ALASKA WORKERS' COMPENSATION BOARD

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

SHAWN D. HUDAK,	)	
	)	
Employee,	)	
Claimant,	)	
	)	
v.	)	INTERLOCUTORY
	)	DECISION AND ORDER
YES BAY LODGE, INC.,	)	
	)	AWCB Case No. 200615619
Employer,	)	
and	)	AWCB Decision No. 15-0022
	)	
EMPLOYERS INSURANCE CO. OF	)	Filed with AWCB Juneau, Alaska
WAUSAU,	)	on February 24, 2015
	)	
Insurer,	)	
Defendants.	)	

Yes Bay Lodge, Inc.'s (Employer) April 25, 2014 and Shawn Hudak's (Employee) November 6, 2014 petitions to exclude medical records due to unlawful changes of physicians were heard on December 16, 2014, in Juneau, Alaska, a date selected on November 3, 2014. Attorney Michael Jensen appeared telephonically and represented Employee. Attorney Martha Tansik appeared and represented Employer and its insurer Employers Insurance Co. of Wausau. Employee appeared telephonically and was the only witness. The record remained open until December 19, 2014, to receive Employee's supplemental affidavit of attorney's fees and costs and Employer's objection. The record closed on February 23, 2015, after further deliberation.

ISSUES

Employer contends Employee made an unlawful change in his choice of physician when he switched from David Anderson, M.D., to Michael Nemanich, M.D., back to Dr. Anderson, then

to Samuel Dardick, M.D. Employer concedes it approved Employee's change back to Dr. Anderson when it signed a 2008 settlement agreement. However, it contends Employee's change from Dr. Anderson to Dr. Dardick was unlawful and the panel cannot consider reports and opinions of Dr. Dardick or any physician in his referral chain, for any purpose from July 9, 2011 on, under AS 23.30.095(a) and 8 AAC 45.082(c).

In response to Employee's petition, Employer contends it has only changed its physician once, from James Gannon, M.D., to Rajan Jhanjee, M.D.

In response to Employer's petition, Employee contends he has not made an unlawful change of physician because: 1) after Dr. Nemanich's evaluation, the insurer's nurse case manager referred Employee back to Dr. Anderson, 2) Dr. Nemanich worked for the same clinic as Dr. Anderson, 3) Dr. Anderson discharged Employee from care on March 3, 2010, 4) Dr. Anderson referred Employee to Dr. Dardick, 5) AS 23.30.095(a)'s physician limitation does not apply when an employer denies future medical benefits, 6) Employer waived or is equitably estopped from raising an excessive change of physician defense, and 7) strict application of the Alaska Workers' Compensation Act (Act) and its regulations would result in "manifest injustice" to Employee and should be waived.

Employee's petition contends Employer selected Dr. Gannon as its first physician and then directed Employee to see Dr. Anderson, making him Employer's first change. Employee contends Employer's subsequent change to Dr. Jhanjee was thus unlawful.

1) Did either party make an unlawful change of physician?

Employee contends his attorney provided valuable legal services on a complex issue; both defending against and bringing an unlawful change-of-physician petition. Employee contends he is entitled to actual attorney's fees under AS 23.30.145(b). Employer contends Employee is not entitled to any benefits as a result of his lawyer's efforts. Therefore, it contends he is not entitled to attorney's fees.

2) Is Employee entitled to interim attorney's fees and costs?

FINDINGS OF FACT

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

1) Prior to 1988, parties to workers' compensation cases routinely sought numerous medical opinions to support a claim or defense. This was called "doctor shopping." In 1988, the legislature amended the Alaska Workers' Compensation Act to prevent this practice. (Experience).

2) On September 15, 2006, Employee injured his right shoulder while working for Employer as a fishing guide. Following the injury, Employee returned to his home in Minneapolis, Minnesota. (Report of Injury, September 19, 2006; Settlement Agreement, May 28, 2008).

3) On September 25, 2006, orthopedic surgeon David Anderson, M.D., with Orthopedic Surgeons, Ltd., located at 6363 France Ave. South, Suite 404, in Edina, Minnesota, treated Employee for right shoulder pain. (Chart Note, Dr. Anderson, September 25, 2006).

4) On May 18, 2007, Employee self-referred to Michael Nemanich, M.D., at Minnesota Orthopaedic Specialists, P.A., located at 7373 France Ave. South, Suite 312, in Edina, Minnesota, for a second opinion regarding his right shoulder. This was Employee's first change of physician. (Chart Note, Dr. Nemanich, May 18, 2007; experience, judgment and inferences drawn from the above).

