ALASKA WORKERS' COMPENSATION BOARD

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

JAMES A. "DREW" FREEMAN, Employee, Claimant, v. ASRC ENERGY SERVICES, self-insured, & UDELHOVEN OIL FIELD SYSTEM SERVICES, and its insurer ACE FIRE UNDERWRITERS INSURANCE CO., Employers, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201003705 AWCB Decision No. 15-0073 Filed with AWCB Anchorage, Alaska on June 26, 2015

ASRC Energy Services' (ASRC) February 3, 2015 petition to exclude medical opinions was heard on May 13, 2015, in Anchorage, Alaska, a date selected on April 6, 2015. Attorney Steve Constantino appeared and represented James A. "Drew" Freeman (Employee), who appeared and testified. Attorney Nora Barlow appeared and represented ASRC. Attorney Timothy McKeever appeared by telephone and represented Udelhoven Oilfield System Services and its carrier (Udelhoven). Other witnesses were Tracy Davis and Lynn Palazzatto who testified for ASRC. At hearing Employee filed a *Smallwood* objection to ASRC's May 5, 2015 medical summary to which was attached a computer "screen print." Employee also requested written closing arguments. The panel reserved judgment on the *Smallwood* objection but denied Employee's request for written closing arguments. ASRC requested leave to file divorce court evidence post-hearing to impeach Employee. The panel denied ASRC's request. ASRC also made an oral *Smallwood* objection to Exhibit 19 to Employee's hearing brief arguing it was not admissible because it was not timely filed. The panel sustained ASRC's objection. This

decision addresses Employee's *Smallwood* objection, examines the oral orders and decides ASRC's petition on its merits. The record closed when the panel members met to deliberate on June 17, 2015.

ISSUES

At hearing, Employee filed a *Smallwood* objection to ASRC's May 5, 2015 medical summary to which was attached a computer screen print. Employee objects to the screen print stating it lacks foundation, is unidentifiable hearsay, is not filed timely and is truncated. He seeks an order holding the screen print is not admissible at this hearing.

ASRC contends the screen print was a referral list for Employee from his primary care physician Marguerite McIntosh, M.D. ASRC contends as a "business record," the screen print is an exception to the hearsay rule and is therefore admissible over Employee's objection.

Udelhoven did not express a position on the *Smallwood* objection. The panel held the *Smallwood* objection in abeyance.

1) Will the screen print attached to ASRC's May 5, 2015 medical summary be considered at the May 13, 2015 hearing?

At hearing, ASRC made an oral *Smallwood* objection and contended Exhibit 19, an October 22, 2013 letter attached to Employee's hearing brief, should not be considered at the May 13, 2015 hearing because it had not been filed or served at least 20 days prior to the hearing.

Employee conceded Exhibit 19 had not previously been filed or served on either employer. He contended it should be considered anyway.

Udelhoven did not express a position on ASRC's objection to Exhibit 19. The panel sustained ASRC's *Smallwood* objection and excluded Exhibit 19 from consideration for this decision.

2) Was the oral order excluding Exhibit 19 to Employee's hearing brief from consideration at the May 13, 2015 hearing correct?

At hearing, Employee contended he only then fully understood ASRC's contentions, having received and reviewed its hearing brief. Surprised by some arguments, Employee contended the parties should be allowed to provide written closing arguments.

ASRC contended there was no reason for written closing arguments. ASRC contended its brief contained no surprises and nothing new.

Udelhoven did not express a position on the request for written closing arguments. The panel denied Employee's request for written closing arguments.

3) Was the oral order denying Employee's request for written closing arguments correct?

At hearing, ASRC contended it should be allowed to file notes and a transcript from Employee's divorce case, post-hearing. ASRC contended it was unaware Employee would allegedly testify untruthfully at hearing. ASRC contended the divorce court transcript would prove Employee withheld facts from the divorce court, testified falsely about it at the May 13, 2015 hearing and thus lacks credibility. ASRC later confirmed it had already timely filed the court notes.

Udelhoven concurred with ASRC's request for leave to file the divorce hearing transcript.

Employee contended the divorce court transcript should not be filed post-hearing. He contended the court notes and transcript were not relevant, would not provide a full, accurate picture and, insofar as the notes were concerned, would necessarily involve a third-person's interpretation. The panel issued an oral order sustaining Employee's objection and denying ASRC's request to file the divorce court transcript post-hearing, though the timely filed notes may be considered.

4) Was the oral order refusing to allow ASRC to file a divorce court transcript post-hearing correct?

ASRC contends Employee made numerous unlawful changes in his attending physician.

Udelhoven joined in supporting ASRC's petition.

Employee contends he made no unlawful change in his attending physician under the statute. He further contends the related regulation does not apply to any medical records filed in this case. Employee contends he relied on ASRC's conduct and statements in choosing his attending physicians, and ASRC is estopped from asserting the unlawful change defense.

5) Did Employee make an unlawful change in his attending physician?

Lastly, ASRC contends the law on unauthorized medical opinions is clear. It contends under no circumstances should records or opinions from Employee's unlawfully changed physicians be considered in this case.

Udelhoven agrees with ASRC. Udelhoven contends records from unlawfully changed physicians and records from unlawful referrals from those physicians should all be excluded.

Employee contends if he made an unlawful change in attending physician, the applicable regulation should be waived or modified to prevent "manifest injustice." He contends all medical records from his treating physicians should be considered in this case.

6) Should any medical records from Employee's physicians be excluded in this case?

FINDINGS OF FACT

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

1) On November 8, 2007, the Alaska Workers' Compensation Appeals Commission Issued *Guys With Tools v. Thurston*, AWCAC Decision No. 062 (November 8, 2008) (Official notice). *Guys With Tools* held in part that, absent a board regulation to the contrary, relevant, unlawfully obtained medical opinions could not be excluded from evidence at board hearings. (*Id*.).

2) On March 30, 2010, Employee while working for ASRC at Kaparuk on Alaska's North Slope reported to David Decker, PA-C, the following:

> Going upstair [sic] to break, looked behind me over left sholder [sic] to see if someone was behind me. Stumbled, had a hold w/right hand of the hand rail, caught self with left hand on stair. Thumb caught the edge of stair w/most weit [sic] on thumb, felt a pop in right shoulder.

PA-C Decker told Employee to return in the morning for reevaluation. Employee's supervisor and safety personnel had escorted him to the Conoco Phillips medical facility. (Initial Report of Injury/Illness, March 30, 2010; Decker prescription, March 30, 2010; Patient Disposition Recommendation, March 30, 2010).

3) Employee's visit with PA-C Decker occurred at an "emergency care facility." (Experience, judgment and inferences drawn from the above).

4) On March 31, 2010, Employee returned to Anchorage and saw Jim Marlow, PA-C, at Beacon Occupational Health & Safety. PA-C Marlow referred him to Diagnostic Imaging of Alaska for a left wrist x-ray. (Employee; Marlow chart note, March 31, 2010; Diagnostic Imaging of Alaska x-ray report, March 31, 2010).

5) On April 1, 2010, PA-C Marlow saw Employee again. PA-C Marlow recorded:

> The company decided they would like him to come into town for further evaluation and potential MRI. He came through town yesterday and I examined him at that time. X-ray of his hand and wrist on the left was done at that time and no fractures were noted. MRI of his right shoulder was ordered and that was accomplished today, 4/1/10. . . . At this point in time he has been referred to Orthopedic Physicians of Anchorage for further evaluation and treatment. We will await that return before we write a full disposition of his return to work issue. Don Gray was informed of these findings and our consultation to Orthopedic Physicians of Anchorage. (Marlow chart note, April 1, 2010).

6) ASRC gave Employee Beacon's name, directed him to go there and arranged the appointment. Employee did not designate Beacon as an attending physician in writing. (Employee; observations).

7) On April 1, 2010, PA-C Marlow referred Employee to Alaska Innovative Imaging for a right shoulder MRI. (MRI report, April 1, 2010).

8) Employee did not designate Alaska Innovative Imaging as an attending physician in writing. (Observations).

9) On April 1, 2010, Employee also saw Sharon Sturley, PA-C, at Orthopedic Physicians Anchorage (OPA). OPA physician James Eule, M.D., reviewed right shoulder x-rays. OPA physician William Mills, M.D., reviewed the right shoulder MRI. PA-C Sturley diagnosed a right shoulder SLAP lesion and a rotator cuff injury, and referred Employee to Dr. Mills for probable surgery. (Sturley chart note, April 1, 2010).

10) Beacon referred Employee to OPA. Employee did not designate OPA as an attending physician in writing. (*Id*.; observations).

11) On April 5, 2010, Employee saw OPA physician Dr. Mills, on referral from PA-C Sturley. Dr. Mills diagnosed an acute, superior labral tear, recommended physical therapy (PT) and referred Employee to Frontier Therapy Services. (Mills chart note, referral, April 5, 2010).

12) Employee did not designate Dr. Mills as an attending physician in writing. (Observations).

13) On April 8, 2010, Employee attended right shoulder PT. (PT notes, April 8, 2010).

14) Employee testified Palazatto told him to get a referral if he wanted a surgeon closer to home. When asked if she recalled a conversation with Employee about seeking treatment from Dr. Ross, Palazatto said, "I don't recall." However, in a case where an injured worker wants to treat closer to home, Palazatto said her standing practice is to always say, "You have a right to treat with whoever you want. You have a right to change one time unless you're referred." When asked if it would have been necessary for her to tell Employee to get a referral to see someone near his home, Palazatto said, "What I would've said was that you have the right to change physicians one time unless you're referred." (Employee; Palazatto).

15) On April 12, 2010, Employee went to his primary care provider Dr. McIntosh and saw Margaret Scrimger, ANP, at Peninsula Community Health Services, formerly known as Cottonwood Health Center. Employee wondered if he needed surgery and if it could be done locally. ANP Scrimger referred Employee to Peter Ross, M.D., at Kenai Peninsula Orthopaedics for evaluation. (Scrimger report, April 12, 2010; Physician's Report, April 14, 2010).

16) Employee selected Dr. McIntosh's office and obtained treatment, advice, opinions and medical services from her office for his March 30, 2010 work injury. Dr. McIntosh's office was Employee's first physician choice. (Experience, judgment and inferences drawn from the above).

17) On April 28, 2010, Employee presented to Dr. Ross as a "new patient." Employee had come to Dr. Ross for evaluation and a "second opinion closer to home." Dr. Ross diagnosed a right shoulder SLAP tear. After Dr. Ross explained the various treatment options, Employee chose to continue with PT and follow-up in four weeks. (Ross chart note, April 28, 2010).

18) Dr. McIntosh's office referred Employee to a specialist, Dr. Ross. Dr. Ross was not a physician change. (Experience, judgment and inferences drawn from the above).

19) Employee continued attending PT on Dr. Mills' referral. (PT notes, April 28, 2010 through June 4, 2010).

20) On June 4, 2010, Employee told Dr. Ross he had been going to PT but may have plateaued and wanted to consider "definitive treatment." Following this evaluation and consultation with Dr. Ross, Employee decided to have right shoulder surgery. (Ross chart note, June 4, 2010).

21) On July 30, 2010, Employee saw Dr. Ross who repeated the information from the June 2010 report and added Employee wanted "a second opinion closer to home." (Ross chart note, July 30, 2010).

22) On August 3, 2010, Dr. Ross performed a right shoulder superior labral tear debridement on Employee. (Operative Report, August 3, 2010).

23) On August 13, 2010, Dr. Ross prescribed right shoulder PT and referred Employee to PT from a list Dr. Ross provided. (Ross referral, August 13, 2010).

24) On August 25, 2010, Employee selected KPO Rehabilitation & Sports Medicine (KPOR) to provide PT. (KPOR Initial Evaluation, August 25, 2010).

25) Beginning September 1, 2010 and continuing through May 24, 2011, Employee had PT at Dr. Ross' referral. Employee missed numerous PT appointments because he, one of his children or the therapist was sick, he had a doctor's appointment, the clinic was closed, he had to attend a field trip with a child, or for an unspecified reason Employee could not make it. (Daily Note, September 1, 2010 through May 24, 2011).

26) On May 31, 2011, Employee called KPOR to cancel his remaining PT appointments. (KPOR Discharge Summary, May 31, 2011; Employee).

27) On September 10, 2010, Employee returned to Dr. Ross' office for follow-up for a right and left shoulder and left thumb injury all of which occurred on "March 31, 2010." (Ross chart note, September 10, 2010).

28) On May 12, 2011, ASRC's adjuster Palazatto asked Dr. Ross if Employee was medically stable. Dr. Ross predicted stability effective May 19, 2011. (Facsimile letter, May 12, 2011).

29) ASRC and Employee agree Employee and ASRC at this point both wanted a second opinion about his right shoulder. (Employee; Palazatto).

30) On May 26 2011, Employee attended physical therapy with KPOR. Employee explained Dr. Ross said he was "medically stable." Employee said the insurer had purchased a Bowflex and Body Blade for him. Employee said he would contact the insurer to see if the Body Blade

had been ordered and, if it had, Employee was "agreeable to being discharged to continue on his own." (KPOR Daily Note, May 26 2011).

31) On May 31, 2011, the KPOR physical therapist recommended: "Discharge to perform exercises with Bowflex and Body Blade, maintain ROM with pulleys, and manage pain with TENS unit." (Physical Therapy Progress Report, May 31 2011).

32) On June 1, 2011, Palazatto wrote to OPA:

> We administer the workers' compensation benefits for Mr. Freeman. He was initially diagnosed by Dr. William Mills with a right acute superior labral tear in April 2010. Because he lives in the Kenai area, he transferred his care to Dr. Peter Ross in Soldotna who performed type I superior labral tear debridement on August 3, 2010. Since that time, Mr. Freeman has been involved in physical therapy. Although he has had some improvement, he believes he needs another opinion.
>
> I called your office to schedule an appointment and was told that I needed to submit Mr. Freeman's medical reports since the time he saw Dr. Mills in April 2010 and that these records would be reviewed by orthopedist an [sic] I would then be contacted for an appointment. It would probably be more efficient to make this appointment with Mr. Freeman directly. His contact number is (907) ***-****. Enclosed are his records.
>
> If you have any questions, please call me at my direct number, ***-****. (Palazatto letter, June 1, 2011; (phone numbers redacted for privacy)).

33) Effective July 9, 2011, the board overruled the *Guys with Tools* holding which had refused to exclude records and opinions from unlawfully changed physicians, when the board amended 8 AAC 45.082(c) to its current language. (Official notice).

34) The July 9, 2011 amendment to 8 AAC 45.082(c) is primarily legislative. (Experience, judgment).

35) Though the OPA selection occurred before the current 8 AAC 45.082(c) became effective, ASRC, through Palazatto's June 1, 2011 letter and through subsequent contact OPA had with Employee at ASRC's request to set up an appointment, gave Employee OPA's name and arranged the August 8, 2011 OPA appointment. (Judgment).

36) On August 8, 2011, Employee saw Robert Hall, M.D. Dr. Hall's report says in part:

> The patient is a 45-year-old male, established patient of this practice. . . .
> . . . .

