ALASKA WORKERS' COMPENSATION BOARD

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

BRUCE J. BROWN, Employee, Respondent, v. ASRC ENERGY SERVICES, Employer, and ARCTIC SLOPE REGIONAL CORP., Insurer, Petitioners.	INTERLOCUTORY DECISION AND ORDER ON RECONSIDERATION AWCB Case No. 200820295 AWCB Decision No. 15-0015 Filed with AWCB Anchorage, Alaska on January 30, 2015

ASRC Energy Services and Arctic Slope Regional Corp.'s (collectively, Petitioner) November 10, 2014 request for reconsideration of *Brown v. ASRC Energy Services, Inc.,* AWCB Decision No. 14-0142 (October 24, 2014) (*Brown V)* was heard on the written record on January 6, 2015, in Anchorage, Alaska. On November 19, 2014, *Brown v. ASRC Energy Services, Inc.,* AWCB Decision No. 14-0142 (October 24, 2014) (*Brown VI)* granted reconsideration of *Brown V* but held the record open until December 3, 2014, to afford Bruce J. Brown (Respondent) 20 days to answer the November 10, 2014 petition. On November 24, 2014, attorney Burt Mason entered his appearance on behalf of Respondent. Because attorney Mason was not served *Brown VI*, and may not have been aware of the December 3, 2014 deadline prior to its passing, and in the interest of due process and proper notice, on December 23, 2014, the record was reopened to afford him the opportunity to respond to the November 10, 2014 petition. Attorney Robert J. Bredesen represented Petitioner. The record closed when the panel met to deliberate on January 6, 2015.

ISSUE

Petitioner contends reconsideration is necessary because *Brown V* erred by: (1) not making a factual finding that a letter purportedly written by Dr. Brady was "indisputably false evidence"; (2) relying on legal authorities Petitioner asserts have been overruled, and allowing the board's letter to the SIME physician to include unspecified "questions founded upon bad law"; and (3) "overlooking" Petitioner's request to provide the SIME physician with a complete case record, meaning the same record reviewed by the Employer's Medical Evaluation (EME) physician. Petitioner contends these issues must be addressed, and appropriate changes made now, to prevent confusion and/or prejudice.

It is assumed Respondent opposes a factual finding that he is not credible with regard to the disputed letter, but Respondent's position on the remainder of the reconsideration request is unknown, as no response was filed.

Should Petitioner's November 10, 2014 petition for reconsideration of *Brown V* be granted?

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) On August 19, 2014, Employee's December 20, 2010 claim, as amended June 1, 2011, was heard. *Brown v. ASRC Energy Services, Inc.,* AWCB Decision No. 14-0129 (September 24, 2014) (*Brown IV*) concluded the claim was not ripe and a second independent medical evaluation (SIME) was ordered. (*Brown IV.*)

2) In response to Petitioner's request for reconsideration, *Brown v. ASRC Energy Services, Inc.*, AWCB Decision No. 14-0142 (October 24, 2014) (*Brown V*) made supplemental factual findings, reworded a SIME question, allowed the parties to submit questions for possible inclusion in the board's letter to the SIME physician, and ordered *Brown IV* and *Brown V* not sent to the SIME physician. It also denied Petitioner's request to redact from *Brown IV*'s Principles of Law section all citations to pre-2005 law, and ordered both parties not to have any conversations or other contact with the SIME physician or anyone in his office before the final SIME report is submitted to the board. (*Brown V.*)

3) On November 10, 2014, Petitioner timely filed a Petition for Reconsideration of *Brown V*. The petition contended *Brown V* erred by: (1) not making a credibility determination regarding the authorship of a letter purportedly written by Dr. Patrick Brady on November 7, 2008; (2) relying on legal authorities Petitioner asserts have been overruled, and allowing the board's letter to the SIME physician to include unspecified "questions founded upon bad law"; and (3) "overlooking" Petitioner's request to provide the SIME physician with a complete case record. (Petition for Reconsideration, November 10, 2014.)

4) On November 19, 2014, *Brown v. ASRC Energy Services, Inc.*, AWCB Decision No. 14-0142 (October 24, 2014) (*Brown VI*) granted reconsideration of *Brown V* but held the record open until December 3, 2014, to afford Respondent the full 20 days to answer the November 10, 2014 petition, pursuant to 8 AAC 45.050(c)(2) and 8 AAC 45.060(b). (*Brown VI.*)

5) On November 24, 2014, attorney Burt Mason entered his appearance on behalf of Respondent. (Entry of Appearance, November 24, 2014.)