5) On July 12, 2007, Employee returned to Dr. Anderson for right upper extremity pain following reinjury. Dr. Anderson released Employee to work without restrictions as his pain tolerated. This would have been Employee's first unlawful change of physician, but Employer conceded it gave written consent to this change in the parties' subsequently approved 2008 settlement agreement. (Chart Note, Dr. Anderson, July 12, 2007; Settlement Agreement, May 28, 2008).

6) On July 18, 2007, the insurer's nurse case manager and Employee discussed whether Dr. Anderson could perform a PPI rating. The nurse case manager told Employee if his treating physician was unable to perform it, Employer would schedule one with a different physician. (Nurse Case Manager Notes, July 18, 2007).

7) On September 27, 2007, orthopedic surgeon James Gannon, M.D., evaluated Employee for an Employer's Medical Evaluation (EME). The EME report is not relevant to the narrow issues reached in this decision. (Dr. Gannon EME, September 27, 2007; judgment).

8) On November 8, 2007, the Alaska Workers' Compensation Appeals Commission (AWCAC) issued *Guys With Tools, LTD v. Thurston*, AWCAC Decision No. 062 (November 8, 2007). From November 8, 2007, until the effective date of the board's amended regulation 8 AAC 45.082(c) on July 9, 2011, *Guys With Tools* was precedent on this issue in all cases and the board was required to consider all otherwise admissible medical evidence even if it was obtained in violation of AS 23.30.095(a) or (e). (Experience, judgment, observations and inferences drawn from the above).

9) On February 5, 2008, Dr. Anderson referred Employee to Michael Freehill, M.D., for a second opinion on right upper extremity treatment. (To Whom It May Concern Letter, February 5, 2008).

10) On March 25, 2008, Employee saw Dr. Freehill for a second opinion on Dr. Anderson's recommended right shoulder surgery. As Dr. Anderson was an Employer-approved change of physician, his referral to Dr. Freehill was lawful. (Chart note, Dr. Freehill, March 25, 2008; experience, judgment and inferences drawn from the above).

11) On May 23, 2008, Dr. Anderson performed a right arm open long head of biceps tenotomy on Employee. John Anderson, M.D, and David Winecoff, PA-C, assisted Dr. Anderson. (Operative Report, May 23, 2008).

12) On May 29, 2008, the parties filed a settlement agreement which resolved all disputes other than future medical treatment and related transportation costs. The agreement contained stipulated factual statements, including the statement Dr. Anderson was Employee's treating physician and Dr. Gannon was Employer's EME. It also specified Employer did not waive its right to assert defenses and contest liability for future medical benefits under the Act, case law, and board regulations. (Settlement Agreement, May 29, 2008).

13) On March 30, 2009, Laura Wilson, PT, at Park Nicollet Methodist Hospital (Park Nicollet), treated Employee for left low back pain and a right ankle sprain. She noted Employee was referred to PT by Employee's family doctor, internist Samuel Dardick, M.D., also with Park Nicollet, and stated Employee, "suspects that his low back pain is due to compensation after his right sided proximal biceps tenodesis. There were two surgeries for this, one to repair, and one to release the long head." (PT Note, Wilson, March 30, 2009).

14) Neither party has filed a medical record showing a referral from Dr. Anderson to Dr. Dardick or from Dr. Dardick to PT Wilson. (Record).

15) On September 9, 2009, Dr. Anderson referred Employee to Bernard Morrey, M.D., at the Mayo Clinic, for a second opinion on Employee's continued right upper extremity pain. Employee was unable to obtain an appointment with Dr. Morrey. (Chart Note, Dr. Anderson, September 9, 2009; Chart Note, Dr. Anderson, October 12, 2009).

16) On October 12, 2009, Dr. Anderson referred Employee to Bill Simonet, M.D., for a second opinion on Employee's continued right upper extremity pain. (Chart Note, Dr. Anderson, October 12, 2009).

17) On October 13, 2008, Employee saw Dr. Simonet. This was a valid referral. (Chart Note, Dr. Simonet, October 13, 2008; judgment and inferences drawn from the above).

