ALASKA WORKERS' COMPENSATION BOARD

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

JOANNE DEHUT, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201326345 AWCB Decision No. 15-0115 Filed with AWCB Anchorage, Alaska on September 15, 2015

Joanne Dehut's (Employee's) July 8, 2015 petition for a second independent medical evaluation (SIME) was heard on August 25, 2015, in Anchorage, Alaska, a date was selected on July 14, 2015. Attorney Michael J. Patterson appeared and represented Employee, who appeared and testified. Attorney M. David Rhodes appeared and represented the State Of Alaska (Employer). As a preliminary matter, Employer withdrew its March 19, 2015 Petition to Strike Dr. Rhyneer's medical reports and opinions on the grounds Employee made an unlawful change of physicians, which had also been a scheduled hearing issue. The record was left open until August 31, 2015, to allow Employee to file a supplemental attorney fee affidavit and to respond to Employer's objection to the first fee affidavit. The record closed on August 31, 2015.

ISSUES

Employee contends an SIME should be ordered because a significant medical dispute regarding causation and treatment exists between an attending physician and the Employer's Medical Evaluation (EME) physician. Employer contends an SIME should not be ordered because no significant dispute exists and, even if one did, an SIME would not assist in resolving the dispute;

because the record already includes the opinions of multiple orthopedic specialists, Employer contends obtaining another opinion would only increase costs and delay resolution of the case.

1) Should an SIME be ordered?

Employee contends she is entitled an award of fees and costs if she prevails on her petition for an SIME issue, and for her resistance to Employer's Petition to Strike, which was withdrawn as a preliminary matter at hearing. Employer contends attorney's fees and costs were not set as a hearing issue in a prehearing conference summary, and therefore should not be considered at this time. Employer further contends both an SIME and attending physician status are collateral issues, not benefits, and fees are inappropriate prior to a decision on the merits of Employee's claim.

2) Should attorney's fees and costs be awarded?

FINDINGS OF FACT

1) On October 23, 2013, Employee filed a Report of Injury stating she injured her left knee on October 7, 2013, as a result of a fall at work. (Report of Injury, October 23, 2013.)

2) On October 10, 2014, Employer controverted all benefits, citing a September 29, 2014 report from attending physician Doug Vermillion, M.D., who opined the substantial cause of her need for further left knee treatment was underlying osteoarthritis. (Controversion, filed October 14, 2014; Vermillion chart note, September 29, 2014.)

3) On October 20, 2014, Employee sought a second opinion from John D. Frost, M.D., who opined a total left knee replacement was "probably the best thing for her." Dr. Frost stated, "I do not believe that her current need for a joint replacement is related to her fall at work and I have told her this. I believe that the fall at work represented a temporary aggravation of a pre-existing underlying condition." He noted Employee expressed some dissatisfaction with the original treating physician's office, and gave her the names of other orthopedic surgeons in Anchorage who could do her joint replacement surgery. (Frost chart note, October 20, 2014.)

4) On November 11, 2014, Employee was evaluated by George D. Rhyneer, M.D., whose treatment plan read:

> [Employee] has end stage osteoarthritis of the left knee. She reportedly had a fall at her workplace in October of 2013 which was the start of her knee pain. She reportedly had an asymptomatic knee prior to this injury. It is possible that this

> trauma had exacerbated underlying symptoms and hastened wear. She has failed conservative treatment and will require a total knee arthroplasty.
> (Rhyneer chart note, November 11, 2014.)

5) On December 8, 2014, Dr. Rhyneer performed a total left knee arthroplasty on Employee. (Operative Report, December 8, 2014.)

6) On February 26, 2015, Employee filed a workers' compensation claim for temporary total disability (TTD) from December 8, 2014 through February 22, 2015, penalty and interest. (Claim, February 22, 2015.)