> The patient was seen by Dr. Mills in April 2010 for a work-related injury involving his right shoulder. . . . The patient was treated by Dr. Ross in Soldotna as the patient lives in the area. . . .
> . . . .
>
> I discussed with the patient as far as the shoulder, I would be concerned about his acromioclavicular joint whether that is contributing to some of his persistent pain. We discussed the utility of a diagnostic injection in that joint. If that does not relieve any of his pain, the next thing I would probably recommend would be an MRI arthrogram of the shoulder to evaluate the rotator cuff as well as the glenoid labrum.
>
> As far as the left shoulder, he has had no other evaluation to date. I would recommend at some point along the way, he should get an MRI of the left shoulder as well.
>
> For the left hand, I am unable to come up with a specific diagnosis today; but with his persistent symptoms and the CT abnormality, I think it would be worthwhile having him evaluated by Dr. Kornmesser. We will arrange that appointment. . . . (Hall report, August 8, 2011).

37) On August 8, 2011, Dr. Hall injected Employee's right shoulder. (*Id*.).

38) On August 16, 2011, Dr. Hall prescribed an MRI arthrogram for Employee's right shoulder. (Prescription, August 16, 2011).

39) OPA provided services to Employee, but Employee did not designate OPA or Dr. Hall as an attending physician in writing. (*Id*.).

40) On September 8, 2011, Employee saw Dr. Hall who recommended a diagnostic injection into the glenohumeral joint to see if this was contributing to his pain. Employee could either live with his pain or have a Mumford surgical procedure. Dr. Hall referred Employee to OPA physician John Botson, M.D., for the injection. (Hall report, September 8, 2011).

41) On September 8, 2011, Dr. Botson performed an ultrasound-guided right glenohumeral injection on Employee. (Botson report, September 8, 2011).

42) Employee did not designate Dr. Botson as an attending physician in writing. (Observations).

43) On September 8, 2011, Dr. Hall prescribed a left shoulder MRI for Employee. (Hall prescription, September 8, 2011).

44) On September 14, 2011, Employee had a left shoulder MRI at Dr. Hall's referral. (MRI, September 14, 2011).

45) On September 19, 2011, Employee saw Dr. Hall for continuing right shoulder pain. Dr. Hall recommended a second right shoulder surgery. Dr. Hall also reviewed a left shoulder MRI, noted Employee had extensive physical therapy that failed to improve his pain, and recommended subacromial decompression and possibly other procedures for the left shoulder. (Hall chart note, September 19, 2011).

46) On October 5, 2011, Employee saw OPA physician Marc Kornmesser, M.D., at Dr. Hall's referral for left thumb basal joint pain. Dr. Kornmesser recommended steroid injections and splinting and provided these services. (Kornmesser report, October 5, 2011).

47) Employee did not designate Dr. Kornmesser as an attending physician in writing. (Observations).

48) On October 13, 2011, Davis accepted a referral to handle Employee's case from Palazatto. (Davis Invoice, November 2, 2011).

49) On October 14, 2011, Davis billed ASRC for the following: "Called ee, discussed my involvement at length, discussed secop with Dr. McNamara, ee states willing to have secop." "Secop" means "second opinion." Davis drafted and faxed a request for a second opinion to Michael McNamara, M.D. (*Id.*; Davis).

50) On October 16, 2011, Davis sent an "Urgent" fax to Dr. McNamara's office regarding Employee. The facsimile cover sheet stated: "Dr. McNamara -- I really need a second opinion ASAP! EE is scheduled for yet another procedure with Dr. Hall at OPA. Help!" (Fax Transmission cover sheet, October 16, 2011).

51) At hearing, Davis testified surgery had been recommended so ASRC wanted her to see if a second opinion could be obtained in lieu of an employer's medical evaluation (EME). This is what she told Employee. Employee was responsive. She did not document his response, but Employee met with Davis in Dr. McNamara's office. Employee had several questions and concerns about his medical care in this case, which Davis addressed. Sometimes injured workers ask Davis to recommend physicians, though she did not say Employee did. When so asked, Davis said she tells them "I cannot direct their medical care," though she might say "if it were my shoulder, I would see. . . ." and then lists doctors with whom she feels comfortable. (Davis).

52) According to Davis, as Employee had been treating for over a year, Palazatto felt having a nurse case manager involved might assist Employee in getting proper medical care and more quickly returning to work. Palazatto had discussed with Davis getting an EME with Stephen

Marble, M.D. The "whole idea" behind the EME suggestion was to address whether Employee needed additional right shoulder surgery. (*Id.*).

53) However, after Davis reviewed Employee's medical records, she told Palazatto, "we may not need" an EME, because all ASRC really needed was an opinion "from a good doctor," stating whether or not Employee needed another right shoulder surgery. (*Id.*).

54) Davis denied her job was to influence Employee's medical decision-making, but rather, said her task was to offer him an alternate treatment. Davis told Employee Dr. McNamara had excellent results with shoulder surgeries. She had known him for 20 years, trusted his opinion, and believed he was "excellent." Davis said she offered Employee the option to return to Dr. Hall or to treat with Dr. McNamara. Davis said the purpose for Dr. McNamara's opinion was for "our benefit" to see if Dr. Hall was correct in suggesting a need for additional surgery. Dr. McNamara had successfully treated multiple patients with whom Davis had worked. No "referral" to Dr. McNamara was made; according to Davis, "we offered" Employee a second opinion. Davis said Employee told her he had done his own research and everyone with whom he spoke told him Dr. McNamara was the best person to see for shoulder surgery. She "absolutely" explained to Employee the law about changing physicians. Davis said she always asks patients to sign a physician-change statement to make sure there is a proper paper trail. Davis typically does not cancel appointments for her patients so it does not appear she is controlling medical care, though she will schedule appointments. (*Id.*).

55) Davis denied she would ever say Dr. Hall was not a "good doctor." She said, "I do not use those words." (*Id.*).

56) Davis said she likes to move forward with things rather than let things sit around on her desk. Therefore, she scheduled the appointment with Dr. McNamara quickly, explaining her urgent "help" facsimile to Dr. McNamara. ASRC canceled the Marble EME when Employee chose to treat with Dr. McNamara. (*Id.*).

57) By contrast, at hearing Employee testified he scheduled right shoulder surgery with Dr. Hall, but did not have it performed by Dr. Hall. Before the surgical date, Davis contacted Employee. Davis told him ASRC had hired her to "take care of me." Davis told him she was going to get the "best care possible" and he did not have to "worry about it." Davis wanted Employee to switch from Dr. Hall to Dr. McNamara. Davis did not think Dr. Hall was a good shoulder surgeon like Dr. McNamara. Davis told Employee she had been in the medical field for

years and was in and out of physicians' offices daily. Davis said she had "intimate knowledge" of "inner workings" at doctors' offices. She told Employee if he switched to Dr. McNamara it would make "ASRC happy" and he would have the best shoulder surgeon. Employee had never heard of Dr. McNamara before he spoke with Davis. ASRC paid for the flight to Anchorage and for the taxi to Dr. McNamara. Davis was present at Employee's first appointment with Dr. McNamara. Davis made a big "fanfare" over Dr. McNamara. Employee felt he was "led by the nose" all the way. Davis insisted "let me handle it." Employee found Dr. McNamara knowledgeable and felt as comfortable with him as he had with Dr. Hall who had a similar treatment opinion. Following the appointment with Dr. McNamara, Employee had a discussion with Davis about switching to Dr. McNamara. He was puzzled with this discussion because he thought it was a "done deal," and was not aware he had to do anything further in respect to Dr. McNamara. (Employee).

58) On November 1, 2011, Employee handwrote on a piece of paper and signed the following:

> I, James Packer Andrew Freeman, I am ~~requesting~~ changing doc's [sic] to Doctor McNamara as of 11/1/11. (Employee's note, November 1, 2011).

59) At hearing, Employee identified the hand-written statement he had prepared and signed. When Employee wrote this, Davis, supervising him, told him to cross out "request" and write "change." He thought this was "odd." He did not question Davis about changing the words but asked why he had to write the document. Davis told him it was "for her records." (Employee).

60) On November 1, 2011, Employee completed an intake sheet for Dr. McNamara's office. In what appears to be someone else's handwriting, the form states Employee's "Case Manager" referred him to Dr. McNamara. (Dr. McNamara intake form, November 1, 2011).

61) On November 1, 2011, Employee saw Dr. McNamara, as a "new patient" for his shoulder and thumb injuries. Dr. McNamara's report says the "Referring Provider" is "Tracy Davis, RN." Dr. McNamara's report states in pertinent part:

> HISTORY: James is here today as a Workman's Comp. referral from Tracy Davis, RN for a second opinion. . . . He was seen at Beacon initially in Anchorage, subsequently referred to Bill Mills at OPA, was told he probably had a labral injury. He chose to go see Dr. Ross in Soldotna since he was local. . . . The patient states he did not get any better with his shoulder, and he then saw RJ Hall at OPA. . . . (McNamara report, November 1, 2011).

Dr. McNamara recommended arthroscopic surgery including a Mumford procedure. As for the left shoulder and thumb, Dr. McNamara wanted to review Employee's x-rays and MRI before evaluating those conditions. Dr. McNamara also wanted to order nerve conduction and velocity studies for Employee's right upper extremity to rule out cubital or carpal tunnel components to his symptoms. This was "all discussed in detail with Tracy his case manager." (*Id*.).

62) At hearing, Davis said once she obtained Dr. McNamara's opinion, "we had the opinion we needed," and so far as she was concerned Employee could have selected Dr. Hall to perform the surgery. Davis said, "We secured Dr. McNamara for a second opinion because we trust his opinion," and if he said Employee needed surgery, it would not matter where Employee went for the surgery. Davis could not "remember the specifics" involving Employee's hand-written note but did not believe it would "make any difference" what Employee wrote on it. Davis conceded Dr. McNamara was her recommendation. ASRC approved Dr. McNamara. "They [ASRC] selected him for a second opinion on my advice." Because Employee was on the surgical calendar with Dr. Hall, Davis wanted him to have an opportunity for a second opinion with Dr. McNamara, whom she trusts. Davis asked Employee if he was willing to have another opinion with Dr. McNamara, and Employee said he was. (Davis).

63) ASRC, through Davis, gave Employee Dr. McNamara's name and arranged the appointment. Employee wanted to request ASRC's consent for a second opinion from Dr. McNamara, but Davis told him to cross out "request," and write "change." Employee received treatment, advice, opinions and services from Dr. McNamara for Employee's work injury. Employee designated Dr. McNamara as his attending physician, in writing, at Davis' specific direction. (Employee; Davis; experience, judgment and inferences drawn from the above).

64) On November 1, 2011, Davis, to further ASRC's interests, interfered with Employee's selection of an authorized physician to treat him for this injury. (Employee; experience, judgment and inferences drawn from the above).

65) On November 1, 2011, given the above and notwithstanding his handwritten note, Employee did not make his first, post-regulation physician selection by designating Dr. McNamara as his attending physician in writing. (Observations, judgment).

66) On November 1, 2011, Dr. McNamara referred Employee to Alaska Spine Institute (ASI) for electrodiagnostic testing. (NCV/EMG Referral Form, November 1, 2011).

67) ASRC and Employee agree he did not go to Alaska Spine Institute for this electrodiagnostic testing. (Parties' arguments).

68) At hearing, Davis said Employee did not want to travel to Anchorage for testing at ASI. Davis told him a physician in Soldotna could perform the tests. She contacted Dr. McNamara's office and confirmed the studies could be performed in Soldotna. Davis scheduled Employee with Kristen Jessen, M.D. Employee told Davis ASI was calling him to schedule the diagnostic testing and Davis reminded Employee that at his request the tests had been rescheduled in Soldotna. Davis testified she was trying to make it easier on Employee. (Davis).

69) On November 28, 2011, Employee saw Dr. Jessen on Dr. McNamara's referral. Dr. Jessen took a history from and examined Employee and performed electrodiagnostic studies. She diagnosed: neck pain; radicular symptoms of the upper extremities; polyneuropathy; median neuropathy at the wrist; sleep disorder; periodic limb movement; and allergic asthma. Dr. Jessen suspected Employee may have damaged his neck during his fall at work and may have had chemical exposures at work. She recommended a cervical MRI and additional testing. (Jessen report, November 28, 2011; Jessen electrodiagnostic studies report, November 28, 2011).

70) Dr. Jessen was Dr. McNamara's referral to a specialist, not a physician change. Employee did not designate Dr. Jessen as an attending physician in writing. (Observations, judgment).

71) On December 1, 2011, Employee saw Dr. McNamara for a preoperative exam. His report again states Davis was the "referring provider." Dr. McNamara copied Davis with all his reports. Dr. McNamara referenced Dr. Jessen's report suggesting a cervical MRI, and her abnormal electrodiagnostic testing and said, "We will see him in followup for that down the line." (McNamara report, December 1, 2011).

72) On December 2, 2011, Dr. McNamara performed right shoulder surgery and a rotator cuff repair on Employee. (Operative Report, December 2, 2011).

73) On December 9, 2011, Employee called Dr. McNamara with concerns about surgical complications. Dr. McNamara's office told him to follow-up with "a provider" for evaluation. Employee went to MediCenter in Kenai where he saw William Crawford, PA, who examined Employee's surgical wound and prescribed medication. (McNamara chart note, December 8, 2011; MediCenter report, December 9, 2011).

74) Employee's December 9, 2011 MediCenter visit was an indirect referral from Dr. McNamara at an emergency care facility. Employee did not designate MediCenter as an

attending physician in writing. (Experience, judgment, observations and inferences drawn from the above).

75) On December 13, 2011, Dr. McNamara's office referred Employee to 1st Choice Home Health & Hospice for home therapy. (McNamara report, December 13, 2011).

76) On December 16, 2011, in response to Dr. Jessen's report, Davis sent the adjuster a detailed report. Davis' letter included:

> I advised Mr. Freeman that Dr. McNamara was his treating physician and all further studies needed to be ordered through him. Dr. Jessen had been requested to perform EMG studies only. I further advised him that several of the documented medical issues were not related to his worker's [sic] compensation claim, and that if he wanted to pursue Dr. Jessen's recommendations for care, that he should do so under his personal health insurance (i.e. polyneuropathy, sleep study, laboratory studies, periodic limb movement disorder, etc.). Mr. Freeman verbalized understanding.
> . . . .
>
> At the upcoming appointment with Dr. McNamara, I will discuss Dr. Jessen's findings with him and establish a plan of care and recommendations for treatment. I will also discuss with Dr. McNamara if he is willing to address causation. It has been my experience with him in the past that in the absence of clear documentation, he will likely want us to move forward with an EIME. . . . (Status Report, December 16, 2011).

77) At hearing, Davis testified: Dr. McNamara's referral to Dr. Jessen was for "a consult," and not for Dr. Jessen to take over Employee's care. In Davis' view, Dr. Jessen diagnosed Employee with multiple, "unrelated" medical conditions. According to Davis, Employee called her and asked if ASRC would pay for a sleep study. Davis advised Employee there was no relationship between a sleep study and an orthopedic condition and if he wanted to treat with Dr. Jessen for "unrelated medical conditions" the cost was "on him." Davis testified she "reminded" Employee Dr. McNamara was the treating physician and any studies for his work injury would have to originate with Dr. McNamara. Dr. Jessen's diagnoses raised questions in Davis' mind about where the case "was going to be headed." She had "done this long enough" to know that if these additional issues were not "acted on" promptly, it would cause "problems" later. For example, non-work-related medical issues may get included in the case. Davis recommended Palazatto move forward with an EME to address the issues Dr. Jessen raised. Dr. Marble was to perform an EME to give opinions on all issues raised in Dr. Jessen's report. (Davis).

78) Beginning December 17, 2011, Employee underwent right shoulder, home-based physical therapy with 1st Choice. (1st Choice chart notes, December 17, 2011).