18) On March 3, 2010, Dr. Anderson treated Employee for right shoulder pain and performed a right bicep cortisone injection. On this date, Dr. Anderson did not discharge Employee from his care, refuse to provide services or refer Employee to Dr. Dardick or to any other physician. Rather, Dr. Anderson stated Employee, "will follow up as needed." (Chart Note, Dr. Anderson, March 3, 2010).

19) On April 27, 2010, Employee self-referred to Dr. Dardick who treated Employee for his work injury with Employer, although the primary purpose of the visit was to perform a physical. This was Employee's first unlawful change of physician, as there is no documentary evidence of a referral or any other documentary basis to make this something other than a physician "change." Dr. Dardick stated Employee was, "quite bothered by chronic right upper extremity pulling pain up to 6/10 in severity in the anterior biceps area of his scar particularly with supination." Dr. Dardick noted Employee, "Sees an outside orthopedist who did these Workman's Comp surgeries. The orthopedist felt there is nothing more to do." Dr. Dardick referred Employee to orthopedic surgeon Kirk Aadalen, M.D., at Tria Orthopaedic Center, and physical medicine and rehabilitation specialist Daniel Kurtti, M.D., at Park Nicollet, for evaluation of Employee's continued right upper extremity post-surgical pain. As Dr. Dardick was an unlawful change of physician, his referrals to Drs. Aadalen and Kurtti were also unlawful. Dr. Aadalen and Dr. Kurtti subsequently referred Employee to numerous other providers for treatment and evaluation of his work injury. These referrals were also unlawful. (Chart Note, Dr. Dardick, April 27, 2010; Chart Note, Dr. Kurtti, January 15, 2013; record; experience, judgment and inferences drawn from the above).

20) On July 9, 2011, amended 8 AAC 45.082(c) became effective and provides when a party makes an unlawful change of physician in violation of AS 23.30.095, the board is prohibited from considering the unlawfully obtained reports, opinions, or testimony of the physician or panel in any form, in any proceeding, or for any purpose. (8 AAC 45.082(c)).

21) Employer concedes all medical reports and opinions from Employee's above-mentioned unlawfully changed physicians obtained before July 9, 2011, otherwise admissible, may be considered as evidence in this case and are not subject to Employer's petition to exclude evidence. (Employer's arguments).

22) On December 1, 2011, orthopedic surgeon Rajan Jhanjee, M.D., evaluated Employee for an EME. The EME report is not relevant to the narrow issues reached in this decision. This was Employer's first change of physician. (Dr. Jhanjee EME, December 1, 2011; experience, judgment and inferences drawn from the above).

23) On May 20, 2013, Employer's attorney explained Employee's treatment history in a letter to Dr. Jhanjee. Employer's attorney described Employee's initial treatment with Dr. Anderson, subsequent evaluation by Dr. Nemanich and stated, "Due to Mr. Hudak's condition, Employer requested that he not come to be a guide. The case manager sent him for a follow-up examination with Dr. Anderson on 7/20/07." The last phrase is not correct. (Letter from Martha Tansik to Dr. Jhanjee, May 20, 2013; judgment and inferences drawn from all the above).

24) On October 21, 2014, PA-C Winecoff, stated Employee was last seen by Dr. Anderson on March 3, 2010, and, "Since that time, he has been referred to Dr. Samuel Dardick for further care. He was also seen by Dr. Nemanich at Twin Cities Orthopedics. Shawn has been discharged from our care. We have not seen him since 2010. He reports ongoing care with Dr. Dardick." (Letter, PA-C Winecoff, October 21, 2014).

25) On December 22, 2014, Employee filed the March 30, 2009 physical therapy chart note from PT Laura Wilson. The filing was late. (Affidavit of Filing, December 22, 2014; Physical Therapy Note, PT Wilson, March 30, 2009; judgment).

26) Dr. Dardick was Employee's family doctor for at least ten years prior to his work injury. Employee testified he was discharged from Dr. Anderson's care, and Dr. Anderson referred Employee to Dr. Dardick, in March 2010. (Employee).

PRINCIPLES OF LAW

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.** (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .
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> (b) If the employee is unable to designate a physician and the emergency nature of the injury requires immediate medical care, or if the employee does not desire to designate a physician and so advises the employer, the employer shall designate the physician. Designation under this subsection, however, does not prevent the employee from subsequently designating a physician for continuance of required medical care. . . .
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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 physician resides, 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. . . .