6) On December 8, 2014, attorney Mason attended his first prehearing conference in this matter. To assist attorney Mason to familiarize himself with the case, Attorney Bredesen stated he would check with his clerical staff to ensure attorney Mason received requested discovery. (Prehearing conference summary, December 8, 2014.)

7) Because attorney Mason was not served *Brown VI*, and may not have been aware of the December 3, 2014 deadline prior to its passing, and in the interest of due process and proper notice, on December 23, 2014, the record was reopened through January 5, 2015, to allow him the opportunity to respond to the November 10, 2014 petition. (Scott letter, December 23, 2014.)

8) The *Brown IV*, *Brown V* and *Brown VI* findings of fact are adopted by reference here. (Record.)

9) *Brown IV* factual finding 13 stated:

On November 7, 2008, treating internist Dr. Patrick Brady, M.D., wrote:

> I have been treating Bruce for liver, kidney and immune system function. To monitor his progress, we have been taking blood and urine samples. At the beginning, it was twice a month for blood and urine. Due to his improvement, this testing has been tapered off and now Bruce is only required to take a blood sample every three months. The purpose of these blood and urine samples is to monitor the progress of his kidney and liver functions and his immune system. (Brady narrative report, November 7, 2008.)

10) *Brown IV* factual finding 13 is herein reworded as follows:

A letter dated November 7, 2008, and purportedly written by treating internist Dr. Patrick Brady, M.D., reads:

> I have been treating Bruce for liver, kidney and immune system function. To monitor his progress, we have been taking blood and urine samples. At the beginning, it was twice a month for blood and urine. Due to his improvement, this testing has been tapered off and now Bruce is only required to take a blood sample every three months. The purpose of these blood and urine samples is to monitor the progress of his kidney and liver functions and his immune system. (Purported Brady narrative report, November 7, 2008.)

11) *Brown IV* factual finding 13 is supplemented to include the following, contextual findings of fact:

- On October 24, 2008, Carolyn Swangler, ASRC Manager of Drug and Alcohol Programs, wrote an email with the subject line "Bruce Brown – Northstar," which read:

> I just spoke to Robert Olson who had an interview with Tracy (supervisor) and Bruce Brown last evening to review changes in his behavior and job performance . . . [Employee] also stated he was in <u>possession of urine samples</u> that his doctor required him to take on certain days and bring back with him so they could be analyzed. . . . I have asked Robert to obtain a note from his doctor by Monday, October 27th for the urine samples. . . . (Email from Carolyn Swangler, ASRC Manager of Drug and Alcohol Programs, October 24, 2008; emphasis original.)

- At deposition on April 4, 2013, Dr. Brady testified he did not remember writing the November 7, 2008 letter. He testified the document was not in the format he normally used for writing letters, the signature was not his, and some of the statements in the letter were not accurate. He further testified he would never have directed Employee to collect urine samples while working on the slope to bring back home with him. (Brady deposition, April 4, 2013, pp. 24-28.)

- At the August 19, 2014 hearing, Employee was asked, "But did you have urine samples in your room or . . ." Employee responded,

> You know, I think at one time – one time I had, yeah, I think I – I had one for Dr. Brady, and it was mai-mainly what it was for, I believe, was to – I was real concerned about my urine being dark and dehydration and stuff. We'd had some classes and stuff about stuff like that, and he – we had discussed bringing it, you know, because, I mean, that's where the urine got the darkest was at work.

At hearing the following exchange took place with regard to Ms. Swangler's October 24, 2008 email:

