ALASKA WORKERS' COMPENSATION BOARD

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

CHARLES G. MANLEY, Employee, Claimant, v. MUNICIPALITY OF ANCHORAGE, Self-insured Employer, Defendant.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201200402 AWCB Decision No. 15-0018 Filed with AWCB Anchorage, Alaska on February 6, 2015

Charles G. Manley's (Employee) December 23, 2014 petitions for a second independent medical evaluation (SIME) and to have surveillance tapes deemed illegally retained and a remedy fashioned were heard on January 27, 2015, in Anchorage, Alaska, a date selected on January 6, 2015. Attorney Eric Croft appeared and represented Employee. Attorney Shelby Nuenke-Davison appeared and represented the Municipality of Anchorage (Employer). There were no witnesses. The record remained open to allow Employer to submit supplemental legal authority. The record closed on February 3, 2015.

ISSUES

Employee contends an SIME should be ordered because there are significant disputes between Employee's attending physician and Employer's medical evaluation (EME) physician regarding treatment and functional capacity. Employer contends there is no significant dispute or gap in the medical evidence to warrant an SIME. If an SIME is ordered, Employer contends it should be a records review only to minimize costs.

1) Should an SIME be ordered?

Employee contends Employer illegally ignored an ongoing discovery request for video surveillance records by neither seeking a protective order nor timely producing the information. Employee contends the board should fashion an appropriate remedy for an intentional discovery violation or, at a minimum, find that a sanctionable violation occurred. Employer contends it did not illegally retain video surveillance, and sanctions are inappropriate because it did not violate any statute, regulation or board order to produce evidence.

2) Were Employer's surveillance videos illegally retained and, if so, what is an appropriate remedy?

FINDINGS OF FACT

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

1) On January 10, 2012, Employee injured his spine while working for Employer, who described the injury: "While moving a very heavy patient on a gurney, an unexpected movement caused [Employee] to suddenly take a heavy load when he was not properly positioned or prepared. The sudden loading caused bilateral lumbar pain with any movement and significant muscle spasms." (Report of Injury, January 10, 2012.)

2) On August 16, 2012, Employee sent Employer an informal discovery request including "any and all surveillance videos, statements, transcripts, investigator's reports, notes or records of telephone conversation regarding [Employee]." The letter requested the information within the next 30 days and noted "This should be considered a continuing request for discovery." (Letter, August 16, 2012.)

3) In workers' compensation cases, informal discovery requests routinely ask that the information sought be produced within 30 days, though there is no statute or regulation mandating compliance with that deadline. (Experience; observations.)

4) On September 19, 2012, Employee sent Employer a copy of his August 16, 2012 discovery request, noting that it had been 30 days and Employee would appreciate an immediate response. (Letter, September 19, 2012.)

5) Employee filed three worker's compensation claims:

- On October 16, 2012, for reclassification of permanent partial impairment (PPI) and §041 benefits to temporary total disability (TTD), reimbursement for out-of-pocket expenses, penalty on PPI and §041 benefits, and attorney's fees and costs;

- On January 17, 2014, for reclassification of §041 benefits to TTD, penalty and interest, and attorney's fees and costs;
- On July 21, 2014, for permanent total disability (PTD), reclassification of § 041 benefits to TTD/PTD, penalty, interest, and attorney's fees and costs. (Claims, October 16, 2012; January 17, 2014; July 18, 2014.)

6) Employer filed six controversions:

- On December 10, 2012, for experimental stem cell injections and related treatment as well any complications from experimental stem cell treatment;
- On December 31, 2013, for TTD as of January 22, 2013;
- On February 18, 2014, for TTD, penalties, interest, and attorney's fees and costs;
- On July 9, 2014, for PTD as of June 23, 2014;
- On July 17, 2014, for referral to Dr. Edward Cupler;
- On October 13, 2014, for all benefits after October 13, 2014; (Controversions, December 6, 2012; December 30, 2013; February 13, 2014; July 8, 2014; July 16, 2014; October 13, 2014.)

7) On September 16, 2014, Employee was evaluated by EME internist and addiction specialist Gary Olbrich, M.D., who opined:

> [Employee's] preexisting personality development with evidence of a Somatic Symptom Disorder and his probable alcoholism, i.e. Alcohol Addiction, were the most substantial contributing causes of his need for medical treatment and/or any resulting disability. In either case, the most substantial cause has been one that is psychosocial – not physiologic.