7) On March 19, 2015, Employer petitioned to strike Dr. Rhyneer's medical reports and opinions on the grounds Employee made an unlawful change of physicians. Employer also asked for a finding it was not responsible for payment of services rendered following an unlawful change of physicians. (Petition, March 19, 2015.)

8) On March 23, 2015, Employer controverted medical and disability benefits after September 1, 2015, based on the opinions of Drs. Vermillion and Frost. (Controversion, filed March 27, 2015.)

9) At a prehearing on April 9, 2015, Employee verbally amended her claim to add medical costs and attorney's fees and costs. (Prehearing conference summary, April 9, 2015.)

10) On May 1, 2015, Jonathan A. Metzger, PA-C, wrote Employer's adjuster on Rhyneer Caylor Clinic letterhead:

> [Employee] was initially seen in our office in November, 2014 for significant osteoarthritis, a common degenerative joint disease of the left knee. Understandably, this degeneration is a long-standing disorder which often takes years to develop. This said, it is very common for patients to have radiographic evidence of rather substantial wear and be completely asymptomatic. A traumatic event, such as a fall can be the sole precipitating factor which can have a cascading effect, turning a completely pain-free joint into a debilitating condition. Likewise, an injury such as a fall can dramatically worsen both symptoms and also hasten the degeneration of the joint. In such instances . . . the only corrective treatment is a total knee replacement. . . . I do believe it more than reasonable to assume that her fall at work, sustained in October 2013 was the substantial precipitating factor resulting in a total knee replacement.
> (Metzger letter, May 1, 2015.)

11) On May 1, 2015, Dr. Rhyneer's office indicated on a "check-the-box" form that the October 7, 2013 work injury was the substantial cause of the need for Employee's total left knee replacement. A hand-written note opined, "The fall which occurred 10/13 was likely the inciting

event which worsened osteoarthritis of the left knee – See attached letter." The form was directed to both Dr. Rhyneer and PA Metzger, and was signed by the later. ("Check-the-box" form, May 1, 2015; Observation, judgment.)

12) On June 19, 2015, Employee attended an EME with John Ballard, M.D., who diagnosed a left knee contusion, resolved, and left knee arthritis status post left total knee replacement. Dr. Ballard opined "the substantial cause of the arthritic condition and need for surgery would not be the work-related injury, but it would be the preexisting degenerative changes in her knee along with her age and body habitus." He further opined he did not believe the work injury was the substantial cause of medical treatment provided from September 29, 2014 through the examination date. (EME report, pp. 9-10, June 19, 2015.)

13) On July 7, 2015, Employee petitioned for an SIME with an orthopedic specialist, based on a dispute regarding causation and treatment between PA Metzger and Dr. Ballard. (Petition and SIME form, filed July 8, 2015.)

14) On July 13, 2015, Employer opposed the SIME petition, contending that, in light of the opinions of Drs. Vermillion and Frost, the dispute outlined by Employee was not significant and an SIME would not assist the board. (Response in Opposition to Petition for SIME, July 13, 2015.)

15) At a prehearing conference on July 14, 2015, a hearing was set for August 25, 2015, on the issues of Employer's March 19, 2015 Petition to Strike and Employee's July 8, 2015 Petition for an SIME. The prehearing conference summary reiterated that Employee's February 26, 2015 claim had been verbally amended to include temporary total disability (TTD) from December 8, 2014 through February 22, 2015, medical costs, penalty, interest and attorney's fees and costs. (Prehearing conference summary, July 14, 2015.)

16) Neither party objected to the July 14, 2015 prehearing conference summary. (ICERS computer database.)

17) On August 20, 2015, Employee filed an affidavit seeking an award of $8,039 in attorney's fees and costs. Employee noted the amount would be supplemented after the August 25, 2015 hearing. (Affidavit of Attorney's Fees and Costs, August 20, 2015.)

