ALASKA WORKERS' COMPENSATION BOARD

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

JANICE M. PARSLEY,	)	
	)	
Employee,	)	INTERLOCUTORY
Claimant,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201309284
	)	
STATE OF ALASKA,	)	AWCB Decision No. 15-0020
	)	
Employer,	)	Filed with AWCB Anchorage, Alaska
Defendant.	)	on February 18, 2015
	)	

Janice Parsley's (Employee) June 12, 2014 request for a second independent medical evaluation (SIME) was heard on February 17, 2015, in Anchorage, Alaska, a date selected on January 15, 2015. Attorney Robert Rehbock appeared and represented Employee. Assistant Attorney General Jayme Keller appeared and represented the self-insured State Of Alaska (Employer). There were no witnesses. The record closed at the hearing's conclusion on February 17, 2015.

ISSUE

Employee contends there are significant medical disputes between her attending physician and Employer's medical evaluators (EME) in three areas: causation, compensability and treatment. Consequently, she contends an SIME should be ordered with a neurosurgeon.

Employer at first objected to an SIME, contending Employee failed to follow proper procedures. Now that paperwork has been filed, Employer no longer opposes Employee's SIME request.

Should an SIME be ordered?

FINDINGS OF FACT

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

1) On July 5, 2013, Employee claims she injured her neck and upper back while moving a 15-20 pound box while working for Employer (Workers' Compensation Claim, June 12, 2014).

2) On January 27, 2014, Robert Nielsen, DC, said Employee had an "old," "cumulative" trauma. He opined Employee had joint dysfunction, a bulging cervical disc, myofascial scar tissue "post traumatic injury," and "postural ergonomic muscle tension," all work-related (Nielsen report, January 27, 2014).

3) On January 27, 2014, Dr. Nielson took Employee off work on "temporary partial disability" from January 27, 2014 to February 13, 2014 (Nielsen Disability Form, January 27, 2014).

4) On or about January 29, 2014, Dr. Nielson referred Employee to Situs for workstation assessment and modification. On the referral form, Dr. Nielson said Employee had increased neck, upper back and shoulder pain from ergonomic stress at work (Nielsen Referral Slip, undated but received January 29, 2014).

5) On January 30, 2014, Dr. Nielson prescribed a modified arm sling and over-the-counter remedies (Nielsen report, January 30, 2014).

6) On February 3, 2014, Liz Dowler, PhD, at Situs said Employee had symptoms directly associated with the C5-6 spinal level. She recommended a magnetic resonance imaging (MRI) scan and further medical evaluation (Dowler report, February 3, 2014).

7) On February 7, 2014, Dr. Dowler said Employer was not willing to do an ergonomic job assessment if the job was not appropriate for Employee. Dr. Dowler reviewed the job description for Office Assistant I. After performing physical capacities testing on Employee, Dr. Dowler opined Employee did not meet the physical requirements of her job as described by the written description. Dr. Dowler considered referring Employee to a neurosurgeon for consultation and, if surgery was not recommended, for therapy and permanent job modification or job change, and ergonomic assessment (Dowler report, February 7, 2014).

8) On March 25, 2014, Louis Kralick, M.D., neurosurgeon, saw Employee on referral and stated "[t]his is a worker's compensation case," and noted Employee's pain began after a work-related injury lifting boxes over her head, which "resulted in neck pain as well as arm numbness and weakness" (Kralick report, March 25, 2014).

9) On April 4, 2014, Dr. Nielson said Employee had moderate to severe neck pain from a work-related injury (Nielsen report, April 4, 2014).

