# ALASKA WORKERS' COMPENSATION BOARD

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

| | | |
|---|---|---|
| REGINA G. JOY,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>WALMART ASSOCIATES, INC.,<br><br>Employer,<br>and<br><br>NEW HAMPSHIRE INSURANCE COMPANY,<br><br>Insurer,<br>Defendants. | ) | INTERLOCUTORY DECISION AND ORDER<br><br>AWCB Case No. 201404656<br><br>AWCB Decision No. 15-0051<br><br>Filed with AWCB Fairbanks, Alaska on May 5, 2015 |

Regina Joy's (Employee) November 20, 2014 petition requesting a second independent medical evaluation (SIME) and Walmart Associates, Inc.'s (Employer) December 3, 2014 cross-petition for a "substitute" employer's medical evaluator (EME) were heard on April 30, 2015, on the written record in Fairbanks, Alaska, a date selected on March 4, 2015. Attorney Amy Tallerico represented Employee. Attorney Vicki Paddock represented Employer and its carrier. There were no witnesses. The record closed at the hearing's conclusion on April 30, 2015.

## ISSUES

Employee contends there are medical disputes between her attending physicians and Employer's EME, so her SIME request is not premature. She requests an SIME.

Employer contends Employee's SIME request is premature for several reasons. It contends the SIME request should be denied at this time.

**1) Should an SIME be ordered?**

Employer contends Employee failed or refused to attend a properly noticed EME. It contends Employer's initial EME physician nonetheless performed a records-review EME. Since Employee relocated to Florida, Employer contends its recent EME with a Florida doctor should not count as a physician change, and Employer should be entitled to a "substitution physician."

Employee contends the law is clear. She contends there is no statutory or regulatory authority for Employer to have a "substitution physician" under circumstances presented in this case.

**2) Is Employer allowed a "substitution physician"?**

FINDINGS OF FACT

1) On October 22, 2012, Employee saw a practitioner at Interior Community Health Center for follow-up on prior headaches. (Chart note, October 22, 2012).
2) On September 24, 2013, Employee presented with high cholesterol and gastric reflux disease. (Chart note, September 24, 2013).
3) On December 19, 2013, Employee presented with headaches and possible hypertension. Employee told her nurse practitioner she had experienced chest pains over the prior two weeks with no prior history. The nurse practitioner diagnosed chest pain and suggested Employee stop smoking. (Chart note, December 19, 2013).
4) On March 8, 2014, an ambulance operated by the Fairbanks Fire Department assisted Employee at work and took her to the emergency room. The ambulance was dispatched for "chest pain," and Employee's chief complaint was "vertigo." Employee's "narrative" included "acute vertigo," with similar symptoms two days prior resulting in a visit to her doctor, which resulted in no definitive diagnosis. Employee reported stress-related headaches and a sore neck. She had red, teary eyes and blurred vision, but conversed in complete sentences "without difficulty." Employee's headache improved from a 9/10 on the pain scale to 3/10 upon arriving at the emergency room. The ambulance attendants found no obvious external trauma and found

equal facial expression and equal upper extremity strength. The ambulance crew diagnosed "vertigo." There is no mention of Employee slipping on oil or dropping a box of frozen chicken on her head and neck. (Fairbanks Fire Department report, March 8, 2014).

5) On March 8, 2014, at approximately 12:20 p.m., Employee arrived at the emergency room, where Art Strauss, M.D., examined her. Employee's chief complaints included dizziness and chest discomfort. Employee described the history of her then-present illness as follows:

> Female . . . was at Wal-Mart, working when she became heavy-handed, dizziness with slight discomfort in her chest. She had to sit down, was unable to get up and ultimately presents via ambulance. Symptoms are still present. She has been in her normal state of health recently. . . .