Dr. Olbrich further opined Employee "needs to develop a good program of exercise and return to work as soon as possible." However, Employee "will be unable to return to his work at the time of injury, or any other work in an arena where his physical and/or mental capacities could be impaired by his use of chronic narcotics." (Olbrich EME report, pp. 46, 54.)

8) On September 16, 2014, Employee was also evaluated by medical and clinical psychologist Donna C. Wicher, Ph.D., who diagnosed somatic symptom disorder, substance-related and addictive disorder, and chronic pain. (Wicher EME report, September 16, 2014, p. 5.)

9) On November 10, 2014, Employee underwent a substance use/abuse/dependence assessment by licensed professional counselor Tyrone Charles, who classified Employee as having a "Tendency

for Addictive Traits" but concluded, "There are no substance use/abuse/dependency issues with [Employee]. He is taking his muscle relaxing medication and pain medication as prescribed." (Charles Assessment/Evaluation, November 10, 2014, pp. 1, 3.)

10) On November 12, 2014, Employee's pain management specialist Steven Johnson, M.D., opined regarding psychologist Wicher's EME report:

> I do not necessarily disagree with his [sic] conclusion in the absence of any objective evidence related to the underlying symptoms. Certainly a psychological component of this pain may exist, and in fact, usually does exist in any case of chronic pain. However, there are 2 important facts to recognize and these are 1) A diagnosis of Somatic Syndrome Disorder does not imply malingering, and 2) The pain complaints in these disorders represent real pain.

Regarding Dr. Olbrich's EME report, Dr. Johnson opined:

> Dr. Olbrich, at one point, emphasizes the inappropriate use of the term addiction. He then proceeds to label [Employee] as having a narcotic addiction in direct contradiction to his understanding of addiction representing a pattern of behavior and drug-seeking behavior. [Employee] requested early refills of his medication apparently on 2 occasions. Beyond this, I had seen no addiction qualities with [Employee], although, he certainly does exhibit narcotic tolerance. . . .
>
> I do agree with Dr. Olbrich's assessment of chronic narcotic use. . . .
>
> [Employee] has been adamant that he cannot function without the narcotics and in fact, although he does not function at a level up to his previous level, he is able to conduct some activities with his child as well as do some activities in and about his house, many of which were outlined by Dr. Olbrich. As such, it would appear that he is getting some benefit from these narcotics. However, I also feel in the long run [Employee] would be better off without these narcotics and he understands this and this would be his wish as well.
>
> Concerning my statement that I felt [Employee] could work while taking these narcotics; I still feel this to be the case. Although I do agree that this would be difficult working as a firefighter and/or EMT technician, as there would be quite a bit of liability involved with this. We do have many patients in our practice who do work while under medications but are not in an overly physical or potentially endangered profession. (Johnson letter, November 12, 2014, pp. 1-3.)

11) On November 17, 2014, Employee was evaluated in an SIME by neurosurgeon Bruce M. McCormack, M.D., who opined regarding recommended treatment:

> [Employee's] pain is mighty. There is [sic] no objective findings on MRI. Typically in this scenario, there are often psychological barriers to recovery. I would recommend he be detoxed off narcotics. Once off, they can be restarted if

> necessary but titrated to maximize physical function and not pain relief. I would recommend a functional restoration program with a neuropsychiatric orientation to facilitate this. . . .
>
> [Employee] has chronic pain without objective findings. I am not sure curing pain is a realistic goal because there isn't an anatomic basis for it. . . .
>
> [Employee] has a pain syndrome. Perhaps he has somatization disorder as suggested by a psychologist but I am casting beyond my expertise. I don't see an anatomic basis for his persistent pain complaints. In the course of spine practice, I occasionally run into patients with debilitating pain and little to nil objective pathology on imaging. Often there are psychological barriers to recovery, rarely there is no explanation. I don't see overt malingering or illness behavior. I would have to agree that elevated LFT's [liver function tests] are concerning for more alcohol use than admitted. I would recommend a chronic pain program to detox him off narcotics. . .

Dr. McCormack also reported negative Waddell signs. (McCormack SIME report, pp. 7, 31-32.)