10) On April 5, 2014, Thomas Dietrich, M.D., neurosurgeon, and Charles Simpson, DC, examined Employee in an EME for her July 5, 2013 work injury. Employee initially denied any prior numbness or tingling in her hands, neck or shoulder except for brief neck symptoms after "sleeping wrong." She later acknowledged having had a whiplash injury in a motor vehicle accident in 2003 after which she may have had chiropractic treatment but she was uncertain. She denied having any symptoms or treatment for her neck from that date until July 5, 2013. However, the EME physicians noted Employee's medical records showed "considerable treatment" for the cervical spine beginning in July 2007 with complaints including right neck, shoulder and upper arm pain. She also reported tingling and numbness in the left hand in July 2007 and in the right arm in August 2007. In respect to the work injury, Employee stated she was moving a box down from an overhead shelf on July 5, 2013, and when she put the box back up on the shelf, "something happened" in her neck and upper back. She estimated the box weighed between 15-20 pounds. Employee described the sensation as a "pull or a twinge." She recalled it was more on the left side. Employee reported the pain persisted over the weekend. She saw her primary care physician and was referred to chiropractor Nielson. The EME panel reviewed other medical records including two MRI scans, one for the neck and one for the right shoulder. Employee's then-current complaints were constant pain in the neck and upper back, intermittent pain in the right shoulder, and to a lesser degree the left shoulder. Her arms had numbness and tingling primarily in the hands. Desk work and typing caused more numbness and tingling in both hands, while rubbing and shaking her hands and massaging them helped the symptoms to subside. Employee stated she awoke every night with neck and shoulder pain as well as numbness and tingling in both hands. Her pain level ranged from "4/10" up to "7/10." The EME panel performed a physical examination and relevant to this decision diagnosed: preexisting degenerative cervical disc disease at C5-6 and C6-7 with significant foraminal stenosis; a cervicothoracic strain/sprain resulting from the July 5, 2013 work injury; and subsequent sensory symptoms in both hands, etiology undetermined but possible cervical radiculopathy or carpal tunnel syndrome. The EME panel recommended electrodiagnostic studies to resolve the issue of what was causing her hand symptoms. The EME panel concluded Employee had a "mild cervical injury at the time of the incident on July 5, 2013." In its opinion,

her symptoms "seem to have resolved" with treatment over the next three to four months. The panel opined it was "difficult to attribute the course of events beginning in mid-December to the work injury of July 5, 2013," referring to her sensory symptoms. The panel concluded it would "be most reasonable to consider July 5, 2013, as an exacerbation of a preexisting cervical condition." There was no evidence of a permanent change in the preexisting condition. The sensory symptoms beginning in mid-December were, in the EME physicians' opinions, due entirely to the preexisting condition. The work-related "sprain/strain" injury resolved by "October/November" 2013. As for further treatment, the EME panel recommended only electrodiagnostic studies to determine if carpal tunnel syndrome was a significant factor in her upper extremity sensory symptoms and to find any evidence of "radicular motor abnormality." They opined cervical traction may be helpful if Employee has a true cervical radiculopathy. However, the panel did not attribute these recommendations to the work injury. Employee was medically stable as of December 5, 2013, and there was no permanent partial impairment from the work injury (EME report, April 5, 2014).

11) On April 11, 2014, Dr. Nielson completed a form stating Employee had moderate neck and shoulder pain arising from a work injury on July 5, 2013. He placed her on "temporary partial disability" from April 11, 2014 to May 15, 2014. Dr. Nielson gave Employee the following limitations: no repeated lifting over five pounds; single lifting limited to 10 pounds; lifting restricted to one to two times per hour; no lifting above waist level; limited carrying activity; and a 15 minute break every two hours (Nielsen Disability Form, April 11, 2014).

12) Effective April 11, 2014, when Dr. Nielson completed his report, there were medical disputes between EME panelists Drs. Dietrich and Simpson, and attending physician Dr. Nielson. These medical disputes included: causation; medical stability; functional capacity; and the amount and efficacy of the continuance of or necessity of treatment (experience, judgment, observations, and inferences drawn from the above).

13) On April 24, 2014, Employer filed a notice denying Employee's right to "PPI, TTD, TPD and medical benefits related to the diagnosis of cervical thoracic strain/sprain." Employer relied upon the April 5, 2014 EME report to support its denial. Employer cited predominately to the EME opinions that beginning mid-December 2013, the sensory symptoms in Employee's upper extremities as well as the alleged "shift" of pain to the right shoulder "is more likely due entirely to the preexisting conditions" (Controversion Notice, April 22, 2014).

