritzka, Employee's attorney appeared confused and expressed difficulty focusing on the hearing. He implied a continuance might be needed. During a break, the parties conferred and on the record stipulated to a hearing continuance so long as the evidence and witness lists were frozen in status quo. The parties also stipulated Employee could add two lay witnesses to his witness list, "Colin" and Chris Krieg, and could depose Dr. Roderer at his option, even though Dr. Roderer was not listed on Employee's witness list (observations; parties' hearing stipulations).

PRINCIPLES OF LAW

> **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. . . .

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

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

submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the physician resides, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. . . .

8 AAC 45.050. Pleadings. . . .
. . .

(f) **Stipulations.**
. . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

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;

(3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records; to constitute a panel, for purposes of this paragraph, the panel must complete its examination, but not necessarily the report, no later than five days after the first physician sees the employee; if more than five days pass between the time the first and last physicians see the employee, the physicians do not constitute a panel, but rather a change of physicians;

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

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(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) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;

(D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095 (a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer. . . .

ANALYSIS

1) Was the oral order declining to consider Dr. Gritzka's reports and opinions and allowing Employee time to depose other physicians correct?

In 1988, the legislature amended the Act to prevent a process informally known as "doctor shopping." Before the amendments, it was commonplace for parties to obtain opinions from diverse physicians until they obtained an opinion to their liking. The legislature implemented AS 23.30.095(a) and (e) to end this practice. Employee's right to obtain medical care and opinions is governed by AS 23.30.095(a). It states Employee may not make "more than one change" in Employee's "choice of attending physician" without Employer's written consent. However, "referral to a specialist" by Employee's attending physician or obtaining a "substitution" physician "is not considered a change" in physicians. Employee must give notice "of a change in his attending physician before the change." This statute is plain on its face and states Employee can select a physician, and can "change" his physician only one time.

Employer has a similar limitation found in AS 23.30.095(e). This section requires Employee to attend medical evaluations when Employer requires it, with certain restrictions. Employer may not make more than one change "in its choice" of a physician without Employee's written consent. Referral to a specialist by Employer's physician is not considered a change in physicians. Employer also has the right to have Employee seen by a multi-physician "panel," again with some restrictions. In any event, both Employee and Employer have ample opportunity to have Employee seen by multiple physicians. But "changing" physicians by either party is strictly regulated to prevent doctor shopping.

Occasionally, a physician dies, the injured worker moves, or a physician refuses to provide services to the injured worker. In such appropriate cases, an injured worker can have a "substitution of physician." AS 23.30.005(h); 8 AAC 45.082(b)(4)(a). Employee did not demonstrate his attending doctor died, or that Employee moved. He argued he was not able to find Dr. Kohler. Assuming Employee was implying this made Dr. Kohler one who "refuses to provide services," he failed to demonstrate Dr. Gritzka was the first physician thereafter to provide services, thus making Dr. Gritzka a proper substitution physician. Employee could not identify a date after which Dr. Kohler allegedly refused to provide services by virtue of being

gone. It is not possible to determine on this record what medical provider next saw Employee, making that provider a "substitution of physician." It is not even clear Dr. Kohler ever qualified as an attending physician. Employee's evidence was vague and did not demonstrate a clear picture of a change, appropriate referrals or any facts supporting Dr. Gritzka was a valid substitution physician.

Employee also argued he had a right to hire an independent expert outside the Act's limitations. The Act and regulations contain no suggestion a party has a right, apart from those provided under AS 23.30.095(a) and (e), to obtain additional opinions or evaluations from medical experts. Such practice would contravene the statutes and revert back to "doctor shopping," which the legislature eliminated years ago. In some cases, parties have procured medical experts without objection from opposing parties and these experts' opinions have been considered. This is not one of those cases. Employer objected to Dr. Gritzka's participation alleging he was an unlawful change in Employee's choice of attending physician. Regulation 8 AAC 45.082(c) codifies decisional law disallowing reliance by a party on unlawfully obtained medical opinions. If a party makes an unlawful change of physician in violation of AS 23.30.095(a) or (e), or 8 AAC 45.082, the panel "will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose." The panel has no discretion. Employee stipulated the evaluation with Dr. Gritzka was arranged and paid for solely by his attorney. Employee failed to show any exception applied to his situation. He also failed to demonstrate Dr. Gritzka was a valid change, referral or substitution physician.

