ALASKA WORKERS' COMPENSATION BOARD

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

STEPHAN CRAIG MITCHELL, Employee, Claimant, v. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No(s). 199523875 AWCB Decision No. 14-0049 Filed with AWCB Anchorage, Alaska On April 07, 2014

Stephan Craig Mitchell's March 6, 2006 Petition for Modification, and his July 30, 2006 claim for benefits, as amended, came on for hearing in Anchorage, Alaska on March 19, 2014, a date selected on November 25, 2013. The matter was heard by a two person panel, a quorum under AS 23.30.005(f). Attorney Richard Harren appeared and represented Stephan Craig Mitchell (Employee). Jeanne Mitchell, Employee's wife, assisted as a non-attorney representative. Attorney Constance Livsey appeared and represented United Parcel Service and Liberty Mutual Insurance Company (collectively, Employer). Several preliminary matters were addressed and shaped the course of the hearing. Mrs. Mitchell testified. No other witnesses were called. Employer's petition to exclude handwritten annotations contained in Employee's exhibits was granted in part and denied in part. Employee's petition to exclude the reports and opinions of two employer medical evaluators (EME) as an excessive change of physician was granted, and the reports and opinions of the EME panel were stricken from the record. Employer's unopposed petition to continue the hearing in light of the ruling striking its expert witnesses was

granted. The record closed at the hearing's conclusion on March 19, 2014. This decision examines the oral orders issued at hearing, and memorializes them.

ISSUES

Employee, at the time acting *in propia persona*, filed documentary evidence containing handwritten annotations and highlighting. Employer contends documents containing annotations should be stricken as the marginalia alters the original documents, and contains editorial comment and opinion properly restricted to legal memoranda and oral argument. Employer further contends the annotations contain irrelevant or repetitions information and hearsay. Alternatively, Employer contends Employee should be required to resubmit the documents with the annotations redacted. Employee argues that many of the objectionable documents have previously been admitted without objection and are already contained in the record. Employee argues that to require him to redact the annotations would be burdensome at this stage in the proceedings, and leeway should be granted him as a *pro se* litigant.

1. *Was the order that handwritten annotations on Employee's exhibits were inappropriate, and would be disregarded by the board, but the documents would not be stricken, nor Employee required to redact and resubmit them, correct?*

Employee contends Employer's choice of a panel of physicians comprised of physiatrist Dennis Chong, M.D. and orthopedic surgeon Keith Holley, M.D. was an excessive change of physician under AS 23.30.095 and 8 AAC 45.082, and the reports, opinions and testimony of Drs. Chong and Holley should be stricken. Employer contends the panel comprised of Drs. Chong and Holley was its first, permissible change of physician, and their reports, opinions and testimony are admissible.

2. *Was the order finding the EME panel comprised of Drs. Chong and Holley an excessive change of physician, and ordering their reports and opinions stricken and their testimony excluded, correct?*

Employer requested a continuance when its medical evaluators' opinions were excluded, contending its case had been premised on their evidence and it was not otherwise adequately prepared for hearing. Employee did not object. The continuance was granted.

3. Was the order granting Employer's continuance request correct?

FINDINGS OF FACT

Employee injured his back during the course and scope of employment on October 31, 1995. Employer initially accepted compensability of Employee's disability and need for medical care. A partial factual and procedural history of the case is recorded in nine prior decisions:

(a) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02–0182 (September 12, 2002) (*Mitchell I*), granting Employer's request for bifurcation;

(b) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02-0195 (September 27, 2002) (*Mitchell II*), ordering an SIME and finding there was not an excessive change of physician;

(c) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02–0239 (November 21, 2002) (*Mitchell III*), granting in part Employee's request for interest and penalties, and denying his rehabilitation expenses;

(d) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 03–0060 (March 18, 2003) (*Mitchell IV*), clarifying and affirming *Mitchell III*;

(e) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 05-0224 (September 1, 2005) (*Mitchell V*), denying Employee's petition for a hearing on the validity of an SIME report;