14) On June 18, 2014, Dr. Nielson stated Employee was under his care for a July 5, 2013 work related injury and had "moderate to severe" neck and upper extremity pain. He placed Employee on "temporary partial disability" from June 18, 2014 through December 18, 2014, and restricted her physical exertion to: no repeated lifting over five pounds; single lifting limited to 10 pounds; lifting restricted to one to two times per hour; no lifting above waist level; limited carrying; and take a 15 minute break at unspecified times (Nielsen Disability Form, June 18, 2014).

15) On June 18, 2014, Dr. Nielson also stated Employee had neck and low back pain and soreness, respectively, and this probably arose from a "recent trauma." He recommended spinal adjustments twice a week for four to eight weeks (Nielsen Patient Problem List and Treatment Plan, June 18, 2014).

16) On June 18, 2014, Employee filed a claim requesting an SIME, and seeking temporary total disability (TTD), medical costs, interest, and attorney's fees and costs (Workers' Compensation Claim, June 12, 2014).

17) On July 8, 2014, Dr. Kralick's nurse practitioner Jennifer McGrath said Employee's cervical symptoms began acutely at her workplace on July 5, 2013, while she was lifting 25-30 pound objects above her head. Her symptoms had gotten progressively worse. She also opined Employee's pain had lasted for about one year and she had bilateral upper extremity weakness, numbness and tingling, in the right upper extremity greater than in the left. Employee stated the symptoms were affecting her quality of life. Employee's imaging correlated with some of her exam findings. Dr. Kralick stated Employee appeared to have possible right carpal tunnel syndrome in addition to her cervical issues. Dr. Kralick discussed surgical intervention pending electromyography (EMG) results, which likely would include C5-6 and C7 anterior cervical discectomy and fusion, as well as a carpal tunnel release (McGrath/Kralick report, July 8, 2014).

18) Effective July 8, 2014, when nurse practitioner McGrath and Dr. Kralick wrote their report, medical disputes existed between the EME panel and Dr. Kralick, including: causation; medical stability; and the amount and efficacy of the continuance of or necessity of treatment (observations, experience, judgment and inferences drawn from the above).

19) On July 14, 2014, Employee saw Erik Kussro, D.O., at Dr. Kralick's office on referral from Dr. Kralick for electrodiagnostic consultation. Employee reported her symptoms resulted from a work-related lifting injury on July 5, 2013, where she was lifting 20-25 pounds overhead. Employee had gotten some relief temporarily from acupuncture and chiropractic adjustments.

Dr. Kussro performed EMG studies and determined Employee had evidence of mild to moderate bilateral median neuropathy at the wrist, otherwise known as carpal tunnel syndrome. There were no findings of right or left ulnar neuropathy and no findings to suggest a polyneuropathy. There was no right or left cervical radiculopathy. Dr. Kussro prescribed bilateral wrist splints with instructions for Employee to wear them at night (Kussro report, July 14, 2014).

20) On July 15, 2014, Dr. Nielson referred Employee for surgery as the result of "old trauma." Dr. Nielson recommended she continue spinal adjustments until surgery to decrease pain and improve joint motion (Nielson Patient Problem List and Treatment Plan, July 15, 2014).

21) On July 22, 2014, Dr. Kralick reiterated Employee had a history of neck pain with upper extremity numbness, tingling and weakness. These symptoms began acutely while at work when she was lifting 25-30 pound objects above her head on July 5, 2013. Dr. Kralick noted Employee's symptoms correlated with her imaging studies and EMG findings. He recommended a C5-6 and C6-7 anterior cervical discectomy and fusion with allograft and instrumentation (Kralick report, July 22, 2014).

22) Neurosurgeons frequently perform cervical discectomy and fusion surgeries because the operable structures are close to the spinal cord. Spinal and carpal tunnel surgeries are expensive and can cause extended disability (experience).

23) On January 15, 2015, the parties through counsel appeared at a prehearing conference. As the parties were unable to agree on the need for an SIME, the designee set a procedural hearing for February 17, 2015, limited to an SIME (Prehearing Conference Summary, January 15, 2015).