Wolde v. Westward Seafoods, AWCB Decision No. 00-0236 (November 21, 2000), held an employer's unjustified refusal to pay for a health care provider's medical treatment constitutes grounds for the employee to "substitute" a new physician. *Wolde* cited AS 23.30.095(b) to support its ruling and held an employer that impermissibly refuses to permit treatment with an employee's attending physician may not later argue against a subsequent substitution of physicians. *Sawicki v. Great Northwest, Inc.*, AWCB Decision No. 06-0029 (February 6, 2006), and *Clifton v. Swenson Construction, Inc.*, AWCB Decision No. 06-0311 (November 24, 2006), adopted and followed *Wolde's* reasoning and holding.

In *Miller v. Nana Regional Corp.*, AWCB Decision No. 13-0169 (December 26, 2013), the board addressed "extraordinary unique facts" and the majority held that even where the employer could not rebut the raised presumption on a change-of-physician issue, the employer's otherwise unlawful "change" would be "excused through the waiver process." In *Miller*, the employer's supervisory employee told the injured employee shortly after her injury that she had a medical appointment, which she attended. But no one knew for sure who chose the medical provider at issue, or why he was even examining the employee, and there was no resultant medical record other than a referral form for diagnostic imaging. Further, the employer had already expended considerable sums on additional EME evidence and the *Miller* majority determined it would be "extremely unfair and unreasonable" to strike these EME reports given this "confounded evidence." *Miller* held the initial, supervisory direction for medical care, though technically the employer's first "selection," would be excused and the normal EME selection process waived, making this first medical provider not an EME. *Miller* at 18-22.

In *Guys With Tools, LTD v. Thurston*, AWCAC Decision No. 062 (November 8, 2007), the commission reviewed a case in which the board had applied an "exclusionary rule" and refused to consider medical evidence offered by the injured employee, finding the evidence resulted from an unlawful change of physician in violation of AS 23.30.095(a). *Guys With Tools* held, notwithstanding AS 23.30.095(a), (e) and decades of Board decisional law, the board lacked statutory or regulatory authority to form a medical record "exclusionary" sanction against parties who made an unlawful change of physician. *Guys With Tools* held an existing, adequate sanction provided that an employer did not have to pay for medical services rendered by an employee's unlawfully changed medical provider. Rather than exclude such evidence, the board should consider "any relevant evidence" in making its decision on the merits. *Id.* at 22. *Guys With Tools* did not discuss how the existing remedy worked when the employer, rather than the employee, made the unlawful change of physician, and refusing to order the employer to pay its own unauthorized provider's bill was not a sanction. (Experience, judgment, observations and inferences drawn for the above).

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

(1) the claim comes within the provisions of this chapter. . . .

An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, the employee must establish a "preliminary link" between the claim and his employment. In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The employee need only adduce "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

In *Runstrom v. Alaska Native Medical Center,* AWCAC Decision No. 150 (March 25, 2011), the commission stated "if the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Id.* This test would also apply to claims for benefits other than "disability or need for medical treatment," based on the commission's use of "etc." in *Runstrom*. "Neutral" evidence is not adequate to rebut the raised presumption. *Harp v. ARCO, Alaska, Inc*., 831 P.2d 352 (Alaska 1992). Once the presumption is rebutted, the burden of production shifts back to the employee. In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. The employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

In *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993), the Alaska Supreme Court held the Alaska Workers' Compensation Board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights. It said equitable-estoppel elements include: "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Id*. The court concluded, "a finder of fact could not reasonably find that a person in the position of Van Biene could reasonably interpret Wausau's conduct as amounting to an implied communication that no social security offset would be required. At best, such conduct subsequent to Gerke's conversation and letter indicates only neglect or an internal mistake." The court relied significantly on the fact Wausau apprised Van Biene both orally and in writing that workers' compensation benefits would be offset in the event she received social security survivor's benefits, and no representations were made by Wausau to Van Biene that it would not seek to offset social security survivor's benefits in the event that she received such payments. *Id*. at 589.

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board. . . . When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer . . . otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.
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> **8 AAC 45.082. Medical treatment**. . . .
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> (b) A physician may be changed as follows:
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> > (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the

same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service

. . . .

(B) from a physician

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(ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

(iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

. . . .

(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, no later than 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;

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;

(C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;

> (D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095 (a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer. . . .

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

8 AAC 45.900. Definitions. (a) In this chapter

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(5) "claim" includes any matter over which the board has jurisdiction. . . .

