ALASKA WORKERS' COMPENSATION BOARD

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

JEFFREY KOLLMAN, Employee, Applicant, v. ASRC ENERGY SERVICES, INC., and ARCTIC SLOPE REGIONAL CORPORATION, Self-Insured Employer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201007169 AWCB Decision No. 15-0004 Filed with AWCB Fairbanks, Alaska on January 7, 2015

The parties' numerous procedural disputes were heard on November 20, 2014, in Fairbanks, Alaska. The hearing date was selected on October 1, 2014. Attorney Michael Jensen represented Jeffrey Kollman (Employee). Attorney Robert Bredesen represented ASRC Energy Services, Inc. and Arctic Slope Regional Corporation (Employer). The record was held open to receive a letter from Lynne Bell, M.D. The record closed when the panel next met and deliberated, on December 4, 2014.

ISSUES

Employee contends Employer has exceeded its one allowable change of physician under AS 23.30.095(e). Employee contends the pending report of Russell Cherry, M.D., should therefore be stricken from the record. Employer contends it has not violated AS 23.30.095(e), and in fact has not yet exercised its one allowable physician change.

1) ***Has Employer exceeded its one allowed change of physician?***

Employee contends Employer has failed to respond to his July 28, 2014 discovery requests seeking information related to Dr. Bell's professional background. Employee seeks an order compelling Employer to respond to his discovery requests. Employer contends it has fully responded to Employee's requests.

2) *Should Employer be ordered to respond to Employee's discovery requests?*

Kollman v. ASRC Energy Services, AWCB Dec. No. 14-0075 (May 30, 2014)*(Kollman II)* ordered a second independent medical evaluation (SIME) with either a neurosurgeon or pain management specialist on the question of whether a spinal cord stimulator is reasonable and necessary to treat Employee's headaches. Employee contends an SIME with a neurosurgeon is no longer warranted, as numerous medical opinions now exist demonstrating the spinal cord stimulator was effective in alleviating Employee's headaches. Employee seeks modification of *Kollman II* and an order denying Employer's request for an additional SIME. Employer contends a dispute remains whether the spinal cord stimulator was reasonable and necessary treatment for Employee's headaches and the SIME should go forward.

3) *Should Kollman II be modified?*

Employee contends Employer's proposed SIME questions should be stricken as they were filed 52 days after the deadline set by the board designee at the June 5, 2014 prehearing conference. Employer contends the questions were submitted before the SIME was scheduled and there is no harm to Employee by the late-filing of the questions.

4) *Should Employer's proposed SIME questions be stricken?*

Employee contends he should not be required to attend a second videotaped deposition, as he has already been extensively deposed and cross-examined at hearing. He contends Employer merely intends to harass, intimidate and embarrass him by redeposing him. Employer contends significant new issues have developed since Employee's August 2013 deposition and Employer is entitled to depose Employee on these new issues.

5) *Should Employee be ordered to appear for a videotaped deposition?*

FINDINGS OF FACT

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

1) On April 27, 2010, Employee injured his neck, back, right shoulder, nose and head when the tow strap of a dozer he was operating failed and struck him on the right side of his face. (Report of Occupational Injury or Illness, undated; Employee's Claim, November 5, 2012).

2) On December 1, 2011, Employee saw Paul Craig, Ph.D., for a neuropsychological evaluation, on referral from Employee's treating physician Sean Johnston, M.D. Dr. Craig conducted psychometric tests as part of his evaluation. (Dr. Craig report, December 1, 2011).

3) On March 16, 2012, at Employer's request, Douglas Bald, M.D., conducted an employer's medical evaluation (EME). Dr. Bald provided addendum reports on March 23, 2012 and July 12, 2012. (Dr. Bald report, March 16, 2012; Addendums, March 23, 2012 and July 12, 2012).

4) On November 9, 2012, Employee filed a workers' compensation claim, seeking reclassification of .041(k) stipend to temporary total disability (TTD) benefits, medical costs, transportation, interest, attorney's fees and costs, and an SIME. (Claim, November 5, 2012).

5) On November 27, 2012, Employer filed its answer to Employee's claim, admitting reclassification to TTD and denying all other claimed benefits. (Answer, November 27, 2012).