24) On February 10, 2015, Employee filed as an attachment to her hearing brief an SIME form with attached medical records. Employee listed the respective physicians and cited facts from their reports which she believed demonstrated medical disputes justifying an SIME. Employee listed disputed issues as: "causation," "compensability" and "treatment." She requested a "neurosurgeon" for the SIME (Second Independent Medical Evaluation (SIME) Form, undated).

25) On February 10, 2015, Employee filed a hearing brief suggesting all requirements for an SIME had been met. She requested an order for an SIME (Hearing Brief, February 10, 2015).

26) On February 12, 2015, Employer filed a hearing brief which stated Employer initially refused to agree to an SIME because Employee had failed to provide the SIME form. Since Employee had filed the form as an attachment to her hearing brief, Employer no longer opposed

Employee's SIME request. (Employer's Hearing Brief Re: Necessity of a Second Independent Medical Evaluation).

27) Given Employer's hearing brief statements, the parties have now stipulated to an SIME effective February 12, 2015 (experience, judgment and inferences drawn from the above).

28) As of February 17, 2015, the parties had not stipulated to the medical disputes at issue or to the medical specialty needed to perform the SIME (observations).

29) At hearing on February 17, 2015, the parties stipulated to a neurosurgeon to perform the SIME. They also stipulated to the following medical disputes to be addressed by the SIME: "causation," "compensability," and "the amount and efficacy of the continuance of or necessity of treatment" (parties' hearing stipulations).

30) The record shows significant medical disputes between the two primary attending physicians and the EME panel in the following areas: "causation," "medical stability," "functional capacity," and "the amount and efficacy of the continuance of or necessity of treatment" (experience, judgment, observations and inferences drawn from the above).

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).

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
>
> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the

> need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .
>
> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. . . .

AS 23.30.095(k) is procedural, not substantive. *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165, at 3 (July 23, 1997). Wide discretion exists under AS 23.30.095(k) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), addressed authority to order an SIME under §095(k) and §110(g). *Bah* used the term "SIME" to apply to evaluations ordered under both sections. With regard to §095(k), the AWCAC cited *Smith v. Anchorage School District*, AWCAC Decision No. 050, at 8 (January 25, 2007), in which it confirmed:

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

Bah further stated in *dicta*, before ordering an SIME it is necessary for the board to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073, at 4 (February 27, 2008). *Bah* noted the purpose of ordering an SIME is to assist the board, and it is not

intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion (*id.*). When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between an employee's physician and an EME?
2) Is the dispute significant? and
3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal, AWCB Decision No. 97-0165, at 3 (July 23, 1997); *see also, Schmidt v. Beeson Plumbing & Heating*, AWCB Decision No. 91-0128 (May 2, 1991).

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

The board has broad statutory authority in conducting its hearings. *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010).

> **8 AAC 45.050. Pleadings**. . . .
>
> (f) **Stipulations.**
> . . . .
>
> (2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.
> . . . .
>
> (4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence . . . any stipulation to the contrary notwithstanding.

> **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. . . .
> . . . .
>
> (e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095(k), the board or its designee may select a

physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as an independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:

(1) the nature and extent of the employee's injuries;
(2) the physician's specialty and qualifications;
(3) whether the physician or an associate has previously examined or treated the employee;
(4) the physician's experience in treating injured workers in this state or another state;
(5) the physician's impartiality; and
(6) the proximity of the physician to the employee's geographic location.

. . . .

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

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

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

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

. . . .