(f) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 05-0333 (December 20, 2005) (*Mitchell VI*), establishing medical stability and awarding TTD; awarding medical benefits; denying Employee's frivolous or unfair controversion claim; and retaining jurisdiction to resolve disputes regarding future medical treatment;

(g) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 06-0024 (January 30, 2006) (*Mitchell VII*), granting in part Employee's request for unpaid medical expenses, and denying his request for penalties;

(h) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 06-0045 (February 27, 2006) (*Mitchell VIII*), denying Employer's petition for reconsideration/clarification of *Mitchell VII*; and

(i) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 13-0123 (October 7, 2013) (*Mitchell IX*), finding the board designee abused his discretion by failing to provide any analysis for a decision denying discovery; and granting in part and denying in part Employer's petition to dismiss portions of claims under AS 23.30.110(c) and the doctrine of *res judicata*.

The following findings of fact and factual conclusions, limited to those relevant to the limited issues presented, are established by a preponderance of evidence:

1. It is undisputed Employer's first choice of physician was orthopedist Michael G. McNamara, M.D., who on January 27, 1996, performed a medical evaluation at Employer's request (EME). (EME Report, Dr. McNamara, January 27, 1996).
2. On August 7, 1996, also at Employer's request, Employee was seen by Larry Levine, M.D., for another EME. (EME Report, Dr. Levine, August 7, 1996). This evaluation was arranged by John A. Murray, Vice President, Worker's Compensation, Northern Adjusters, by letter to Employee dated July 24, 1996, which read:

   > ". . . it should also be noted that the Alaska Workers' Compensation Act allows us to change Independent Medical Evaluators one time without your written authorization. As you are aware, we requested that you be evaluated on 1/27/96 by Dr. Michael McNamara. Dr. McNamara was working through a company called Western Medical Consultants. That company is no longer doing business here in Alaska, therefore, I am substituting Dr. Levine for Dr. McNamara. (Letter, July 24, 1996, Murray to Employee).

   Dr. Levine's report was conveyed to Employer on letterhead from Dr. Levine's practice group, Rehabilitation Medicine Associates, P.C. (RMA) (Letter, August 8, 1996, Dr. Levine to Murray).
3. On July 20, 1999, at the request of a new adjuster, Jeffrey Phillips, employed with a new adjusting firm, Crawford and Company, Employee was evaluated by Susan Klimow, M.D. This was done without Employee's written request, and without a written referral. At the time, Dr. Klimow was a practice partner of Dr. Levine's at RMA, and her report is also written on RMA stationery. (Record; Observation; EME Report, Dr. Klimow, July 20, 1999).
4. On March 30, 2000, at Employer's request, Dr. Klimow wrote a referral note for a further EME to be conducted by Douglas Smith, M.D. (Note to "Jeffrey Philips re Stephan Mitchell" "Referral EME – Dr. Douglas Smith, March 30, 2000").
5. Also on March 30, 2000, Tracy Conrad, Crawford and Company's nurse case manager, convened a "Rehab Conf" or "care conference" with treating orthopedic surgeon Davis Peterson, M.D. Summarizing the discussion with Ms. Conrad, Dr. Peterson's note states:

> "Concerns currently include progress into his vocational rehabilitation retraining program, which I think he should (indiscernible) be able to do starting in April. The other problem is long term pain management. I think it would be a reasonable plan to see if Rehabilitation Medicine Associates, Dr. Gevaert or Dr. Levine, are willing to evaluate him for both long term pain management as necessary and an aggressive trunk and back rehabilitation program.

Employee was not present at this conference. (Dr. Peterson, Physician's Report, March 30, 2000).

6. On April 12, 2000, Employee was seen by Eric Carlsen, M.D., of Alaska Rehabilitation Medicine, Inc. In the discussion portion of his chart note Dr. Carlsen wrote:

> Both Mr. Mitchell and I were somewhat unclear on my role in his treatment at this point. Dr. Peterson's last note indicates a referral to Dr. Gevaert or Dr. Levine. Mr. Mitchell indicates that he was referred here by Tracy Conrad for what he assumed was another independent medical evaluation, of which he states he has had a number. . . (Dr. Carlson, April 12, 2000).

