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. 199523875 AWCB Decision No. 14-0161 Filed with AWCB Anchorage, Alaska on December 12, 2014

Stephen Craig Mitchell's (Employee) Petition for Protective Order and United Parcel Service's (Employer) Petition for a Second Independent Medical Evaluation (SIME) were heard on September 10, 2014, in Anchorage, Alaska. The hearing date was selected on March 27, 2014. Employee appeared and testified. Attorney Richard Harren appeared and represented Employee. Employee's wife, Jeanne Mitchell, also appeared as non-attorney representative of Employee and also testified. Attorney Constance Livsey appeared and represented Employer. There were no other witnesses. The record closed when the panel next met, on October 9, 2014.

ISSUES

Employee filed a petition for a protective order objecting to additional Employer medical evaluations (EME) with a physician other than Larry Levine, M.D. Employee contends an examination by an EME physician other than Dr. Levine constitutes an excessive and unlawful

change of physician by Employer. Specifically, Employee contends a panel EME by Dennis Chong, M.D. and Keith Holley, M.D. would be disallowed, because reliance on those physicians was found to be an excessive change of physician in a previous decision and order. Employee's petition requests a finding Dr. Levine remains available to conduct an EME. Alternatively, Employee requests an order stating Dr. Levine's unavailability constitutes an affirmation of his earlier opinions.

Employer contends Dr. Levine's office has declined to examine Employee and has declined to provide a referral. Employer therefore requests an EME examination with a physician other than Dr. Levine, including a possible panel EME by Drs. Chong and Holley. After deliberation, an oral order issued denying Employee's petition for a protective order, and allowing Employer to substitute another physician for Dr. Levine as EME.

1) **Was the oral order permitting an examination of Employee by an EME physician other than Dr. Levine correct?**

Employer contends medical disputes exist between Employee's treating physicians Lawrence Stinson, M.D. and Rick Delamarter, M.D., and Employer's EME physicians Drs. Chong and Holley as to diagnosis, causation, date of medical stability, and need for medical treatment. Employer contends these disputes are significant such that an SIME is warranted. Alternatively, Employer contends even if the reports and opinions of Drs. Chong and Holley are excluded, a significant "gap" in the medical evidence exists, such that an SIME is warranted. Employer further contends Employee voluntarily underwent significant and substantial medical procedures – including surgery – despite a previous decision and order finding him medically stable and a medical recommendation for only conservative care. Employer seeks an SIME with an orthopedic surgeon and neurosurgeon.

Employee opposes an SIME. Employee contends the reports and opinions of Drs. Chong and Holley were struck from the record by *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 14-0049 (April 7, 2014) (*Mitchell X*) and cannot be relied upon in finding a medical dispute justifying an SIME. However, Employee concedes if reports and opinions of Drs. Chong and Holley were allowed into the record, a medical dispute would likely then be created, possibly necessitating an SIME to which Employee might stipulate.

2) Should an SIME be ordered?

FINDINGS OF FACT

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

1) On October 31, 1995, Employee injured his back while working for Employer as a truck driver. (Report of Injury, October 31, 1995).

2) On January 27, 1996, Employee attended the first EME in this case with Michael G. McNamara, M.D. (McNamara EME Report, January 27, 1996).

3) On August 7, 1996, at Employer's request, Employee was examined by Larry Levine, M.D., for another EME. (Levine EME Report, August 7, 1996). This evaluation was arranged by John Murray, Vice President of Workers' Compensation for Northern Adjusters, by way of a letter to Employee dated July 24, 1996, which stated:

> . . . 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).

4) On July 20, 1999, at the request of a new adjuster, Jeffrey Phillips, employed with a new adjusting firm, Crawford and Company, Employee was examined by Susan Klimow, M.D. At that time, Dr. Klimow was Dr. Levine's practice partner. (Record; Observations).