(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;

(2) the party making the copies to serve the two binders of medical records upon the opposing party together with an affidavit verifying that the binders contain copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binders to review the copies of the medical records to determine if the binders contain copies of all the employee's medical records in that party's possession. The party served with the binders must file the two binders with the board within 10 days of receipt and, if the binders are

(A) complete, the party served with the binders must file the two sets of binders upon the board together with an affidavit verifying that the binders contain copies of all the employee's medical records in the party's possession; or

(B) incomplete, the party served with the binders must file the two binders upon the board together with two supplemental binders with copies of the medical records in that party's possession that were missing from the binders and an affidavit verifying that the binders contain copies of all medical records in the party's possession. The copies of the medical records in the supplemental binders must be placed in chronological order by date of treatment and numbered consecutively. The party must also serve the party who prepared the first set of binders with a copy of the supplemental binder together with an affidavit verifying that the binder is identical to the supplemental binders filed with the board;

(4) the party, who receives additional medical records after the two binders have been prepared and filed with the board, to make three copies of the additional medical records, put the copies in three separate binders in chronological order by date of treatment, and number the copies consecutively. The party must file two of the additional binders with the board within seven days after receiving the medical records. The party must serve one of the additional binders on the opposing party, together with an affidavit stating the binder is identical to the binders filed with the board, within seven days after receiving the medical records;

> (5) that, within 10 days after a party's filing of verification that the binders are complete, each party may submit to the board designee up to three questions per medical issue in dispute under AS 23.30.095(k), as identified by the parties, the board designee, or the board, as follows:
>
> > (A) if all parties are represented by counsel, the board designee shall submit to the physician all questions submitted by the parties in addition to and at the same time as the questions developed by the board designee;
> >
> > (B) if any party is not represented by counsel, only questions developed by the board designee shall be submitted to the physician; however, the board designee may consider and include questions submitted by the parties;
> >
> > (C) if any party objects to any questions submitted to the physician, that party shall file a petition with the board and serve all other parties within 10 days after receipt of the questions; the objection must be preserved in the record for consideration by the board at a hearing on the merits of the claim, or, upon the petition of any party objecting to the questions, at the next available procedural hearing day; failure by a party to file and serve an objection does not result in waiver of that party's right to later argue the questions were improper, inadequate, or otherwise ineffective;
> >
> > (D) any questions submitted for purposes of this paragraph must be prepared in accordance with 8 AAC 45.114(3) and (4). . . .

ANALYSIS

Should an SIME be ordered?

The parties initially disagreed over whether there should be an SIME. Employee requested one but Employer refused to stipulate to an SIME until Employee completed the SIME form. Employee attached the SIME form to her hearing brief. Since the paperwork has been provided, the parties have stipulated to an SIME. 8 AAC 45.050(f)(2). However, prior to hearing the parties had not stipulated to disputed categories or to the medical specialty to perform the SIME. At hearing, the parties agreed to use a neurosurgeon to perform the SIME. They also agreed "causation," "compensability," and "the amount and efficacy of the continuance of or necessity of treatment" were among the initial medical disputes. 8 AAC 45.050(f)(2). To make this process quick, efficient and as summary and simple as possible, this decision will analyze the SIME issue, determine the disputes, approve the stipulated medical specialty to perform the

SIME and fashion procedural orders. AS 23.30.001(1); AS 23.30.005(h); 8 AAC 45.092(h); *De Rosario*.

a) Are there medical disputes?

The parties agreed at hearing to medical disputes in at least three areas. 8 AAC 45.050(f)(2). The record reflects several medical disputes between Drs. Nielson and Kralick, Employee's primary attending physicians, and Drs. Dietrich and Simpson, the EME panel physicians, sufficient to justify an SIME. AS 23.30.095(k); *Bah*. On April 5, 2014, the EME panel said Employee's work injury had "resolved" months earlier. Though they recommended additional evaluation and possible treatment, it can be inferred from their report that the EME panel did not believe the work injury necessitated further evaluation or treatment, as they stated the work injury had resolved. Therefore, it can also be inferred from their report that the EME physicians did not think there was a causal connection between the work injury and the need for any further evaluation or treatment. *Rogers & Babler*. By contrast, just following the April 5, 2014 EME, Dr. Nielson on April 11, 2014, recommended additional evaluation and medical treatment, and said Employee continued to be disabled. Dr. Nielson treated this matter as a work injury from Employee's first visit post-injury. Therefore, it can be inferred from his report that Dr. Nielson thinks the work injury caused a need for additional evaluation, treatment and any possible disability. *Rogers & Babler*. Thus, there is a medical dispute between an attending physician and the EME physicians concerning "causation." AS 23.30.095(k).

