ALASKA WORKERS' COMPENSATION BOARD

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

JERI L. CLIFTON, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200801738 AWCB Decision No. 15-0016 Filed with AWCB Anchorage, Alaska on February 3, 2015

Jeri Clifton's (Employee) January 6, 2015 Petition for Protective Order was heard on January 20, 2015 in Anchorage, Alaska, a date selected on January 8, 2015. Employee appeared telephonically and testified. Assistant Attorney General Jayme Keller appeared in person and represented the State of Alaska (Employer). There were no other witnesses. The record remained open at the hearing's conclusion to allow Employer to submit evidence of costs incurred in scheduling an employer's medical evaluation for which Employee did not appear. The record closed on January 23, 2015.

ISSUES

Employee contends she should not be required to attend any additional employer's medical evaluations (EME) or any additional depositions. Employee contends Employer has engaged in "doctor shopping" in scheduling her for repeated EMEs in effort to inconvenience her, and to prolong litigation. Employee contends physical limitations make it difficult for her to travel to EME examinations or depositions without assistance. Employee contends ample medical

evidence already exists in the record, without the need for additional discovery. Employee seeks an order excusing her from attending any future EME examinations or depositions.

Employer contends it has a statutory and regulatory right to request EMEs of Employee. Employer contends it also has a statutory and regulatory right to depose Employee as part of discovery in connection with her claim. Employer contends notices to Employee of scheduled EMEs and depositions have been reasonable with respect to time, frequency, location, and travel accommodations. Employer seeks an order denying Employee's January 6, 2015 petition.

1) **Should Employee be excused from attending future EMEs?**
2) **Should Employee be excused from attending future depositions?**

FINDINGS OF FACT

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

1) On February 5, 2008, while working for Employer as a law office assistant, Employee injured her back and side when she tripped while at work and fell against a desk. (Report of Occupational Injury or Illness, February 13, 2008).

2) On October 19, 2009, Employee saw orthopedic surgeon Douglas Bald, M.D. for an EME. (Bald EME Report, October 19, 2009).

3) On October 20, 2009, Employee saw Ronald Turco, M.D. for a psychiatric EME. (Turco EME Report, October 22, 2009).

4) Dr. Turco's October 20, 2009 examination was the last EME to have occurred in this case prior to the date of this decision. (Record; Observations).

5) On June 30, 2011, Employee saw orthopedic surgeon Thomas Gritzka, M.D. for board-ordered second independent medical evaluation (SIME). (Gritzka SIME Report, June 30, 2011).

6) On January 7, 2013 Employee filed a letter from Richard Taylor, M.D. stating Employee has "multiple health conditions that make it unsafe for her to travel great distances at this time" and briefly describing those conditions. (Taylor Letter, January 2, 2013).

7) On December 9, 2013, Employee saw William Campbell, M.D. for another board-ordered SIME. (Campbell SIME Report, December 17, 2013).

8) On December 31, 2013, Employee saw Franklin Ellenson, M.D. at Alaska Neurology Center in Anchorage for an SIME. (Ellenson SIME Report, June 17, 2014).

9) On November 10, 2014, Employee filed an Affidavit of Readiness for Hearing (ARH) on her October 27, 2008 claim. (Affidavit of Readiness for Hearing, November 10, 2014).

10) On November 14, 2014, Employer filed an Affidavit of Opposition to Employee's November 10, 2014 ARH, stating discovery still needs to be completed. (Affidavit of Patricia Huna, November 14, 2014).

11) On December 4, 2014, a prehearing conference was held. The parties stipulated to a hearing on the merits on February 25, 2015. (Prehearing Conference Summary, December 4, 2014).

12) On December 22, 2014, Employer scheduled a panel EME with neurologist Lynn Bell, M.D., psychiatrist Keyhill Sheorn, M.D., and orthopedic surgeon Douglas Bald, M.D. The examinations were all scheduled to take place in Anchorage. (Letter from Madeline Rush, Adjuster, December 22, 2014).

13) On December 27, 2014, the foregoing letter was returned to Employer by the U.S. Postal Service as "Return to Sender / Vacant / Unable to Forward." (USPS Certified Mail Receipt, December 27, 2014).

14) On December 29, 2014, the EME notice letter was again sent to Employee. The USPS tracking information states it was delivered on January 2, 2015. (USPS Certified Mail Tracking Printout, Employer's Hearing Exhibit 12).

15) On January 6, 2015, Employee filed a Petition for Protective Order to prevent Employer from requiring her to attend any additional EMEs and depositions. Employee acknowledged she received the EME notice letter in her January 6, 2015 petition and also that she recently received a phone call from Employer telling her she would be required to attend a deposition soon. Employee's brief makes the following main arguments:

- Employee has financial hardship which makes it difficult for her to attend the EMEs scheduled by Employer.
- Because of her physical condition, it is difficult for Employee to leave the house to attend EMEs or depositions without assistance.
- Employee's repeated EMEs are attempts at subterfuge, intimidation, and harassment, and are meant to discourage Employee from pursuing her claim.