7. On May 9, 2000, Employee was again seen by Dr. Smith. (EME Report contained in letter from Dr. Smith to Shelby Nuenke-Davison, Esq., Davison & Davison Law Firm, May 9, 2000).
8. On July 12, 2001, at Employer's request, and without Employee's written consent or written referral, Employee was again examined by Dr. Levine. (Record; Observation; EME Report contained in letter from Dr. Levine to Shelby Nuenke-Davison, Davison & Davison, July 12, 2001).
9. In a dispute over his degree of permanent partial impairment (PPI), and alleging Dr. Smith was an excessive change of physician under AS 23.30.095, Employee sought to exclude Dr. Smith's May 9, 2000 opinion Employee suffered a 10% PPI, which contrasted with the 20% PPI assigned by treating physician Dr. Peterson. (Employee Petition to exclude Dr. Smith as excessive change of physician, May 14, 2002; Prehearing conference summary, June 26, 2002; *Mitchell II* at 4).
10. *Mitchell II* examined Employer's selection of physicians, concluding Employer's May 9, 2000 selection of orthopedist Dr. Smith was not a change of physician from its initial selection of Michael G. McNamara, M.D. The panel found Employer's change from Dr. McNamara to Dr. Levine was an allowable "substitution" and not a change of physician "due to the unavailability of Dr. McNamara." In making this finding the panel relied on the July

24, 1996 letter from adjuster Phillips to Employee, mischaracterizing its contents as "informing the employee that Dr. McNamara was no longer in town and that the employer would be substituting Dr. Levine for Dr. McNamara." In response to Employee's argument the change from Dr. Levine to Dr. Klimow was an unauthorized change, the panel erroneously found that because Dr. Klimow and Dr. Levine were practice partners Dr. Klimow was not a change of physician. Finally, *Mitchell II* held that because Dr. Klimow, a physiatrist, provided a written referral to Dr. Smith, an orthopedic specialist, Dr. Smith's participation was not a change of physician, and his opinion would not be excluded. (*Mitchell II* at 5-6). The panel finally concluded Employer had not yet exercised any change of physician when it selected Dr. Smith to perform an EME on May 9, 2000. *Mitchell II* did not consider what effect Ms. Conrad's instruction to Employee to attend the April 12, 2000 appointment with Dr. Carlson had on Employer's choices of physician. (*Id*.).

11. On July 12, 2001, at Employer's request, and without Employee's written consent or referral, Employee was again evaluated by Dr. Levine. Dr. Levine's EME report is directed to Employer's attorney. The report began:

> Dear Shelby Nuenke-Davison:
> I have received your letter dated June 18, 2001, which is 13 pages in length, reviewing the overall case in relation to Mr. Steven "Craig" Mitchell. . . . Mr. Mitchell was seen for an independent medical evaluation on 7/12/01 in the offices of Rehabilitation Medicine Associates, PC . . . The examinee was informed that this examination is at the request of Attorney Shelby Nuenke-Davison, that any written report will be sent to the attorney, and that the examination is for evaluative purposes only. The purpose of this visit is not to treat the patient. . . (Letter from Dr. Levine to Ms. Nuenke-Davison, July 12, 2001).

Employer's change from Dr. Smith back to Dr. Levine constituted Employer's one permissible change of physician. (Record; judgment, experience, observation, facts of the case; *Miller v. NANA Regional Corporation*, AWCB Decision No. 13-0169 (December 26, 2013).

12. On July 11, 2003, at Employer's request, and without Employee's written consent or referral, Employee was again evaluated by Dr. Smith. Dr. Smith's report is directed to Attorney Constance Livsey, at that time and currently the attorney for Employer and its carrier. Dr. Smith's report began:

> Dear Ms. Livsey:

> At your request, Stephan "Craig" Mitchell was seen for purposes of orthopedic evaluation in my office on July 11, 2003. This was the third time that he has been seen in this office and the second time that he has been seen in reference to a back problem at your request.
>
> His most recent prior visit was on April 21, 2000 and the results of that visit and evaluation were reported to the law firm of Davison and Davison in a report on May 9, 3000 (sic).