5) On March 30, 2000, at Employer's request, Dr. Klimow wrote a referral note for an additional EME to be conducted by Douglas Smith, M.D. (Letter, March 30, 2000).

6) On April 21, 2000, Dr. Smith performed an EME of Employee. (Smith EME Report, May 9, 2000).

7) On July 12, 2000, Dr. Levine performed an EME of Employee. (Levine EME Report, July 12, 2000).

8) On July 12, 2001, Employee was again examined by Dr. Levine for an EME. (Levine EME Report, July 12, 2001).

9) On September 12, 2002, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02–0182 (September 12, 2002) (*Mitchell I*), granted Employer's request for bifurcation. (*Id.*).

10) On September 27, 2002, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02-0195 (September 27, 2002) (*Mitchell II*), ordered an SIME and found there was not an excessive change of physician. (*Id*.). 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 that Employee incurred a 10 percent PPI, which contrasted with the 20 percent PPI previously assigned by treating physician Dr. Peterson. *Mitchell II* found Employer had not yet exercised any change of physician when it selected Dr. Smith to perform an EME on May 9, 2000. (Employee Petition to exclude Dr. Smith as excessive change of physician, May 14, 2002; *Mitchell II* at 4).

11) On November 21, 2002, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02–0239 (November 21, 2002) (*Mitchell III*), granted in part Employee's request for interest and penalties, and denied his rehabilitation expenses. (*Id*.).

12) On March 18, 2003, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 03–0060 (March 18, 2003) (*Mitchell IV*), clarified and affirmed *Mitchell III*. (*Id*.).

13) On July 11, 2003, Dr. Smith performed another EME. Dr. Smith's report, addressed to Employer's attorney and dated August 13, 2003, began:

> 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) (Smith EME report, August 13, 2003, at 1).

14) On October 24, 2003, Alan C. Roth, M.D. performed a Board-ordered SIME. Dr. Roth's report found significantly decreased lumbar range of motion. All other ranges of motions and measurements were normal and symmetrical. Dr. Roth opined Employee reached a point of medical stability by December 16, 2002. Dr. Roth assigned a 20 percent PPI rating. Finally, Dr. Roth opined Employee was status post three lumbosacral surgeries including laminectomy and L4-L5 fusions, status post epidural blocks, IDET procedures and conservative treatment and diagnosis, chronic lumbar pain, and degenerative disc disorder at L4-L5. (Dr. Roth SIME Report, December 10, 2003).

15) On September 1, 2005, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 05-0224 (September 1, 2005) (*Mitchell V*), denied Employee's petition for a hearing on the validity of the Dr. Roth SIME report. (*Id*.).

16) On December 20, 2005, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 05-0333 (December 20, 2005) (*Mitchell VI*) decided Employee's claim for TTD, "additional medical benefits," penalty and interest, and unfair or frivolous controversion. After examining the medical evidence, including Dr. Roth's SIME report, *Mitchell VI* found Employee reached medical stability as of January 30, 2003, that disc replacement surgery was neither reasonable nor necessary, and the only reasonable or necessary treatment presented in the record until that time was conservative care. Specifically, *Mitchell VI* made the following findings:

> We find [Employee] continues to suffer from chronic low back pain.
> . . .
>
> We find the observations of Drs. Peterson, Stinson, Roth, and Delamarter that fused vertebrae put stress on surrounding vertebrae that would not otherwise be present persuasive.
> . . .
>
> [W]e find by a preponderance of the evidence that the need for medical treatment at L4-L5 is work-related, and hence compensable.
> . . .
>
> [W]e find disc replacement surgery neither reasonable nor necessary under the facts presented. We further find that the only reasonable and necessary treatment presented in the record at this time is for conservative care. . . . (*Mitchell VI* at 15, 17, 18, 21).

17) On August 10, 2006, Rick Delamarter, M.D., performed a Dynesys stabilizer implant surgery at L4-5 and L3-4. (Delamarter, Postoperative report, August 18, 2006).