6) On January 22, 2013, Dr. Bald conducted another EME. He noted "… it would be extremely informative to obtain a psychiatric consultation perhaps with Dr. Eugene Klecan, M.D., psychiatrist, regarding what contribution there are from Mr. Kollman's depression and underlying psychological issues to his current physical complaints." He later noted in his report:

> I definitely feel that a follow-up independent medical examination with a psychiatrist, perhaps Dr. Eugene Klecan, would be very reasonable and appropriate. I do think that an independent medical examination by an ENT specialist regarding the claimant's complaints of vertigo and their potential association with inner ear abnormalities would also be reasonable given the fact that Dr. Beals has apparently recommended surgical treatment for these complaints.

(Dr. Bald EME report, January 22, 2013).

7) On June 27, 2013, *Kollman I* issued, finding Sean Johnston, M.D., and nurse case manager Suzan del Rosso were not employer-selected physicians and therefore Employer had not exceeded its one allowable change of physician under AS 23.30.095(e). *Kollman I* found Dr. Bald was Employer's first physician selection. *(Kollman I).*

8) On August 7, 2013, Employer took Employee's deposition. (Record).

9) On August 15, 2013, Dr. Bald wrote a letter to Employer's adjuster:

> I performed an independent medical evaluation on Jeffrey Kollmann (sic) January 22, 2013 and issued a report regarding claim 20101-05672.
>
> In my response to question 7 in the cover letter, I recommended the claimant undergo an independent psychiatric evaluation possibly by Dr. Eugene Klecan. At this time, Dr. Klecan is unavailable to perform an evaluation on Mr. Kollmann (sic). I would, therefore, recommend Mr. Kollmann (sic) undergo an independent psychiatric evaluation by Dr. S. David Glass.

(Dr. Bald letter to L. Palazzotto, August 15, 2013).

10) On August 27, 2013, S. David Glass, M.D., conducted a psychiatric evaluation at Employer's request, per Dr. Bald's recommendation. (Dr. Glass EME, August 27, 2013).

11) On August 28, 2013, otolaryngologist James Rockwell, M.D., conducted an ENT evaluation, based on Dr. Bald's January 22, 2013 referral. Dr. Rockwell recommended a referral to audiologist James Wuth. (Dr. Rockwell EME, August 28, 2013).

12) On November 6, 2013, Dr. Wuth conducted balance testing upon Dr. Rockwell's referral. (Dr. Wuth report, December 10, 2013).

13) On May 30, 2014, *Kollman II* issued, ordering an SIME with an ENT and either a pain specialist or neurosurgeon, depending on which was more qualified to comment on whether a spinal cord stimulator is reasonable and necessary to treat Employee's headaches. *(Kollman II).*

14) On June 1, 2014, Employee reported to Dr. Grissom he enjoyed significant relief of his headaches (greater than 60%) from the spinal cord stimulator. (Dr. Grissom report, June 1, 2014).

15) On June 5, 2014, the parties attended a prehearing conference. The parties stipulated to deadlines for the board-ordered SIMEs. The parties agreed their proposed questions would be due to the board by June 20, 2014. (Prehearing Conference Summary, July 1, 2014).

16) The prehearing conference summary ordering SIME deadlines based on the parties' stipulation at the June 5, 2014 hearing was not issued until July 1, 2014, after the deadline for proposed questions had passed. (Record).

17) On June 10, 2014, Dr. Bald issued an addendum report after reviewing medical reports received since his January 2013 EME. Dr. Bald noted "[f]ollow-up referral to a neurologist would be appropriate." (Dr. Bald addendum, June 10, 2014).

18) On July 28, 2014, Employee submitted discovery requests to Employer requesting information about Dr. Bell. (M. Jensen letter to R. Bredesen, July 28, 2014).

19) On July 29, 2014, Employee submitted the CV of David Schindler, M.D., proposing him as the ENT SIME physician. (M. Jensen letter to M. Kokrine, July 29, 2014).

20) On July 30, 2014, Employee saw his treating neurologist, Franklin Ellenson. Dr. Ellensen noted Employee had experienced improvement of his headache symptoms after placement of the spinal cord stimulator. (Dr. Ellenson report, July 30, 2014).