Consequently, the only role Dr. Gritzka could play at hearing is as an unauthorized expert medical witness. Accordingly, under AS 23.30.095(a) and 8 AAC 45.082(c), the panel will not consider Dr. Gritzka's reports, opinions or testimony in any form, proceeding or for any purpose. The fact Employer relied upon Dr. Gritzka's opinions to form the basis for an SIME without initial objection is immaterial. Employer correctly notes there is no time limit for a party to object to an unauthorized medical expert. The regulation states only that the panel may not consider the unauthorized opinions; it says nothing of the parties' reliance upon it. Furthermore, Employer said it was unaware Dr. Gritzka was an unlawful change until late in litigation. Neither the law nor the regulation provides a waiver of a parties' right to object to an unlawful

physician. Employer may have made a litigation choice by not objecting to Dr. Gritzka's report earlier. The fact Employer relied upon it for one purpose does not waive Employer's right to object to it for another reason.

Employer's eleventh hour objection does, however, raise due process concerns because Employee believed until the week before hearing that he could rely upon Gritzka's reports and his testimony at hearing. But for Employer's objection, he could have. On the hearing day, Employee learned he had lost his main medical witness. A better practice would have been for Employer to discern any violation of AS 23.30.095(a) early on and raise any objections so the issue could be dealt with promptly, well before the merits hearing. Failure by a party to object promptly to an unauthorized physician may cause issues difficult to remedy. Had the SIME physician, for example, adopted Dr. Gritzka's opinions, the result on this preliminary issue may have been different and Employer may have been held estopped from raising a belated objection. In such case, an employer's failure to discern the violation and raise the objection promptly might have tainted the SIME and possibly even EME or treating doctors' opinions. Fortunately, that was not the case here. But the genesis of this problem lies with Employee, who violated the statute and regulations, not with Employer.

Given Employer's very recent objection to Dr. Gritzka and the resultant surprise on Employee, the panel's oral order also provided an equitable remedy for Employee by giving him 45 days so he can, at his option, depose any medical providers he has already seen as of the hearing date, to provide evidence in lieu of Dr. Gritzka's reports and testimony, which will not be considered. Employee is reminded that any medical providers' opinions considering and basing their opinions on Dr. Gritzka's inadmissible opinions will also not be considered. 8 AAC 45.082(c). The oral order disallowing Dr. Gritzka's reports and testimony and allowing Employee 45 days to obtain other medical depositions as limited in this decision was correct.

2) Was the oral order continuing the hearing on the merits correct?

Employee's counsel implied during the hearing that he wanted a continuance. Initially, when asked what grounds justified his implied request, Employee's counsel was unable to articulate any grounds. Employee eventually had health issues and he and his wife left the hearing early.

Employee's lawyer expressed difficulties proceeding as well. During a brief recess, the parties conferred and stipulated on the record to a conditional, hearing continuance. Employer agreed to continue the hearing if the parties' hearing preparation was "frozen" in the status quo, so Employee could not use the continuance to his advantage to fortify his position.

Employee agreed to this arrangement but asked to substitute two lay witnesses for two other lay witnesses on his witness list. Employer agreed to allow Employee to add the two lay witnesses, which Employee identified as "Colton," whose last name Employee's counsel could not recall, and Chris Krieg. Employer further agreed Employee could depose Dr. Roderer even though he was not on Employee's witness list for this hearing. With that, the hearing was continued. The parties entered into a binding stipulation. 8 AAC 45.050(f)(2). Accordingly, the hearing continuance was proper.

CONCLUSIONS OF LAW

1) The oral order declining to consider Dr. Gritzka's reports and opinions and allowing Employee time to depose other physicians was correct.
2) The oral order continuing the hearing on the merits was correct.

ORDER

1) Employer's objection to Employee's use of Dr. Gritzka's reports, opinions and testimony is sustained.
2) Dr. Gritzka's reports, opinions and testimony will not be considered in this case in any form, in any proceeding or for any purpose, and Employer will not be ordered to pay any medical fees associated with his reports or testimony.
3) Employee has 45 days from February 18, 2014, to depose any valid attending physicians, referral physicians or substitution physicians who have seen him as of February 18, 2014, to use in lieu of Dr. Gritzka's reports and testimony.
4) Employee may not use Dr. Gritzka's reports, opinions or testimony in any such depositions.

Dated in Anchorage, Alaska, on February 19, 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 February 19, 2014.

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Anna Subeldia, Office Assistant