18) On August 24, 2015, Employer objected to the Affidavit of Attorney's Fees and Costs, noting fees and costs were not set as a hearing issue. Employer contended a fee award is inappropriate because the only issues scheduled for hearing were collateral and, even if successful, would not

result in Employee's receiving a benefit. Employee further contended an SIME is only an administrative tool, and the board should consider who ultimately is successful on the claim, not who prevails on collateral issues or at interlocutory proceedings. (Objection to Affidavit of Attorney's Fees, August 24, 2015.)

19) At hearing on August 25, 2015, Employer withdrew its March 19, 2015 Petition to Strike Dr. Rhyneer's medical reports and opinions. Employer stated it did so based on information revealed for first time in Employee's hearing brief. (Record.)

20) The parties agreed to argue the issue of attorney's fees and costs, even though it had not been set as a hearing issue in the July 14, 2015 prehearing conference summary. The record was held open until August 31, 2015, to allow Employee to file a supplemental attorney fee affidavit and to respond to Employer's objection to Employee's Attorney Fee affidavit. (*Id.*)

21) On August 31, 2015, Employee filed a supplemental affidavit itemizing additional attorney and paralegal fees of $6,560, for a total of $14,599 ($14,570 fees plus $29 costs). Employee also responded to Employer's August 24, 2015 Objection to Affidavit of Attorney's Fees, contending that prehearing conference summaries memorialized that attorney's fees and costs were at issue, prior board decisions had awarded attorney's fees where an employer unsuccessfully resisted an employee's request for an SIME, and Employee's attorney was also entitled to fees for resisting and inducing Employer to withdraw its Petition to Strike. (Supplemental Affidavit of Attorney's Fees after Hearing; Response to Opposition to Request for Attorney's Fees and Costs; August 31, 2015.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body

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

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . .
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
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> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . .
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. . . .
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> **AS 23.30.110. Procedure on claims.**
> (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability . . . and the board may hear and determine all questions in respect to the claim.
> . . .
> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.
> . . .

The language "all questions" in AS 23.30.110(a) is limited to questions raised by the parties or by the agency upon notice duly given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

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

An SIME under §095(k) may be ordered when a medical dispute exists between physicians for the employee and the employer, and the "dispute is significant or relevant to a pending claim or

petition and . . . an SIME would help the board resolve the dispute. . . . In the absence of opposing medical opinions between employer and employee physicians, there cannot be a medical dispute." The purpose of an SIME is to assist the board. *Bah* at 4; *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007.) at 8. Under §110(g) the board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. *Bah* at 5. "Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in the evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board." *Id.*

Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage,* AWCB Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co*., AWCB Decision No. 98-0076 (March 26, 1998). The Commission described an SIME as "an investigative tool exercised by the board to assist the board by providing disinterested information." *Olafson v. State of Alaska, Dept. of Transportation and Public Facilities*, AWCAC Decision No. 061 (October 25, 2007) at 15. The board has long held the SIME is not intended to inure to the benefit of either party; rather, it is "an administrative tool meant to facilitate the resolution of disputed claims." *See, e.g., Rockstad v. Chugach Eareckson Support Services,* AWCB Decision No. 08-0208 (November 6, 2008); *Bass v. Veterinary Specialists of Alaska,* AWCB Decision No. 08-0093 (May 16, 2008); *Cossette v. Providence Health Systems,* AWCB Decision No. 08-0013 (January 11, 2008); *Steele v. Providence Alaska Medical Center,* AWCB Decision No. 06-0322 (December 6, 2006); *Syren v. Municipality of Anchorage,* AWCB Decision No. 06-0087 (April 20, 2006); *Gamez v. United Parcel Service,* AWCB Decision No. 05-0289 (November 8, 2005); *Toskey v. Trailer Craft, Inc*., AWCB Decision No. 99-0058 (March 15, 1999).

> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter ....