21) On July 31, 2014, Dr. Bald issued an addendum:

> I did previously suggest referral to a neurologist for evaluation of the neurological type symptoms that Mr. Kollman has been describing which he attributes to this work injury.
>
> In reviewing the more recent medical records, it is apparent that the claimant's symptoms, on a cognitive basis, if anything seem to be increasing in nature and I would then like to clarify and recommend referral for an Independent Medical Examination to a neurologist for evaluation of his current neurological type symptomatology. I also think it would be very appropriate to refer Mr. Kollman for an Independent Medical Examination from a board certified neuro-psychologist regarding his current symptomatology.

(Dr. Bald addendum report, July 31, 2014).

22) On August 7, 2014, Employer scheduled an evaluation with neuropsychologist Russell Cherry, M.D. (Employee Hearing brief at 2, dated November 7, 2014).

23) On August 8, 2014, Dr. Bell, a neurologist, conducted an EME. She opined Employee's work-related headaches were resolved no later than March 2012 and any continuing headache symptoms were caused by preexisting conditions. She specifically opined the spinal cord stimulator was not reasonable and necessary medical treatment related to the work injury. In response to the question whether she recommended any additional evaluations to complete her assessment, Dr. Bell noted:

> Yes, I do recommend that Mr. Kollman undergo a follow-up neuropsychological evaluation by Dr. Paul Craig, who performed the original psychometric testing. This would be reasonable so that Dr. Craig could compare results from the two test batteries and determine whether there has been improvement or whether there is a decline in function that might suggest some other process (such as a vascular dementia) as the cause of the self-reported cognitive decline.

(Dr. Bell EME report, August 8, 2014).

24) On August 11, 2014, Employer submitted its proposed SIME questions to the board. (Employer SIME Questions, August 11, 2014).

25) On August 12, 2014, Employee filed a petition to strike Employer's late-filed SIME questions. (Employee Petition, August 12, 2014).

26) On August 13, 2014, Employee filed a petition to strike Dr. Cherry's EME report. (Employee Petition, August 11, 2014).

27) On August 14, 2014, Employee sent a letter to board designee Melody Kokrine objecting to Dr. Cleary serving as the neurosurgeon SIME. (M. Jensen letter to M. Kokrine, August 12, 2014).

28) On September 2, 2014, Employee underwent a neuropsychological evaluation with Dr. Cherry. Dr. Cherry has not yet issued his report. (Record).

29) On September 5, 2014, Employee filed a petition to compel Employer to respond to Employee's July 28, 2014 discovery requests. (Employee Petition to Compel, September 3, 2014).

30) Employer did not file an answer to Employee's September 5, 2014 petition to compel. (Record).

31) On September 22, 2014, Employee filed a petition to modify *Kollman II*. Employee contended no dispute existed on the issue of reasonableness and necessity of the spinal cord stimulator. Employee requested the SIME on this issue be cancelled. (Employee's Petition for Modification, September 18, 2014).

32) On October 1, 2014, the parties attended a prehearing conference. The parties agreed to set the following issues for hearing on November 20, 2014:

> Petition to Strike Sixth EIME Physician and Cancel September 3, 2014 EIME dated 8/11/14
> Petition to Strike ER's SIME Questions dated 8/12/14
> Petition for Modification dated 09/18/14
> Petition to Compel dated 6/11/14 (may resolve)
> Petition to Compel dated 9/3/14 (may resolve)

(Prehearing Conference Summary, October 1, 2014).

33) On October 6, 2014, Employer filed its answers to Employee's petition to modify *Kollman II* and Employee's petition to strike Employer's SIME questions. (Employer's Answers, October 2, 2014).

34) On October 8, 2014, Employer responded to Employee's discovery requests concerning Dr. Cherry. (R. Bredesen letter to M. Jensen, October 8, 2014).

35) There is no record in the file of Employer responding to Employee's discovery requests related to Dr. Bell. (Record).

36) On October 9, 2014, board designee Melody Kokrine issued a notification letter to the ENT SIME physician, Jerome List, M.D., along with the SIME binders and the parties' proposed questions. The SIME was scheduled for October 29, 2014. (M. Kokrine letter to Dr. List, October 9, 2014).