18) On January 30, 2006, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 06-0024 (January 30, 2006) (*Mitchell VII*), granted in part Employee's request for unpaid medical expenses, and denied his request for penalties. (*Id*.).

19) On February 27, 2006, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 06-0045 (February 27, 2006) (*Mitchell VIII*), denied Employer's petition for reconsideration or clarification of *Mitchell VII*. (*Id*.).

20) On April 8, 2010, Lawrence Stinson, M.D., performed a spinal cord stimulator implant surgery. (Stinson, Postoperative Report, April 13, 2010).

21) No employer's medical evaluations took place between 2003 and 2014. (Record; observations).

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

23) On February 4, 2014, at Employer's request, Employee was seen by physiatrist Dennis Chong, M.D., and on February 8, 2014, by orthopedist Keith Holley, M.D., for a panel EME. (Record; observations).

24) Of particular relevance here, on April 7, 2014, *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 14-0049 (April 7, 2014) (*Mitchell X*), found Employer's return to Dr. Smith for an EME constituted an unauthorized change of physician, found Employer's use of Drs. Chong and Holley constituted Employer's second unauthorized change of physician, and found Dr. Levine was Employer's last permissible EME physician. (*Id.* at 6-7, 16-17). Specifically, the decision ordered:

> 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 physicians 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 witness is granted. (*Id.* at 18) (emphasis added in bold).

25) On July 22, 2014, Employer's attorney sent a letter to Dr. Levine's office requesting an EME of Employee. (Letter, July 22, 2014).

26) On July 24, 2014, Employer's attorney received an email from Erik Deets, a scheduler for ExamWorks, Inc., which works with Dr. Levine to coordinate EMEs. Mr. Deets' email stated:

> I heard from Dr. Levine's office and he said that he would not be willing to do a follow up IME. I have asked his office for a referral to another provider for you. Please let us know if you have any questions. (Email, July 24, 2014).

27) On July 25, 2014, Employer's attorney sent Employee's attorney a letter, which stated:

> This letter is to advise you that pursuant to the Alaska Workers' Compensation Act, UPS and its insurer, Liberty, have scheduled Mr. Mitchell for a panel independent medical evaluation ("IME") pursuant to AS 23.30.095 and 8 AAC 45.082 with Dr. Dennis Chong and Dr. Keith Holley through Objective Medical Assessments Corp (OMAC) in Anchorage, Alaska. We requested that Dr. Larry Levine, whom the Board determined was our most recently properly-designated IME physician, perform a repeat IME on UPS/Liberty's behalf. Dr. Levine's office advised that he has declined to perform another IME and will be providing a referral. . . . (Letter, July 25, 2014).

28) On August 6, 2014, Employee filed a Petition for Protective Order, which stated:

> [Employee seeks] a protective order precluding further EIME's in advance of the September 10, 2014 hearing; for a finding that Dr. Levine remains available, within the meaning of the law, or, in the alternative, that his "unavailability" is an affirmation of his earlier opinions. That employer is not entitled to a change of physicians, or a change to a panel. . . . (Petition, August 6, 2014).

29) On August 21, 2014, Employer's attorney sent an email to Janice Weaver, office manager for Alaska Spine Institute where Dr. Levine practices, which stated:

> I received the e-mail . . . from Erik Deets at Examworks, with whom I've been in communication in connection with my request last month that Dr. Levine perform an IME of Stephen Craig Mitchell. . . .
>
> You indicated to me that you speak for Dr. Levine regarding scheduling matters (and have for many years) and that you conveyed to Examworks Dr. Levine's decision to decline to perform the requested IME. I'm trying to avoid multiple layers of "he said that she said that he said" stuff. So that I can document Dr. Levine's declining to perform the IME a bit more directly from the horse's mouth so to speak, can you please confirm for me via e-mail that you provided Dr. Levine my IME request letter and medical records and he declined to perform the eval? (sic) (Email, August 21, 2014).