12) With regard to functional capacity, Dr. McCormack opined:

> With or without a functional restoration program I don't believe that [Employee] can return to work as a fireman. Getting him off narcotics would be a start in accessing [sic] his true physical impairment. . . . Chronic narcotic use makes him not workable as a fireman. His physical restrictions due to pain would limit him to light work, but there is a lack of objective findings aside from pain as a basis for physical restrictions. (*Id.*, p. 32.)

13) On December 8, 2014, Employer filed and served on Employee a Notice of Intent to Rely (NOI) on evidence including surveillance tapes, land and aerial photographs, videos and investigator logs dating from May 21, 2014 through November 11, 2014. (NOI, December 8, 2014.)

14) In a December 19, 2014 addendum report, psychologist Wicher opined that evidence since her initial EME report "raises serious questions about the possibility of malingering":

> In summary, the video surveillance showing [Employee] engaging in activities he claims he is unable to do without pain, where he does them without hesitation and demonstrates no observable pain behavior, along with the discrepancies between his video deposition and the video surveillance and his resistance to cooperation with treatment recommendations are all consistent with a diagnosis of malingering. (Wicher EME addendum report, December 19, 2014, p. 2.)

15) In a December 22, 2014 addendum report, Dr. Olbrich opined his "final diagnoses" for Employee included subjective chronic pain condition, with no objective evidence to verify a tissue

pathology source of this pain; chronic pain disease; opioid abuse and probable opioid dependence; somatic symptom disorder; and malingering. (Olbrich addendum report, December 22, 2014, pp. 14-15.)

16) On December 23, 2014, Employee petitioned for an SIME with neurology, psychiatry and substance abuse specialist Walter Ling, M.D., based on medical disputes regarding treatment and functional capacity. Employee noted that Dr. Ling is the only physician on the SIME list with those three specialties. (Petition, December 23, 2014.)

17) On December 23, 2014, Employee also petitioned to declare video surveillance to have been illegally retained, to order Employer to provide the surveillance in a readable format, and to fashion an appropriate remedy for the intentional discovery violation. (Petition, December 23, 2014.) At hearing on January 27, 2015, the parties agreed that providing the surveillance in a readable format was now a moot issue, and Employee asserted his main request was that Employer's actions be found a sanctionable violation, though Employee stated he did not yet know what sanction he was seeking. (Record.)

18) In the summary of the prehearing conference held January 6, 2015, the board designee granted Employee's request to withdraw his claim for PTD without prejudice; set a procedural hearing for January 27, 2015 on Employee's December 23, 2014 petitions for an SIME with Dr. Ling, and to have surveillance tapes deemed illegally retained and sanctions imposed; and continued indefinitely the merits hearing scheduled for January 27-29, 2015, pending a decision on whether an SIME will be ordered. The designee stated evidence was due before January 12, 2015. (Summary from January 6, 2015 Prehearing Conference, served January 8, 2015.)

19) On January 15, 2015, *Manley v. Municipality of Anchorage*, AWCB Dec. No. 15-0009 (*Manley I*), denied the bulk of Employer's November 25, 2014 Petition to Compel, granting only the portion of the request to which Employee agreed. This factual recitation incorporates the relevant findings of *Manley I* and addresses only the issues currently in dispute.

20) At hearing on January 27, 2014, Employee asserted Employer was obligated to provide Employee surveillance discovery piecemeal, within 30 days of when each discrete item was gathered, as opposed to in aggregate within 30 days after the course of the investigation ended. Though he provided no legal authority for this assertion, Employee expressed concern that to rule otherwise would place too much power in the control of Employer, who could unfairly withhold discovery by choosing to never end an investigation. In response, Employer asserted it had no duty

to disclose individual bits of evidence gathered in an ongoing investigation. Employer argued it had turned over the video surveillance once it knew it was going to be relied upon at hearing, and Employer had not violated any statute, rule or precedential case law regarding discovery. (Record.)

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

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). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . .
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. . . .