79) On January 24, 2012, Employee saw Dr. McNamara for a seven and one-half week follow-up on his right shoulder surgery. Dr. McNamara performed a brief left shoulder and left thumb examination and planned to evaluate these injuries more fully at Employee's next visit. (McNamara chart note, January 24, 2012).

80) On February 2, 2012, Employee saw Dr. Marble for an EME. Under "History," Dr. Marble's report says, "Dr. McNamara is the attending orthopedic surgeon." Employee recalled seeing Dr. Mills and being advised he had a rotator cuff tear. According to Dr. Marble's report, "He then switched doctors and went to see Dr. Ross at KPO." Dr. Marble's report says Employee told him Dr. Ross at some point "threw his hands up" and could do nothing further for him. Thus, Employee returned to Dr. Mills' clinic but Dr. Mills had died. Dr. Hall at the same clinic examined Employee and found additional right shoulder problems necessitating a second surgery. Employee also saw another physician in Dr. Hall's office who looked at his thumb and provided a thumb injection. (Marble EME report, February 2, 2012).

81) On Dr. Marble's form, Employee listed Dr. McNamara as his "Attending Physician." (Marble Intake Form, February 2, 2012).

82) On February 6, 2012, Employee returned to Dr. McNamara to have x-rays. Dr. McNamara stated indications for this were, "Left shoulder and left thumb were both injured when he took his fall on 3/30/10 . . . ." (Radiographic Report and McNamara chart note, February 6, 2012).

83) On February 6, 2012, Dr. McNamara took additional history from Employee and examined his left shoulder and thumb. Davis attended this appointment. Dr. McNamara performed a left shoulder examination and diagnosed a rotator cuff tear and a delaminating supraspinatus and infraspinatus. Dr. McNamara recommended "takedown and repair" for the left shoulder and a likely acromioplasty. As for the left thumb, he diagnosed preexisting arthritis exacerbated "by a fall." Dr. McNamara recommended thumb surgery with an eventual tendon transfer. The report did not give a causation opinion for the left shoulder. (McNamara report, February 6, 2012).

84) Beginning February 8, 2012, on Dr. McNamara's referral, Employee resumed physical therapy. (Frontier Therapy report, February 8, 2012).

85) On March 15, 2012, Dr. Jessen wrote a letter, the genesis for which is unknown, stating:

> Mr. Freeman was seen at Central Peninsula Neurology 11/28/2011 where he had an EMG preformed [sic]. I suspect after reading the findings of the EMG that he may have damaged his neck during his fall going up the stairs at his work on 03/31/2010. There is electrophysiological evidence of chronic neuropathy changes on the right C4-5 which may represent old radiculopathy. There is electrophysiological evidence of left cervical radiculopathy at C6-7. (Jessen letter, March 15, 2012).

86) On March 30, 2012, Employee saw Peter Hansen, M.D., at Kenai Medical Center for a State of Alaska "interim disability exam" discussing Employee's March 30, 2010 neck and shoulder injuries. Dr. Hansen's report states, "PRELIMINARY EXAM FOR INTERIM ASSISTANCE FILLED OUT FOR STATE OF ALASKA." (Hansen reports, March 30, 2012).

87) Employee's March 30, 2012 visit with Dr. Hansen was not for his instant workers' compensation claim, but rather, was to obtain medical evidence for government assistance. His visit with Dr. Hansen was neither a designation nor change in attending physician for this injury. (Experience, judgment and inferences drawn from the above).

88) On April 5, 2012, ASRC filed a notice denying all benefits in reliance upon Dr. Marble's February 13, 2012 EME report. ASRC cited excerpts from Dr. Marble's report stating: the work injury was not the substantial cause of Employee's current symptoms, disability or need for medical treatment; the cervical MRI was not a consequence of the work injury; Employee's treating physicians errantly assumed his cervical-radiculopathy symptoms were related to his work injury; his work injury is not the substantial cause of Employee's inability to resume work as an electrician; and Employee had reached medical stability for his work injury. ASRC served a copy of this denial on Dr. McNamara. (Controversion Notice, April 4, 2012).

89) On April 13, 2012, Dr. McNamara retroactively released Employee to light duty work with no lifting, pulling, or pushing over five pounds effective March 20, 2012. (McNamara Work Status, April 13, 2012).

90) On April 19, 2012, Dr. McNamara responded to a request from a reemployment specialist for a prediction about Employee's permanent impairment and ability to return to work as an electrician. Dr. McNamara was unable to comply because Employee was not yet medically stable and had health issues that had not yet been resolved. (Physician Statement Regarding Retraining, April 19, 2012).

91) On May 14, 2012, attorney Constantino filed his appearance for Employee in the ASRC case. (Entry of Appearance, May 10, 2012).

92) On September 6, 2012, the parties filed a partial settlement agreement in this case resolving only Employee's reemployment benefits and related attorney's fees. Employee had signed the agreement on August 22, 2012. The agreement was effective upon filing and did not need board approval because Employee had an attorney and the agreement did not waive medical benefits. (Partial Compromise and Release, effective September 6, 2012).

93) On October 1, 2012, Employee saw Paul Puziss, M.D., for a second independent medical evaluation (SIME). (Puziss report, October 1, 2012).

94) On January 10, 2013, an evidentiary hearing was held in Employee's divorce case, *Freeman v. Freeman*, Superior Court Case No. 3KN-10-561 Civil. Trial court notes reflect discussion concerning whether Employee had disclosed proceeds from his partial workers' compensation settlement. Though it is difficult to determine from the notes, the court may have set aside the parties' divorce settlement agreement, or reverted back to an interim support order pending further evidentiary hearings, or both. (Court notes, January 10, 2013).

95) On January 18, 2013, Employee saw Dr. McIntosh for follow-up on medication and lab tests, a lesion on his back and "snorting." Employee's main concern was depression. Among other things, Employee mentioned his shoulders, neck, thumb and "joint pain," which in his "medical history" he related to his March 2010 work injury. After reviewing his medications, Dr. Macintosh told Employee to stop taking some medications and start taking hydrocodone for his "joint pain." (McIntosh chart note, January 18, 2013).

96) On January 18, 2013, Employee got treatment, advice, an opinion and medical services for his work injuries from Dr. McIntosh. Dr. McIntosh became Employee's first post-regulation attending physician. (Experience, observations, judgment and inferences from the above).

97) On March 14, 2013, Employee saw Dr. McIntosh again for depression. Dr. Macintosh also refilled the hydrocodone prescription. (McIntosh chart note, March 14, 2013).

98) On May 11, 2013, Employee told Dr. McIntosh he needed a letter concerning his "disabilities." Dr. McIntosh discussed Employee's work injury and offered limitations concerning his upper extremities. Her note says in respect to his work injury, "He has been seeing Dr. McNamara and they are now stating that this may be a preexisting condition." In summary, Dr. Macintosh said a combination of work-related and non-work-related issues have rendered Employee disabled from work. She wanted to refer Employee to a psychiatrist and told him he is "not able to return to work." (McIntosh chart note, May 11, 2013).

99) On May 11, 2013, Dr. Macintosh also completed a disability form for Employee's Social Security attorney. This form discussed, among other things, Employee's work injury complaints. (McIntosh Multiple Impairment Questionnaire, May 11, 2013).

100) On July 25, 2013, Employee called Dr. McNamara's office to obtain a letter in support of a Social Security disability request. Dr. McNamara's office stated Employee had not been seen for 1.5 years but would be seeing Dr. McNamara on July 29, 2013. No such letter could be written without an appointment. (McNamara chart note, July 25, 2013).

101) On July 29, 2013, Employee completed a questionnaire for Dr. McNamara's office. He stated Dr. McIntosh and "Dr. Carleson" had referred him. (Intake sheet, July 29, 2013).

102) On July 29, 2013, Dr. McNamara examined Employee and wrote Dr. Jessen referring Employee to her so she could "continue work up" on his neck and obtain an MRI as needed. Dr. McNamara's letter also noted he had examined Employee for his left shoulder and thumb, "which [were] controverted initially and apparently [have] been reversed." (McNamara chart note, July 29, 2013; McNamara letter, July 29, 2013).

103) On September 6, 2013, Employee had a right shoulder MRI at Dr. McNamara's referral. (MRI, September 6, 2013).

104) On September 9, 2013, Dr. McNamara stated Employee needed left shoulder and thumb surgery and was unable to work secondary to persistent pain. (Preliminary Examination for Interim Assistance, September 9, 2013).

105) October 10, 2013, Dr. McNamara saw Employee for his right shoulder, but his left thumb bothered him more than the right shoulder and Employee wanted to have it addressed. Dr. McNamara reviewed the recent right shoulder MRI and noted Employee may have a small interstitial tear or re-tear of the supraspinatus which would help explain his persistent symptoms and mild weakness. Dr. McNamara thought it was "worth considering" thumb surgery and "at a later date if his shoulder continues to bother him, consider an arthroscopic evaluation, small chance of takedown and repair of a re-tear. We will get him scheduled." (McNamara chart note, October 10, 2013).

106) On November 7, 2013, Employee returned to Dr. Jessen on Dr. McNamara's referral. She performed an evaluation and assessed neck pain, upper limb radicular syndrome, and polyneuropathy. Dr. Jessen recommended a cervical spine MRI to address the neck and upper extremity symptoms. (Jessen chart notes, November 7, 2013).

107) At some point shortly after the Marble EME, Davis closed her file in this case. Davis reopened her file by at least November 20, 2013. (Davis).

108) On November 20, 2013, Davis wrote a letter to Dr. McNamara requesting his opinion. Among other things, Davis highlighted with bold lettering what she referred to as "pertinent records of interest." Among these were: a PT exam in which Employee reported his shoulder was a little sore because he "[had] been doing some lifting etc."; a PT report in which he said his shoulder was really sore and the only thing he did was "helping a friend carry a TV"; a PT report stating Employee's shoulder was more sore than usual because "he [had] been lifting a lot more lately"; an OPA report stating he had shoulder pain whenever "he [lifted] anything such as his children"; and a Dr. McNamara report stating Employee had increased symptoms in the past few months especially when he reached overhead or out from his body with any weight. Davis' letter asked for Dr. McNamara's opinion on causation for Employee's left shoulder "problems":

> (1) Given that there was no documentation of left shoulder problems on the report of injury dated 03/30/10 combined with Dr. Mills [sic] normal examination of the left shoulder on April 5, 2010, was the injury of 03/30/10 **the substantial cause*** of Mr. Freeman's claimed disability and/or reason for continued medical treatment and/or need for surgical intervention as it pertains to his **left** shoulder ~~complaints~~ [interlineation] injury? Yes ( ) No ( ) (**Please note that there is no reference in the medical records prior to September 2010 that Mr. Freeman has left shoulder injury**.)

Someone checked the "No" box in responding to the above question. Hand-written comments further stated Employee needed left shoulder surgery to repair his supraspinatus, but no further right shoulder treatment was indicated. The report opined Employee was able to work as an Electrical Inspector or as an Electrical Technician. As for the left thumb injury, Employee could be expected, in the author's view, to be released to work as an Electrical Inspector or Electrical Technician within three and one-half to four months following thumb surgery. Dr. McNamara signed and dated this letter. (Davis letter, November 20, 2013; McNamara signature, November 21, 2013).

109) At hearing, Davis said her November 20, 2013 letter was intended to address whether or not Employee needed additional medical care for his work injury. Davis conceded that on November 21, 2013, at a care conference with Dr. McNamara, she completed answers to the November 20, 2013 letter as Dr. McNamara provided his verbal responses to her. She is aware

Dr. McNamara stated in his deposition the answers on the November 20, 2013 questionnaire were not his responses. However, Davis said she did not try to "influence" Dr. McNamara's opinion. Davis did not tell Employee she was going to meet privately with Dr. McNamara and obtain his opinions. Davis insisted Dr. McNamara's answers to her questionnaire were his responses that she simply wrote down and he later signed. She cannot explain why Dr. McNamara changed his opinions. Davis said it was common for nurses to write down things physicians say and have them sign the documents later. (Davis).

110) On November 21, 2013, following a conference with Davis to "discuss left shoulder symptoms/cause," Dr. McNamara answered five questions. First, Dr. McNamara did not believe the left shoulder was compensable. Second, it would not be unreasonable to let Employee attempt to perform Electrical Inspector and Electrical Technician positions. Third, Employee's left shoulder probably needed surgery, but the findings were consistent with his degenerative process and poor conditioning, and "never are due to overuse of that extremity or rehabbing the opposite." Fourth, as for formal treatment for the right shoulder, given the recent MRI showing no formal gross recurrent partial or full-thickness tear, the symptoms Employee has are ones "he would just have to live with." And fifth, Employee probably needed left thumb surgery but, he may also be able to return to work and "just tolerate it for a period of time before the surgery is done." (McNamara chart note, November 21, 2013).

111) On November 25, 2013, Employee had the cervical spine MRI Dr. Jessen had recommended, at her referral. (MRI, November 26, 2013).

112) On November 25, 2013, Davis wrote a letter to Palazatto. After reviewing responses from Dr. McNamara to her November 20, 2013 letter, Davis stated she had reviewed Employee's medical records and was able to "pull from these records multiple references noting Mr. Freeman's various levels of activity with multiple references to various lifting types of activities despite the fact he was 'off work.'" Davis further explained:

> By obtaining Dr. McNamara's opinion that the work injury of 03/30/13 was not the substantial cause of Mr. Freeman's left shoulder injury, I estimate that we have saved in excess of $90,000 in surgical, therapy and time loss compensation costs. (Report of Task Assignment, November 25, 2013).

113) At hearing, in respect to her saving-$90,000-comment in her November 25, 2013 report, Davis said it was her duty to prevent ASRC from incurring non-work-related expenses. (Davis).

114) On December 2, 2013, Employee had "Pre-surgery screening" with Dr. McIntosh for surgery scheduled to occur December 11, 2013. This examination included a complete blood count and physical examination. Dr. McIntosh opined Employee was a "low surgery risk," and prescribed antibiotics for a sinus infection. (McIntosh chart note, December 2013).

115) On December 10, 2013, Employee went to Dr. McNamara for a pre-op surgical consult for his left thumb. (McNamara chart note, December 10, 2013).

116) On December 11, 2013, Dr. McNamara performed surgery on Employee's left thumb. (Operative Report, December 11, 2013).

117) On January 2, 2014, Employee applied for a fee discount at Dr. McIntosh's office. (Sliding Fee Discount Determination Worksheet, January 2, 2014).

118) On January 9, 2014, Employee had a follow-up EME with Dr. Marble at ASRC's request. (Marble EME report, January 9, 2014).

119) On February 19, 2014, Employee saw Dr. Jessen who referred him to PT for his neck, noting he was already attending for his right shoulder. (Jessen chart note, February 19, 2014).

120) On March 18, 2014, Dr. McNamara responded to Davis' questions. He stated a "pending evaluation" was required to determine if Employee needed more left thumb treatment but he was "likely" medical stable. (Davis letter, March 17, 2014; McNamara responses, March 18, 2014).

121) On April 8, 2014, a therapist with Advanced Physical Therapy reported Employee was 3.5 months out from his left thumb surgery and had continued to make progress with "home management." He had been referred for PT by Bethany Myers, PA-C, at Dr. McNamara's office. (Progress Report, April 8, 2014).