30) That same day, Ms. Weaver responded: "This is to confirm that Dr. Levine did a records review on the records you provided and has declined to perform the IME." (Email, August 21, 2014).

31) Dr. Levine is unavailable to perform an EME of Employee and has not provided a referral. (Experience, judgment, observations, and inferences from all of the above).

32) On August 22, 2014, Employer filed an Answer in Opposition to Employee's August 6, 2014 petition which stated, in relevant part:

> Employee is not entitled to a finding that "Employer is not entitled to a change of physicians, or a change to a panel." AS 23.30.095 and its accompanying regulation at 8 AAC 45.082 permits the Employer to undertake an independent medical examination by a "physician or panel of physicians" and further states that the IME physicians are to be "selected by the employer." 8 AAC 45.082(b)(3). The Employer is thus entitled to select a different physician to take the place of Dr. Levine as a consequence of Dr. Levine's refusal to perform an IME. Employer has done so by selecting Dennis Chong, MD, a physician with the same medical specialty (physical medicine and rehabilitation) and credentials (licensure in Alaska, AMA Board Certification in Rehabilitation and Physical Medicine) as Dr. Levine. Further, Employer's choice to have Employee evaluation by a "panel of physicians" is in accord with the express provision of the cited regulation. . . . (Answer, August 22, 2014).

33) On August 22, 2014, Employer controverted all benefits. The controversion form states:

> All benefits are controverted pursuant to AS 23.30.095(e). Employee refused to submit to an examination provided for in this section and properly noticed on 7/25/14. Employee failed to attend properly notice IME appointments on 8/7/14 and 8/9/14. The employee's rights to compensation shall be suspended until the obstruction or refusal ceases and may be forfeited. AS 23.30.095. (Controversion, August 22, 2014).

34) On September 4, 2014, the parties met at a prehearing conference. The parties agreed the preliminary issues to be heard at the September 10, 2014 hearing were as follows:

i) Whether EE has received or is in possession of a Social Security award letter and what efforts have been undertaken to provide ER with same;

ii) Whether an SIME will be ordered per ER's petition of August 28, 2014;

iii) EE's August 6, 2014 Petition for a Protective Order regarding EME and ER's Answer of August 22, 2014.

The prehearing conference summary listed an additional twelve primary issues for the hearing. (Prehearing Conference Summary, September 4, 2014).

35) At the September 10, 2014 hearing, only the three preliminary issues were heard. Employee provided Employer a copy of a Social Security initial award letter. Employer stated it was satisfied with the letter. Therefore, the first preliminary issue concerning the Social Security award letter is not decided here and Employer's September 3, 2014 petition is held in abeyance. (Record).

36) At the September 10, 2014 hearing, an oral issued order after the panel deliberated denying Employee's August 6, 2014 Petition for Protective Order concerning additional EME examinations. (Record).

37) The record remained open at the conclusion of the hearing to allow the parties to submit briefs addressing the second paragraph in the order of *Mitchell X* in light of the above oral order. (*Id.*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . .
>
> (3) this chapter may not be construed by the courts in favor of a party;
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . The board may authorize continued treatment or care or both as the process of recovery may require. 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. (emphasis added).
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> (b) If the employee is unable to designate a physician and the emergency nature of the injury requires immediate medical care, or if the employee does not desire to designate a physician and so advises the employer, the employer shall designate the physician. Designation under this subsection, however, does not prevent the employee from subsequently designating a physician for continuance of required medical care.
> . . .
>
> (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. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . .
>
> (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. . . .

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. Multiple employer physicians who work "under the auspices of

the same organization" are treated as separate physicians. *Colette v. Arctic Lights Electric, Inc.*, AWCB Decision No. 05-0135 (May 19, 2005). The purpose of the "one change of physician" rule is to curb doctor shopping. *E.g.*, *Bloom v. Tekton, Inc.*, 5 P.3d 235, 235 (Alaska 2000); *Coppe v. United Parcel Service, Inc.*, AWCB Decision No. 11-0084 (June 17, 2011).