Employee's head, ears, eyes, nose and throat (HEENT) examination stated, "Normocephalic, atraumatic." Employee's electrocardiogram showed a "first-degree AV block," but otherwise examination and laboratory results were relatively normal. Emergency room physicians prescribed Valium and recommended an outpatient stress test through the cardiology clinic. Chest x-rays disclosed a "nodule" in Employee's right lung. A radiologist subsequently reviewed Employee's chest x-rays and recommended further evaluation including a computerized tomography (CT) chest scan. There is no mention of Employee slipping on oil or dropping a box of frozen chicken on her head and neck. (Dr. Strauss report, March 8, 2014).

6) On March 8, 2014, emergency department nurses' records state Employee's chief complaint was "dizziness." Employee had a sudden onset of vertigo at Walmart, which lasted about 10 minutes. (Emergency Department record, March 8, 2014).

7) On March 14, 2014, Employee told nurse Justin Harvey at Tanana Valley Clinic she had neck pain following trauma to the top of her head about six days earlier while she was at work. Employee told nurse Harvey she was taking a box down from an overhead shelf and slipped on oil. Employee dropped the box, which fell onto her head. She continued to work but started feeling dizzy and eventually was taken to the emergency room via ambulance. (Harvey Nursing Comments, March 14, 2014).

8) On March 14, 2014, Employee saw Tanana Valley Clinic physician Grayson Westfall, M.D., and said one week prior she was at work for Walmart when she slipped on oil on the floor and a heavy box flew through the air and landed on her head. She did not feel well thereafter and eventually went to the emergency room. Employee complained of headaches and neck pain,

which had remained unchanged. Employee also reported having nausea, phonophobia, photophobia and vertigo. (Dr. Westfall report, March 14, 2014).

9) On March 14, 2014, Dr. Westfall completed a "Work Ability Report" for Employee. The report stated Employee "was hit in the head at work," which affected her "brain," and caused a concussion. The treatment plan was "rest," and Dr. Westfall restricted Employee from work "until concussion evaluation normal – at least one week." Dr. Westfall opined Employee "may not have light work," as treatment for a concussion is "rest." (Dr. Westfall Work Ability Report, March 14, 2014).

10) On March 18, 2014, Employee and her husband walked into the Fairbanks Workers' Compensation Division offices seeking information about how Employee could obtain medical and disability benefits from her March 8, 2014 injury. The division's database records:

> In Fbks, EE and husband came to ask about how to get ambulance bill paid for & time loss benefits. Doctor at TVC took EE off work for one week starting 3/14/14. EE says Adjuster won't accept work release and and (sic) questions EE about why she didn't tell Emergency Room Doctor about hitting her head at work. EE says she was dizzy and having a hard time breathing after she was hit on the head by a box in the freezer. Looks like there is a Controversion under FROI/SROI tab in ICERS, but nothing under Events and the EE has not recvd a denial in the mail yet. EE had already left the office by the time I found the Denial form under FROI/SROI tab. I called her cell and left a message for EE to come back and fill out a claim form, or I could explain it to her over the phone. EE was given claim form, Atty list and WC & You packet. Nzh (ICER's database, accessed April 29, 2015).

11) On March 18, 2014, Employee filed a claim requesting unspecified temporary total disability and medical costs. Employee said her "left" head was injured and she had suffered a concussion. Employee described the injury as follows:

> I went to the freezer and the box of frozen chicken tender fell down on my head and I started getting headache, till I get (sic) dizzy. (Workers' Compensation Claim, March 18, 2014).

12) On March 20, 2014, Employee reported to Tanana Valley Clinic physician Matthew Raymond, D.O., that she had headache, dizziness and neck pain following a head injury at Walmart on March 8, 2014. Employee said she was in the freezer and reaching overhead for a heavy box of frozen chicken. Employee told Dr. Raymond she immediately felt dizzy and

sought help from coworkers. Employee said she had slipped on cooking oil on the floor and the box fell "a foot or two" striking her on top of her head and neck. While in route via ambulance to the emergency room, Employee "improved somewhat." Emergency room staff provided Valium and discharged Employee to home, where she vomited twice. Employee's headaches continued as did her neck pain, and she was having trouble sleeping. She had not worked since the injury. Dr. Raymond diagnosed a concussion, which Employee told him occurred from a "head and neck injury at work." Dr. Raymond prescribed a cervical spine x-ray and brain magnetic resonance imaging (MRI) to address her post-concussion symptoms. He requested a follow-up appointment with "occupational medicine" following the brain MRI, and removed Employee from work for one week until the MRI had been reviewed. Dr. Raymond also prescribed Naprosyn and Zanaflex. (Dr. Raymond Work Ability Report, March 20, 2014).