122) On April 29 and May 9, 2014, Employee saw Jacqueline Bock, PhD, on Dr. McIntosh's referral for a neuropsychological evaluation. Among other things, Employee mentioned "mobility problems" from his shoulder and neck injuries and offered "depression" as his chief complaint. (Bock report, April 29 and May 9, 2014).

123) On May 15, 2014, Dr. McNamara responded to a check-the-block form letter stating Employee's left thumb was medically stable. The form letter's author is not identified. (Statement of Michael McNamara, M.D., May 15, 2014).

124) On May 15, 2014, Dr. McNamara also examined Employee's left thumb. Finding Employee medically stable, Dr. McNamara referred him to ASI for a left thumb permanent partial impairment rating. Employee also complained of his right and left shoulders and asked if

Dr. McNamara would see him under Medicaid for his left shoulder. Dr. McNamara told Employee he could schedule separate appointments for his right and left shoulders. (McNamara chart note, May 15, 2014).

125) On June 3, 2014, Dr. McNamara referred Employee to Shawn Johnston, M.D., at ASI for a left thumb PPI rating. (McNamara letter, June 3, 2014).

126) On June 9, 2014, Employee saw Robert Thomas, PA-C, at Dr. McNamara's office. It had been 2.5 years since Employee's right shoulder surgery and he still had persistent pain and limited motion. Employee told PA-C Thomas he wanted to be present or have his attorney present whenever Davis spoke with Dr. McNamara. Employee said he had a painful catching sensation in the right shoulder. After reviewing the chart and examining Employee, PA-C Thomas stated, "I agree with Dr. McNamara's plan back in October of 2013 that the patient should undergo a right shoulder arthroscopy with the intent to either debride his rotator cuff or do an open repair." PA-C Thomas scheduled an appointment with Dr. McNamara who would have to see Employee prior to "taking him back to surgery." (Thomas chart note, June 9, 2014).

127) On June 29, 2014, Employee saw Dr. McNamara's physician's assistant PA-C Thomas. Employee had continued right shoulder symptoms and reiterated he would like to start having either himself or his attorney present when Davis spoke to Dr. McNamara or his staff. (Thomas chart note, June 29, 2014).

128) On July 3, 2014, Dr. McNamara wrote a generic referral for Employee to ASI for a left thumb PPI rating. (McNamara letter, July 3, 2014).

129) On July 8, 2014, a right shoulder post-arthrography MRI Dr. McNamara had ordered showed a horizontal linear tear in the axis of infraspinatus muscle. (MRI, July 8, 2014).

130) On July 8, 2014, Dr. McNamara examined Employee's right shoulder and noted he was being "followed by Dr. Kristen Jessen in Soldotna for his neck." Dr. McNamara reviewed the MRI and concluded there was "no formal partial or complete tear." He concluded Employee's right shoulder had persistent intermittent pain of unclear etiology and bilateral upper extremity numbness and tingling, which in Dr. McNamara's opinion appeared to come from the neck. Dr. McNamara recommended "one final trial of some therapy" to see if this would help, and referred him to Central Peninsula PT, but stated it was "likely he will have to live with this and do a job where he has lower level lifting requirement and use of his shoulders." Dr. McNamara

suggested Dr. Jessen evaluate his neck. This was Employee's last visit with Dr. McNamara. (McNamara chart note, July 8, 2014; observations).

131) On July 9, 2014, Dr. Macintosh wrote a letter stating she had been treating Employee approximately once per month since September 26, 2012. She listed his diagnoses which included his shoulders, thumb and cervical spine. Dr. McIntosh listed Employee's physical restrictions and stated they were expected to persist for at least 12 months. This letter appears to have been prepared for Social Security reasons. (McIntosh letter, July 9, 2014; observations).

132) On July 23, 2014, Employee saw Dr. McIntosh for non-work-related medical care. (McIntosh report, July 23, 2014; experience, judgment).

133) On July 29, 2014, Dr. McNamara responded to a letter from Davis clarifying his PT prescription was for two times a week for eight weeks. Dr. McNamara said the PT was "palliative." Dr. McNamara would not say whether he anticipated any measurable improvement from this PT and stated Employee remained medically stable for his right shoulder. (Davis letter, July 16, 2014; Dr. McNamara responses, July 29, 2014).

134) On August 1, 2014, Employee followed up with Dr. McIntosh for "chronic pain" related to his neck and shoulders. Dr. Macintosh and Employee signed a narcotic agreement for "chronic shoulder pain" and "neck pain." Hydrocodone was the subject narcotic. (Controlled Drug Management Individual Treatment Plan, August 1, 2014).

135) On August 6, 2014, Employee saw Dr. McIntosh again for a non-work-related medical conditions and related treatment. (McIntosh chart note, August 6, 2014; judgment).

136) On August 18, 2014, Employee saw Larry Levine, M.D., at ASI on Dr. McNamara's May 15, 2014 referral for a left thumb impairment rating. (Levine chart note, August 18, 2014).

137) Employee did not designate Dr. Levine as an attending physician in writing. (Observations).

138) Employee continued to occasionally see Dr. McIntosh for non-work-related medical conditions. On some occasions, Employee also mentioned symptoms he attributed to his work injury. (See for example McIntosh chart notes, August 22, 2014, September 26, 2014, October 8, 2014, November 6, 2014, and December 4, 2014).

139) On September 29, 2014, Employee returned to Dr. Hall for a "second opinion involving right shoulder pain." Dr. Hall reviewed the recent right shoulder MRI and advised Employee, "after two surgeries on the shoulder," further surgery had a "very low likelihood" of improving

his situation. However, Dr. Hall opined a Mumford procedure might help resolve pain from Employee's acromioclavicular joint. Radiculopathy or a brachial plexus injury from his surgical blocks could account for shoulder numbness. Dr. Hall recommended electrodiagnostic testing to evaluate these possibilities, and said he would find a physician who could perform testing closer to Employee's home. (Hall chart note, September 29, 2014).

140) Employee did not give prior notice he was changing his attending physician for this case from Dr. McIntosh to Dr. Hall. Effective September 29, 2014, Dr. Hall became Employee's "one change" in his "choice of attending physician." (Observations, judgment).

141) On September 30, 2014 and October 1, 2014, respectively, Steven Stauber, LCSW, and Dr. McIntosh signed a letter stating they had been treating Employee for depression since September 26, 2012. Among other things, they said "depression increases his shoulder and hand pain." (Stauber and McIntosh letter, September 30, 2014 and October 1, 2014, respectively).

142) On October 1, 2014, Dr. Hall completed a written referral to Dr. Jessen for Employee's additional electrodiagnostic testing. (Hall Referral Request, October 1, 2014).

143) October 20, 2014, Employee saw Dr. Jessen for his right shoulder and right cervical radiculopathy and "possible head injury problems," on referral from Dr. Hall. Dr. Jessen performed electrodiagnostic and cervical x-ray studies which were abnormal. (Jessen report, October 20, 2014).

144) Employee's visit with Dr. Jessen on October 20, 2014 was a referral by his attending physician Dr. Hall to a specialist. It was not a change in Employee's attending physician. (Experience, judgment and inferences drawn from the above).

145) On October 27, 2014, Employee called Dr. Hall's office to follow-up on his electrodiagnostic testing done by Dr. Jessen. Dr. Hall said he would be "hesitant" to recommend further shoulder surgery but would refer Employee to a spine surgeon in the Kenai area for his neck. (Hall chart note, October 27, 2014).

146) On November 13, 2014, Employee saw Dr. McIntosh again for chronic pain follow-up related to his neck and shoulders. Dr. McIntosh opined Employee's opioid therapy benefits, including pain relief, outweighed any risks. This visit also addressed several non-work-related medical conditions. (McIntosh chart note, November 13, 2014).

147) On November 13, 2014, because Dr. McIntosh provided medical services related to Employee's neck and shoulders, it was an unlawful physician change. (Experience, judgment).

148) On December 15, 2014, Employee saw Stephanie Winter, PA-C, at Kenai Spine for his cervical radiculopathy and right arm on referral from Dr, Hall. PA-C Winter obtained cervical spine x-rays, assessed neck pain and cervical stenosis and recommended continued PT. (Diagnostic Imaging report; Winter chart note, December 15, 2014).

149) Employee's December 15, 2014 visit with PA-C Winter at Kenai Spine was a referral to a specialist by Employee's attending physician Dr. Hall, not a change in physician. (Experience, judgment and inferences drawn from the above).

150) On January 2, 2015, Employee saw Dr. McIntosh to follow up on several non-work-related medical issues. (McIntosh chart note, January 2, 2015).

151) On January 5, 2015, at Dr. McIntosh's referral, Employee saw Elizabeth Weeks, LCSW, for depression. Employee listed his medications and discussed depression, but did not mention his work injury. It is unclear from his pleadings and this report whether or not Employee claims work related depression. (Weeks chart note, January 5, 2015; judgment).

152) If Employee claims work-related depression, his January 5, 2015 visit with LCSW Weeks was an unlawful referral from an unlawful attending physician Dr. Macintosh. (Judgment).

153) On January 16, 2015, Employee saw Patrick Radecki, M.D., for Udelhoven's EME. (Radecki EME, January 16, 2015).

154) On January 30, 2015, Employee saw Dr. McIntosh to follow up on a recent emergency room visit for chest pain and to discuss sinus problems. (McIntosh chart note, January 30, 2015).

155) On February 4, 2015, ASRC filed a petition to exclude from evidence all medical records for Employee's treatment after November 1, 2011, from all medical providers other than Dr. McNamara and the specialists to whom Dr. McNamara referred Employee. ASRC contended Employee saw numerous physicians without an appropriate referral. ASRC contended Employee made one or more unlawful physician changes, and reports and opinions from these unauthorized physicians should not be considered. (Petition to Exclude, February 3, 2015).

156) On February 4, 2015, Dr. Hall referred Employee to Dr. Bote to address bilateral shoulder pain. (Hall Referral Request, February 4, 2015).

157) On February 10, 2015, Employee returned to Kenai Spine for bilateral shoulder pain, right greater than left, where he saw Herbert Bote, M.D. Dr. Bote ordered and obtained bilateral shoulder x-rays and a left shoulder MRI, and injected both shoulders. (Bote chart note; Diagnostic Imaging reports, February 25, 2015).

158) Employee's February 10, 2015 visit with Dr. Bote was a referral to a specialist from his attending physician Dr. Hall and not a change in physician. (Experience, judgment and inferences drawn from the above).

159) On February 13, 2015, Employee returned to Dr. McIntosh to review his medications, discuss pain management and review results from his visit with Dr. Bote at Kenai Spine. After discussing his situation, Dr. Macintosh provided some "bridge" hydrocodone and said he would discuss Employee's request for pain medication with the "pain management team." If after consulting with "the team" Dr. McIntosh found she was not able to prescribe pain medication, she would refer Employee to a pain specialist. (McIntosh chart note, February 13, 2015).

160) On February 23, 2015, Employee answered ASRC's petition and denied he made an unauthorized physician change. He further contended ASRC's cited regulation did not apply to any medical record filed on a medical summary in this case. Employee listed numerous other affirmative defenses including his argument that following Dr. Hall's surgical recommendation, ASRC hired nurse case manager Davis to influence Employee's physician selection and manipulate his care. In the event Employee made an unlawful physician change, he contended the regulation's strict requirements should be waived or modified to prevent "manifest injustice." Employee contended he reasonably relied on ASRC's agent's conduct and statements in selecting treating physicians and ASRC is estopped from raising the unauthorized physician change defense. (Employee Answer to ASRC Petition to Exclude, February 23, 2015).

161) On February 26, 2015, Employee returned to Dr. Bote, who recommended right and possible left shoulder surgery. (Bote chart note, February 26, 2015).

162) On May 6, 2015, ASRC filed its hearing brief. In it, ASRC conceded neither PA-C Marlow at Beacon nor Dr. Mills at OPA should be considered Employee's attending physician because ASRC directed Employee to Marlow who referred him to Dr. Mills. Thereafter, Employee never designated either as his attending physician. Thus, ASRC contended Dr. Ross was Employee's first attending physician when he began treating with Dr. Ross. ASRC argued there is no evidence Dr. Ross refused to provide medical services to Employee. By contrast, ASRC contended the medical records show Dr. Ross referred Employee to additional physical therapy and told him to return to the clinic. ASRC argued Employee terminated physical therapy on his own and never returned to Dr. Ross. ASRC contended Employee's hearsay testimony about what Dr. Ross may have told him, though admissible, is inadequate to support a factual

finding. Given the above, ASRC argued when Employee returned to OPA to seek treatment with Dr. Hall, he was not returning to an "employer's evaluator." Rather, at that point Employee changed his attending physician from Dr. Ross to Dr. Hall. ASRC argued Employee researched Dr. McNamara and decided to change to him before ever speaking with nurse case manager Davis. (Employer's Hearing Brief, May 6, 2015).

163) Davis knew Employee had never heard of Dr. McNamara until she mentioned him and knew Employee later learned Dr. McNamara had a good surgical reputation. (Davis).

164) ASRC's hearing brief further said Employee wanted a second opinion on his right shoulder so he approached Davis, who arranged an appointment with Dr. McNamara. Eventually, Employee put his request to change his attending physician to Dr. McNamara in writing. ASRC argued it allowed Employee to change attending physicians to Dr. McNamara. ASRC contended Employee's pleadings, including those filed after he retained counsel, demonstrate Employee's belief Dr. McNamara was his attending physician in November 2011, and continued to be so thereafter. ASRC argued Employee next saw Dr. McIntosh in January 2013, and she eventually began providing treatment for his work-related injury. ASRC contended Employee's visit to Dr. McIntosh was an unauthorized physician change and her records from January 2013 forward should be excluded from evidence. Then, according to ASRC, Employee continued to treat with Dr. McNamara who referred him to Dr. Jessen and to PT. Rather than initiate PT, Employee self-referred to Dr. Hall at OPA, in ASRC's view. ASRC contended the visit to Dr. Hall in 2014 was another unlawful physician change. Consequently, ASRC argued Dr. Hall's records from 2014 forward and any records generated by his specialist referrals should also be excluded from evidence. In ASRC's opinion, this would include notes from Dr. Jessen, PA-C Winters, and Dr. Bote. ASRC contended Employee bears the burden to show he has not made an unlawful physician change. If Employee argues he made a physician "substitution," ASRC contended he must establish his attending physician refused to provide him services. ASRC argued there is no evidence any attending physician refused to provide services to Employee. ASRC further maintained Employee's unlawful change should not be excused, and ASRC is not estopped from asserting the unlawful change defense. It contended Employee has been represented by counsel since June 2012, and should have been relying on his attorney's legal advice, not on ASRC's conduct or statements. Lastly, ASRC noted Employee may attack Davis' character. It contended any such attack is contrary to the documentary evidence. ASRC concedes while

Davis may have recommended Dr. McNamara, Employee did his own "due diligence," met with Dr. McNamara, and made his own decision to select Dr. McNamara as his attending physician. ASRC argued Davis would refute any contrary evidence from Employee. ASRC asked that its petition to exclude be granted. (Employer's Hearing Brief, May 6, 2015).