> **AS 23.30.110. Procedure on claims**. . . .
> . . .
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> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .
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> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .
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> **AS 23.30.135.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence of 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. . . .
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> **AS 23.30.155. Payment of compensation**. . . .
> . . .
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> (h) The board may upon its own initiative at any time in a case . . . where right to compensation is controverted . . . 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 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter. . . .

8 AAC 45.082. Medical treatment. . . .

. . .

(b) Physicians may be changed as follows:

. . .

(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.

. . .

(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 45.092. Selection of an independent medical examiner. . . .

. . .

(g) If there exists a medical dispute under AS 23.30.095(k),

. . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived; . . .

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

> (A) the parties stipulate, in accordance with (1) of this subsection to the contrary and the board determines the evaluation is necessary; or
>
> (B) the board on its own motion determines an evaluation is necessary.

The following, general criteria are typically considered when ordering an SIME, though the statute does not expressly so require:

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

2) Is the dispute "significant"?

3) Will an SIME physician's opinion assist the fact-finders in resolving the disputes?

DiGangi v. Northwest Airlines, AWCB Decision No. 10-0028 (February 9, 2010), at 13. AS 23.30.095(k) is procedural and not substantive for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 at 3 (July 23, 1997). AS 23.30.135 provides the board with wide discretion under AS 23.30.095(k) to consider any evidence available when the board decides whether to order an SIME to assist in investigating and deciding medical issues in contested claims. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), *Bah* stated:

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

Id. at 4. *Bah* also stated, before ordering an SIME, it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Id.*

The law gives discretion to the board to order the specialty to conduct an SIME, and to empanel one or several doctors for an SIME if necessary to ensure "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to Employer. *Mazurenko v. Chugach Alutiiq JV*, AWCB Case No. 11-0064 (May 17, 2011).

"Process and procedure under this chapter shall be as summary and simple as possible." AS 23.30.005(h). By law, the board may require an SIME "by a physician or physicians" selected from a list established and maintained for such purposes. The board may also order an "investigation or inquiry" in "the manner by which it may best ascertain the rights of the parties." AS 23.30.135. If an employee's claim has been controverted, the board may "cause the medical examinations to be made," and take discretionary action to "properly protect the rights of all parties." AS 23.30.155(h). In short, the board has broad discretion to order a medical evaluation and to select one or more specific physicians from the SIME list, and their specialties, for an SIME. *Lindeke v. Anchorage Grace Christian School*, AWCB Decision No. 11-0040 (April 8, 2011).

Under Alaska's Workers' Compensation Act, an employer shall furnish an employee injured at work any medical treatment "which the nature of the injury or process of recovery requires" within the first two years of the injury. The medical treatment must be reasonable and necessitated by the work-related injury. Thus, when the board reviews an injured employee's claim for medical treatment made within two years of an injury that is undisputably work-related, its review is limited to whether the treatment sought is reasonable and necessary. *Weidner v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999).

Employers have a constitutional right to defend against claims. *Rambo v. VECO, Inc.*, AWCB Decision No. 14-0107 (August 5, 2014), at 8 (citing *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), at 6, which cited Alaska Const., Art. I Sec. 7). Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Granus* at 5, citing AS 21.36.120 and 3 AAC 26.010-300. A thorough investigation of workers' compensation claims allows employers to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect fraud. *Granus* at 6, citing *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987).

> **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.

ANALYSIS

1) Was the oral order permitting an examination of Employee by an EME physician other than Dr. Levine 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. *Id.* The Act and regulations do not state an EME physician is required to provide a referral in the event he or she declines to undertake the requested EME. *Id.*; 8 AAC 45.090.