- The opinions of Employee's attending physicians provide ample support for Employee's disability and need for treatment being related to the February 5, 2008 work injury.

- Sending Employee to Portland for EMEs with Drs. Turco and Bald were attempts to inconvenience Employee and further deter her from pursuing her claim, especially since local physicians were available.

- Because Employee's case is almost seven years old, Employer has had ample opportunity to gather evidence, including medical evidence.

- Employer is engaged in "doctor shopping," in order to discourage Employee's claim and prolong litigation. (Petition, January 6, 2015; Observations).

16) Employee's brief and argument do not contend Employer has made an excessive or unlawful change of physicians under 8 AAC 45.082(c). (Observations).

17) Employee uses a personal care assistant, who attends Employee four hours per day, Monday through Friday. The personal assistant is able to assist Employee to travel, including to depositions or EMEs, so long as they are scheduled within the assistant's regular hours. (Employee).

18) Employer's attorney argued at hearing it is willing to work with Employee to schedule EMEs or depositions within a time where the personal care assistant can aid with travel. (Employer's Hearing Argument).

19) On January 7, 2015, Employer issued a subpoena for Employee to appear in person and testify under oath at a deposition at its office in Anchorage on January 29, 2015. (Notice of Deposition, January 7, 2015).

20) Employee has not previously been deposed by Employer in connection with the instant claim. (Record; Observations).

21) On January 8, 2015, a prehearing was held. The prehearing summary states:

> At the prehearing conference, the EE confirmed she was seeking protection from being required to attend any further EME's (including the 3 EME's currently scheduled) and also any deposition of her by the ER. The EE believes the ER has had more than enough time to prepare their case for hearing and that she has seen more than enough physicians in order for her physical status to be fully documented. The EE also did not want the 2/25/2015 merits hearing postponed and would not miss any of her appointments with her treating physician in order to see an EME. The ER explained that these new EME's and deposition were

> scheduled in order to allow the merits hearing to be held on 2/25/2015, the currently scheduled date. . . .

The Board Designee declined to rule on Employee's January 6, 2015 petition. Instead, the Designee set a hearing on Employee's January 6, 2015 petition for January 20, 2015. (Prehearing Conference Summary, January 8, 2015).

22) At hearing on January 20, 2015 and also in its hearing brief, Employer argued it is entitled to recoup costs and fees related to Employee's failure to attend previously-scheduled EMEs. (Employer's Hearing Brief, January 16, 2015). The record was left open at the conclusion of the hearing to allow Employer to file proof of these costs. (Record).

23) On January 23, 2015, Employer filed a Notice of Withdrawal of Request for Recoupment of Costs. Employer's January 23, 2015 notice reserved a right to file a petition in the future for recoupment, if circumstances arise. (Petition, January 23, 2015).

24) On January 26, 2015, Employer filed a Petition for Recoupment of Physician's Fees and Expenses. Employer's petition states:

> The Employer petitions for a finding pursuant to 8 AAC 45.090(g), that no good cause existed for the employee's failure to attend the EMEs scheduled for Jan. 10, 12, and 14, 2015 and for a finding that the Employer is entitled to a reduction in any future awarded benefits in order to recoup physician's fees and expenses. (Petition, January 26, 2015).

25) Because it was filed after the close of the record, Employer's January 26, 2015 petition is not decided, and is held in abeyance. (Record).

26) On January 28, 2015, Employer re-noticed a deposition of Employee, to take place on February 9, 2015. (Re-notice of Deposition, January 28, 2015).

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;
> . . . .
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> (3) this chapter may not be construed by the courts in favor of a party;

> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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**.
> . . . .
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> (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. . . .

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 23.30.115. Attendance and fees of witnesses.** (a) A person is not required to attend as a witness in a proceeding before the board at a place more than 100 miles from the person's place of residence, unless the person's lawful mileage and fee for one day's attendance Is first paid or tendered to the person; but the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. . . .
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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.

The Alaska Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab* at 4, n. 2 (December 11, 1987); *citing United Services Automobile Ass'n v. Werley,* 526 P.2d 28, 31 (Alaska 1974); *see also*, *Venables v. Alaska Builders Cache*, AWCB Decision No. 94-0115 (May 12, 1994). Employers must be able to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. Medical and other releases are important means of doing so. *See, e.g., Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Under AS 23.30.107(a), an employee must, upon

written request, release medical and rehabilitation information "relative" to the employee's injury. Evidence is "relative" to the claim where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell,* AWCB Decision No. 99- 0016 (January 20, 1999).

> **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. . . .
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> (b) Upon the petition of a party, the board will, in its discretion, order other means of discovery. . . .
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> **8 AAC 45.082. Medical treatment**. . . .
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> (b) Physicians may be changed as follows:
> . . .
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> (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.
> . . .
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> (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.