ANALYSIS

1) Did either party make an unlawful change of physician?

In 1988, the legislature amended the Act to prevent a process informally known as "doctor shopping." Before the amendments, it was commonplace for parties to obtain opinions from diverse physicians until they obtained an opinion to their liking. The legislature implemented AS 23.30.095(a) and (e) to end this practice. Employee's right to obtain medical care and opinions is governed by AS 23.30.095(a). It states Employee may not make "more than one change" in Employee's "choice of attending physician" without Employer's written consent. However, "referral to a specialist" by Employee's attending physician or obtaining a "substitution" physician "is not considered a change" in physicians. This statute is plain on its face and states Employee can select a physician, and can "change" his physician only one time.

Employer has a similar limitation found in AS 23.30.095(e). This section requires Employee to attend medical evaluations when Employer requires it, with certain restrictions. Employer may

not make more than one change "in its choice" of a physician without Employee's written consent. Referral to a specialist by Employer's physician is not considered a change in physicians. Employer also has the right to have Employee seen by a multi-physician "panel," again with some restrictions. In any event, both Employee and Employer have ample opportunity to have Employee seen by multiple physicians. But "changing" physicians by either party is strictly regulated to prevent doctor shopping. Occasionally, a physician dies, the injured worker moves, or a physician refuses to provide services to the injured worker. In such appropriate cases, an injured worker can have a "substitution of physician." AS 23.30.005(h); 8 AAC 45.082(b)(4)(a).

A) Employer's EME Physicians.

Employee contends the insurer's nurse case manager referred Employee to Dr. Anderson in July 2007, making Dr. Anderson its first EME physician. He contends Employer then changed from Dr. Anderson to Dr. Gannon, and then unlawfully changed its physician from Dr. Gannon to Dr. Jhanjee. This "claim" raises factual questions to which the statutory presumption applies. *Sokolowski*; 8 AAC 45.900(a)(5). Employee raises the presumption with the statement Employer's attorney made when summarizing Employee's medical history in a May 2013 letter to EME Dr. Jhanjee. Employer's attorney stated, "The case manager sent him for a follow-up examination with Dr. Anderson on 7/20/07." *Koons*; *Wolfer*; *Cheeks*. Employer rebuts the presumption with substantial evidence, specifically the parties' 2008 settlement agreement where the parties stipulated Dr. Anderson was Employee's treating physician and Dr. Gannon was Employer's EME, in addition to the July 2007 nurse case manager notes where the insurer's nurse case manager and Employee discussed whether Dr. Anderson could perform a PPI rating. *Runstrom*. The nurse case manager told Employee if his treating physician was unable to perform it, Employer would schedule one with a different physician. The presumption drops out and Employee must prove his claim that Employer made an unlawful change in its physician. *Saxton*.

Employer's attorney's statement, made in 2013, is not persuasive evidence Employer selected Dr. Anderson as its EME in 2007, and is given very little weight. AS 23.30.122; *Smith*. Attorney Tansik's letter is simply an attempt to summarize what occurred in the case, and on this

point is an inaccurate summary. It is not supported by the actual medical evidence. There is no medical evidence showing Employer directed Employee to see Dr. Anderson at its request. Employee's medical records, the nurse case manager notes, and most importantly, the parties' 2008 settlement agreement, are given the greatest weight on this issue. AS 23.30.122; *Smith*. Dr. Gannon was Employer's first EME and Dr. Jhanjee was a lawful change of physician. AS 23.30.095(e); 8 AAC 45.082(b)(3). Accordingly, Employee is unable to prove by a preponderance of the evidence Employer unlawfully changed physicians and his request for such order will be denied. *Saxton*.

B) Employee's Treating Physicians.

Employer concedes under *Guys With Tools*, medical records and opinions issued before 8 AAC 45.082(c)'s July 9, 2011effective date are not subject to exclusion. Employer further concedes it consented to Employee's change from Dr. Nemanich back to Dr. Anderson and agreed in the parties' 2008 settlement agreement Dr. Anderson was Employee's attending physician. However, Employer contends Employee made an unlawful change in his choice of physician when he subsequently changed again from Dr. Anderson to Dr. Dardick.