37) On October 16, 2014, Employee filed a Petition to Compel discovery contending Employer's October 8, 2014 responses related to Dr. Cherry were not fully responsive. (Petition to Compel, October 13, 2014).

38) On October 29, 2014, Employee attended the ENT SIME with Dr. List. (Record).

39) On November 7, 2014, Employee filed a Petition of Objection to Scheduling a Second Deposition of Employee. (Employee's Petition, November 5, 2014).

40) On November 10, 2014, the parties attended a prehearing conference and stipulated to add Employee's November 5, 2014 Petition of Objection to Scheduling of a Second Deposition as an issue to the November 20, 2014 hearing. (Prehearing Conference Summary, November 10, 2014).

41) The October 16, 2014 petition to compel was not an issue to be heard at the November 20, 2014. There appears to be some confusion between the parties, as Employee argued this petition at length in his brief. Employer contended it responded to the discovery requests, but referenced its October 8, 2014 responses concerning Dr. Cherry and does not acknowledge that it did not respond to the initial July 28, 2014 requests related to Dr. Bell, which were the subject of the September 5, 2014 petition to compel. (Prehearing Conference Summary, November 10, 2014; Record; Parties' Hearing Briefs).

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. . . .

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).

> **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. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. 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.
> …
> (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. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter….
> …

AS 23.30.110. Procedure on claims.

. . .

(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.

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

AS 23.30.155. Payment of compensation.

. . .

(h) The board may upon its own initiative at any time in a case . . . 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 45.050. 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 45.054. Discovery.

(a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition.

(b) Upon the petition of a party, the board will, in its discretion, order other means of discovery.

(c) The board or division will issue subpoenas and subpoenas duces tecum in accordance with the Act. The person requesting the subpoena shall serve the subpoena at the person's expense. Neither the board nor the division will serve subpoenas on behalf of a party.

(d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.

8 AAC 45.082. Medical treatment ....

...

(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 with 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;

> (A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and
>
> (B) copies of the medical records reflecting the dispute; or

(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 board in resolving the disputes? (*Digangi v. Northwest Airlines,* AWCB Decision No. 10-0028 at 13 (February 9, 2010)(citations omitted)).

Section 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). Section 135 provides the board wide discretion pursuant to §095(k) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims. AS 23.30.155(h) also allows for board-ordered medical evaluations in controverted cases.

In *Bah v. Trident Seafood Corp.*, AWCAC Decision No. 07-0134 (February 27, 2008), the Commission outlined the board's authority to order an SIME under AS 23.30.110(g):

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it.... Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Bah, at 5.

> **Alaska Civil Rule 26. General Provisions Governing Discovery; Duty of Disclosure.**
>
> …
> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations.

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).
(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Alaska Civil Rule 30.1. Audio and Audio-Visual Depositions.

(a) Authorization of Audio-Visual Depositions.

(1) Any deposition upon oral examination may be recorded by audio or audio-visual means without a stenographic record. Any party may make at the party's own expense a simultaneous stenographic or audio record of the deposition. Upon request and at the expense of the requesting party, any party is entitled to an audio or audio-visual copy of the audio-visual recording.

> (2) The audio or audio-visual recording is an official record of the deposition. A transcript prepared in accordance with Rule 30(c) is also an official record of the deposition.
>
> (3) On motion for good cause the court may order the party taking, or who took, a deposition by audio or audio-visual recording to furnish at that party's expense a transcript of the deposition.
>
> (b) Use. An audio or audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.
>
> (c) Notice. The notice for taking an audio or audio-visual deposition and the subpoena for attendance at that deposition must state that the deposition will be recorded by audio or audio-visual means. If a court reporter will not be used to record the deposition, the notice must also state this fact.

ANALYSIS

1) Has Employer exceeded its one allowed change of physician?