> Q [attorney Bredesen]: And it indicates . . . that you were asked to obtain a note from your doctor for urine samples. Do you remember that?
> **A [Employee]: Uh-huh. Yes. Sort of, yeah.**
> Q: And did you actually go to your doctor and get a note?
> **A: Yeah, I called and talked to one of the ladies there and – and got a letter from him.**
> Q: And from who?
> **A: One of the ladies there. I – I don't – I don't know, really. I mean, I know who Dr. Brady is and – and the one other lady that we were all together talking, I – I mean, I – you know, I know who she is, but as far as that I don't remember or know any of the others, no.**
> Q: Okay. And so it was from Dr. Brady that you would have gotten the note?
> **A: No. I got it from one of the ladies at the – one of the ladies at the desk.**
> Q: So you got a note …
> **A: I – I called and – and asked about it, told them – explained to them what happened, and she said, sure, she'd talk to Dr. Brady and . . .**
> Q: Someone . . .
> **A: take care of it.**
> Q: Someone at – Dr. Brady's receptionists?
> **A: I – I guess or one of his doctors. I don't – I don't know.**
> Q: Okay.
> **A: Alls I know is I went there, picked up an envelope with my name on it, drove and brought it to the lady. I kind of specifically remember bringing it up there because I sat in the bottom of ASRC's big building there and we had a conversation.**

Employee then testified he was sure he had received the letter dated November 7, 2008 from Dr. Brady's office. When asked who he thought wrote the letter, Employee testified, "Dr. Brady or one of his associates, I assume." In response to the question, "Do you understand that Dr. Brady said he did not write the letter?" Employee testified, "I believe, yeah – yeah, I believe he said he didn't remember or didn't know it, yeah." When asked if he could explain why the letter "says what it says" with regard to content, Employee testified, "No, that – that letter right – I got. I asked for, I got. I took it to ASRC, and that's all I can say. I mean, I don't know anything different." (Hearing transcript, August 19, 2014, pp. 69-74.)

12) Respondent did not answer Petitioner's November 10, 2014 petition for reconsideration of *Brown V*. (ICERS computer database.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of this 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;
> . . .
> (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 23.30.110. 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 purpose of ordering an SIME is to assist the board. *Bah v. Trident Seafoods Corp., AWCAC Decision No. 073 (February 27, 2008) at 5.* Citing *Olafson v. State, Dep't of Trans. & Pub. Facilities,* AWCAC Decision No. 061 (October 25, 2007) at 23, *Bah* reiterated the SIME physician is the *board's expert,* not the employee's or employer's expert. *Id.*, emphasis in original.

Transcripts of depositions, other than those taken from medical providers, are considered "litigation tools," and are rarely submitted to the SIME physician for review. *See, e.g., Larson v. Bek of Alaska,* AWCB Decision No. 05-0081 (March 17, 2005); *Groom v. State of Alaska,* AWCB Decision No. 02-0168 (August 29, 2002). However, in certain circumstances where prior sworn testimony of an employee would assist the SIME in rendering his opinion on issues in dispute, the employee's deposition transcript may be forwarded to the SIME physician. *See, e.g., Groom; Davis v. Prescott Equipment Co., Inc.,* AWCB Decision No. 01-0045 (March 8, 2001); *Gurnett v. Millennium Hotel,* AWCB Decision No. 07-0007 (January 4, 2007).

> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter ....

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471, 473-74 (Alaska 1991). If an employer rebuts the presumption of compensability, at the third step of the analysis the burden shifts to the employee to prove his claim by a preponderance of the evidence. *McGahuey* at 621; *Smith* at 788. Witness credibility determinations are made at the third stage. *McGahuey* at 621; *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 691 (Alaska 2000).

> **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. . . .

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

> **AS 44.62.540. Reconsideration.**
> (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for

> reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .
>
> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. . . .

8 AAC 45.050. Pleadings.

. . .

(c) Answers.

> . . .
>
> (2) An answer to a petition must be filed within 20 days after the date of service of the petition and must be served upon all parties.

8 AAC 45.092. Selection of an independent medical examiner.

(a) The board will maintain a list of physicians' names for second independent medical evaluations. The names will be listed in categories based on the physician's designation of his or her specialty or particular type of practice and the geographic location of the physician's practice. . . .

. . .

(h) If the board requires an evaluation under AS 23.30.095(k), the board will, in its discretion, direct

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

"The purpose of 8 AAC 45.092 is to ensure SIMEs are conducted by physicians who are independent, and that the evaluations are conducted in a manner to ensure its independence." *Gamez v. United Parcel Service*, AWCB Decision No. 05-0289 (November 8, 2005). The SIME physician is obligated to provide, to the best of his or her ability and knowledge, a thorough, professional, informed and impartial evaluation of the examinee and a similarly thorough, professional, impartial, informed and timely report to the board. The SIME physician has a duty to perform his or her quasi-official function as an appointed expert impartially, and that duty requires pre-appointment disclosure of conflicts of interest to the appointing authority. *Stephen Olafson v. State of Alaska*, AWCAC Decision No. 061 at 19 (October 25, 2007).