Employer produced reliable evidence Dr. Levine's office has declined to perform additional EMEs of Employee in the form of emails from Dr. Levine's office and also the EME service agency working for Dr. Levine. Dr. Levine has not provided a referral. If Employer is not permitted a substitution of EME physicians at this time, Employer would be left without means to gather additional evidence concerning Employee's physical condition and open claims for benefits. Employer would be stripped of a means to defend itself because it would not be able to conduct investigation into Employee's claim. Such a result would deprive Employer of due process, would be fundamentally unfair, and is therefore contrary to the purpose of the Act. Employers have a constitutional right to defend against claims, including the right to thoroughly investigate and gather evidence concerning claims for benefits under the Act for which they ultimately may be responsible. *Granus*; AS 23.30.001(1), (3) - (4).

Referral to a specialist by an employer's physician is not considered a change in physicians. AS 23.30.095(e). Therefore, Employer is correct in its contention that, had Dr. Levine been willing to provide a referral, Employer could utilize Drs. Chong or Holley as either a substitute or a referral panel EME. *Id.* To the extent Employee wishes to impose conditions on Employer's selection of an EME (namely, exclusion of Drs. Chong and Holley), the Act is clear: under AS 23.30.095(e), Employee is required to "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." Licensure to practice medicine where the examination occurs is the only requirement for a medical evaluator. *Id.* Examination by a panel EME is permissible, so long as the panel completes its report no more than five days after the first EME physician has seen the employee. 8 AAC 45.082(b)(3).

In *Bloom*, the Supreme Court noted the purpose of the Act's restrictions on changes of physicians is to curb potential abuse by "doctor shopping." Employer has presented convincing evidence of Dr. Levine's unavailability due to circumstances not in Employer's control; therefore, doctor shopping is not a concern. *Mitchell X* ordered the reports of the EME panel of Drs. Chong and Holley struck as an excessive change of physicians. Modification of Board orders is appropriate where "a change in conditions" is shown. AS 23.30.130(a). A change of circumstances, as occurred here when Dr. Levine became unavailable, necessarily triggers Employer's right to have a substitution of the EME physician with an EME of its choice by way of modification of *Mitchell X*. AS 23.30.095(e). Accordingly, *Mitchell X* will be modified to permit Employer to rely on future EME reports of Drs. Chong and Holley, if those are the EMEs Employer selects. AS 23.30.130(a); AS 23.30.135. A different result would place form over substance and would be contrary to the purposes of the Act. AS 23.30.001. Therefore, the oral order denying Employee's August 6, 2014 Petition for Protective Order and permitting an examination of Employee by an EME physician other than Dr. Levine was correct. Employer will be permitted to change its medical evaluator to an EME of its choice, including to a panel EME by Drs. Holley and Chong, if Employer so elects. AS 23.30.095(e); AS 23.30.155(h); 8 AAC 45.082; 8 AAC 45.195.

Should an SIME be ordered?

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

In the event of a medical dispute regarding 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 an employee's attending physician and the employer's independent medical evaluation, the board may require an SIME be conducted. AS 23.30.095. Employer contends the reports of Drs. Stinson and Delamarter conflict with those of EMEs Drs. Chong and Holley. The oral order which issued at hearing denied Employee's August 6, 2014 Petition for Protective Order and permitted an examination of Employee by an EME physician other than Dr. Levine. While Employer may ultimately choose to use Drs. Chong and Holley as future EME physicians, the previous reports of those EMEs, struck from the record by *Mitchell X*, cannot be used to create a medical dispute justifying an SIME in the instant case.

An additional contention which Employer relies on in support of its petition for an SIME is if the EME reports of Drs. Chong and Holley remain stricken from the record, as ordered by *Mitchell X*, a significant gap exists in the medical record which would make determination of key medical disputes problematic or difficult. Employer's contention is well-founded. No employer's medical evaluations took place between 2003 and 2014. The February 2014 panel EME reports of Drs. Chong and Holley remaining struck from the record leaves a gap in the EME reports of nearly ten years – a very significant span of time during which Employee was receiving treatment for which Employer may potentially be responsible and for which no valid EME reports currently exist.