Employee's contentions include: 1) after Dr. Nemanich's evaluation, the insurer's nurse case manager referred Employee back to Dr. Anderson, 2) Dr. Nemanich worked for the same clinic as Dr. Anderson, 3) Dr. Anderson discharged Employee from care on March 3, 2010, 4) Dr. Anderson referred Employee to Dr. Dardick, 5) AS 23.30.095(a)'s physician limitation does not apply when an employer denies future medical benefits, 6) Employer waived or is equitably estopped from raising an excessive change of physician defense, and 7) strict application of the Alaska Workers' Compensation Act and its regulations would result in "manifest injustice" to Employee and should be waived.

i) (1) The insurer's nurse case manager did not refer Employee back to Dr. Anderson, (2) Dr. Nemanich did not work for the same clinic as Dr. Anderson, (3) Employee was not discharged from Dr. Anderson's care on March 3, 2010, and (4) Dr. Anderson did not refer Employee to Dr. Dardick for treatment for his work injury.

Employer bears the burden of proof in its petition to exclude. *Saxton*. Employer's first four arguments are factual: (1) As explained in subsection A, above, the insurer's nurse case manager did not refer Employee back to Dr. Anderson. There is no medical evidence showing Employer directed Employee to see Dr. Anderson at its request. Employer's attorney's inaccurate statement, made in 2013, is given very little weight. Employee's medical records, the nurse case manager notes, and most importantly, the parties' 2008 settlement agreement, are given the greatest weight on this issue. AS 23.30.122; *Smith*. Employer has met its burden by proving the insurer's nurse case manager did not refer Employee back to Dr. Anderson. *Saxton*.

(2) Employee's contention Dr. Nemanich worked for the same clinic as Dr. Anderson raises factual questions to which the statutory presumption applies. AS 23.30.120; *Sokolowski*. Employee raises the presumption with his hearing testimony, computer printouts from 2014, and PA-C Winecoff's October 2014 letter. *Koons*; *Wolfer*; *Cheeks*. Employer rebuts the presumption with substantial evidence, specifically Employee's contemporaneous medical records showing Dr. Anderson worked for Orthopedic Surgeons, Ltd. and Dr. Nemanich worked for Minnesota Orthopaedic Specialists, P.A., when treating Employee in 2006 and 2007, when Employee's physician changes were made. *Runstrom*. The presumption drops out and Employer must prove this issue by a preponderance of the evidence. Employee's computer printouts from 2014 and PA-C Winecoff's October 2014 letter stating Employee had been seen by "Dr. Nemanich at Twin Cities Orthopedics" is given very little weight on the issue of where Drs. Anderson and Nemanich worked when they treated Employee in 2006 and 2007. Greater weight is given to Employee's contemporaneous 2006 and 2007 medical records. AS 23.30.122; *Smith*. Employer has met its burden by proving Dr. Nemanich did not work for the same clinic as Dr. Anderson at the relevant times. *Saxton*.

(3) Employee's contention he was discharged from Dr. Anderson's care on March 3, 2010, also raises factual questions to which the statutory presumption applies. AS 23.30.120; *Sokolowski*. Employee raises the presumption with his hearing testimony and PA-C Winecoff's October 2014 letter. *Koons*; *Wolfer*; *Cheeks*. Employer rebuts the presumption with substantial evidence, specifically Dr. Anderson's contemporaneous medical record showing he treated Employee on March 3, 2010, and expected to continue treating him "as needed." *Runstrom*. Employer must

also prove this issue by a preponderance of the evidence. PA-C Winecoff's October 2014 letter states, "Shawn has been discharged from our care. We have not seen him since 2010." This letter is given very little weight on this issue, as it does specify when or why Employee was discharged from Dr. Anderson's care, or what is meant by "discharged." AS 23.30.122; *Smith*. When read in conjunction with Dr. Anderson's March 3, 2010 chart note, the evidence shows Dr. Anderson did not discharge Employee from his care on March 3, 2010. Little weight is given to Employee's hearing testimony stating he was discharged from Dr. Anderson's care in March 2010, as this testimony contradicts Dr. Anderson's chart note made at the time of Employee's evaluation. Greatest weight is given to Dr. Anderson's March 3, 2010 chart note showing Dr. Anderson treated Employee and expected to continue treating him "as needed." Employer has met its burden of proving by a preponderance of the evidence Employee was not discharged from Dr. Anderson's care on March 3, 2010.