165) On May 6, 2015, Employee filed his hearing brief. In it, Employee contended ASRC does not dispute it directed him to Dr. Mills at OPA soon after the work injury. However, Employee argues Palazatto thereafter made false statements to Employee suggesting he needed "a referral" to see another physician, when in reality Employee had yet to make his first physician selection. He contended Palazatto misled him into selecting his family physician as his first physician selection to get a referral. Consequently, Employee argued PA-C. Scrimger's referral to Dr. Ross was simply a referral, not a change in physician. Thereafter, when Dr. Ross told Employee he was medically stable and could do nothing further for him, Dr. Ross became "unavailable" and refused to provide further treatment. Employee contended by refusing to provide treatment and not making a referral, Dr. Ross cast Employee "at sea without direction." Employee argued Palazatto's selection of and direct contact with OPA and her authorization for OPA to see Employee for a second opinion amounted to ASRC's selection of an "employer physician." In Employee's view, regardless of how Dr. Ross is characterized, "there is no question" Employee's acceptance of care from Dr. Hall was neither doctor shopping nor an excessive, unauthorized physician change. Alternately, Employee contended even if seeking an opinion from Dr. Hall could be construed as a "change," Palazatto's conduct in contacting and authorizing OPA to provide a second opinion was at least ASRC's consent to the "change," and was not Employee's unilateral action constituting a physician change. In short, Employee argued Davis manipulated him into signing a "change" form to Dr. McNamara, which amounted to "employer interference" with Employee's selection of an authorized physician. Therefore, Employee contended Dr. McNamara "in equity and good conscience" should not be treated as Employee's selection, exhausting his right to change physicians. He argued Dr. McNamara proved "malleable" to Davis' influence, had nothing further to offer Employee, and therefore Employee was entitled to substitute Dr. Hall for Dr. McNamara. Employee contended ASRC's petition to exclude should be denied. (Employee's Memorandum, May 6, 2015).

166) On May 20, 2015, ASRC filed a medical summary, which will not be considered for this decision because it was filed after the hearing ended and the record was not left open for parties to file additional evidence. (Medical Summary, May 20, 2015; Observations).

167) Table I, below, finds pertinent facts and law related to the physician change issue:

Table I

Date:	**Provider:**	**Selected/Referred by:**
November 8, 2007	Commission Issues *Guys with Tools*	*Guys with Tools* Effective
March 30, 2010	Conoco Philips Clinic	Selected-ASRC
March 31, 2010	Beacon -Marlow, PA-C	Selected-ASRC
April 1, 2010	Beacon -Marlow, PA-C	Referred-Beacon
April 1, 2010	OPA-Sturley, PA-C	Referred-Beacon
April 1, 2010	OPA-Eule	Referred-OPA
April 1, 2010	OPA-Mills	Referred-OPA
April 1, 2010	Alaska Innovative Imaging	Referred-Beacon
April 5, 2010	OPA-Mills	Referred-OPA
April 8, 2010	Frontier PT	Referred-OPA
April 10, 2010	McIntosh/Scrimger	Selected-Employee
April 28, 2010	KPO-Ross	Referred-Scrimger
August 25, 2010	KPO Rehab & Sports Medicine PT	Referred-Ross
July 9, 2011	8 AAC 45.082(c) became effective	*Guys with Tools* Overruled
August 8, 2011	OPA-Hall	Selected-ASRC
August 8, 2011	OPA-Botson	Referred-Hall
October 5, 2011	OPA-Kornmesser	Referred-Hall
October 13, 2011	Davis begins nurse case management	N/A
November 1, 2011	McNamara	Selected-Davis/ASRC
November 28, 2011	Jessen	Referred-McNamara
December 9, 2011	MediCenter	Referred-McNamara
December 13, 2011	First Choice Home Healthcare	Referred-McNamara
February 2, 2012	EME-Marble	Selected-ASRC
March 30, 2012	Kenai Medical Center-Hansen	State of Alaska
May 10, 2012	Constantino enters his appearance	N/A
January 18, 2013	McIntosh	Employee
July 29, 2013	McNamara	McIntosh
November 7, 2013	Jessen	McNamara
April 29, 2014	Bock	McIntosh
August 18, 2014	ASI-Levine	McNamara
September 29, 2014	OPA-Hall	Employee
October 20, 2014	Jessen	Hall
December 15, 2014	Kenai spine-Winter, PA-C	Hall
January 5, 2015	Weeks	McIntosh
January 16, 2015	EME-Radecki	Udelhoven
February 10, 2015	Kenai Spine-Bote	Hall

168) At hearing, ASRC made a "standing objection" to hearsay testimony from Employee about what Drs. Ross and McNamara purportedly told him. (Employer's argument).

169) In response, Employee contended hearsay is admissible and would be corroborated. If Employee's testimony was not corroborated, Employee argued the panel could still exercise its discretion and consider it. (Employee's argument).

170) Davis has a bachelor's degree in nursing and worked for 10 years in a hospital setting. She has worked the last 20 years in the workers' compensation area as a nurse case manager. Nurse case managers are generally hired to "help get injured workers through the workers' compensation system." This includes making sure injured workers get proper, reasonable, economic and timely healthcare for their work injuries. "Economic" medical care means "reasonable and necessary" care. Davis has a responsibility "not only to the employee," but to the employer to make sure it does not pay for non-work-related medical care. Once Davis points out issues to an employer, it is the employer's or insurer's responsibility to take action, including directing her to do something. She has 30 to 70 open cases at any given time. ASRC is one of her clients and she may currently have four to five open cases with ASRC out of 50 total cases. Very few cases are "litigated." Typical nurse case manager duties include asking treating physicians about timelines for surgery and medical stability dates. Davis knows staff at medical providers' offices, a familiarity which assists her in obtaining timely information, which benefits her clients. When Davis contacts an injured worker for the first time, her practice includes telling them who she is, who hired her, and her purpose. Davis does not provide medical care. Davis denied "directing" medical care stating "that's not my job." In Davis' experience, injured workers typically do not understand the health care system. If no nurse case manager is involved in a case, injured workers typically solicit medical resource information from their employer, family or friends. Davis usually has from four to seven patients with Dr. McNamara and is in his office frequently. As for Employee's left shoulder, Dr. McNamara recommended a left shoulder MRI and Davis arranged for it. Davis agreed she asked Dr. McNamara's staff to wait for her to arrive at appointments with Dr. McNamara so she could participate in the appointments and get things scheduled. However, Davis said she always tells her patients if they want a private evaluation they can have one. According to Davis, Employee said he had no problem with her participating in his appointments. (Davis).

171) During cross-examination, Davis said her clients include employers, third-party administrators and insurance companies. She denied her "primary duty" is to the people who hire her. Davis implied her primary duty was to help injured workers get through the workers' compensation system. She conceded if her employer's goal was to have an injured worker's condition be found not work-related, she would facilitate that goal as well. Her job requires a good working relationship with physicians and their staff. She probably has better access than most people to obtain medical information from providers in a case. Davis was aware ASRC was seeking information to prove the left shoulder was not work-related after its EME, and she participated in obtaining this evidence. Davis said she does not give patients "medical advice," but gives them "education." For example, she tells patients who she would have work on her if she needed care, and conceded that could be interpreted as telling patients who are the "good doctors." It was Davis' understanding from reading the medical records that Dr. Ross had "released [Employee] from care." Drs. McNamara's and Hall's treatment recommendations were the same. In her 20 years, Davis has kept up with Alaska workers' compensation law and has accumulated "significant knowledge" about laws regarding physician changes. Davis conceded, "I knew" there was a difference between Employee requesting permission from ASRC to see Dr. McNamara versus him unilaterally designating Dr. McNamara as his attending physician. Davis further admitted Dr. Jessen, on referral from Dr. McNamara, recommended a cervical MRI but Davis told Employee he could not obtain it, unless Dr. McNamara ordered it. Davis said she inquired about the cervical MRI with Dr. McNamara who told Davis he would not order it and Dr. Jessen would have to order it. Davis conceded it was nearly a year before Employee actually obtained the cervical MRI, with Davis' assistance. Davis had no additional, direct contact with Employee after she closed her file. (*Id*.).

172) During re-direct examination, Davis reversed her opinion about the difference between "requesting" a change and actually "changing" an attending physician and said, "It seems to mean the same thing to me." Davis said ASRC accepted Dr. McNamara as Employee's attending physician. Once Davis closed her file after Dr. Marble's report, she ceased working with Employee. Thereafter, when Davis reopened her file and met with Dr. McNamara she was no longer "working with" Employee and her communications had "nothing to do with" him. (*Id*.).

173) In reviewing Dr. McNamara's July 8, 2014 report, Davis agreed Dr. McNamara said if PT did not improve Employee's condition, there was nothing further Dr. McNamara could do for him and he would have to "live with this." (*Id.*).

174) Once Davis reopened her file, her role changed and she was no longer facilitating Employee's medical care, but rather, was attempting to get answers to questions the insurer had. Employee was represented so Davis was no longer allowed to have contact with him. (*Id.*).

175) At hearing, Employee testified that following his injury, he went to the local clinic. ASRC sent him to Anchorage and a Beacon representative met him at the airport and took him to the Beacon facility. Beacon provided him with a hotel room, clothing, and toiletries and took him to OPA. He had no choice where to go. Employee recalled seeing Dr. Mills at OPA. Employee subsequently inquired if he could get a physician closer to home and Palazatto told him he needed to get a referral. Employee asked Palazatto how to accomplish this, and she told him to consult with his family physician. Employee went to Dr. McIntosh's office and saw the physician's assistant. The physician's assistant referred Employee to Dr. Ross. Dr. Ross concurred with Dr. Mills' surgical recommendations. Employee eventually had Dr. Ross perform the surgery. Physical therapy did not improve Employee's right shoulder symptoms after surgery. Employee returned to Dr. Ross who suggested Employee get a second opinion. Employee told Palazatto he needed a second opinion. Palazatto asked if returning to OPA was acceptable to him, and Employee agreed as he had no physician in mind. Upon returning to OPA, Employee saw Dr. Hall because Dr. Mills had died. Dr. Hall reviewed Employee's situation and told him he needed additional right shoulder surgery. Dr. Hall also referred Employee to Dr. Kornmesser for his thumb injury. Before surgery was scheduled, Dr. Hall injected Employee's right shoulder, which improved the symptoms briefly. Typically, Davis was at each appointment although on one occasion he arrived early before Davis was there. Davis asked him to wait for her in the future. Dr. McNamara referred Employee to someone in Anchorage to examine his neck. Davis told Dr. McNamara Employee lived in the Kenai area and Dr. McNamara referred him to Dr. Jessen. Dr. McNamara recommended in-home PT following his shoulder surgery. Employee said he attended all PT Dr. McNamara recommended. Palazatto told Employee to "hold off" getting his cervical MRI until after the EME with Dr. Marble. Davis told Employee Dr. Jessen did not have authority to order the MRI. After Dr. Marble's EME, Employee's case was controverted. After the controversion, Employee saw no

additional doctors until he went to an SIME. Eventually, ASRC accepted Employee's left thumb injury and Dr. McNamara performed surgery for that injury. No one told Employee ASRC was going to obtain opinions from his physician. On some occasions, Employee was surprised to find Dr. McNamara's opinions in "check off letters" were "180 degrees different" than what Dr. McNamara had just finished telling him. In October 2013, Employee had an appointment with Dr. McNamara and discussed Employee's right shoulder condition. Employee understood Dr. McNamara wanted to possibly have another right shoulder operation after Employee's thumb was repaired. Employee saw Dr. McNamara's November 2013 report stating no further medical treatment was necessary. At this point, Employee told Dr. McNamara's office he did not want Davis to meet with his physician unless Employee or his lawyer was present. Employee understood his right shoulder needed additional surgical treatment. He followed up with Dr. McNamara in July 2014 to schedule exploratory right shoulder surgery. Dr. McNamara did not recommend surgery at this visit. Dr. McNamara reviewed the most recent MRI with a medical student present and suggested additional PT. Employee believed if PT did not work, Dr. McNamara was "done" with him. Employee understood the PT was designed to see if it "helped." Employee's doctor-patient relationship with Dr. McNamara changed over time. Employee eventually did not think Dr. McNamara had his "interests at heart." Dr. McNamara was telling Employee one thing during their meetings and Employee was receiving records a month later from his attorney in which Dr. McNamara was saying the opposite. After Employee's last visit with Dr. McNamara, he returned to Dr. Hall. (Employee).

176) On cross-examination, Employee was asked about his 2012 deposition where he said he was uncertain who told him he needed to get a referral to Dr. Ross. At hearing, Employee recalled Palazatto had told him. Employee conceded he settled his reemployment benefits for about $98,000 and, at the time, was involved in a divorce proceeding. Employee was entering into a property settlement in the divorce. Employee and his ex-wife reached a resolution. The court set the agreement aside. Employee did not think the judge set aside his divorce settlement because Employee failed to disclose the workers' compensation settlement. (*Id*.).

177) Given Employee's testimony about the divorce settlement, ASRC requested an order leaving the hearing record open so it could produce evidence proving the divorce court set aside the settlement in the divorce proceeding because Employee had withheld information from the court about the $98,000 workers' compensation settlement. ASRC contended this evidence

would show Employee lacked credibility. It further contended it did not anticipate cross-examining Employee on allegedly prior inconsistent statements. Udelhoven joined with ASRC's request. Employee objected to ASRC's request on relevance grounds and on ASRC's failure to file and serve evidence supporting its position prior to the hearing, leaving Employee unprepared to respond. (Record).

178) After deliberating, the panel sustained Employee's objection to leaving the record open and denied ASRC's request. The panel found since ASRC knew Employee's credibility would be an issue it should have filed and served any evidence upon which it wanted to rely at hearing at least 20 days before the hearing, pursuant to the regulations. ASRC could rely upon, and the panel would consider, any timely filed divorce court related documents. (Oral order at hearing).

179) Thereafter, ASRC objected to Exhibit 19 to Employee's hearing brief on grounds he did not file and serve it at least 20 days prior to hearing. Employee conceded this was true. The panel sustained ASRC's objection. (Oral order at hearing).

180) Resuming cross-examination, Employee said he attended the PT Dr. Ross prescribed. He did not recall missing four consecutive PT appointments after his final visit with Dr. Ross but recalled missing some PT appointments. Employee said on May 31, 2011, he canceled his remaining PT with KPOR because he wanted to change PT providers to Frontier, which was closer to his home. Thereafter, Employee never returned to Dr. Ross. It was not Employee's position that ASRC was adamant to get him to treat with Dr. McNamara rather than Dr. Hall. Rather, Employee said Davis led him away from Dr. Hall to Dr. McNamara. When Employee discussed with Palazatto about a second opinion, they discussed going back to Dr. Hall at OPA. Palazatto agreed and authorized an appointment. Looking back on things, Employee said it made no sense to him that Palazatto would hire Dr. Hall to see Employee and then hire Davis to lure him away to Dr. McNamara. Davis convinced Employee it was her job to handle all appointments. Though Davis did not "push him around," she "convinced" him it was her job to take over his case and had his best interests at heart. Davis told Employee Dr. Hall was not "that great of a shoulder surgeon" and she did not like him as a surgeon. Davis "pushed really hard" for him to leave Dr. Hall and go to Dr. McNamara. Based upon Davis' recommendations, Employee was "fine with" seeing Dr. McNamara. He just wanted to get his shoulder fixed, and made the hand-written change letter requested by Davis. Employee did not complete the treatment Dr. McNamara suggested, and did not return to him. Dr. Hall was the next physician

Employee saw. Employee thought Dr. McIntosh began prescribing Oxycodone for Employee's bilateral, chronic shoulder pain sometime in late 2013 or early 2014 when he first saw her for depression. Dr. McIntosh referred Employee for PT in January 2014 for "physical fitness," when he was 85 pounds heavier. The therapist also did shoulder PT under a different order. Dr. McIntosh referred Employee to Cynthia Kahn, M.D., with whom he is treating on Dr. McIntosh's referral. Dr. McIntosh also referred him to Frontier Community Service for his "FASD," which is "Fetal Alcohol Spectrum Disorder." Currently Dr. McIntosh and Dr. Kahn are treating Employee. Dr. Hall referred Employee to Dr. Bote for his third, right shoulder surgery. Dr. Bote referred Employee to Central Peninsula Rehabilitation (formerly Frontier Physical Therapy) for PT. Employee did not speak to anyone at ASRC before he returned to Dr. Hall. Dr. McIntosh did not refer Employee to Dr. Hall. Employee has been represented by an attorney in this case since 2012. Dr. Kahn manages Employee's pain medications. (Employee).