Employee contends Employer has exceeded its one allowable change of physician, per AS 23.30.095(e). Specifically, Employee contends Dr. Bell made an explicit referral for a neuropsychological evaluation to Dr. Craig and therefore referral to Dr. Cherry was inappropriate. However, Dr. Bell noted in her report she recommended Employee see Dr. Craig because he was the physician who conducted the original psychometric testing. It is unclear whether Dr. Bell was aware Employee saw Dr. Craig on referral from his treating physician. In any event, Dr. Bell made a valid referral to a neuropsychologist in his July 31, 2014 addendum report, and Employer scheduled the evaluation with Dr. Cherry before Employee saw Dr. Bell. The fact Dr. Bell later recommended Employee follow-up with Dr. Craig does not invalidate Dr. Bald's earlier referral.

Careful evaluation of the record as a whole shows every employer evaluation Employee attended was on a proper referral. In his January 2013 report, Dr. Bald, Employer's first physician selection, referred Employee to an ENT specialist and a psychiatrist. Employee saw Dr. Rockwell and Dr. Glass respectively for these evaluations. Dr. Rockwell referred Employee to audiologist Dr. Wuth. Dr. Bald issued an addendum report recommending Employee see a

neurologist, and Employee saw Dr. Bell. Dr. Bald issued another addendum recommending a neuropsychological evaluation in addition to the neurology referral, and Employer scheduled an appointment with neuropsychologist Dr. Cherry. Employer has not yet exercised its one allowed change of physician. Employer has not violated AS 23.30.095(e). Dr. Cherry's report will not be stricken from the record.

2) Should Employer be ordered to respond to Employee's discovery requests?

Employee contends Employer failed to respond to his July 28, 2014 discovery requests seeking information related to Dr. Bell's professional background within thirty days of the request. Employee seeks an order compelling Employer to respond to his discovery requests. At hearing, Employer's counsel indicated Employer had responded to Employee's discovery requests and the November 20, 2014 hearing was the first indication Employee considered Employer unresponsive. After reviewing the parties' hearing briefs and reviewing the hearing recording, it appears there is some confusion between the parties. There are in fact two pending petitions to compel, dated September 5, 2014 and October 16, 2014 respectively. The September 5, 2014 petition concerns Employee's July 28, 2014 discovery requests relating to Dr. Bell, and the October 16, 2014 petition concerns Employee's discovery requests relating to Dr. Cherry. Employer responded to the requests related to Dr. Cherry on October 8, 2014, though Employee contends his answers were not fully responsive. That petition was not set to be decided at the November 20, 2014 hearing, and remains pending.

The September 5, 2014 petition concerns Employer's failure to respond to Employee's July 28, 2014 discovery requests relating to Dr. Bell, and there is no record in the file Employer ever responded to Employee's initial requests. Employer will be ordered to respond to Employee's July 28, 2014 discovery requests related to Dr. Bell within 30 days of issuance of this decision. The parties are aware of the board's policy favoring liberal discovery, and are encouraged to work together to ensure future reasonable requests are responded to promptly.

3) Should Kollman II be modified?

Kollman II ordered an SIME with either a neurosurgeon or pain management specialist on the question of whether a spinal cord stimulator is reasonable and necessary to treat Employee's

headaches. Employee contends an SIME with a neurosurgeon is no longer warranted, as numerous medical opinions now exist demonstrating the spinal cord stimulator was effective in alleviating Employee's headaches. Employee seeks modification of *Kollman II* and an order denying Employer's request for an additional SIME. Employer contends a dispute remains whether the spinal cord stimulator was reasonable and necessary treatment for Employee's headaches and the SIME should go forward.

Employee relies on the opinions of Drs. Grissom and Ellenson, received after *Kollman II* issued, which document Employee's reports of relief of his headache symptoms as a result of the spinal cord stimulator. However, Dr. Diamond has not altered his original opinion recommending a neurosurgical SIME, and in her August 8, 2014 EME report, Dr. Bell definitively stated treatment for headaches after March 2012 was not work related and the spinal cord stimulator "was not reasonable treatment of [Employee's] post-traumatic headache complaints." A significant medical dispute still exists in the record on the issue of whether the spinal cord stimulator is reasonable and necessary treatment for Employee's work-related headache complaints. *Kollman II* will not be modified.

4) Should Employer's proposed SIME questions be stricken?