Employer's return to Dr. Smith constituted an unauthorized change of physician. (Record; judgment, experience, observation, facts of the case; *Miller v. NANA Regional Corporation*, AWCB Decision No. 13-0169 (December 26, 2013)).

13. On February 4, 2014, at Employer's request, and without Employee's written consent or referral, Employee was seen by physiatrist Dennis Chong, M.D., and on February 8, 2014, by orthopedist Keith Holley, M.D., for a panel EME. Employer's use of Drs. Chong and Holley constituted Employer's second unauthorized change of physician. (Record; judgment, experience, observation, facts of the case; *Miller v. NANA Regional Corporation*, AWCB Decision No. 13-0169 (December 26, 2013).
14. Dr. Levine continues to perform independent medical evaluations in Anchorage, Alaska. (Experience; *See also* AWCB Bulletin No. 13-06, December 2, 2013).
15. Several of the exhibits Employee appended to his hearing brief or filed as evidence under 8 AAC 45.120(f), contain some highlighting or handwritten annotations, including editorial comment and hearsay statements. Employer objected to admission of the documents containing this "marginalia." (Employer's petition *in limine* to exclude evidence, March 10, 2014). Some of these documents had been filed with previous pleadings without objection. (Observation).
16. Employer's hearing brief relies largely on the opinions of Drs. Chong and Holley for its position Employee is not entitled to the benefits he seeks. (Observation).

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;

> 2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute.
> 3) this chapter may not be construed by the courts in favor of a party;
> 4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.
>
> **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, 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, 533-534 (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 (2009).

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . .
> . . .

Under the Act, both an employee and an employer can make one change to their respective physician without the written consent of the other party. The purpose of the "one change of physician" rule is to curb doctor shopping. *Bloom v. Tekton, Inc.*, 5 P.3d 235, 235 (Alaska 2000).

Bloom reversed a Board decision declining to allow an injured worker to select a third attending physician, elaborating on the intent of AS 23.30.095(a), that portion of the Act pertaining to injured workers' physician choices:

> The Alaska Workers' Compensation Act gives each injured worker the right to choose an attending physician (footnote omitted). But in order to curb potential abuse -- especially doctor shopping -- the Act allows an injured worker to change attending physicians only once without the consent of the employer.
>
> In order to protect the injured worker's right to choose his attending physician, the Alaska Workers' Compensation Board has consistently interpreted the statute to allow an employee to 'substitute' a new physician in circumstances where the current attending physician is either unwilling (footnote omitted) or unable to continue providing care (footnote omitted). These 'substitutions' do not count as changes in attending physicians: even a worker who has already changed doctors may choose a new attending physician without the employer's consent if the current physician becomes unwilling or unavailable to treat (footnote omitted). Moreover, when an attending physician refers a worker to a specialist, the worker may see the referral physician without running afoul of the statute's one-change rule.
>
> Allowing an employee to substitute attending physicians when the employee's current physician becomes unwilling or unavailable to treat is consistent with the well-settled rule that under AS 23.30.095(a) an injured worker is presumed entitled to continuing medical treatment (footnote omitted). The substitution policy ensures that the employee's right to continuing care by a physician of his choice will not be impeded by circumstances beyond the employee's control.

Bloom addressed an injured worker's right to select a substitution physician in appropriate circumstances. It referenced the then recently promulgated regulation 8 AAC 45.082, and acknowledged the regulation's safeguards pertained only to an injured employee's choice of physician. *Bloom* did not extend the same considerations to employers' choices of physician. *McCall v. BP America, Inc.,* AWCB Decision No. 11-0124 (August 22, 2011).