> **8 AAC 45.150. Rehearings and modifications of board orders.**
> . . .
> (f) In reviewing a petition for rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

"Harmless errors are those that do not affect the outcome of the case." *J.C. Marketing v. You Don't Know Jack*, AWCAC Decision No. 132 at 3, n. 31 (March 30, 2010) (board's failure to strike SIME report, if it was error at all, was harmless error because parties could still depose doctor); *Christopher v. Louisiana Pacific Corp.*, AWCB Decision No. 87-0185 (August 13, 1987) (while board's reliance on an inadmissible medical opinion was error, it was harmless error because "substantial evidence exists for each of our findings without reliance" on the inadmissible medical opinion); *Marsh Creek v. Benston*, AWCAC Decision No. 101 (March 13, 2009) (because board had sufficient evidence in the record to support a finding that the subject matter of the altercation arose out of the employment, the board's error in failing to identify the specific origin or subject matter of the quarrel is harmless error); *Carlson v. Doyon Universal-Ogden Services*, 995 P.2d 224, 228 (Alaska 2000) (board's error in failing to attach compensability presumption was harmless where it conducted alternative analysis and concluded the presumption was rebutted in any event); *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114, 1120 (Alaska 1994) (board's failure to inform parties of right to SIME was not harmless because, given equivocal medical evidence, an SIME may have influenced the decision to deny benefits).

ANALYSIS

Should Petitioner's November 10, 2014 petition for reconsideration of *Brown V* be granted?

Petitioner contends *Brown V* contains errors that, if not corrected now, are likely to generate confusion and/or prejudice. Specifically, Petitioner contends *Brown V* erred by: (1) failing to find not credible Respondent's testimony regarding the letter purportedly written by Dr. Brady; (2) relying on legal authorities Petitioner believes have been overruled and allowing the SIME questions to include unspecified "questions founded upon bad law"; and (3) not granting Petitioner's request to provide the SIME physician with a "complete case record."

1) Credibility Determination

Citing *McGahuey*, *Steffey*, and *Bah*, *Brown V* maintained that under most circumstances credibility determinations are not made prior to the third step of the presumption analysis at a merits hearing:

> In *Brown IV* the hearing panel's deliberations were thwarted at the third step by both gaps in the medical evidence and the panel's lack of understanding of the evidence produced, and an SIME was therefore ordered. *Bah.* Prior to the inclusion of the SIME report in the record, credibility determinations regarding medical evidence are premature. (*Brown V* at 11.)

The November 7, 2008 allegedly "fake Dr. Brady letter" is a medical narrative report of disputed authorship, not, as Petitioner asserts, "indisputably false evidence." A credibility determination will be reserved for the third step of the presumption analysis at a future hearing on the merits. *McGahuey, Steffey*.

However, Petitioner is correct that the phrasing of *Brown IV*'s factual finding 13 ("On November 7, 2008, treating internist Dr. Patrick Brady, M.D., wrote:") implies a credibility determination has already been made, and the letter found to be genuine. To allay Petitioner's concern the finding will generate confusion and/or prejudice, it will be reworded as follows:

- A letter dated November 7, 2008, and purportedly written by treating internist Dr. Patrick Brady, M.D., reads:

> I have been treating Bruce for liver, kidney and immune system function. To monitor his progress, we have been taking blood and urine samples. At the beginning, it was twice a month for blood and urine. Due to his improvement, this testing has been tapered off and now Bruce is only required to take a blood sample every three months. The purpose of these blood and urine samples is to monitor the progress of his kidney and liver functions and his immune system. (Purported Brady narrative report, November 7, 2008.)

To further clarify the authorship dispute, *Brown IV* factual finding 13 will be supplemented to include the following, contextual findings of fact:

- On October 24, 2008, Carolyn Swangler, ASRC Manager of Drug and Alcohol Programs, wrote an email with the subject line "Bruce Brown – Northstar," which read:

> I just spoke to Robert Olson who had an interview with Tracy (supervisor) and Bruce Brown last evening to review changes in his behavior and job performance . . . [Employee] also stated he was in <u>possession of urine samples</u> that his doctor required him to take on certain days and bring

> back with him so they could be analyzed. . . . I have asked Robert to obtain a note from his doctor by Monday, October 27th for the urine samples. . . . (Email from Carolyn Swangler, ASRC Manager of Drug and Alcohol Programs, October 24, 2008; emphasis original.)