13) On March 20, 2014, Dr. Raymond referred Employee for massage therapy to treat her head and neck injury suffered at work. Dr. Raymond prescribed therapy two times a week for four weeks. (Dr. Raymond Other Therapy Referral, March 20, 2014).

14) On March 20, 2014, Employee had cervical spine x-rays performed. The radiologist's impression was, "Mild degenerative disc disease and subjective osteopenia without fracture or subluxation." (X-ray final report, March 20, 2014).

15) On April 2, 2014, Employee underwent a brain MRI. The radiologist's impressions included: no evidence of intracranial hemorrhage; mildly prominent cerebral spinal fluid volume in one area, which was a nonspecific finding but can "sometimes be seen with chronically increased intracranial pressure"; and nonspecific signal changes in the right mastoid air cells, which could be related to chronic inflammation. If this was the "location of trauma," the radiologist recommended a "CT temporal bone study." (MRI Final Report, April 2, 2014).

16) On April 4, 2014, Alan Goldman, M.D., performed a records review employer's medical evaluation (EME) on Employee. Dr. Goldman reviewed and summarized Employer-provided medical records and witness statements. He noted his concern about "what appears to be a discrepancy" in histories Employee gave to medical providers, compared to witness statements. Employee's coworkers claimed they were unaware of any trauma on March 8, 2014. Dr. Goldman further observed the emergency room record also did not mention any injury. He noted approximately one week later, when Employee saw Dr. Westfall, she discussed a slip and fall with trauma from a heavy box striking Employee on the head. Additionally, while the

emergency room physician described Employee's head as being "atraumatic," Dr. Westfall described Employee's skull as having a "tender vertex, small hematoma (1 cm)." In responding to Employer's 11 questions, Dr. Goldman could not be certain as to his opinions, and needed more information. He nonetheless recommended a brain MRI and a chest computer assisted tomography (CT) on a non-industrial basis to rule out any possible intracranial process and any lung disease. He had difficulty offering a diagnosis, but noted Employee historically had hypertension, hyperlipidemia, thyroid dysfunction, and a gastric reflux problem. Dr. Goldman said his ultimate diagnoses, treatment recommendations, and medical stability and causation opinions might depend on the test results. He stated some of Employee's symptoms and complaints on March 8, 2014, as observed by coworkers and emergency room physicians "could occur following a head trauma." (Dr. Goldman EME report, April 4, 2014).

17) On April 14, 2014, Employer answered Employee's claim denying her request for temporary total disability and medical benefits. Employer argued Employee's work was not "the substantial cause" of any disability or need for medical treatment, she failed to attend a properly noticed EME, and she failed to return releases or petition for a protective order. (Answer to Employee's Workers' Compensation Claim, April 10, 2014).

18) On April 21, 2014, lawyers for Employer and Employee attended a prehearing conference. Employee's attorney stated:

> EE's atty stated that her client could not attend the previously scheduled IME however; she is now available. Her client would like the IME in Florida where she currently resides. ER's atty stated she is not sure that can happen since there has been a records review and they will most likely want to use the same physician for the IME. (Prehearing Conference Summary, April 21, 2014).

19) On June 25, 2014, Employee's counsel filed a notice stating Employee was residing in Florida. (Notice of Change of Address, June 25, 2014).

20) On August 4, 2014, Employer's counsel wrote Dr. Raymond a letter seeking his opinion on various questions. The letter also included Employee's medical records. Dr. Westfall provided his responses. (Letter, August 4, 2014; Employer's Brief for 04/30/15 Hearing, April 27, 2015).