Only one board decision, *Mitchell v. United Parcel Service, Inc.,* AWCB Decision No. 02-0195 (September 27, 2002)(*Mitchell II*), has extended to an employer employees' express "substitution" of physician and other exceptions to the "one change" rule. An opposite result was reached in *Colette v. Arctic Lights Electric,* AWCB Decision No. 05-0135 (May 19, 2005).

Later, and definitively, *Coppe v. United Parcel Service, Inc.,* AWCB Decision No. 11-0084 (June 17, 2011), concluded that extending to employers employees' express exceptions to the "one

change of physician rule" constituted *ad hoc* decisional rule making by the board, contrary to the Alaska Supreme Court's holding in *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851 (Alaska 2010). *Mitchell II* has been roundly criticized and never followed. *Freelong v. Chugach Alaska Services, Inc.* AWCB Decision No. 13-005 (January 14, 2013); *McAlpine v. Fairbanks Memorial Hospital*, AWCB Decision No. 12-147 (August 24, 2012); *Coppe*; *McCall*; *Colette.*

Miller v. NANA Regional Corporation, AWCB Decision No. 13-0169 (December 26, 2013) held that once a change in physician is made by either party, if a party returns to a previous physician, the party has made a change in its choice of physician. *Miller* explained, "The word 'change' has a plain, simple meaning, and includes "to put or take (a thing) in place of something else; substitute for, replace with, or transfer to another of a similar kind. (Citation omitted)." Because the statute expressly prohibits a party from making more than one "change" in physician, parties "cannot go back and forth" between their physician choices. *Id.* at 22. While one change is permissible without the written consent of the other party, a return to a former physician without the written consent of the opposing party is an unauthorized change of physician. *Id.*

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

> **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. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.

(4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

8 AAC 45.074. Continuances and cancellations. . . .

. . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

. . .

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

8 AAC 45.082. Medical treatment. . . .

. . .

(b) Physicians 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, within 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 suggest, 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 request in writing that the employer consent to a change of attending physician, 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.

8 AAC 45.114. Legal Memoranda. Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must:

(1) be filed and served at least five working days before the hearing…

(2) not exceed 15 pages, excluding exhibits, unless at a prehearing the board or its designee determined that unusual and extenuating circumstances warranted a longer memorandum; if the board or its designee granted permission at prehearing to file a legal memorandum exceeding 15 pages, excluding exhibits, it must be accompanied by a one-page summary of the issues and arguments;

. . .

8 AAC 45.116. Opening and closing argument. Except when the board or its designee determines that unusual and extenuating circumstances exist, the amount of time at a hearing for a party's opening and closing arguments, including a statement of the issues, will be a combined total of not more than 20 minutes.

8 AAC 45.120. Evidence.

. . . .

(b) . . . All proceedings must afford every party a reasonable opportunity for a fair hearing.

. . .

(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. . . .

In cases involving *pro se* litigants, procedural requirements must be relaxed to a reasonable extent, and pleadings of *pro se* litigants will be held to less stringent standards than those of lawyers. *Bohlmann v, Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009), citing *Gilbert* v. *Nina Plaza Condo Ass'n*, 64 P.3d 126, 129 (Alaska 2003).

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

Alaska Rules of Evidence.

Rule 402. Relevant Evidence Admissible – Exceptions – Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme court. Evidence which is not relevant is not admissible.

> **Rule 801. Definitions**.
> The following definitions apply under this article:
> . . .
> (c) **Hearsay**. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> **Rule 802. Hearsay Rule.**
> Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.
>
> **Law of the case doctrine**. . . . The doctrine expresses practice of courts generally to refuse to reopen what has been decided. *Black's Law Dictionary*, Sixth Edition (1990.

The law of the case doctrine prevents re-litigation of issues previously decided in a case. In *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758 (Alaska 1997).

In *Dierringer, Jr. v. Martin*, 187 P.3d 468 (Alaska 2008) at 474, the Alaska Supreme Court held:

> The law of the case is both a doctrine of economy and of obedience to judicial hierarchy. The doctrine applies to all previously litigated issues unless there are "exceptional circumstances presenting a clear error constituting manifest injustice."