- At deposition on April 4, 2013, Dr. Brady testified he did not remember writing the November 7, 2008 letter. He testified the document was not in the format he normally used for writing letters, the signature was not his, and some of the statements in the letter were not accurate. He further testified he would never have directed Employee to collect urine samples while working on the slope to bring back home with him. (Brady deposition, April 4, 2013, pp. 24-28.)
- At the August 19, 2014 hearing, Employee was asked, "But did you have urine samples in your room or . . ." Employee responded,

> You know, I think at one time – one time I had, yeah, I think I – I had one for Dr. Brady, and it was mai-mainly what it was for, I believe, was to – I was real concerned about my urine being dark and dehydration and stuff. We'd had some classes and stuff about stuff like that, and he – we had discussed bringing it, you know, because, I mean, that's where the urine got the darkest was at work.

At hearing the following exchange took place with regard to Ms. Swangler's October 24, 2008 email:

> Q [attorney Bredesen]: And it indicates . . . that you were asked to obtain a note from your doctor for urine samples. Do you remember that?
> **A [Employee]: Uh-huh. Yes. Sort of, yeah.**
> Q: And did you actually go to your doctor and get a note?
> **A: Yeah, I called and talked to one of the ladies there and – and got a letter from him.**
> Q: And from who?
> **A: One of the ladies there. I – I don't – I don't know, really. I mean, I know who Dr. Brady is and – and the one other lady that we were all together talking, I – I mean, I – you know, I know who she is, but as far as that I don't remember or know any of the others, no.**
> Q: Okay. And so it was from Dr. Brady that you would have gotten the note?
> **A: No. I got it from one of the ladies at the – one of the ladies at the desk.**
> Q: So you got a note …
> **A: I – I called and – and asked about it, told them – explained to them what happened, and she said, sure, she'd talk to Dr. Brady and . . .**
> Q: Someone . . .

> **A: take care of it.**
> Q: Someone at – Dr. Brady's receptionists?
> **A: I – I guess or one of his doctors. I don't – I don't know.**
> Q: Okay.
> **A: Alls I know is I went there, picked up an envelope with my name on it, drove and brought it to the lady. I kind of specifically remember bringing it up there because I sat in the bottom of ASRC's big building there and we had a conversation.**

Employee then testified he was sure he had received the letter dated November 7, 2008 from Dr. Brady's office. When asked who he thought wrote the letter, Employee testified, "Dr. Brady or one of his associates, I assume." In response to the question, "Do you understand that Dr. Brady said he did not write the letter?" Employee testified, "I believe, yeah – yeah, I believe he said he didn't remember or didn't know it, yeah." When asked if he could explain why the letter "says what it says" with regard to content, Employee testified, "No, that – that letter right – I got. I asked for, I got. I took it to ASRC, and that's all I can say. I mean, I don't know anything different." (Hearing transcript, August 19, 2014, pp.69-74.)

If the improvident phrasing of *Brown IV*'s factual finding 13 constituted a factual mistake, the error was harmless because it will not affect the outcome of the case. *See, e.g., Carlson; Dwight; You Don't Know Jack; Benston.* An SIME would have been ordered with or without this piece of evidence. AS 23.30.135(a); AS 23.30.155(h). The SIME physician will not, as Petitioner fears, be given the confusing or prejudicial impression Dr. Brady has been found to be the author of the November 7, 2008 narrative report, because Dr. Raybin will not see, and therefore will not be influenced by, the factual findings in *Brown IV, Brown V, Brown VI* or this decision (*Brown VII*). On the contrary, Dr. Raybin will be allowed access to an exceptionally broad scope of documentation from which to draw his own conclusions, including all depositions and Respondent's hearing testimony regarding the letter. *Larson; Groom; Davis; Gurnett.* Furthermore, the parties remain free to revisit and argue the authorship, relevancy and weight accorded to the letter at a future hearing on the merits.