21) On August 15, 2014, Dr. Goldman provided an addendum to his EME report. Dr. Goldman had reviewed additional Employer-provided medical records including reports from March 6, 2014, showing Employee had thyroid nodules; March 8, 2014 Fairbanks Fire

Department ambulance reports; March 2014 thyroid biopsy reports; and a April 2, 2014 brain MRI report. Having reviewed these additional records, Dr. Goldman was ready to give opinions. Dr. Goldman opined: 1) no further diagnostic studies, tests or treatment were necessary for the work injury; 2) Employee's March 8, 2014 symptoms were associated with non-industrial, underlying medical conditions and he found no "medically evidenced" documentation of a head trauma in paramedic or emergency room reports; 3) Employee had no work-related dysfunctions or diagnoses; 4) the substantial cause for Employee's disability and need for medical treatment was non-industrial; 5) as Dr. Goldman did not believe Employee ever had a work-related injury, he did not find the medical stability question applicable; 6) as Dr. Goldman did not believe Employee ever had a work-related injury, he did not find the permanent partial impairment (PPI) question applicable; 7) Employee had no physical restrictions and had no injury arising from her work on March 8, 2014. (Dr. Goldman Addendum EME report, August 15, 2014).

22) On August 20, 2014, Dr. Westfall reviewed Employee's records for two hours and responded to questions Employer had directed to Dr. Raymond. Dr. Westfall explained Dr. Raymond had retired and was unavailable to respond to Employer's questions. Dr. Westfall said he had examined Employee on March 14, 2014, after she had slipped on the floor at Walmart. He noted Employee slipped on oil on the floor and a heavy box flew through the air hitting her on the head. She was seen in the emergency room and later in Dr. Westfall's office. On a later occasion, Employee reported a headache for a week, and neck pain. Dr. Westfall opined Employee's exam was consistent with a cervical sprain and a concussion without loss of consciousness. A SCAT II test was administered to follow her concussion, and the score was 75, though Employee had no previous baseline score with which to compare. Dr. Westfall referred Employee to "occupational health" to follow her injury and he contacted her Walmart supervisors with Employee in the room to "discuss the injury." Dr. Westfall also reviewed subsequent reports from his clinic. In summary, and in responding to Employer's questions, Dr. Westfall opined: 1) the April 2, 2014 brain MRI did not show evidence of acute injury or concussion, but a concussion would not show up on an MRI; 2) he reiterated Dr. Raymond's care plan and stated Employee "would continue to not be able to work" based on her having concussive symptoms; 3) Employee would have been disabled from work for an indefinite time after a concussion and, pursuant to Alaska law, must follow a "graded return to participation program" after having suffered a concussion; this was the purpose of the SCAT testing; 4) if

Employee's symptoms lingered for more than a month or two, she would need a referral to an neuropsychiatric specialist; 5) Employee "absolutely would have restrictions" from work due to her concussion until after a "graded returned to participation program." The concussion required "absolute rest, no work, until asymptomatic for 24 hours" with no headache, dullness, or neck pain complaints, and then after 24 hours, a "graded returned to participation program"; and 6) Dr. Westfall tried to contact Employee to discuss the MRI results, but was unsuccessful until she called from Florida to make an inquiry. (Dr. Westfall letter, August 20, 2014).

23) On September 17, 2014, Employer denied Employee's claim based upon Dr. Goldman's August 15, 2014 EME addendum report. (Controversion Notice, September 16, 2014).

24) On November 20, 2014, Employee filed an SIME petition. (Petition, November 19, 2014).