A three-step analysis is used to determine the compensability of a worker's claim. Issues of credibility and evidentiary weight are deferred until the third step, after it has been determined an employer has rebutted a presumption of compensability raised by the employee, and the burden has shifted back to the employee to prove all elements of her case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991); *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *VECO, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

> **AS 23.30.145. Attorney fees**.
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board . . . When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer . . . otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.
> . . .

The Alaska Supreme Court has repeatedly and consistently recognized the importance of providing attorney's fees to injured workers' attorneys. *Rose v. Alaskan Village, Inc.*, 412 P.2d 503 (Alaska 1966) explained:

> AS 23.30.145(a) of the Alaska Workmen's Compensation Act enjoins the Board, in determining the amount of legal fees that are to be awarded, to take into consideration the nature, length and complexity of the services performed. . . .
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> In the instance where an employer fails to pay compensation or otherwise resists the payment of compensation, AS 23.30.145(b) provides:
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> > (I)f the claimant has employed an attorney in the successful prosecution of his claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation ordered. . . .

> We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorneys in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant. . . .

In *Johns v. State, Dept. of Highways*, 431 P.2d 148 (Alaska 1967), the court reiterated, "We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorney's [sic] in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant" (footnote omitted; *id*. at 154). Likewise, in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986) the court observed the objective in workers' compensation cases "is to make attorney fee awards both *fully compensatory and reasonable* so that competent counsel will be available to furnish legal services to injured workers" (emphasis in original). The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

The statute at AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009) at 5. Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Bouse v. Fireman's Fund Insurance Co.*, 932 P.2d 222, 241 (Alaska 1997) held that claimed fees could be reduced to account for issues on which the injured worker did not prevail. *Williams v. Abood*, 53 P.3d 134, 147-148 (Alaska 2002) likewise upheld an award of one-half of actual attorney's fees because the employee did not prevail on all his claims. On the other hand, fees for a *de minimis* amount of time spent litigating unsuccessful claims should not be disallowed if the employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 14-16 (May 11, 2011).

In *Adamson v. University of Alaska*, 819 P.2d 886, 888 (Alaska 1991), a settlement was reached and read into the record about half-way through a hearing on the merits, but the employee later refused to sign the written settlement document. The board denied the employer's petition to reduce the oral settlement to an order, and instead picked up the hearing where it had left off, without taking

additional evidence beyond that which the parties would have presented at the first hearing. The board ultimately denied the employee's claim in its entirety, also denying an award of attorney's fees for the employee's "success" in obtaining an opportunity to finish the continued hearing. The Court held the language of AS 23.30.145(b) "makes it clear" that to be awarded attorney's fees and costs, "the employee must be successful on the claim itself, not on a collateral issue. . . . The word 'proceedings' also indicates that the Board should look at who ultimately is successful on the claim, as opposed to who prevails at each proceeding." *Id.* at 895.

Citing *Adamson, Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184, 1193 (Alaska 1993) held the employee was not entitled to fees for his whole claim, because he lost on most issues; he was, however, entitled to full reasonable fees for those matters (temporary total disability benefits, penalty and interest) on which he prevailed. Also citing *Adamson, Sulkosky v. Morrison-Knudsen,* 919 P.2d 158, 170 (Alaska 1996) held an employee who partially prevailed on an interlocutory discovery dispute but lost on the merits of his case was not entitled to an award of attorney's fees.

Interlocutory board decisions have cited *Adamson, Childs* and *Cortay v. Silver Bay Logging,* 787 P.2d 103, 108 (Alaska 1990), in declining to award interim attorney's fees related to the determination of attending physician status. Both *Brewster v. Davison & Davison,* AWCB Decision No. 95-0218 (August 24, 1995) and *Coffin v. Alaska Airlines,* AWCB Decision No. 95-0214 (August 21, 1995) stated:

> The question of who is the attending physician is a collateral issue which had to be resolved on the way to deciding the employee's ultimate claim of compensability. Consequently, we conclude under *Adamson* that a fee award must be denied at this time. Should the employee ultimately prevail on [her/his] claim, the attorney's time may be considered in determining a reasonable and fully compensatory fee award.