In *Beal v. Beal*, 209 P.3d 1012 (Alaska 2009) at 1016-1017, the Court held:

> The law of the case doctrine, which is "grounded in the principle of *stare decisis*" and "akin to the doctrine of *res judicata*," generally "prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case." Previous decisions on such issues - even questionable decisions - become the "law of the case" and should not be reconsidered on remand or in a subsequent appeal except "where there exist 'exceptional circumstances' presenting a 'clear error constituting a manifest injustice.'"

The law of the case doctrine applies in workers' compensation cases. *See, e.g. Failla v Fairbanks Resource Agency, Inc.*, AWCAC Decision No. 162 (June 8, 2012).

ANALYSIS

1. *Was the order that handwritten annotations on Employee's exhibits were inappropriate, and would be disregarded by the board, but the documents would not be stricken, nor Employee required to redact and resubmit them, correct?*

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. 8 AAC 45.135. It must do so in a manner which ensures the parties due process and an opportunity to be heard and for their arguments and evidence to be fairly considered. AS 23.30.001. In 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 specifically provided in the Act and its implementing regulations. 8 AAC 45.120.

To ensure a fair hearing, all parties have a right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter, impeach witnesses and rebut contrary evidence. 8 AAC 45.120. Documents submitted 20 days or more before hearing will, in the board's discretion, be relied upon in reaching a decision. 8 AAC 45.120(f). All 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. 8 AAC 45.120(e). Irrelevant or unduly repetitious evidence may be excluded. *Id*. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but is insufficient in itself to support a finding of fact under most circumstances. *Id*. Parties may submit legal memoranda in advance of the hearing, and are allowed time for oral opening and closing arguments during the hearing. 8 AAC 45.114; 8 AAC 45.116.

A party's right to examine, cross-examine or impeach witnesses, and rebut contrary evidence, is compromised when exhibits otherwise self-authenticating and admissible contain handwritten annotations, as did several exhibits submitted by Employee. This is especially true where, by law, the board will rely upon documents timely submitted at least 20 days before hearing. Documents are arguably altered or tainted, and orderly process and procedure disrupted when annotations, editorial comments and argument are interspersed on the face of documentary evidence rather than confined to legal memoranda and oral argument. For these reasons the marginalia contained on Employee's documentary exhibits was inappropriate. However, because the hearing was underway, procedural requirements are relaxed for *pro se* litigants, and the panel can easily examine the documents' contents while ignoring the annotations, and can distinguish irrelevant, repetitious and hearsay statements from fact, the decision to allow the documents, with annotations excluded from consideration, was correct.

2. *Was the order finding the EME panel comprised of Drs. Chong and Holley an excessive change of physician, and ordering their reports and opinions stricken and their testimony excluded, correct?*

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." 8 AAC 45.082(b)(3). Thus, by regulation, an employer *changes* its choice of physician when it then selects a *different* physician or panel of physicians to 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. *McAlpine*. An employer may not make more than one change of physician without the written consent of the employee. AS 23.30.095(e).

Earlier in this case, *Mitchell II* examined Employer's use of numerous physicians, from orthopedist Dr. McNamara in 1996 through orthopedist Dr. Smith on May 9, 2000. Erroneously applying to Employer a variety of physician choice principles applicable only to employees under 8 AAC 45.082(b), *Mitchell II* held Employer's May 9, 2000 choice of Dr. Smith was not only not a change of physician, but Employer had yet to exercise its first permissible change of physician. While *Mitchell II*'s misapplication of 8 AAC 45.082(b) has been roundly criticized and never followed, under the Law of the Case doctrine this panel is bound by *Mitchell II*'s conclusion that Employer, by May 9, 2000, had not yet exercised its one lawful change of physician. Going forward from that date, however, this panel must also apply the law correctly. *Barlow v. Thompson*, 221 P.3d 998 (2009).