25) On December 5, 2014, Employer answered Employee's SIME petition, and filed a cross-petition to "substitute" an EME without making its one authorized physician change under AS 23.30.095(e). Employer opposed Employee's SIME petition as "premature." Employer contended the SIME request was premature because Employee failed to attend an EME and consequently, Employer's physician was unable to perform a physical examination. Employer contended Employee also failed to follow up with her own physician to discuss brain MRI results. Employer further contended Employee's reliance upon Dr. Westfall's opinions to support her SIME request was inappropriate because Dr. Westfall did not examine Employee following the brain MRI and offered medical opinions four months after the fact concerning Employee's condition. Employer contended the SIME request was premature because Employer should have the opportunity to have its physician perform a physical examination. Employer also contended the SIME request was premature because Employee failed to provide medical records since April 2, 2014, and Employer had received no medical bills for payment. Employer contended Employee's then-current physical condition was unknown, for lack of medical records. In its cross-petition, Employer contended it should be allowed to select a third EME closer to Employee's current home in Florida without using its one allowable change. Since Employee moved to Florida, and Employer required Employee to attend another EME with a physician closer to her home for Employee's convenience, Employer contended "fundamental fairness" required it should not have the second EME count as Employer's one change of physician, and Employer should be allowed a "substitution physician." (Employer's Answer to

Employee's Petition for a SIME and Cross-Petition to Substitute Its IME Physician Without a Change Under AS 23.30.095(E) (sic), December 3, 2014).

26) On February 10, 2015, Employee filed a reply to Employer's opposition to her SIME request, and answered Employer's cross-petition. Employee asserted she had to leave Alaska to stay with family in Florida soon after the work injury because her continuing symptoms prevented her from working and she could not obtain additional medical care since she had no health insurance and Employer controverted her case. Employee contended her counsel contacted Employer's lawyer and requested an EME in Florida, which Employer denied. Employee contended Employer chose to have Dr. Goldman conduct an records review EME only. Therefore, Employee contended Employer's request for a substitution physician should be denied. As there were clear medical disputes between the EME and attending physicians, Employee reiterated her request for an SIME. (Employee's Reply to Employer's Answer to Employee's Petition for a SIME and Employee's Answer to Employer's Cross-Petition to Substitute Its IME Physician Without a Change Under AS 23.30.095(E)).

27) In her hearing brief, Employee contends her SIME request was not premature. Employee notes Dr. Goldman ultimately said Employee's job was not "the substantial cause" of her post-March 8, 2014 disability or any need for medical treatment. He blamed it on preexisting, non-industrial medical conditions. By contrast, Employee contends Dr. Westfall attributed Employee's concussion and neck pain to being hit in the head at work by a box. She notes Dr. Raymond restricted Employee from work because she had "concussive symptoms." Thus, Employee contends there is a clear medical dispute between Dr. Goldman and Drs. Westfall and Raymond regarding causation, medical stability, and permanent impairment. On Employer's cross-petition, Employee contends there is no legal authority justifying Employer's request for a third EME physician. (Employee's Written Record Brief, April 27, 2015).

28) In its hearing brief, Employer contends the SIME request is premature because Employee failed to appear for a physical exam by Dr. Goldman, and then moved to Florida. It contends Employee's SIME request is merely a ruse to obtain the physical examination she "managed to avoid" with Dr. Goldman. Further, Employer contends Dr. Westfall's opinions are only assumptions based on reviewing medical records four months after the fact. Employer contends the SIME is also premature because the agency file currently contains only older medical records, and no current medical reports. Lastly, Employer contends the SIME request may be

moot once a recent EME with Brody Henkel, M.D., is received, implying Dr. Henkel may agree with Employee's physicians' opinions. As for its cross-petition, Employer contends Employee moved to Florida with full knowledge she had an appointment with Dr. Goldman. Employer contends Employee "evaded this appointment" by leaving the state. Employer contends, since it had already incurred the appointment cost, it asked Dr. Goldman to review the records and provide his opinions. Employee requested an EME closer to her home and Employer contends it accommodated her request. Since Employee's relocation put Employer "in the position of having to select a new IME physician," Employer contends "fundamental fairness" requires the board to allow Employer to select a third EME physician without violating the statutes and regulations. (Employer's Brief for 04/30/15 Hearing, April 27, 2015).

29) Medical care can be expensive. (Experience, observations).

30) Injured workers frequently have difficulty obtaining medical care when their case is controverted. (*Id.*).

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 the employers. . . .

The board may base its decision not only on direct testimony 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 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .

> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . .
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability . . . 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. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . . .

*Kiehn v. Westford Seafoods, Inc.*, AWCB Decision No. 12-0026 (February 14, 2012) addressed a "premature SIME" question. In *Kiehn*, the injury occurred in January 2011. The attending physicians opined the injured worker had a work-related, bilateral upper extremity injury. They recommended additional testing. In May 2011, the employer sent the injured worker to an EME. The employee had not yet had recommended nerve conduction studies so the EME physician stated the injured worker had no objective, abnormal findings supporting any medical condition, and released him to return to full duty work. Employee requested an SIME; the employer argued it was premature. *Kiehn* declined to order an SIME under these circumstances, finding it was premature. The decision does not say whether the employer controverted the employee's rights to benefits before the EME, or controverted his claim after the EME. It does not explain how the injured worker was to obtain the recommended diagnostic testing if his rights to benefits had been controverted.

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an

SIME under §095(k). The AWCAC referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), and said, referring to AS 23.30.095(k):

> [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.

The AWCAC further stated in *dicta*, before ordering an SIME it is necessary 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 (February 27, 2008). Under §095(k), the AWCAC noted the purpose of an SIME is to assist the board. (*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 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?

> **8 AAC 45.082. Medical treatment**. . . .
> . . . .
>
> (c) Physicians may be changed as follows:
> . . . .
>
> (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
>
> (A) at a hospital or an emergency care facility;
>
> (B) from a physician
>
> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
>
> (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. . . .
>
> (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 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. . . .

**8 AAC 45.092. Selection of an independent medical examiner**. . . .
. . . .

(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

**1) Should an SIME be ordered?**

This issue requires answers to two sub-questions: (a) Is the SIME request premature, and (b) Is an SIME warranted?

**(a) Is the SIME request premature?**

Employer's only objection to Employee's SIME petition is that the request is "premature." However, AS 23.30.095(k) sets forth the timeframe for a party to request an SIME. "In the event of a medical dispute" is the earliest a party may request an SIME. Thus, once a party identifies a medical dispute in one of seven enumerated areas, an SIME request is ripe. Employer sets forth several arguments supporting its position.

First, Employer cites Employee's failure to attend an allegedly properly noticed EME with Dr. Goldman. The circumstances surrounding Employee not attending the EME will not be decided here. But, regardless of the reason, Employee's absence resulted in Dr. Goldman's inability to examine her physically. Employer contends this justifies delaying the SIME. But the law is clear on this point. Once Dr. Goldman issued his written opinion, he had performed an EME. 8 AAC 45.082(b)(3). The law does not limit SIME requests to only medical disputes derived through physical examinations. The facts and law do not support Employer's position.

Second, Employer contends the SIME should be delayed because Employee failed to follow up with her physician after the brain MRI, as directed. Rather, Employer contends Employee elected to move to Florida and not seek further medical care. Employer contends the SIME request is really Employee's inappropriate attempt to obtain the physical examination she "has managed to avoid." But Employer cites no legal authority requiring an injured worker to follow up with her physician before requesting an SIME. The record shows Employee eventually called

her physician from Florida and discussed the brain MRI results. Employee has the right to move to Florida, especially if her disability requires her to minimize living expenses. Lastly, Employer controverted Employee's claim making it more difficult for her to obtain medical care. *Rogers & Babler*. These facts and the law also do not support Employer's position.

Third, as a further reason to delay the SIME, Employer faults Employee's reliance on Dr. Westfall's responses to Employer's questions as a basis for her SIME request. Employer contends Dr. Westfall's report shows he did not fully review Employee's records before providing his opinions. This argument goes to the weight accorded Dr. Westfall's opinions, not whether they create a medical dispute. Dr. Westfall's response says he spent two hours reviewing Employee's medical records, provided by Employer, before rendering his opinions. Employer further faults Dr. Westfall's opinions as being assumptions made four months after the fact, without a follow-up physical examination. But Employer wrote the letter seeking Dr. Westfall's opinions, so it is odd Employer would question the timeliness of his answers. Further, Employer relied upon Dr. Goldman's August 15, 2014 addendum opinions, made without a physical examination, as an adequate basis to controvert Employee's claim, roughly five months after the fact. The legal bar for obtaining an SIME is relatively low. It requires a "medical dispute." AS 23.30.095(k). The law does not define how the dispute must be derived. Again, Employer's arguments are not persuasive.