(4) Employee's contention Dr. Anderson referred him to Dr. Dardick raises factual questions to which the statutory presumption applies. AS 23.30.120; *Sokolowski*. Employee raises the presumption with his hearing testimony and PA-C Winecoff's October 2014 letter. *Koons*; *Wolfer*; *Cheeks*. Employer rebuts the presumption with substantial evidence, specifically Employee's admission Dr. Dardick was Employee's family doctor for at least ten years prior to his work injury, Dr. Dardick's April 2010 chart note showing the purpose of Employee's visit was a physical, and Dr. Anderson's contemporaneous medical record showing he treated Employee on March 3, 2010, and expected to continue treating him "as needed." *Runstrom*. The presumption drops out and Employer must prove this issue by a preponderance of the evidence. Dr. Dardick was Employee's family physician for years prior to the work injury and Employee continued to see him for non-work related treatment following the injury. In April 2010, Dr. Dardick performed a physical, during which he and Employee began discussing Employee's continued right upper extremity post-surgical pain. Dr. Dardick then referred Employee to orthopedic surgeon Dr. Aadalen and physical medicine and rehabilitation specialist Dr. Kurtti. There is no medical record documenting any referral from Dr. Anderson to Dr. Dardick to treat Employee's work injury. Just the month prior, Dr. Anderson had treated Employee's right shoulder and expected Employee to follow up with him. PA-C Winecoff's October 2014 letter noted Employee was last seen by Dr. Anderson on March 3, 2010 and, "Since that time, he has

been referred to Dr. Samuel Dardick for further care." This letter is given very little weight on this issue, as it does specify who made the alleged referral or when. Little weight is given to Employee's hearing testimony that Dr. Anderson referred him to Dr. Dardick prior to April 2010, as this testimony is not supported by the medical records. AS 23.30.122; *Smith*. Greatest weight is given to Dr. Anderson's March 3, 2010 chart note showing he treated Employee and expected to continue treating him "as needed." AS 23.30.122; *Smith*. Employer has proven Dr. Anderson did not refer Employee to Dr. Dardick for treatment for his work injury. *Saxton*. Employee's factual arguments are not supported by the evidence. Employer has proven factually that Employee unlawfully changed physicians. *Saxton*.

ii) (5) AS 23.30.095(a)'s physician limitation applies even when an employer denies future medical benefits, (6) Employer did not waive nor is it equitably estopped from raising an excessive change of physician defense, and (7) strict application of the Alaska Workers' Compensation Act's regulations should not be waived.

Employee's last three arguments are legal: (5) Relying on *Wolde*, *Sawicki* and *Clifton*, Employee contends AS 23.30.095(a)'s physician limitation does not apply when an employer denies future medical benefits. *Wolde* held an employer's unjustified refusal to pay for medical treatment constitutes grounds to "substitute" a new physician. *Wolde* cited AS 23.30.095(b) to support its ruling. *Sawicki* and *Clifton* both adopted *Wolde's* reasoning and holding. The statute on which these cases rely does not support their reasoning and holding. AS 23.30.095(b) states if an employee is unable to designate a physician and an emergency requires immediate medical care, or if the employee does not desire to designate a physician and so advises the employer, the employer shall designate the physician. The employee reserves his right to designate an attending physician later for continued care, once the emergency is abated or when he so chooses. This statute does not provide any support for *Wolde*, *Sawicki*, and *Clifton*'s holdings. AS 23.30.095(a) explicitly provides, however, an employee may not make more than one change in the employee's choice of attending physician without the employer's written consent. Further, nothing in the statute or regulations supports the contention an employer which impermissibly refuses to permit treatment with an employee's attending physician may not later argue against a subsequent change of physicians. 8 AAC 45.082 defines what is not considered a physician "change" and what constitutes a physician "substitution." An employer's refusal to permit

treatment with an employee's attending physician is not one of them. The plain language of the statute and regulation indicates Employee is subject to limitations on when and how he may change or substitute physicians in specific circumstances. Therefore, *Wolde*, *Sawicki*, and *Clifton* will not be followed.