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 45.120. Evidence.**
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> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

> **Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure**. . . .
> . . .
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> **(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:
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> (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. . . .

> **Alaska Rule of Civil Procedure 30. Depositions Upon Oral Examination.**
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> **(a) When Depositions May Be Taken; When Leave is Required.**
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> (1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. . . .
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> **(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.**

> (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice. . . .

ANALYSIS

1) Should Employee be excused from attending future EMEs?

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). Within this bundle of rights is the right to seek an employer's medical evaluation in connection with a claim under AS 23.30.095(e). Concerning selection of EME physicians, the Act is clear: under §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." 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). The Act and regulations authorize an employer to send a claimant to an EME every 60 days. AS 23.30.095(e). Examinations shall be presumed reasonable, and an employer need not apply for a board order requiring an employee to appear for an EME. *Id.* If an Employee refuses to attend an otherwise properly scheduled EME, the Act authorizes an employer to suspend payment of benefits. *Id.*

In the present case, it is undisputed the last EME to have taken place was on October 20, 2009, over five years ago, when Employee was seen by Dr. Turco. Employer's December 22, 2014 letter requesting Employee attend a panel EME gave reasonable notice in advance of the appointments. AS 23.30.095(e); *Rogers & Babler*. The examinations were all scheduled to take place in Anchorage, where Employee has a post office box. Employer is willing to work with Employee to schedule EMEs within a time and location where Employee's personal care

assistant can aid with travel. Employee has not alleged – nor is there evidence in the record – Employer unlawfully changed EME physicians. 8 AAC 45.082(b). Consequently, "doctor shopping" is not a concern. *Bloom*; *Coppe*. Because over five years have passed since the last EME in this case, and Employer's recent EME notice was reasonable, Employee's argument she is being required to attend an excessive or unreasonable amount of EMEs is without merit.

Employee will be required to submit to an EME examination, as requested in Employer's December 22, 2014 letter. AS 23.30.095(e); AS 23.30.155(h); 8 AAC 45.082; 8 AAC 45.195. Employee's petition for an order excusing her from all future EMEs is overbroad and will be denied. *Id.* The parties will be directed to discuss scheduling future EMEs in this case at a time and place Employee can attend. *Id*.

2) Should Employee be excused from attending future depositions?

As with EMEs, an employer's bundle of rights under the Act includes the right to seek depositions of witnesses which may have information relevant to the subject matter being litigated. *Granus*; AS 23.30.001(1), (3) - (4); AS 23.30.115(a). Depositions may be taken without a board order, so long as reasonable notice is given stating the time and place of the deposition and the name and address of each person to be examined. Alaska R. Civ. P. 30. Because Employee is the claimant in the instant case, and possesses firsthand knowledge of the circumstances and causes of her disability or need for treatment, her testimony is highly relevant. Alaska R. Civ. P. 26(b); AS 23.30.001(4); *Granus*. Employee's January 28, 2015 re-notice of deposition of Employee is reasonable and complies with the Act and regulations. AS 23.30.115(a); *Rogers & Babler*; *Schwab*. Therefore, Employee will be required to appear for a deposition, as requested in Employer's January 28, 2015 re-notice. Because the issuance of this decision straddles the period the notice was sent and the date of the deposition, the parties may need to confer to reschedule the February 9, 2015 deposition date.

Finally, on January 23, 2015, Employer filed a Notice of Withdrawal of Request for Recoupment of Costs. Thereafter, Employer filed a Petition for Recoupment of Physician's Fees and Expenses on January 26, 2015. Because Employer's January 26, 2015 petition was filed after the close of the record in this case, it is not addressed. AS 23.30.135; 8 AAC 45.120(m).

Employer's January 23, 2015 notice reserved a right to file a petition in the future for recoupment, if such circumstances arise. Therefore, Employer may seek a hearing on its January 26, 2015 petition for recoupment at some point in the future if it chooses. *Id*.

CONCLUSIONS OF LAW

1) Employee will not be excused from attending future EMEs.
2) Employee will not be excused from attending future depositions.

ORDER

1) Employee will be directed to attend the EMEs requested in Employer's December 22, 2014 letter setting the EME appointments, or face possible suspension of compensation or benefits under the Act.
2) Employee will be directed to attend the deposition requested in Employer's January 28, 2015 re-notice of deposition, or face possible suspension of compensation or benefits under the Act.
3) Because the issuance of this decision is close to the dates Employer requested in the above notices, the parties are directed to confer to discuss scheduling the EMEs and depositions at a time and place reasonably convenient to Employee.
4) Employer's January 26, 2015 petition for recoupment of costs is not decided, and is held in abeyance until such time as Employer seeks a hearing on that petition.

Dated in Anchorage, Alaska on February 3, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

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Ronald Nalikak, Member

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Stacy Allen, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JERI L. CLIFTON, employee / claimant; v. STATE OF ALASKA, employer; self-insurer / defendants; Case No. 200801738; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 3, 2015.

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Pamela Murray, Office Assistant