2) Overruled case law

Petitioner contends *Brown V* inexplicably and unfairly denied to expunge overruled case law, specifically *Fox v. Alascom, Inc*., 718 P.2d 977 (Alaska 1986) and legal theories relying on it, prior to the SIME. As stated in *Brown IV, Fox* laid out the "eggshell skull doctrine," a fundamental principle in workers' compensation law stating an employer must take an employee "as he finds him." *Id.* at 982. Whether *Fox* still carries precedential value or has been superseded is not a ripe issue when ordering an SIME. Petitioner's concern that "bad law" might mislead or confuse the SIME physician is obviated by the exclusion of *Brown IV, Brown V, Brown VI, and Brown VII* from the SIME binders. Parties remain free to argue the precedential status and applicability of *Fox* at a post-SIME merits hearing.

Petitioner further contends SIME questions based on "bad law" should be deleted, but does not indicate which questions it finds objectionable. Due to the lack of a specific request for altered SIME questions, they will remain the same as ordered in *Brown V*.

3) SIME Binders

In response to Petitioner's contention *Brown IV* should be refined for a more inclusive and participatory

AS 23.30.110(g) evaluation, *Brown V* granted Petitioner's request to allow the parties to submit SIME questions. Petitioner now contends *Brown V* "overlooked" its request to provide the SIME physician with a "complete case record" and asks that the SIME physician be provided the same record reviewed by EME physician Brent T. Burton, M.D. Petitioner acknowledges that non-medical evidence is not ordinarily included in SIME binders, but contends it is appropriate to do so here because the merits hearing has been held and no evidentiary questions remain.

Petitioner's request will be denied for several reasons. First, the specific non-medical information Petitioner provided the EME physician is unknown to Respondent or the board. To blindly authorize its submission to the SIME physician, without offering Respondent the opportunity to review and respond, would be a violation of Respondent's due process rights and an abrogation of 8 AAC 45.092's purpose to ensure SIME evaluations are conducted in an independent and impartial manner. *Olafson; Gamez.* Moreover, the SIME physician is the board's expert, not either party's

(*Bah*), and the decision to exclude non-medical evidence from the SIME binders is made under the broad powers conferred by AS 23.30.135(a) and AS 23.30.155(h) to best ascertain and protect the rights of the parties. Petitioner's argument that it is appropriate to send Dr. Raybin non-medical evidence because the merits hearing has been held and no evidentiary questions remain is disingenuous, unless Petitioner intends to waive any further hearings before a final decision is rendered.

Moreover, as noted above, the SIME binders in this case are already unusually inclusive. Dr. Raybin will be provided all depositions even though employee deposition transcripts are considered "litigation tools" and rarely submitted to the SIME physician for review. *Larson; Groom; Davis; Gurnett.* Additionally, the submission of the August 19, 2014 hearing transcript will ensure Dr. Raybin is aware of both Respondent's and Dr. Burton's testimony about Respondent's storing urine in his footlocker. Petitioner's request to provide the SIME physician non-medical evidence will be denied.

CONCLUSION OF LAW

1) Petitioner's November 10, 2014 petition for reconsideration of *Brown IV* will be granted.

ORDER

1) Petitioner's petition for reconsideration is granted.
2) *Brown IV* factual finding 13 is stricken from the record and replaced with the following:

> A letter dated November 7, 2008, and purportedly written by treating internist Dr. Patrick Brady, M.D., reads:
>
> > I have been treating Bruce for liver, kidney and immune system function. To monitor his progress, we have been taking blood and urine samples. At the beginning, it was twice a month for blood and urine. Due to his improvement, this testing has been tapered off and now Bruce is only required to take a blood sample every three months. The purpose of these blood and urine samples is to monitor the progress of his kidney and liver functions and his immune system. (Purported Brady narrative report, November 7, 2008.)

3) The record's factual findings are supplemented by those in this reconsideration decision and order (*Brown VII*).

4) Petitioner's request to redact from *Brown IV*'s Principles of Law section all citations to pre-2005 law is again denied.

5) *Brown IV*, *Brown V*, *Brown VI* and *Brown VII* will not be submitted to the SIME physician for review.

6) No additional, non-medical evidence will be submitted to the SIME physician.

Dated in Anchorage, Alaska on January 30, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____

Margaret Scott, Designated Chair

_____

Michael O'Connor, Member

_____

Stacy Allen, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of BRUCE J BROWN, employee / claimant; v. ASRC ENERGY SERVICES, employer; ARCTIC SLOPE REGIONAL CORP., insurer / defendants; Case No. 200820295; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on January 30, 2015.

_____

Pamela Murray, Office Assistant