On December 20, 2005, *Mitchell VI* found Employee reached medical stability as of January 30, 2003, that disc replacement surgery was neither reasonable nor necessary, and that the only reasonable or necessary treatment presented in the record until that time was conservative care. Thereafter, Employee underwent two very significant medical procedures: the 2006 Dynesys surgical procedure and a 2010 spinal cord stimulator implant. The reasonableness and necessity of these two procedures remains in dispute, and Employer's controversions regarding these benefits

remain in place. Depending on the outcome of a merits hearing, Employer may potentially be required to pay for these procedures. Medical stability and the degree to which Employee remains impaired, if any, is also in dispute. The last valid impairment rating is over ten years old and significant medical facts and Employee's physical condition may have changed since then. An SIME at this time would assist in determination of these issues, and provide information for final resolution of this case. *Bah*; AS 23.30.155(h).

ii) Is the dispute "significant"?

The medical disputes are significant because if the work injury is not the substantial cause of the need to treat Employee, Employer will not be responsible to pay the costs associated with treatment already performed and future procedures, medical follow-up, and supplies necessary for Employee's continued treatment. Further, there are clear medical disputes as to causation, current and future need for treatment, permanent impairment, and medical stability. Employee has undergone significant medical procedures and the gap in the medical evidence from 2003 to 2014 is considerable. An SIME will provide a causation opinion for the need for past and further treatment, an opinion regarding Employee's physical capacity, permanent impairment, possibility of Employee returning to work, and medical stability. The opinions could result in considerable differences in medical costs, disability benefits, and permanent impairment. AS 23.30.001(1).

iii) Will an SIME physician's opinion assist the fact-finders in resolving the disputes?

An SIME will assist the fact-finders in resolving this case for all the reasons set forth above. Given the nature of Employee's condition and the medical record in this case, a panel SIME with a physiatrist and an orthopedic surgeon will ordered. *Lindeke*. A physiatrist SIME will provide medical opinions from a non-surgical perspective, while the orthopedic surgeon SIME will give opinions from a surgical viewpoint. The issues for the SIME will include, but are not limited to: whether the 1995 work injury is a substantial factor in Employee's disability or need for medical treatment, and what treatment was or is reasonable and necessary to improve Employee's condition. To save time and expense, the parties may agree to have the SIME physicians address other issues. A prehearing conference will be ordered at the next mutually available date so the

parties can begin the SIME process and determine if there are any additional issues the SIME should address. *Bah*; AS 23.30.001(1); AS 23.30.095(k); AS 23.30.155(h).

CONCLUSIONS OF LAW

1) The oral order denying Employee's August 6, 2014 Petition for Protective Order and permitting an examination of Employee by an EME physician other than Dr. Levine was correct.
2) An SIME will be ordered.

ORDER

1) Employee's August 6, 2014 Petition for Protective Order is denied.
2) Employer's August 28, 2014 Petition for an SIME is granted.
3) Unless the parties otherwise stipulate, a panel SIME with physiatrist and an orthopedic surgeon is ordered. The physicians will be selected by the appropriate designee in conformance with the division's policy for selecting SIME doctors from the authorized list.
4) The designee will use her discretion and the normal selection process, including the criteria set forth in 8 AAC 45.092(e).
5) Within thirty days of this decision, Employer is to request a prehearing conference to be held at a mutually agreeable date to begin the SIME process.
6) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order No. 14-0049 (April 7, 2014) (*Mitchell X*) is modified to the extent Dr. Levine is now unavailable. Employer will be permitted to change its medical evaluator to an EME of its choice, including to a panel EME by Drs. Holley and Chong, if Employer so elects.

Dated in Anchorage, Alaska on December 12, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

_____
Amy Steele, Member

_____
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. 199523875; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 12, 2014.

_____
Elizabeth Pleitez, Office Assistant