181) Employee saw Dr. McIntosh as his primary care physician, for depression. In the course of seeing her for this purpose, Employee told Dr. McIntosh about his shoulder injuries. Dr. McIntosh reviewed Employee's medications with him and did not like the side effects associated with some medications Dr. McNamara had prescribed. Dr. McIntosh substituted Oxycodone for these medications. If Employee had never met Davis, he never would have changed from Dr. Hall. He had a good relationship with Dr. Hall, which factored into his decision to go back to Dr. Hall after leaving Dr. McNamara. Surgery for Employee's right shoulder was scheduled with Dr. Hall before Employee ever met Davis. (*Id.*).

182) Employee wanted to get treatment closer to his home, so he contacted Palazatto who told him he needed a referral. Dr. Mills told Employee about KPO. Employee went to Dr. McIntosh's office at Cottonwood Clinic, now known as Peninsula Health Care Services, to obtain a referral. He got a referral to KPO. Employee had never heard of Dr. Ross. He did not know he was going to see Dr. Ross until he showed up at KPO. When asked how he ended up going from Dr. Ross to Dr. Hall, Employee said Dr. Ross told him he needed a second opinion so Employee called Palazatto. Employee and Palazatto discussed the second opinion options and Palazatto asked if Employee was okay going back to OPA. When he and Palazatto discussed going back to OPA, Employee had no opinion and said "that's fine with me." He assumed he would be seeing Dr. Mills. OPA called Employee to set up an appointment, so he is not sure who actually made the arrangements. (*Id.*).

183) Palazatto has worked for ASRC as a senior Workers' Compensation Project Manager for 10 years. She has been involved in workers' compensation cases for about 25 years. Palazatto does not recall speaking with Employee about getting treatment from Dr. Hall after he saw Dr. Ross. If Employee had contacted her about seeing Dr. Hall or getting a second opinion, she would not have directed him to a particular physician, though in this instance she agreed a second opinion was "a really good idea" as he was not improving. Palazatto thought it was a good idea to get Davis involved because Davis knows the medical professionals and Palazatto wanted to make sure Employee got the best treatment possible. Employee was very frustrated with his lack of progress. Palazatto denied hiring Davis to get Employee away from Dr. Hall. Palazatto has worked with Davis for many years and has never known her to try to influence an employee's physician choice. Palazatto and Davis discussed obtaining a second opinion. Davis suggested Dr. McNamara. Palazatto said there was no discussion about trying to get Employee to switch from Dr. Hall for Dr. McNamara. (Palazatto).

184) On cross-examination, Palazatto said Employee never signed the original physician designation form her office provided. Palazatto was uncertain whether it was her position that Employee selected Dr. Mills. Palazatto has hired Davis as a nurse case manager in the past and hires her regularly. Palazatto respects Davis' guidance and advice. Davis is effective and good at getting people back to work, in Palazatto's opinion. Palazatto has seen "really good outcomes" from Dr. McNamara's surgeries. Palazatto does not know Dr. Hall very well and has no opinion about him. After Employee agreed to accept care from Dr. McNamara, Davis canceled the EME previously scheduled with Dr. Marble. (*Id*.).

185) In his videotaped deposition, Dr. McNamara said Dr. Mills was a reputable, competent physician and he would tend to rely on Dr. Mills' chart notes. When asked the same question in respect to Dr. Hall, Dr. McNamara said, "Possible." When asked to explain his qualification, Dr. McNamara said "I have a different opinion on those two." (McNamara deposition at 41). Dr. McNamara reviewed the November 20, 2013 letter to him from Davis purporting to set forth his opinions in check-the-block and fill-in-the-answer fashion and conceded they were not his opinions, as there was a discrepancy between his October 10, 2013 examination in which he said surgery may be necessary for Employee's right shoulder, and the November 20, 2013 report which said "no further treatment indicated." (*Id*. at 66-67). The report was prepared by Davis. (*Id*. at 68). Dr. McNamara knows Davis as a nurse case manager in this case. He understood her

to be representing the insurance company's interests. (*Id*. at 69). Dr. McNamara relies upon PA Thomas' notes as his capable medical assistant. (*Id*. at 70). Before Dr. McNamara's deposition, he asked PA Thomas about his last chart note concerning additional right shoulder surgery for Employee. Dr. McNamara clarified that PA Thomas was not sure if Employee needed additional surgery, and PA Thomas simply wanted Dr. McNamara to make the call. (*Id*. at 71-72). Davis is a "good referral source" for Dr. McNamara. (*Id*. at 75). Dr. McNamara said Davis has no ability to influence him or direct his medical care. (*Id*. at 81). Dr. McNamara knows "as a fact" Dr. Hall has been sued for malpractice, because he said, "I've been told that." (*Id*. at 82). ASRC's attorney asked Dr. McNamara, "Anyway, so in terms of Tracy Davis maybe steering somebody away from Dr. Hall to you as a better surgeon would that be in the best interests of the injured worker?" Dr. McNamara was reluctant to answer "on video" but conceded "there is truth to that." (*Id*.).

186) The panel issued an oral order denying Employee's request for written, post-hearing closing arguments. (Record).

187) In its closing argument, ASRC contended Employee's testimony was mostly hearsay. For example, ASRC argued there is no medical evidence showing Dr. Mills referred Employee to Dr. Ross. Similarly, ASRC contended Employee's "substitution" physician argument should fail because he "walked away" from treatment prescribed by Dr. Ross. It argued no evidence demonstrates any physician failed or refused to provide Employee with additional treatment or a referral. As for Dr. Hall's status, ASRC did not believe it was "that important." ASRC contended even if Dr. Hall was ASRC's physician that does not make every physician in his clinic its physician. ASRC argued Dr. Hall was an attending physician. ASRC contended Employee wanted to change to Dr. McNamara. It accepted Dr. McNamara as an attending physician. ASRC conceded things got a bit confusing but at some point Dr. McIntosh became an attending physician. Dr. McIntosh began referring Employee to other physicians. ASRC contended this was also an unlawful change. It argued Employee was "splitting attending physicians" between Dr. McIntosh and Dr. McNamara. Further, ASRC contended it had nothing to do with Employee returning to Dr. Hall after he ceased seeing Dr. McNamara. It asks the board to strictly apply the applicable statute and regulations. (ASRC's closing argument).

188) In its closing argument, Udelhoven agreed with ASRC's position. It further contended Dr. McNamara necessarily was Employee's attending physician. Udelhoven argued the medical records do not support Employee's hearsay statements. (Udelhoven's closing argument).

189) In his closing argument, Employee contended he accepts the one-free-physician-change rule. However, he argued nothing the board provided him on its website or in writing informed him if he made an unlawful physician change, the reports from these physicians would be excluded from the record. He argued the board failed to properly inform him. Further, Employee contended Davis manipulated his medical care to his detriment. Employee argued he relied fully on Davis' misrepresentations that she was only looking after his best interests, when in reality she was looking out for ASRC's best interest. Employee contended once he figured out what was going on between Davis and Dr. McNamara, he had a right to get another physician. Referring to medical ethics, Employee contended Davis and Dr. McNamara had a conflict of interest in respect to his medical care and treatment. Relying on *Bloom*, Employee argued once the patient-physician relationship between him and Dr. McNamara deteriorated the Act's fundamental purpose to provide medical care to injured workers took precedence over the doctor shopping prohibition. (Employee's closing argument).

190) In various pleadings, Employee and his attorney have listed certain physicians under "treating" or "attending" physician headings. (*See for example*, Workers 'Compensation Claim, March 7, 2012; Amended Workers' Compensation Claim, June 8, 2012; SIME Form, June 8, 2012; Employee's Witness List, April 2, 2013; and Employee's Witness List, November 5, 2013).

191) ASRC, Udelhoven and Employee agreed if ASRC's position on excluding records was accepted, this decision would not affect the SIME report. (Parties' hearing statements).

192) If the board granted ASRC's petition, ASRC and Udelhoven argued Dr. McNamara would be Employee's current attending physician for the 2010 injury. (*Id.*).

193) Employee argued Dr. Hall would be his current attending physician if the board granted ASRC's petition. (*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 the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

The board may base its decision not only on direct testimony 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). "The presumption analysis does not apply to every possible issue in a workers' compensation case." *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010). When "coverage" issues are not involved, and the presumption does not promote the goals of encouraging prompt payment, the presumption analysis does not apply. *Rockney v. Boslough Construction Co*., 115 P.3d 1240, 1244 (Alaska 2005).

AS 23.30.005. Alaska Workers' Compensation Board.
. . . .

(h) The department shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

(i) The department may adopt regulations concerning the medical care provided for in this chapter. . . .

AS 23.30.008. Powers and duties of the commission. (a) . . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent. . . .

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. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change. . . .

> . . . .
>
> (i) Interference by a person with the selection by an injured employee of an authorized physician to treat the employee, or the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee, is a misdemeanor.

The authority to determine whether a person has committed a criminal misdemeanor lies with the courts, not the board. *Rayburn v. Alyeska Pipeline Service Co.*, AWCB Decision No. 95-0270 (November 2, 1995). On the other hand, *Dougan v. Aurora Electric, Inc*., held:

> At the same time, we find our lack of authority to adjudicate criminal claims does not limit our discretion, in fashioning remedies under other provisions of the Act, to consider the legislative intent expressed through relevant criminal statutes. For example, in *Rayburn v. Alyeska Pipeline Service Co.*, AWCB Decision No. 95-0270 (November 2, 1995), the Board considered whether an employer had violated AS 23.30.095(i) solely for the purpose of deciding whether it should issue a protective order under 8 AAC 45.095 limiting the employer's contact with the employee's physicians. (*Dougan* AWCB Decision No. 95-0270 at 4).

"An employer must be careful in seeking to influence an employee's selection of an authorized physician, even if from the purest motives, as it may commit a misdemeanor by violating AS 23.30.095(i)." *Kosedar v. Northern Grains, Inc*., AWCB Decision No. 95-0189, at 4, n. 4 (July 20, 1996).

In *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1090 (Alaska 2008), the Alaska Supreme Court stated:

> The board correctly determined . . . that because the Alaska Workers' Compensation Act creates an adversarial system, and because Seybert's and Alaska National's interests were in conflict, there was no basis for a fiduciary relationship between [them]. Although 3 AAC 26.100 imposes some duties on a workers' compensation insurer, it does not impose a fiduciary relationship. (Footnote omitted). The regulation requires an insurer to provide a claimant with 'assistance that is reasonable' so an unrepresented claimant can 'comply with the law and reasonable claims handling requirements.' (Footnote omitted). . . . These requirements do not impose duties of loyalty and the disavowal of self-interest that are hallmarks of a fiduciary's role. (Footnote omitted). The workers' compensation system is still an adversarial system, and a fiduciary relationship does not usually exist between opposing parties in an adversarial system.

In *Seybert*, an injured worker tried to set aside a Board-approved settlement agreement based in part on allegations his adjuster misrepresented the facts and the law concerning his right to change physicians. The court stated:

> Underlying the evaluation of Seybert's misrepresentation and fraud claims is the issue of what duty a workers' compensation insurance adjuster owes to an unrepresented claimant. Although we decide here that there is no fiduciary duty, the board may consider on remand what duty the adjuster does owe. Under certain circumstances non-disclosure of a fact can be equivalent to an assertion, and according to the *Restatement (Second) of Contracts* §161(b), failure to act in good faith and in accordance with reasonable standards of fair dealing can be relevant in determining when non-disclosure of a fact is equivalent to an assertion. (Footnote omitted). . . . In workers' compensation, where there are complex rules that can carry significant consequences, it is hard to ignore the disparity in information and knowledge that an experienced insurance adjuster may possess compared with an unrepresented claimant. . . . The issue of what the insurer's duties are to an unrepresented claimant may also be relevant in assessing whether Seybert was justified in relying on any misrepresentations. . . . (Footnote omitted).

In another unlawful-change-of-physician case decided before the current regulation addressing AS 23.30.095(a) became effective, *Witbeck v. Superstructures, Inc*., AWCAC decision No. 014 (July 13, 2006) said before the board determines whether the injured worker is "doctor shopping," it should determine whether "the employee and his attending physician have complied with the statute and regulation." Motive for a change is irrelevant. But, if the statute and regulation have not been followed, "the change is excessive as a matter of law." *Id*. at 10.

> **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 findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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).

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

> conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 44.62.240. Limitation on retroactive action**. If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective affect only. A regulation adopted under this chapter that is primarily an 'interpretive regulation' has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

Prior to July 9, 2011, 8 AAC 45.082 did not provide for excluding medical records and opinions from providers in cases where a party had made an unlawful change in their physician choice. However, board decisions for years had ruled that an appropriate sanction was to exclude unlawfully obtained reports and opinions from consideration at hearings. *Sherrill v. Tri-Star Cutting*, AWCB Decision No. 95-0118 (May 1, 1995) held:

> [I]f the limit in AS 23.30.095(e) on changing physicians is to have any meaning, there must be some penalty imposed when an employer fails to obtain an employee's consent. To hold otherwise would render the limit meaningless, and would invite insurers and their representatives to 'doctor shop' without concern for the clear prohibition. . . . We find the appropriate remedy for violation of the statute is to disregard the reports . . . for two purposes. . . . We decline to adopt the holding in *Augustine* for two reasons: First, employees who are seeking medical treatment and relying on the insurer to pay for the treatment, are in an entirely different position than insurers who are shopping for a medical opinion to support their position. Second, if we are to enforce AS 23.30.095(e), there must be some consequence or sanction imposed for its violation. (*Id.* at 7-8).

Anderson v. FedEx, AWCB Decision No. 98-0104 (April 24, 1998) applied the same rule to injured workers and said: "In accord with . . . *Sherrill*, we will not permit Employee to rely on Dr. Nordstrom's opinions to support her claims for temporary disability benefits or additional PPI. AS 23.30.095(a). If we allow Employee to rely on Dr. Nordstrom's opinions, it would set a precedent enabling employees to shop for medical opinions that support their claims." *Id.* at 9.

Effective July 9, 2011, the amended regulation addressing a party's unlawful change in its physician choice states:

> **8 AAC 45.052. Medical summary**. . . .

. . . .

(c) . . .

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

. . . .

(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence. . . .

8 AAC 45.082. Medical treatment. . . .

(b) A physician 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;
>
> . . . .
>
> (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 hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer. . . .