Though AS 23.30.145(b) states attorney fees will be awarded where "an employer ... otherwise resists ... related benefits," the statute does not limit the "related benefits" to those that benefit the employee. Attorney's fees have long been awarded when an employer unsuccessfully resists an employee's request for an SIME. *See, e.g., Carter v. Anchorage Daily News,* AWCB Decision No. 13-0050 (May 10, 2013); *Worman v. Wal-Mart,* AWCB Decision No. 11-0026

(March 11, 2011); *McCain v. NANA Regional Corp.*, AWCB Decision No. 11-0025 (March 4, 2011); *Crawford v. Graff Construction LLC*, AWCB Decision No. 10-0038 (February 23, 2010); *MacConnell v. Testamerica Laboratories, Inc.*, AWCB Decision No. 09-0156 (September 30, 2009); *Stepanoff v. Bristol Bay Native Corp.*, AWCB Decision No. 09-0041 (February 26, 2009).

> **AS 23.30.395. Definitions**. In this chapter,
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> (3) "**attending physician**" means one of the following designated by the employee under AS 23.30.095(a) or (b):
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> (A) a licensed medical doctor;
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> (B) a licensed doctor of osteopathy;
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> (C) a licensed dentist or dental surgeon;
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> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
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> (E) a licensed advanced nurse practitioner; or
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> (F) a licensed chiropractor;
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> **8 AAC 45.065. Prehearings**.
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> (a) . . . . At the prehearing, the board or designee will exercise discretion in making determinations on
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> (1) identifying and simplifying the issues; . . .
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> . . .
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> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .
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> **8 AAC 45.070. Hearings**. . . .
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> . . .
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> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing. . . .

Unless modified, or the case of unusual and extending circumstances, the prehearing conference summary governs the issues and the course of the hearing. The board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon* at 256.

In *Ohyama v. Alaska Airlines, Inc.*, AWCB Decision No. 14-0155 (December 3, 2014), the employee, as a preliminary matter at hearing, requested interim attorney's fees and costs if he prevailed on his SIME petitions. The employer objected, contending even if the employee prevailed, the SIME was a collateral issue and not a benefit subject to a fee award. In an oral order, *Ohyama* held it was improper to address interim attorney's fees and costs because the issue was not listed on the controlling prehearing conference summary. *Ohyama* noted the employee had not waived his right to seek attorney's fees and costs should he prevail on his SIME petitions but, pursuant to 8 AAC 45.065(c), 8 AAC 454.070(g) and *Simon*, the issue would not be addressed at the instant proceeding.

> ***Collateral issue.*** A question or issue not directly connected with the matter in dispute. *Black's Law Dictionary*, Eighth Edition, 2004.

ANALYSIS

1) Should an SIME be ordered?

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

Here the record includes two distinct medical opinions from the Rhyneer Caylor Clinic. Dr. Rhyneer opined, "It is possible that [the work injury] exacerbated underlying symptoms and hastened wear," whereas PA Metzger unequivocally opined that the work injury was the substantial cause of the need for total left knee replacement. The fact that a physician assistant's opinion differs from his supervising physician's is legally irrelevant. Both licensed medical doctors and the licensed physician assistants who act under their supervision are included in the Act's definition of "attending physician." AS 23.30.395. The SIME statute does not require a party to demonstrate a medical dispute to any particular degree of certainty or to meet a legal standard. The statute simply requires "a medical dispute" regarding one of the enumerated issues between "the employee's attending physician and the employer's independent medical evaluation." AS 23.30.095(k). PA Metzger is an attending physician whose medical opinion is diametrically opposed to that of EME physician Dr. Ballard, who believes the work injury was

not the substantial cause of the need for surgery or medical treatment from September 29, 2014 forward. Employee has met the first prong of the test for an SIME.