In a personal injury action, the Supreme Court held an insurance adjuster's investigative reports and files were protected as attorney work product, compiled in the ordinary course of business and therefore not discoverable, if they were prepared in anticipation of litigation, at the request of or under the supervision of the insured's attorney. *Langdon v. Champion*, 752 P.2d 999 (Alaska 1988). In workers' compensation proceedings, however, video and photographic surveillance, and related investigative reports, have long been considered relevant to an employee's physical capacities, and thus clearly within the scope of discoverable evidence. *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158 (Alaska 1996).

Adkins v. Alaska Job Corp. Center, AWCB Decision No. 07-0128 (May 16, 2007), ordered an

employer to provide the employee surveillance videos and investigative reports within 30 days after their preparation, a period of time fashioned to allow defense counsel the opportunity to depose the claimant prior to producing the discovery.

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . .
> (k) In the event of a medical dispute regarding determinations of causation . . . or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. . . .

The purpose of an SIME is to have an independent expert provide an opinion to the board about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). The SIME physician is the *board's expert*, not the employee's or employer's expert. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 5; emphasis original.

An SIME under §095(k) may be ordered when a medical dispute exists between physicians for the employee and the employer, and the "dispute is significant or relevant to a pending claim or petition and . . . an SIME would help the board resolve the dispute. . . . In the absence of opposing medical opinions between employer and employee physicians, there cannot be a medical dispute." The purpose of an SIME is to assist the board. *Bah* at 4; *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007.) at 8. Under §110(g) the board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. *Bah* at 5. "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 the evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board." *Id.*

Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Wide

discretion exists under AS 23.30.095(k) and AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." *See, e.g., Hanson v. Municipality of Anchorage,* AWCB Decision No. 10-0175 (October 29, 2010) at 18; *Young v. Brown Jug, Inc*., AWCB Decision No. 02-0223 (October 28, 2002) at 3; AS 23.30.135(a); AS 23.30.155(h).

> **AS 23.30.107. Release of information.**
> (a) Upon written request, an employee shall provide written authority to the employer, carrier . . . to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. . . .

> **AS 23.30.108. Prehearings On Discovery Matters; Objections to Requests For Release of Information; Sanctions For Noncompliance.**
> (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
> . . .
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. . . .

> **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.
> . . .
>
> **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 . . . 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 45.054. Discovery.**
> . . .
> (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.
> . . .

In *Burke v. Houston NANA, LLC*, 222 P.3d 851 (Alaska 2010), the Court held the board did not have the adjudicative power to impose a discovery rule on deadlines, or add legal requirements that neither the legislature nor the executive branch in its rule-making power chose to include in the Alaska Workers' Compensation Act or regulations. "If the board wished to add to the deadlines it explicitly set in the regulations - via adoption of a discovery rule - it was required to do so by regulation." *Id.* at 867. The Administrative Procedures Act (APA) "requires an agency to follow certain procedures, including public notice and an opportunity for public comment, before it can supplement or amend a regulation." *Id.* This is distinguished from an agency's right to implement internal agency practices, which do "not themselves alter the rights or interests of the parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *Id.*

8 AAC 45.065. Prehearings.
(a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
. . .
(11) the closing date for discovery;
(12) the closing date for serving and filing of video recordings, audio recordings, depositions, video depositions, or any other documentary evidence; the date must be at least two state working days before the hearing;
. . .

8 AAC 45.095. Release of information.
(a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 14 days after service of the request, petition for a prehearing under 8 AAC 45.065.

8 AAC 45.120. Evidence.
. . .
(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing.
. . .

ANALYSIS

1) Should an SIME be ordered?

As the Commission noted in *Bah*, there are three requirements before an SIME can be ordered under AS 23.30.095(k). First, there must be a medical dispute between an employee's attending physician and an EME physician. Second, the dispute must be significant. Third, it must be determined an SIME physician's opinion would assist in resolving the dispute.

Employee's medical condition is complex and defies easy diagnoses or obvious treatment recommendations. Nonetheless, the physicians who evaluated him concurred on some opinions. Treating physician Dr. Johnson and EME physician Dr. Olbrich (along with SIME physician Dr. McCormack) agreed Employee suffers from severe, chronic pain with no objective anatomical findings to explain it. All three also agreed Employee is a chronic narcotic user who should be detoxed, an opinion Employee told Dr. Johnson he shared.