It can be inferred from Dr. Nielson's April 11, 2014 recommendation for additional medical care that he believes Employee would improve as a result of this care. Otherwise, he would not have recommended it. *Rogers & Babler*. Therefore, it can be further inferred from Dr. Nielson's report that he does not think Employee was medically stable effective April 11, 2014. The same is true of Dr. Kralick's July 22, 2014 surgical recommendation. On the other hand, Drs. Dietrich and Simpson expressly stated Employee was medically stable from her work injury effective April 5, 2014. This creates a medical dispute over "medical stability." AS 23.30.095(k).

Since the EME panel said Employee's mild "sprain/strain" injury had resolved, there is no reason for the EME to expect Employee was still disabled from her work injury. On the other

hand, Dr. Nielson expressly stated Employee continued to be disabled from her work injury. This creates a medical dispute concerning Employee's "functional capacity." AS 23.30.095(k).

Both Drs. Nielson and Kralick recommended Employee have additional medical evaluation and treatment, including neck and carpal tunnel surgery. By contrast, EME Drs. Dietrich and Simpson opined Employee's work injury had resolved and though additional electrodiagnostic testing should be performed, and Employee may need additional treatment, neither would be related to the work injury. This creates a medical dispute about "the amount and efficacy of the continuance of or necessity of treatment." AS 23.30.095(k).

Though Employee also suggested there was a medical dispute over "compensability," there is insufficient evidence to demonstrate this. Admittedly, what "compensability" means in the applicable statute is open to interpretation and has eluded clarity since 1988. Nevertheless, the above-discussed medical disputes are supported by the record notwithstanding the need to make inferences and notwithstanding the parties' stipulation. *Rogers & Babler*. Employer also believed its EME report was adequate to deny Employee's right to "PPI, TTD, TPD and medical benefits related to the diagnosis of cervicothoracic strain/sprain," because Employer controverted these rights based upon this report on April 24, 2014. Thus, Employer drew inferences similar to those drawn by this decision. *De Rosario*.

b) Are the disputes significant?

This is not a hearing on the merits of Employee's claim. *Deal*. Her claim currently seeks TTD as well as medical benefits. To prevail on her claims at a merits hearing, Employee must present medical evidence demonstrating that, in relation to the relative contribution of different causes of any disability or need for medical treatment, her employment with Employer is "the substantial cause" of the disability or need for treatment. AS 23.30.010(a). In other words, the underlying medical-legal issue is not whether Employee's work injury with Employer is the substantial cause of Employee's "condition." The ultimate issue to be decided at a merits hearing will be whether the employment, when compared to other causes, is the substantial cause of any disability or the need for any recommended medical treatment. AS 23.30.010(a).

Experience shows disability, surgery and any additional disability resulting from it are significant issues. Surgery is expensive. Time loss benefits can be considerable while a person recovers from surgery. *Rodgers & Babler*. Employee does not seek just medical care; she also claims possible disability, both potentially significant benefits. Therefore, these numerous medical disputes are significant. *Bah*.

c) Would an SIME assist the fact-finders?

Lastly, given the significant medical disputes between the attending and EME physicians, as to both causation for any medical care and the need for any necessary medical care, as well as Employee's functional capacity at relevant times and thus any disability, and medical stability, it would assist the fact-finders to have an impartial physician weigh in on these medical disputes. AS 23.30.095(k). An impartial opinion from a third physician would offset any possible bias from either the attending or EME physicians. As has been noted, surgery is expensive and disability can be significant. Therefore, another opinion by a qualified doctor will help the fact-finders establish facts and best ascertain all parties' rights. AS 23.30.135. Having the SIME address all currently existing medical disputes will also help move this case forward at a reasonable cost to Employer. AS 23.30.001(1). Accordingly, Employee's request for an SIME will be granted. The parties' recent stipulation to an SIME is approved and it will be so ordered. 8 AAC 45.050(f)(3). Medical disputes in addition to those to which the parties agreed will be addressed in the SIME as set forth above. 8 AAC 45.050(f)(4).