Next, Employer contends the SIME is premature because the agency record contains little medical evidence since Employee left Alaska, and contends it has received no bills for payment. As previously mentioned, Employer controverted Employee's claim making it more difficult for her to obtain medical care. *Rogers & Babler*. Employer cites no legal authority requiring an injured worker to provide medical bills as a prerequisite to requesting an SIME. To allay Employer's concerns, Employee will be directed to provide updated medical releases and records if she has obtained medical care since leaving Alaska, if this decision orders an SIME. This argument is no impediment to an SIME.

Lastly, Employer argues the pending EME report from Dr. Henkel, if favorable to Employee, may render the whole SIME process moot. Again, Employer cites no legal authority requiring

Employee to delay an SIME request pending a subsequent EME report when a medical dispute already exists. Further, if Dr. Henkel's report convinces Employer to accept Employee's case and pay her claim, the parties can stipulate to canceling the SIME.

Employer's reliance on *Kiehn* is misplaced. *Kiehn* does not address whether the employee's case was controverted or explain how the injured worker was to obtain the prescribed medical testing. *Kiehn* is distinguishable. Here, Employer controverted Employee's claim, making it more difficult for her to obtain medical care. *Rogers & Babler*. Employer's objections to the SIME petition are not well taken. Employee's SIME request is not premature.

**(b) Is an SIME warranted?**

**1) Are there medical disputes?**

The facts in this case disclose several medical disputes. Employee's physicians say she received a concussion and a neck sprain or strain when a box of frozen chicken hit her in the head and neck at work. Dr. Goldman says Employee demonstrated no medical evidence of a work injury, and Employee's symptoms on March 8, 2014 and thereafter, arose from non-industrial, preexisting medical issues. This creates a dispute over "causation." Employee's physicians restricted Employee from work. Dr. Goldman did not think Employee had any work-related disability. This creates a dispute over "functional capacity." Employee's doctors recommended continuing medical care to address her concussion and two further evaluate Employee's neck symptoms. Again, Dr. Goldman identified no work-related injury that could account for any medical evaluation or treatment, and said Employee needed neither. This creates a dispute over "the amount and efficacy of the continuance of or necessity of treatment." AS 23.30.095(k).

**2) Are the medical disputes significant?**

Employee should not go without benefits if she is entitled to them. Conversely, Employer should not pay for benefits for which it is not liable. In this sense, these medical disputes are all "significant." If Employee has been disabled by her work injury, her past and ongoing disability benefits could be substantial. Medical treatment is expensive. *Rogers & Babler*. If Employee's head and neck symptoms arose out of an injury with Employer, past and ongoing treatment could be costly. Therefore, these disputes are significant. *Bah*; *Smith*.

**3) Will an SIME assist the fact-finders?**

This decision does not address whether Employee's injury happened as she later stated. Assuming without finding, solely for purposes of this decision, Employee was hit on the head and neck with a box of frozen chicken, this injury mechanism does not present a particularly complex medical issue. The attending physicians and the current EME all express strongly held opinions. However, Employee's hypertension, thyroid and other possible preexisting medical conditions, along with her concussion, make this case somewhat more complicated than usual. An SIME with qualified specialists would assist the fact-finders in addressing questions about how these alleged work-related injuries and medical conditions may interrelate. Therefore, an SIME will assist in resolving this matter, and an SIME will be ordered without further delay.