Dr. Johnson neither fully discounted nor fully endorsed Dr. Olbrich's "final diagnosis" that Employee suffered from somatic symptom disorder. Noting chronic pain usually involves a psychological component, Dr. Johnson opined he did "not necessarily disagree" with Dr. Olbrich's conclusion psychosocial factors play a role in Employee's current disability and need for medical treatment.

However other, significant differences of opinion clearly exist between the attending and EME physicians:

- EME physician Dr. Olbrich's "final diagnoses" included malingering, an opinion supported by EME psychologist Wicher's statement there were "serious questions about the possibility of malingering." Attending physician Dr. Johnson, on the other hand, opined that even if a definitive diagnosis of somatic syndrome disorder were established, such a diagnosis does not imply malingering, and pain complaints in the disorder represent real pain.
- Dr. Olbrich diagnosed opioid abuse and probable opioid dependence, and psychologist Wicher diagnosed substance-related and addictive disorder. Dr. Johnson, on the other hand, stated Employee exhibited no "addiction qualities," an opinion supported by counselor Charles, who stated Employee had a tendency for addictive traits but "no substance use/abuse/dependency issues," and was taking his muscle relaxants and pain medication as prescribed.
- With regard to functional capacity, Dr. Olbrich opined Employee would be unable to return to any work where his chronic narcotic use would impair his physical and/or mental capacities. Dr. Johnson, on the contrary, opined Employee could work while taking narcotics, and stated he had many patients who work while under medications, so long as the work is not overly physical or potentially dangerous.

In his SIME report, Dr. McCormack reported negative Waddell signs and agreed with attending physician Johnson that Employee did not display overt malingering. Although Dr. McCormack did not specifically address the issue of substance abuse or addiction (as distinguished from undisputed chronic narcotic use), he shared Dr. Olbrich's concern that elevated LFT's could signify more alcohol use than Employee admitted. Dr. McCormack also opined that Employee's pain restricted him to light work, but recommended getting him off narcotics as "a start in accessing [sic] his true physical impairment."

Notably, Dr. McCormack declined to state a definitive opinion on the disputed issue of somatic symptom disorder. Like Dr. Johnson, Dr. McCormack did not specifically rule it out. But Dr. McCormack clearly stated he did not feel qualified to make such a diagnosis: "Perhaps he has somatization disorder as suggested by a psychologist but I am casting beyond my expertise."

Dr. McCormack, whose specialty is neurological surgery, therefore did not cast a decisive "tie-breaking" opinion on two important medical questions: (1) whether Employee suffers from addiction and/or substance abuse; and (2) whether Employee suffers from somatic symptom disorder. Both disputes need to be resolved before an accurate determination can be made as to what is causing Employee's chronic pain, what medical treatment is appropriate, what functional capacities he has now and could expect to have without narcotics, and whether he has a compensable injury.

An SIME will therefore be ordered under AS 23.30.95(k) to assist in resolving these significant medical disputes. *Bah.* The most appropriate SIME physician is Dr. Walter Ling because his expertise is broader than Dr. McCormack's; in addition to being a neurologist, Dr. Ling also specializes in psychiatry and substance abuse. While Employer's desire to minimize its defense costs is understandable, its request for a records-review only SIME will be denied. Because this is a complex case, involving intertwining physiological and psychiatric components, an in-person evaluation is necessary to ensure a comprehensive report that will best advance understanding of the medical evidence, and assist in properly ascertaining and protecting both parties' rights. *Id.*; AS 23.30.135(a); AS 23.30.155(h).

2) Were Employer's surveillance videos illegally retained and, if so, what is an appropriate remedy?

On August 16, 2012, Employee sent Employer an informal discovery request including "any and all surveillance videos." The letter asked for a response within 30 days and specified it should be "considered a continuing request for discovery." More than 21 months later, Employer began a six-month internal investigation that yielded surveillance tapes, land and aerial photographs, videos and investigator logs dating from May 21, 2014 through November 11, 2014. On December 8, 2014, Employer filed and served on Employee an NOI along with the video surveillance in dispute. This was 27 days after the last piece of surveillance evidence was gathered. (The fact that the surveillance video was in a format Employee's counsel could not view is irrelevant for purposes of this analysis, because at hearing the parties agreed the readability issue was moot.)