(6) Employee contends even if he unlawfully changed physicians, Employer either waived or should be equitably estopped from raising this defense. *Van Biene*. Employee argues Employer paid work-related medical bills for years without raising the issue, which constitutes a waiver or estoppel. There is no time limit in 8 AAC 45.082(c) for a party to object to an unlawful change of physician. The regulation states the panel may not consider the unlawfully obtained opinions. Neither the statute nor the regulation provides a waiver of a parties' right to object to an unlawful change of physician. Employer may have made a litigation choice by not objecting earlier to reports from Dr. Dardick or from other physicians to whom he referred Employee. Contrary to Employee's assertions Employer waived its unlawful change of physician defense in the parties' 2008 settlement agreement, the agreement explicitly and unambiguously stated Employer did not waive its right to assert defenses and contest liability for future medical benefits under the Act, case law, and regulations. Employee was notified clearly, in writing, Employer did not waive its right to assert defenses. No representations were made by Employer to Employee that it would not assert an unlawful change of physician defense. *Roger & Babler*. Employer's conduct does not support a finding of waiver or equitable estoppel. *Van Biene*.

(7) Employee also requests waiver under 8 AAC 45.195 and cites *Miller* in support. Regulatory requirements may be waived or modified in some circumstances under 8 AAC 45.195 to prevent "manifest injustice." However, a waiver may not be employed merely to excuse a party from failing to comply with legal requirements or to permit a party to disregard such requirements. This case is distinguishable from *Miller* because in *Miller*, no one knew for sure who chose the provider at issue, and there was no resultant medical record other than a referral form. Here, Employee's medical records and the parties' 2008 settlement agreement clearly show Employee selected first Dr. Anderson, then Dr. Nemanich, then returned to Dr. Anderson, Employer consented to the change back to Dr. Anderson and then Employee changed to Dr. Dardick as his

treating physician for his work injury. These facts show no manifest injustice and this decision declines to waive the requirements of 8 AAC 45.082. *Rogers & Babler*.

iii) March 30, 2009 PT Wilson physical therapy chart note.

On December 22, 2014, Employee filed a March 30, 2009 physical therapy chart note from PT Wilson to support his contentions. PT Wilson states Dr. Dardick referred Employee to physical therapy because of low back pain and a right ankle sprain. Employee related his low back pain to, "compensation after his right sided proximal biceps tenodesis." Employee filed this evidence late, and consequently, the panel will not consider it. 8 AAC 45.120(m). However, even if it were considered, the physical therapy note supports Employer's case, not Employee's. If Dr. Dardick was Employee's work injury treating physician on March 30, 2009, the record lacks any evidence of a referral prior to March 30, 2009 from Drs. Anderson or Nemanich to Dr. Dardick. Further, Employee treated his work injury with Dr. Anderson after March 30, 2009. If Dr. Dardick was Employee's work injury treating physician in March 2009, Employee's change from Dr. Anderson to Dr. Dardick in March 2009, back to Dr. Anderson, and then back to Dr. Dardick in April 2010, would still have been an unlawful change of physician.

Under 8 AAC 45.082(c), enacted July 9, 2011, if a party makes an unlawful change of physician in violation of AS 23.30.095(a) or (e), or 8 AAC 45.082, the panel "will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose." This regulation applies only to the medical providers' unlawfully obtained reports. There is no discretion. Accordingly, under AS 23.30.095(a) and 8 AAC 45.082(c), the panel will not consider any reports and opinions from Dr. Dardick, or any physician in his referral chain, from July 9, 2011 forward in any form, proceeding or for any purpose in this case.

2) Is Employee entitled to interim attorney's fees and costs?

The foundation for Employee's claim for attorney's fees and costs was his contentions Employer unlawfully changed physicians and Employee did not. The evidence does not support his contentions for the reasons stated in section one, above. At this point Employee's attorney has obtained no benefits for Employee. AS 23.30.145. Therefore, Employee's request for interim attorney's fee and costs will be denied.

CONCLUSIONS OF LAW

1) Employee made an unlawful change of physician.

2) Employee is not entitled to interim attorney's fees and costs.

ORDER

1) Employer's petition to exclude is granted. The fact-finders will not consider any reports and opinions of Dr. Dardick, or any physician within his referral chain, from July 9, 2011 forward in any form, proceeding or for any purpose in this case.

2) Employee's petition to exclude is denied.

3) Employee's claim for an award of interim attorney's fees and costs award is denied.

Dated in Juneau, Alaska on February 24, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Marie Marx, Designated Chair

Charles Collins, Member

Bradley Austin, 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 SHAWN D. HUDAK, employee / claimant v. YES BAY LODGE, INC., employer; EMPLOYERS INSURANCE CO. OF WAUSAU, insurer / defendants; Case No. 200615619; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on February 24, 2015.

Robin Silk, Workers' Compensation Technician