In *Miller v. Nana Regional Corp.*, AWCB Decision No. 13-0169 (December 26, 2013), the board addressed "extraordinarily unique facts" and the majority held 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 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 where the board had applied the *Sherrill* "exclusionary rule" and refused to consider medical evidence offered by the injured employee, finding the evidence resulted from an unlawful physician change under AS 23.30.095(a). *Guys With Tools* held, notwithstanding AS 23.30.095(a), (e) and decades of contrary board decisions, the board lacked legal authority to form a medical record "exclusionary" sanction against parties who made an unlawful physician change. *Guys With Tools* held an existing sanction said an employer did not have to pay for medical services rendered by an employee's unlawfully changed provider. Rather than exclude such evidence, *Guys With Tools* held the board should consider "any relevant evidence" in making its decision. *Id*. at 22. *Guys With Tools* also said, referring to AS 23.30.095(i), "However, the statutes also preserve to the employee the right to choose an attending physician free of interference by any person." *Id*. at 21.

> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052. . . .
> . . . .

> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the record. . . .
>
> **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.

"Change" is defined as:

> (1) to put or take (a thing) in place of something else; substitute for, replace with, or transfer to another of a similar kind [to *change* one's clothes, *change* jobs]. . . .

Synonyms for "change" include:

> [C]hange denotes a making or becoming distinctly different and implies either a radical transmutation of character or replacement with something else [I'll *change* my shoes]. . . . (Webster's *New World Dictionary*, Second College Edition, 1979, at 237).

"Interference" is defined as:

> (1) an act or instance of interfering. (2) something that interferes. . . .

"Interfere" is defined as:

> (3) (a) to come in or between for some purpose; to intervene. (b) to meddle. . . . (Webster's *New World Dictionary*, Second College Edition, 1979, at 734).

ANALYSIS

1) Will the screen print attached to ASRC's May 5, 2015 medical summary be considered at the May 13, 2015 hearing?

All three parties in this case are represented by experienced workers' compensation counsel. The law for filing evidence for use at hearing is long-standing and clear. While most evidentiary and civil rules do not apply in these proceedings, basic due process rules do apply. Any document filed and served 20 days or more before a hearing may be relied upon by the fact-finders in reaching a decision unless a party has filed a *Smallwood* objection. Apart from the document's other deficiencies, including but not limited to the lack of foundation and any visible

connection to Employee, partial illegibility and truncation, ASRC did not file and serve the document at least 20 days prior to the hearing. ASRC gave no reason why the document could not have been obtained and filed earlier. Employee timely Smallwooded this document and did not waive his objection. For these reasons, it will not be considered in rendering this decision. Since the document has now been filed and served, it may be admissible at a future hearing in this case subject to Employee's *Smallwood* or other objections. 8 AAC 45.052(c)(3)(B) and (4).

2) Was the oral order excluding Exhibit 19 on Employee's hearing brief from consideration at the May 13, 2015 hearing correct?

It is undisputed Exhibit 19, Employee's October 22, 2013 letter to Dr. McNamara, was filed and served on the other parties for the first time when it was attached to Employee's May 6, 2015 hearing brief. Therefore, because Exhibit 19 was not filed and served at least 20 days before the hearing, the oral order excluding Exhibit 19 from consideration at the May 13, 2015 hearing was correct. Exhibit 19 may be admissible at future hearings subject to objection. 8 AAC 45.120(f).

3) Was the oral order denying Employee's request for written closing arguments correct?

All three parties were represented by competent counsel, well-experienced in handling workers' compensation claims. All three parties thoroughly briefed this case. Each had 20 minutes to provide opening statements and closing arguments. Lawyers for all parties did so and presented their arguments admirably. ASRC and Employee through their witnesses, and all three parties through capable cross-examination, further illustrated their points. The hearing was lengthy. *Rogers & Babler*. Hearings are conducted so all parties' rights may be best ascertained. AS 23.30.135. Thus, there was no need for additional, written closing arguments. The oral order denying Employee's request for written closing arguments was correct. AS 23.30.005(h).

4) Was the oral order refusing to allow ASRC to file a divorce court transcript post-hearing correct?

As noted above, basic due process rules apply in administrative hearings. If ASRC wanted to demonstrate Employee lacked credibility by relying upon court documents purportedly showing he withheld information from the divorce court, it could have and should have filed and served all supporting documentation, including hearing tapes or transcripts, at least 20 days prior to the

hearing. 8 AAC 45.120(f). ASRC's counsel stated she had a divorce court hearing transcript in her office but failed to bring it to hearing, prompting ASRC's request to hold the record open to file this evidence post-hearing. Prior to hearing ASRC must have known Employee's credibility was an issue in this case, given Davis' emphasis in her letters to Dr. McNamara that early medical records did not reflect a left shoulder injury. Employers frequently focus on injured workers' credibility in workers' compensation cases. Allowing ASRC to file such post-hearing evidence would amount to unfair surprise, would unnecessarily lengthen the hearing process and would not accord Employee an opportunity to rebut or explain any alleged inconsistencies without extending the hearing process even further. The Alaska Workers' Compensation Act is to be interpreted to insure quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). Allowing the practice ASRC suggested is contrary to this mandate. *Rogers & Babler*. Therefore, the oral order denying ASRC's request to file post-hearing divorce court evidence was correct.

5) Did Employee make an unlawful change in his attending physician?

Prior to 1988, parties on both sides in workers' compensation cases participated in a process commonly referred to as "doctor shopping." *Sherrill*. Parties sought opinions from as many medical providers as necessary to find a medical opinion suiting their needs. In 1988, the legislature amended AS 23.30.095 to restrict this practice. This decision is limited to Employer's assertion that Employee made unlawful changes in his attending physician and whether or not unlawfully obtained records and related opinions should be excluded.

AS 23.30.095(a) states an injured worker may designate a licensed physician to provide all "medical and related benefits." The worker may not make more than one change in the employee's attending physician without the employer's written consent. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Simply put, in a normal situation Employee has a right to select a doctor to treat his work injury and has a right to change once to another doctor. Employee's physician can make unlimited referrals to specialists. Employee cannot switch back and forth between attending physicians.

Notably absent from the statute are specifics concerning how an injured worker designates a physician, what happens if the worker or his physician moves, his doctor passes away, or his physician refuses to provide further services, and what constitutes a physician "change." Since Employee was injured after July 1, 1988, these details are set forth in 8 AAC 45.082(b)(2). This section states Employee designated an attending physician by getting "treatment, advice, an opinion, or any service" from a physician for his work injury. However, the regulation makes an exception where Employee sought services at a "hospital or an emergency care facility" or from a physician whose name was given to him by ASRC, whom ASRC directed him to see, or whose appointment was set, scheduled or arranged by ASRC, if Employee "does not designate that physician as the attending physician." 8 AAC 45.082(b)(2)(A), (B)(i-iii). Further, the regulation explains Employee did not "change" his attending physician if: he moved 50 miles or more from his attending physician and did not return to that physician after moving; the attending physician died or moved away 50 miles or more from Employee or refused to provide further services; ASRC suggested, directed, or scheduled an appointment with a physician other than the attending physician; the other physician provided services to Employee but Employee did not designate "in writing" that physician as his attending physician; or Employee requested in writing that ASRC consent to a new attending physician and ASRC either consented or did not give written consent or denial to Employee within 14 days after receiving the request and Employee thereafter got services from another physician. 8 AAC 45.082(b)(4). In short, depending upon the circumstances, the regulations provide two ways in which Employee can "designate" an attending physician: (1) by receiving services for the work injury from a physician, or (2) by designating an attending physician in writing. 8 AAC 45.082(b)(2) and (4).

The presumption of compensability analysis does not apply to every possible issue in a workers' compensation case. *Burke*. This physician change issue does not involve coverage, benefit eligibility, or multi-pronged evidentiary tests. *Rockney*. Therefore, the presumption analysis need not be applied. Table I shows ASRC directed Employee to the Conoco Philips clinic, which referred him to Beacon, which referred him to OPA, which referred him to Alaska Innovative Imaging and to Frontier Physical Therapy. Employee selected none of these providers and did not designate any as his attending physician in writing. On April 10, 2010, Employee selected Dr. McIntosh as his first attending physician, and her office referred him to

Dr. Ross, a medical specialist. Based upon these undisputed facts, to this point, Employee had not violated AS 23.30.095(a) or 8 AAC 45.082.

It is further undisputed ASRC, not Employee, selected OPA, gave the clinic's name to Employee and told OPA to call Employee to make an appointment. Employee saw Dr. Hall who referred him to several specialists within the clinic. Employee did not designate OPA or any OPA physician as his attending physician in writing. Again, to this point Employee had still not violated the statute or applicable regulations.

On October 14, 2011, Davis became involved in this case as ASRC's agent. As will be discussed in more detail below, Davis suggested Dr. McNamara and provided his name to Employee. At Davis' recommendation and direction, Employee designated Dr. McNamara as his attending physician in writing effective November 1, 2011. Therefore, on November 1, 2011, Employee changed his attending physician from Dr. McIntosh to Dr. McNamara. Dr. McNamara referred Employee to Dr. Jessen, MediCenter and First Choice Home Healthcare, all medical specialists. Employee needed a form signed by a physician to obtain public assistance from the State of Alaska, so he went to Dr. Hansen at Kenai Medical Center. As Employee went to Dr. Hansen to complete a form required to obtain public assistance, and not to obtain "treatment, advice, an opinion, or any type of service" for his work injury, Dr. Hansen's visit does not count against Employee's rights under AS 23.30.095(a).

However, on January 18, 2013, Employee returned to Dr. McIntosh for services related to his work injuries. There is no evidence Dr. McNamara or Employee moved 50 miles or more or that at this juncture Dr. McNamara refused to provide further services. Employee's "substitution physician" argument is not persuasive. There is no evidence Dr. McNamara referred Employee to Dr. McIntosh. Therefore, under AS 23.30.095(a) and 8 AAC 45.082(b)(2) and (4), Employee's return to Dr. McIntosh was an unlawful physician change. *Witbeck*. Dr. McIntosh subsequently referred Employee to Dr. McNamara, whom he was already seeing for the work injury. She also referred him to Dr. Bock and later LCSW Weeks for psychological treatments. Meanwhile, Dr. McNamara referred Employee to ASI.

Shortly thereafter, on September 29, 2014, Employee returned to Dr. Hall at OPA, having become disillusioned with Dr. McNamara's care. Under the regulations, Employee's return to OPA would be yet another unlawful physician change. *Witbeck.* Dr. Hall subsequently referred Employee back to Dr. Jessen and to Kenai Spine, where Dr. Bote eventually performed additional right shoulder surgery. Dr. Macintosh, Dr. Bock, LCSW Weeks, Dr. Hall, Dr. Jessen and Kenai Spine were all unlawful physician changes and referrals. The remaining question is whether or not the law requires that these providers' records and opinions should be excluded.

6) Should any medical records from Employee's physicians be excluded in this case?

The 1988 amendments to AS 23.30.095 did not provide for a sanction excluding unlawfully obtained medical records and related opinions as evidence. While previous administrative regulations provided that an employer may not be required to pay medical expenses associated with an injured worker's unlawfully obtained medical opinions, the regulations likewise did not provide for an exclusion sanction if either party violated the physician change statute. Occasionally parties raised record and opinion exclusion as an issue and agency decisional law interpreted AS 23.30.095 to provide for such a sanction. Several decisions held that unlawfully obtained medical records and opinions would not be considered as evidence. *Sherrill*; *Anderson.*

In 2007, the Alaska Workers' Compensation Appeals Commission overruled these previous decisions and held, absent a regulation to the contrary, the law did not provide for an evidence exclusion sanction when an injured worker unlawfully obtained medical evidence. The commission said all otherwise admissible relevant evidence should be considered. *Guys With Tools*. Effective July 9, 2011, regulation 8 AAC 45.082(c) overruled *Guys With Tools* and provides that reports, opinions or testimony from unlawfully obtained physicians will not be considered in a case for any purpose. 8 AAC 45.005(i). These various, changing rules must all be applied to Employee's situation.

a) *Guys With Tools* applies to some of Employee's physician selections.

ASRC and Udelhoven seek an order excluding all of Employee's unlawfully obtained medical records and opinions and any resultant unlawful referrals under 8 AAC 45.082(c). Employee's case is complicated because Employee's medical care from March 30, 2010 through July 8,

2011, falls under the *Guys With Tools* rubric, which is binding precedent. AS 23.30.008(a). The regulation upon which ASRC and Udelhoven rely to obtain exclusion, 8 AAC 45.082(c) is "primarily legislative" because it codifies a new rule intended to overrule *Guys With Tools*; 8 AAC 45.005(i). It does not apply retroactively. AS 44.62.240. Between March 30, 2010 and July 8, 2011, Employee did not violate either the statute or the applicable regulations. Therefore, records created during this time and any related opinions from these providers will not be excluded as evidence. Furthermore, pursuant to *Guys With Tools*, Employee's medical records created between March 30, 2010 and July 8, 2011, and medical opinions related thereto, would be admissible as evidence in this case regardless of whether or not they were unlawfully obtained in violation of AS 23.30.095(a) or 8 AAC 45.082.

b) The mid-case law change allows Employee the right to start over with physician selections.

Effective July 9, 2011, amended 8 AAC 45.082(c) applies only prospectively to Employee's medical care. Further, as Employee had already made a physician selection on April 10, 2010, under prior precedent *Guys With Tools* it would be unfair and would violate Employee's right to due process to treat Dr. McIntosh as Employee's first selected physician for this case. Therefore, the relevant inquiry focuses on who Employee selected as his first attending physician after July 9, 2011, and whether or not he made unlawful physician selections or changes thereafter.

Table I shows Employee returned to OPA and saw Dr. Hall on August 8, 2011. However, ASRC had previously selected OPA and Employee never designated OPA or any of its physician's as his attending physician in writing. Therefore, OPA was not Employee's designated physician. 8 AAC 45.082(b)(2) and (4). Dr. Hall referred Employee to specialists Drs. Botson and Kornmesser, both medical specialists in the OPA clinic. Employee did not designate either doctor as his attending physician. To this point, Employee had still not selected his first post-law-change attending physician for purposes of ASRC's petition to exclude evidence. But, on November 1, 2011, Employee changed from Dr. Hall to Dr. McNamara in writing, thus designating Dr. McNamara as his attending physician. 8 AAC 45.082(b)(4)(C).

c) Interference by Davis with Employee's physician selection justifies waiving Employee's written designation of Dr. McNamara as his attending physician.

Davis became involved in this case on October 14, 2011. Davis contacted Employee, who already had shoulder surgery scheduled with Dr. Hall, and asked if he wanted another opinion. He agreed. On November 1, 2011, Employee designated Dr. McNamara as his attending physician in writing and obtained services from him. ASRC and Udelhoven contend once designated as Employee's attending physician in writing, Dr. McNamara became Employee's designated doctor under AS 23.30.095(a) and 8 AAC 45.082(b). But the inquiry does not end here. Employee contends Davis interfered with his physician selection under AS 23.30.095(i). ASRC contends it simply offered Employee another opinion, and he accepted. The courts have jurisdiction to decide if a person has committed a misdemeanor. *Rayburn.* But this decision may consider legislative intent expressed through criminal statutes in the Act while fashioning remedies based on other Act provisions. *Dougan*. Thus, this decision does not decide if a crime has been committed but does consider Davis' actions as they reflect on Employee's change from Dr. Hall to Dr. McNamara.