Employee contends Employer's proposed SIME questions should be stricken as they were filed 52 days after the deadline set by the board designee at the June 5, 2014 prehearing conference. Employer concedes the questions were submitted after the June 20, 2014 deadline ordered at the June 5, 2014 prehearing conference, but contends they were submitted before the SIME was scheduled and Employee was not prejudiced by the late-filing of the questions.

Stipulations are governed by 8 AAC 45.050(f). Stipulations 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. Further, the board has discretion to conduct its investigation and to cause further evidence to be taken regardless of the parties' stipulation. Here, the prehearing conference summary for the June 5, 2014 prehearing was not issued until July 1, 2014, after the stipulated deadlines passed. There were numerous issues related to the SIME after the June prehearing conference which resulted in delaying scheduling the ENT SIME

until October. Employee submitted Dr. Schindler's CV to the board on July 29, 2014. On August 14, 2014, Employee objected to Dr. Cleary as the neurosurgeon SIME. On September 22, 2014, Employee filed his petition to modify *Kollman II*, specifically requesting the SIME with a neurosurgeon be cancelled. Throughout this period, the parties and the board designee had been exchanging CVs and attempting to locate a suitable ENT and neurosurgeon for a panel SIME. Employer's late-filed SIME questions, filed August 13, 2014, in no way caused the delay in scheduling the ENT SIME. The board finds it important to have Employer's questions submitted to the SIME along with Employee's questions in order to ensure an objective and thorough examination is conducted. The board will exercise its discretion and allow Employer's late-filed SIME questions to be presented to the SIME. They will not be stricken.

5) Should Employee be ordered to appear for a videotaped deposition?

Employer took Employee's deposition on August 7, 2013. The deposition was extensive, taking several hours. Employee contends he should not have to appear for a second deposition, contending Employer is merely attempting to harass, intimidate and embarrass Employee. Employee contends his marital issues are not relevant to his claim and Employer is not entitled to depose him on that issue. Employer contends several new issues have arisen since August 2013, including Employee's contention he is permanently totally disabled, he is now experiencing memory loss, and new diagnoses have been considered.

Alaska Civil Rule 30(a)(2)(B) states if a party has already been deposed, he may be ordered to appear for a subsequent deposition if it is consistent with the principles stated in Alaska Civil Rule 26(b)(2). That subsection specifies limitations may be placed on requested discovery methods when i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Employee presents no definitive arguments articulating how Employer intends to harass, intimidate or embarrass Employee. Employee presents no evidence demonstrating how an additional deposition, more than one year after the first, is unreasonably cumulative, how Employer may obtain the same information by another method or how the burden of expense outweighs the potential benefit. Employee's counsel is well aware he may object at deposition to any questions that are irrelevant, argumentative, or improperly worded. Employee will be ordered to attend a properly noticed video deposition.

CONCLUSIONS OF LAW

1) Employer has not exceeded its one allowed change of physician.
2) Employer will be ordered to respond to Employee's July 28, 2014 discovery requests.
3) *Kollman II* will not be modified.
4) Employer's proposed SIME questions will not be stricken.
5) Employee will be ordered to appear for a videotaped deposition.

ORDER

1) Employee's August 11, 2014 petition to strike Dr. Cherry's report is DENIED.
2) Employee's September 5, 2014 petition to compel is GRANTED. Employer shall respond to Employee's July 28, 2014 discovery requests related to Dr. Bell within 30 days of issuance of this decision and order.
3) Employee's September 18, 2014 petition for modification is DENIED.
4) Employee's August 12, 2014 petition to strike Employer's SIME questions is DENIED.
5) Employee's November 5, 2014 petition objecting to a second videotaped deposition of Employee is DENIED. Employee is ordered to appear for a properly noticed video deposition.

Dated in Fairbanks, Alaska on January 7, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Amanda K. Eklund, Designated Chair

_____
Lake Williams, Member

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.

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JEFFREY KOLLMAN, Employee/applicant v. ASRC ENERGY SERVICES, INC., and ARCTIC SLOPE REGIONAL CORPORATION, Self-Insured Employer/defendants; Case No. 201007169; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served on the parties on January 7, 2015.

_____
Nicole Hansen
Workers' Compensation Technician