There is no indication Employer acted improperly here regarding discovery. Due to the then-pending PTD claim, Employer's potential financial liability was especially large during the surveillance period. Employer was entitled to conduct whatever length surveillance it wished in order to defend its position against Employee's claim, so long as it treated the investigative results as discoverable evidence. *Sulkosky*. Employer complied with both Employee's customary informal discovery request and the non-precedential guidance in *Adkins* by providing Employee surveillance videos within 30 days after the November 11, 2014 conclusion of the investigation. Moreover, Employer complied with the prehearing conference's evidence deadline of January 12, 2015. Because Employer lawfully provided discovery, Employee's argument that Employer should have applied for a protective order is moot, and will not be analyzed here.

Employee contends Employer was obligated to provide surveillance discovery piecemeal, within 30 days of when each discrete item was gathered, as opposed to in aggregate within 30 days after the course of the investigation ended. Employee's assertion Employer illegally retained video surveillance is problematic for several reasons:

- First, Employee provided no legal authority to support the existence of a mandatory "thirty-day rule," much less an established procedure to determine when the 30-day period commences.

- Second, had Employer turned over the initial surveillance video within 30 days of receipt, as Employee argues was proper, Employee would have been on notice of the surveillance and could have altered or restricted his activities. If so, Employer's right to investigate and defend against the claim would be severely undermined, and further surveillance would be rendered of questionable usefulness at a merits hearing.
- Third, Employee's concern that not requiring Employer to turn over evidence as it is received could result in a never-ending investigation overlooks 8 AAC 45.120(f), which establishes that documentary evidence must be filed at least 20 days before the hearing, unless another deadline is set by a board designee under 8 AAC 45.065(11)-(12). Employee undoubtedly would have preferred to have seen the video surveillance earlier, but these regulations ensure he will not be prejudiced by not having adequate time to review and prepare arguments against the surveillance prior to a merits hearing.
- Fourth, requiring the release of each individual bit of investigative evidence as Employer receives it would, especially in a lengthy surveillance period such as this, generate significantly more administrative chores and paperwork. Such a procedure would contravene the legislative intent for quick, efficient, fair, and predictable delivery of benefits to entitled claimants at a reasonable cost to employers. AS 23.30.001(1). It would also violate the mandate that process and procedure must be as summary and simple as possible. AS 23.30.005(h).

Agency decisional law cannot add legal requirements that neither the legislature nor the executive branch chose to include in the Act or regulations. The APA requires that certain procedures, including public notice and an opportunity for public comment, be followed before a regulation can be changed, supplemented or amended. *Burke.* Here the factfinders do not have authority to create *ad hoc* rules or regulations, much less remedies for noncompliance with them. Granting Employee's petition for an order declaring Employer illegally retained video surveillance, even if no remedy is fashioned, would be an abuse of discretion, as it would amount to an improper promulgation of a regulation through adjudication. Employee's petition will be denied.

CONCLUSIONS OF LAW

1) An SIME will be ordered.

2) Employer's surveillance videos were not illegally retained and no remedy will be fashioned.

ORDER

1) Employee's December 23, 2014 petition for an SIME is granted.

2) Workers' Compensation Officer Susan Reishus-O'Brien is directed to schedule an SIME with neurology, psychiatry and substance abuse specialist Dr. Walter Ling, subject to his availability and the lack of any potential conflict of interest.

3) A prehearing conference to address deadlines and instructions for compilation of the SIME binders is scheduled for February 18, 2015, at 1:00 p.m. with Workers' Compensation Officer David Grashin.

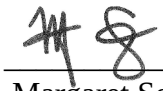
4) Each party will be allowed to submit to the board designee up to three, non-compound questions, limited to the neurological, psychiatric and substance abuse issues analyzed in this Decision and Order.

5) Jurisdiction over the employee's claim is retained, pending receipt of the SIME report.

6) Employee's December 23, 2014 petition to have surveillance tapes deemed illegally retained and a remedy fashioned is denied.

Dated in Anchorage, Alaska on February 6, 2015.

ALASKA WORKERS' COMPENSATION BOARD



Margaret Scott, Designated Chair

Rick Traini, 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 CHARLES G. MANLEY, employee / claimant; v. MUNICIPALITY OF ANCHORAGE, self-insured employer / defendant; Case No. 201200402; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 6, 2015.

Elizabeth Pleitez, Office Assistant