There is a factual dispute over what Davis said to Employee concerning Dr. Hall versus Dr. McNamara. Putting that dispute aside for a moment, it is undisputed Employee had shoulder surgery already scheduled with Dr. Hall when Davis contacted him. He did not contact her. He was satisfied with Dr. Hall. It is undisputed Employee never heard of Dr. McNamara before Davis mentioned his name, and Davis acknowledged, contrary to ASRC's assertions, Employee only "researched" Dr. McNamara's reputation after Davis suggested Employee go to him for a second surgical opinion. It is further undisputed that Employee did not solicit an opinion from Davis about Dr. Hall or his ability to perform surgery. Davis aggressively encouraged and influenced Employee to change his surgeon from Dr. Hall to Dr. McNamara.

These facts are distinguishable from the earlier situation where Employee, after he had been treated by Dr. Ross, asked Palazatto for another opinion and she suggested OPA. ASRC and Employee agreed he needed a second opinion, had no doctor in mind and approached Palazatto to discuss an appropriate physician. Palazatto did not "interfere" with Employee's selection; he asked her for assistance and she provided it. By contrast, in November 2011, when Davis

intentionally "came between" Employee and Dr. Hall "for some purpose," Davis intervened in and meddled with Employee's physician selection and her actions define "interfere" or "interference." Even ASRC's attorney in questioning Dr. McNamara said Davis was maybe "steering somebody away from Dr. Hall to you." Drs. Hall's and McNamara's credentials, surgical results and malpractice litigation histories notwithstanding, AS 23.30.095(i) has no adjective modifying the word "interference." It simply makes "interference" -- coming in or between for some purpose, intervening, or meddling, -- illegal.

As for what Davis told him about Dr. Hall, Employee contends Davis duped him into changing physicians from Dr. Hall to Dr. McNamara primarily by telling him Dr. Hall was not a "good doctor." Davis denies this stating, "I do not use those words." But the evidence and Davis' own hearing testimony belie her assertion. At hearing, when discussing her October 2011 conversation with Palazatto about a possible EME with Dr. Marble, Davis said she told Palazatto to put the EME on hold because all Davis and ASRC "really needed" was an opinion "from a good doctor" opining whether or not Employee needed another right shoulder surgery as Dr. Hall had recommended. Davis' hearing testimony corroborates Employee's testimony that Davis told him Dr. Hall was not a good doctor. Even if Davis had told Employee the exact phrase she used at hearing, *i.e.*, all she and ASRC needed was an opinion "from a good doctor," her statement implied that Davis did not think Dr. Hall was a good doctor. At hearing Davis admitted her statement could be construed in this manner. It is undisputed Davis held herself out to Employee as a nurse with special knowledge about local medical providers and with expertise in helping injured workers navigate the workers' compensation process. Whatever her exact wording was, Davis sent a clear message to Employee stating Dr. Hall was not a good doctor while Dr. McNamara was the best shoulder surgeon in Alaska. Employee is credible and Davis is not. AS 23.30.122; *Smith*.

At hearing, ASRC asserted it made no sense for Palazatto to set Employee up with Dr. Hall at OPA only to hire Davis to lure him away to Dr. McNamara. Again, the evidence belies ASRC's assertion. Palazatto testified she was unfamiliar with Dr. Hall and had no opinion about him. Then Palazatto hired Davis as ASRC's nurse case manager. Davis, on the other hand, based solely on her hearing testimony about needing an opinion from a "good doctor," was familiar

with Dr. Hall and had formed an opinion about him as well as one about Dr. McNamara. Davis accepted a referral in this case from Palazatto on October 13, 2011. The next day she called Employee specifically to discuss a second opinion with Dr. McNamara. By October 16, 2011, Davis had sent Dr. McNamara's office an urgent facsimile requesting, "a second opinion ASAP!" Her message to Dr. McNamara is somewhat disparaging to Dr. Hall as it suggests Employee was scheduled for "yet another procedure with Dr. Hall at OPA. Help!" Thus, while Palazatto may not have had an opinion about Dr. Hall, her agent Davis did and Palazatto relied upon Davis' opinions. At hearing, Palazatto testified she got Davis involved because Davis knows local medical professionals. Though she denied hiring Davis to get Employee away from Dr. Hall, Palazatto trusts Davis, hires her regularly, and respects Davis' guidance and advice. Therefore, while Palazatto did not specifically hire Davis to lure Employee away from Dr. Hall, Palazatto followed Davis' recommendations, which led to the same result.

Other evidence in this case raises concerns over Davis' involvement. Davis admits she told Employee she was there to help him get the best possible care and would take care of arranging for necessary medical treatment. Davis has four to five open cases with ASRC at any given time. Dr. McNamara testified Davis was a "good referral source." She has four to seven patients with Dr. McNamara on a regular and continuous basis. Davis said she has known Dr. McNamara for 20 years. Her expertise and familiarity with Dr. McNamara's office gives her special access to him. These facts were not included with the information Davis told Employee when she introduced herself to him or at any time thereafter. Davis said Dr. McNamara's November 21, 2013 answers to her questionnaire came from him and she simply recorded his responses to her questions. Dr. McNamara testified the answers were not his. Dr. McNamara's 20 year familiarity with Davis and his willingness to allow her to complete questionnaires he later signs and dates without review is disturbing. Given Davis' professed expertise, criticism of Dr. Hall and lavish praise of Dr. McNamara, it is not surprising she got Employee to accept an unsolicited opinion with Dr. McNamara and then directed Employee to hand-write a physician "change" note.

At hearing, Davis conceded she could not "remember the specifics" involving Employee's hand-written note changing from Dr. Hall to Dr. McNamara. Employee credibly stated Davis told him

to write the note, and Davis did not deny this assertion. Further, Employee said as he was writing the note, Davis corrected him and told him to alter the statement's wording to reflect a physician change rather than a request for a second opinion. Davis did not dispute this testimony either. There would have been no reason for Employee to write the note or to make this alteration unless Davis told him to do it. She was familiar with change-of-physician rules and initially said she knew there was a difference between requesting permission from ASRC to see Dr. McNamara for a second opinion versus Employee unilaterally changing to Dr. McNamara as his attending physician. Davis subsequently recanted her statement and said she thought it mattered little what Employee wrote on the note because, "It seems to mean the same thing to me." Davis' testimony is not credible. AS 23.30.122; *Smith*.

Employee thought he was getting a "second opinion," because that is what Davis said she offered him. But Davis insisted he sign a statement changing from Dr. Hall to Dr. McNamara. Given her professed "substantial knowledge" of physician change laws, Davis knew if Employee merely requested a second opinion and ASRC agreed to it from ASRC's selected physician, it would not constitute Employee designating a physician under 8 AAC 45.082(b)(2)(i) and (iii). By contrast, Davis also knew Employee would legally "change" his attending physician if, in writing, he designated Dr. McNamara as his attending physician even though ASRC suggested and scheduled the appointment, pursuant to 8 AAC 45.082(b)(4)(C).

Davis' role and her "duty" to Employee are questionable. There is no statute or regulation expressly providing for nurse case managers and no requirement Employee cooperate with Davis in any respect. Davis said she does not provide or direct medical care or treatment. Therefore, her role and duty were not as a medical provider. She told Employee she would ensure he obtained the best possible medical care. Yet Davis decided some tests Dr. Jessen recommended on Dr. McNamara's referral were inappropriate, made medical decisions, and gave medical advice telling Employee, for example, there was no connection between an orthopedic injury and a sleep study. Even though Dr. Jessen opined Employee injured his neck when he fell on the stairs, it took about a year for Employee to obtain the recommended cervical MRI. Further, though in her view she had a "duty" to Employee, Davis said it was also her "duty" to prevent ASRC from incurring non-work-related expenses. In this case, these duties clearly conflict.

Davis also testified if her employer's goal was to have an injured worker's condition be found not work-related, she would facilitate that goal. Davis said her clients include employers, third-party administrators and insurance companies. Notably absent from her client list were injured workers. Davis conceded she was aware ASRC was looking for medical evidence to prove Employee's left shoulder was not work-related and she helped obtain this evidence. Absent from the testimony was any indication Davis ever advised Employee her professed concern with his best interests may, at some point, conflict with her concern for ASRC's best interests.

In short, workers' compensation cases are adversarial. *Seybert*. The Alaska Supreme Court stated there is no fiduciary duty between the workers' compensation insurance adjuster and the injured worker. *Id*. Likewise, there is no fiduciary duty between the adjuster's agent nurse case manager Davis and Employee. At a minimum, Davis owed a duty to fully inform Employee of her role, including the adversarial nature of workers' compensation cases, his right to decline her assistance altogether and at least the possibility if not the likelihood her client's interests and his interests would someday diverge. The following example from Employee's case illustrates why this is important: So long as treatments and referrals mutually benefited Employee and ASRC, ASRC was happy to assist him. Once ASRC obtained Davis, who had formed strong opinions about Dr. Hall, not initially shared by Palazatto, and once Dr. Jessen suggested potential new work-related injuries and associated medical care, not necessarily in keeping with ASRC's best interests, Davis' focus shifted from Employee's interests to ASRC's interests, creating an undisclosed conflict of interest. The fact Employee eventually obtained a competent, workers' compensation attorney beginning May 10, 2012, is immaterial. By the time Constantino entered his appearance, the damage had already been done. *Rogers & Babler*.

The legislature requires the Act be interpreted to ensure, among other things, "fair" results to injured workers. AS 23.30.001(1). Based upon the above facts and analysis, specifically Davis' interference with Employee's selection of Dr. Hall to perform his second surgery, it would be unfair to hold Employee to his November 1, 2011 written designation of Dr. McNamara as his attending physician. The legislature made such interference a crime. Logically, illegal interference should not impugn Employee's legal right to choose his own physician without

undue influence from ASRC's agent. *Dougan*. Davis interfered and improperly manipulated Employee and persuaded him to designate Dr. McNamara as his attending physician.

ASRC's requested exclusion remedy arises under an administrative regulation, 8 AAC 45.082(c), not under the statute. The specific procedure whereby Employee designates and changes a physician is similarly set forth in administrative regulations, 8 AAC 45.082(b)(2) and (4). Procedural requirements in the regulations may be waived or modified to prevent "manifest injustice" to a party. 8 AAC 45.195; *Miller*. Given this case's unique and specific circumstances, manifest injustice would inure to Employee if his written designation of Dr. McNamara as his attending physician is not excused through waiver, because his subsequent physician selections would be unfairly and irrevocably altered and would violate AS 23.30.095 and 8 AAC 45.082(b)(2) and (4). Dr. McNamara will not be considered Employee's designated attending physician. *Miller.*

Employee also raised an equitable-estoppel argument. He also contended Dr. McNamara ultimately refused to provide additional medical services in 2014 so Employee was entitled to a "substitution physician." Given the above result, this decision need not reach either the equitable-estoppel or substitution physician arguments.

d) Employee subsequently made an unlawful change in his attending physician and those providers' records and related opinions will be excluded.

As discussed above, Dr. McNamara was ASRC's selected physician. His referrals to Dr. Jessen, MediCenter and First Choice Home Healthcare do not count against Employee because Employee never designated those providers as his attending physicians in writing. Dr. Hansen does not count against Employee's choices because he saw Dr. Hansen for a form for interim assistance purposes only. On January 18, 2013, Employee made his first post-law-change physician selection when he saw Dr. McIntosh and she provided care connected to his work injury. Dr. McIntosh referred Employee back to Dr. McNamara who referred him back to Dr. Jessen. Both physicians are medical specialists. On April 29, 2014, Dr. McIntosh referred Employee to Dr. Bock, also a medical specialist. ASRC's selected physician Dr. McNamara referred Employee to ASI on August 18, 2014. Employee never designated any physician with

ASI as his attending physician in writing. On September 29, 2014, Employee changed his attending physician from Dr. McIntosh to Dr. Hall at OPA. This constitutes Employee's post-law-change "change in the employee's choice of attending physician." AS 23.30.095(a). Though Employee gave no prior notice he was changing from Dr. McIntosh to Dr. Hall as the statute requires, neither the statute nor the administrative regulations provide a sanction for failing to give notice "before the change." Dr. Hall referred Employee back to Dr. Jessen and to Kenai Spine where he saw PA-C Winter and subsequently Dr. Bote. Given the above analysis, to this point Employee had not violated 8 AAC 45.082(b)(2) or (4).

However, on January 5, 2015, Employee saw LCSW Weeks at Dr. McIntosh's referral. Once Employee changed his attending physician from Dr. McIntosh to Dr. Hall effective September 29, 2014, he could not subsequently return to Dr. McIntosh in January 2015 for treatment for his work injury or for a referral to another provider for that purpose. LCSW Weeks treated Employee's depression, some of which he attributes to his work injury and its sequela. Therefore, applying AS 23.30.095(a) and 8 AAC 45.082(b)(2), (4) and (c), Employee's return to Dr. McIntosh for his work injury at any time after September 29, 2014, and any referrals from Dr. McIntosh to another provider thereafter, constituted an unlawful change of physician in violation of AS 23.30.095(a) and 8 AAC 45.082(c).

At hearing, Employee said Dr. McIntosh also referred him to Dr. Kahn, though her records are not found in the agency file. It is possible Dr. McIntosh referred Employee to Dr. Kahn before he changed his attending physician to Dr. Hall. This fact cannot be determined from the hearing record. If that is the case, Dr. Kahn's reports and opinions would not be excluded under 8 AAC 45.082(c), since Dr. Kahn would be a valid referral to a specialist by Employee's then-attending physician. If, on the other hand, Dr. Macintosh referred Employee to Dr. Kahn after he changed his attending physician to Dr. Hall effective September 29, 2014, Dr. Kahn's reports and opinions will be excluded. Dr. McIntosh's and LCSW Weeks' reports and opinions created after September 29, 2014, will be excluded and their related opinions and testimony in any form will not be considered for any purpose in this case. This exclusion does not apply to records, opinions and testimony from Dr. McIntosh were her valid referrals created at previous times when she was an appropriate attending physician.

CONCLUSIONS OF LAW

1) The screen print attached to ASRC's May 5, 2015 medical summary will not be considered at the May 13, 2015 hearing.
2) The oral order excluding Exhibit 19 on Employee's hearing brief from consideration at the May 13, 2015 hearing was correct.
3) The oral order denying Employee's request for written closing arguments was correct.
4) The oral order refusing to allow ASRC to file a divorce court transcript post-hearing was correct.
5) Employee made an unlawful change in his attending physician.
6) Some medical records from Employee's physicians will be excluded in this case.

ORDER

1) ASRC's petition to exclude medical opinions is granted in part and denied in part.
2) Employee's November 1, 2011 written designation of Dr. McNamara as his attending physician is excused through waiver under AS 23.30.195.
3) Employee selected Dr. McIntosh as his first post-law-change attending physician effective January 18, 2013.
4) Employee changed his attending physician from Dr. McIntosh to Dr. Hall effective September 29, 2014.
5) Employee's return to Dr. McIntosh for his work injury after September 29, 2014, and any referrals from her to another provider thereafter, constituted an unlawful physician change.
6) Any reports, opinions or testimony from Dr. McIntosh or medical providers to whom she referred Employee after September 29, 2014, will not be considered in this proceeding in any form or for any purpose.
7) Reports, opinions and testimony from Dr. McIntosh or medical providers to whom she referred Employee during times she was an appropriate attending physician will not be excluded.
8) Dr. Hall is Employee's current attending physician for this case.

Dated in Anchorage, Alaska on June 26, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Donna Phillips, 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 James A. "Drew" Freeman, employee / claimant v. ASRC Energy Services, employer; Udelhoven Oil Field System Services, and its insurer Ace Fire Underwriters Insurance Co. insurer / defendants; Case No. 201003705; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 26, 2015.

_____
Pam Murray, Office Assistant