Consistent with *Mitchell II*'s holding that by the time of Dr. Smith's May 9, 2000 report Employer had yet to exercise its one permissible change of physician, when Employer next selected Dr. Levine to perform an EME on July 12, 2001, it exercised its one permissible change of physician. That Dr. Levine previously performed an EME in 1996 is immaterial. Because the statute expressly prohibits a party from making more than one "change" in physician, parties "cannot go back and forth" between their physician choices. *Miller* at 22. This is the case even were *Mitchell II* correct in its holding that no difference existed between Drs. Levine and Klimow because they were "practice partners," and Dr. Smith was a lawful referral from Dr.

Klimow. Once Employer dispensed with Dr. Smith following his May 9, 2000 report, and returned to Dr. Levine, it changed physicians from Dr. Smith to a different physician, Dr. Levine.

When, on July 11, 2003, Employer returned to Dr. Smith for another EME, it again selected a different physician, thereby exceeding its one permissible change of physician. While one change is permissible without the written consent of the other party, a return to a former physician without the written consent of the opposing party, as occurred here, is an unauthorized change of physician. *Id.* Accordingly, Employer's use of Dr. Smith on July 11, 2003 was an unauthorized change of physician. When, in 2014, Employer then selected a panel of physicians comprised of Drs. Chong and Holley, it undertook a second unlawful change of physician. When a party makes an unlawful change of physician in violation of AS 23.30.095, the board is prohibited from considering the reports, opinions, or testimony of the physician or panel in any form, in any proceeding, or for any purpose. 8 AAC 45.082(c).[1] Accordingly, the reports, opinions and testimony of Drs. Chong and Holley must be stricken from the record. The board's oral decision striking the opinions and testimony of Drs. Chong and Holley was correct.

3. Was the order granting Employer's continuance request correct?

Employer sought a continuance of the underlying hearing, implying its case was based substantially on the reports and opinions of Drs. Chong and Holley, it had been prejudiced by the exclusion of this evidence, and could not fairly present Employer's case in the absence of its expert witnesses. Employee did not object to the continuance request. The continuance request was granted.

Continuances are not favored by the board and will be granted only for good cause. Good cause exists where, despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance. Employer was prepared for hearing, having engaged and deposed Drs. Chong and Holley, and was relying on their opinions as the cornerstone of its case in chief. Although having apparently misconstrued the law, Employer acted with due diligence, and demonstrated that without a continuance it would suffer irreparable harm in presenting its case.

[1] 8 AAC 45.082(c) became effective on July 9, 2011.

Employer demonstrated good cause for continuing the hearing under 8 AAC 45.074(b)(1)(N). Employee did not object to the continuance request. The decision to grant the continuance request was correct.

CONCLUSIONS OF LAW

1. The order acknowledging the handwritten annotations on Employee's exhibits were inappropriate, and declaring the annotations would be disregarded by the board, but the documents would not be stricken, nor Employee required to redact and resubmit them, was correct.
2. The order finding the panel comprised of Drs. Chong and Holley an excessive change of physician, and ordering their reports, opinions and testimony stricken in all forms, in all proceedings and for all purposes was correct.
3. The order granting Employer's request to continue the hearing was correct.

ORDER

1. Employer's petition to exclude handwritten annotations contained in Employee's exhibits is granted in part and denied in part.
2. Employee's petition to exclude the reports and opinions of the two member EME panel comprised of Drs. Chong and Holley as an excessive change of physician is granted. The reports and opinions of the EME panel are stricken from the record, and will not be relied upon in any form, in any proceeding or for any purpose.
3. Employer's unopposed petition to continue the hearing in light of the ruling striking its expert witnesses is granted.

Dated in Anchorage, Alaska on April 07, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Linda M. Cerro, Designated Chair

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Mark Talbert, 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 STEPHAN CRAIG MITCHELL, employee / claimant; v. UNITED PARCEL SERVICE, employer; LIBERTY MUTUAL INS CO, insurer / defendants; Case No(s). 199523875; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 07, 2014.

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Mariaanna Subeldia, Office Assistant