Nearly a year will have passed since Employee requested an SIME by the time an SIME report is obtained. Therefore, this decision will also enter orders to further the SIME procedures, a process which usually occurs at a prehearing conference. AS 23.30.001(1); AS 23.30.005(h). Employee claims primarily a cervical injury. A neurosurgeon has recommended surgery. The parties stipulated to a neurosurgeon to perform the SIME. As cervical surgery deals with Employee's spine, and since neurosurgeons typically perform such surgery because of its proximity to the spinal cord, the parties' stipulation will be approved and a neurosurgeon will be selected to perform the SIME. 8 AAC 45.092(e)(1), (2). The appropriate workers' compensation officer will make the necessary determinations under 8 AAC 45.092(e)(3)-(6),

select the neurosurgeon from the agency list and develop the letters for Employee and the selected SIME physician in accordance with the applicable regulations and internal procedures.

CONCLUSION OF LAW

An SIME will be ordered.

ORDER

1) Employee's June 12, 2014 request for an SIME is granted.
2) The parties' February 12, 2015 stipulation for an SIME is approved and an SIME is ordered.
3) An SIME will be performed by a neurosurgeon selected by the appropriate workers' compensation officer in accordance with the Alaska Workers' Compensation Act, applicable regulations, and normal internal processes and procedures.
4) The medical disputes listed on Employee's SIME form are modified in accordance with this decision and order to include: **causation; medical stability; functional capacity; and the amount and efficacy of the continuance of or necessity of treatment**.
5) Employer is directed to make two copies of all medical records, including medical providers' depositions, regarding Employee in Employer'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.
6) Employer is directed to serve the two medical record binders upon Employee together with an affidavit verifying the binders contain copies of all medical reports relating to Employee in Employer's possession by no later than **March 10, 2015**.
7) Employee is directed to review the medical records to determine if the binders contain copies of all of Employee's medical records in Employee's possession. Employee is directed to file the two binders, **within 10 days of receipt**.
8) If the binders are complete, Employee must file the two binders together with an affidavit verifying the binders contain copies of all of Employee's medical records in Employee's possession, **within 10 days of receipt**.
9) If the binders are incomplete, Employee must file the two binders together with two supplemental binders with copies of the medical records in Employee's possession that were missing from the binders and an affidavit verifying the binders contain copies of all medical

records in Employee's possession, **within 10 days of receipt**. The copies of the medical records in the supplemental binders must be placed in chronological order by date of treatment and numbered consecutively. Employee must also serve on Employer a copy of the supplemental binder together with an affidavit verifying the binder is identical to the supplemental binders that were filed, **within 10 days of receipt**.

10) A party who receives additional medical records after the two binders have been prepared and filed, is directed to make **three copies** of the additional medical records, put the copies in three separate binders in chronological order by date of treatment, and number the copies consecutively. The party must file two of the additional binders **within seven days after receiving the medical records**. The party must serve one of the additional binders on the opposing party, together with an affidavit stating the binder is identical to the binders that were filed, **within seven days after receiving the medical records**.

11) **Within 10 days after a party's filing of verification the binders are complete**, each party may file and serve up to three questions per medical issue in dispute under AS 23.30.095(k), as identified in this decision and order.

12) The appropriate workers' compensation officer will review, prepare and submit to the SIME physician questions in accordance with 8 AAC 45.092(h)(5).

13) If any party objects to any questions submitted to the physician, that party shall file and serve a petition **within 10 days after receipt** of the questions. The objection will be preserved in the record for consideration at a hearing on the merits of the claim, or upon the petition of any party objecting to the questions, at the next available procedural hearing day. Failure by a party to file and serve an objection does not result in waiver of that party's right to later argue the questions were improper, inadequate, or otherwise ineffective.

Dated in Anchorage, Alaska on February 18, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Michael O'Conner, Member

_____
Pam Cline, 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 JANICE M. PARSLEY, employee / claimant v. STATE OF ALASKA, self-insured employer; defendant; Case No. 201309284; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 18, 2015.

_____
Elizabeth Pleitez, Office Assistant