To make this process quick and efficient at a reasonable cost to Employer, and to make it as summary and simple as possible, the SIME will address the following SIME and non-SIME issues: causation; medical stability; degree of impairment; functional capacity; and the amount and efficacy of the continuance of or necessity of treatment, both past and ongoing. Since Employee's alleged injuries are to her head and neck, an orthopedic surgeon will be selected to perform the SIME. The concussion and Employee's preexisting medical conditions complicate matters somewhat. Therefore, the designee will be directed to inform the SIME physician to refer Employee to specialists such as an internist or neurologist if necessary to address questions about the concussion and other medical issues. The parties will be directed to promptly attend a prehearing conference to finalize procedures for selecting an SIME physician, circulating medical records and presenting questions. The parties will be directed at the prehearing conference to determine Employee's ability to travel. An orthopedic surgeon from the SIME list will be selected to perform the SIME; procedures set forth in 8 AAC 45.092 will be followed.

**2) Is Employer allowed a substitution physician?**

Employer sent Employee's medical records to Dr. Goldman and asked him for his opinions, which he provided. This constituted an EME, and was Employer's first physician choice. Once Employee moved to Florida, Employer required her to see Dr. Henkel for another EME. This was Employer's second EME choice. AS 23.30.095(e); 8 AAC 45.082(b)(3).

Employer's request for a third EME is based upon the premise that Employee's failure to appear for Dr. Goldman's physical examination, and her move to Florida, somehow prejudiced Employer, entitling it to a third EME selection. Employer had a remedy for Employee's no-show at Dr. Goldman's examination. Employer could have controverted her right to benefits and petitioned for damages associated with any no-show fees. AS 23.30.095(e). So long as Dr. Goldman gave no oral or written opinion, Employer would have preserved its first EME selection. Instead, Employer made a tactical decision to have Dr. Goldman proceed with a records-review EME. Thus, as it pertains to this SIME issue, Employee's failure to appear at Dr. Goldman's examination is immaterial.

Employer further contends its Florida EME selection was made to accommodate Employee's current location and to comply with Alaska Supreme Court precedent prohibiting employers from requiring injured workers to travel unreasonable distances for an EME. Employer correctly notes regulations pertaining to employers, unlike those pertaining to employees, do not afford Employer with a right to a "substitution physician" if Employee moves 50 or more miles from her previous home. 8 AAC 45.082(b)(4). Consequently, Employer's request is diametrically opposed to the statute and regulations. Employer still retains its right to have Dr. Henkel refer Employee to one or more specialists. AS 23.30.095(e). Therefore, absent legal authority to grant Employer's request, it will be denied.

## CONCLUSIONS OF LAW

1) An SIME will be ordered.
2) Employer is not allowed a substitution physician.

## ORDER

1) Employee's November 20, 2014 petition for an SIME is granted.
2) Employer's December 3, 2014 cross-petition for an order allowing it to substitute an EME physician is denied.
3) The parties are ordered to attend a prehearing conference at their earliest opportunity, to determine Employee's ability to travel; to explore and resolve other special needs to accomplish the SIME, such as an interpreter; and to begin the SIME process.

4) Employee is ordered to attend an SIME with an orthopedic surgeon selected by the designee from the authorized SIME list.

5) The designee is directed to follow the SIME procedures set forth in 8 AAC 45.092, and internal procedures for selecting SIME physicians.

6) The designee is directed to inform the SIME physician to refer Employee to one or more specialists if, in the SIME physician's opinion, additional medical expertise is required to address Employee's concussion and other medical conditions as part of the SIME.

7) Employee is ordered to provide, within 14 days of this decision's date, any and all medical records related to her head and neck injuries, not already on medical summaries in the agency file, to her attorney who is directed to file and serve these on a medical summary within five days of receiving them.

8) Employee is ordered to sign appropriate medical record releases if requested by Employer.

Dated in Fairbanks, Alaska on May 5, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
William Soule, Designated Chair

/s/_____
Julie Duquette, Member

/s/_____
Jacob Howdeshell, 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 Regina G. Joy, employee / claimant v. Walmart Associates, Inc., employer; New Hampshire Insurance Company, insurer / defendants; Case No. 201404656; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on May 5, 2015.

/s/_____
Darren Lawson, Office Assistant II