The next question is whether the dispute is significant. Total knee replacement cannot be considered an insignificant issue; it is an expensive, invasive procedure, requiring considerable follow-up treatment and recovery time. *Rogers & Babler*. Employee does not seek just medical care; she also claims 11 weeks of TTD, from December 8, 2014 through February 22, 2015, another significant benefit. *Id.* Moreover, the dispute between PA Metzger and Dr. Ballard is significant in the most fundamental sense, because without causation there can be no compensability. The causation and treatment disputes here are significant and justify an SIME.

The third *Bah* factor is whether an SIME would be helpful to the board in resolving the dispute. If Dr. Vermillion, Dr. Frost, Dr. Rhyneer, PA Metzger and Dr. Ballard all shared a common opinion, Employer would be correct that an additional orthopedic opinion would be an unnecessary expense that would only delay resolution of the matter. However this is not the case. PA Metzger's opinion is unquestionably in the minority, but that does not mean it should be discounted at this interlocutory stage. When opinions diverge, the issue of which opinion should be given more weight may be raised at a hearing on the merits, but is unripe at a hearing to decide an SIME petition. Each physician's credibility, and the weight accorded to his opinion, are issues not properly addressed prior to the third step of an AS 23.30.120 presumption analysis at a hearing on the merits. *Koons; Norcon; Wolfer*. An employee's condition does not have to be complex or defy easy diagnoses and obvious treatment recommendations for an SIME to be appropriate. An SIME is proper if it will help the board understand the medical evidence, fill in any gaps in the medical evidence, and help the board ascertain the rights of the parties. *Bah.* Here an SIME with an orthopedic specialist will assist the board in resolving significant medical disputes, and therefore will be ordered under AS 23.30.095(k).

2) Should attorney's fees and costs be awarded?

Prehearing conferences are held so parties can identify and simplify issues. 8 AAC 45.065(a)(1). Once a prehearing conference is completed, the board designee issues a prehearing conference summary. Unless modified, the summary limits the issues for hearing and controls the hearing's

course. 8 AAC 45.065(c); 8 AAC 45.070(g); *Simon*. This avoids "trial by ambush" and allows parties to properly prepare for hearing. Here, Employee did not raise attorney's fees and costs associated with the SIME petition as an issue for the August 25, 2015 hearing, nor did he object to the July 14, 2015 prehearing conference summary. If Employee had raised the issue for the first time at hearing, it would not be proper for this decision and order to rule on it. *Simon*; *Ohyama*. However the instant fact pattern differs from *Ohyama* because here the parties agreed to argue the issue at hearing, and all relevant evidence and legal arguments were in the record prior to its closing. Under these circumstances, no due process rights are violated by deciding the attorney's fees issue now. On the contrary, delaying that decision would breach the legislative intents for quick and efficient claims resolution and for process and procedure to be as summary and simple as possible. AS 23.30.001(1); AS 23.30.005(h).

Employer cites *Adamson* to support its contention that if Employee prevails on the SIME issue at this hearing, a fee award is premature. *Adamson* held that to be awarded attorney's fees and costs "the employee must be successful on the claim itself, not on a collateral issue," and the factfinders "should look at who ultimately is successful on the claim, as opposed to who prevails at each proceeding." However *Adamson* and the two Supreme Court decisions that cite the above language, *Childs* and *Sulkosky*, are distinguishable in that none addresses an SIME dispute, much less identifies it as a collateral issue.

AS 23.30.095(k) and AS 23.30.110(g) are procedural in nature, not substantive, and an SIME has long been described as an investigative or administrative tool. *See, e.g., Olafson; Deal; Harvey; Rockstad; Bass; Steele.* However an SIME's utilitarian nature does not preclude it from also being an inurement. AS 23.30.145(b) does not limit attorney fee awards to only those cases where an employer resists paying compensation; rather, attorney fees are payable where an employer resists "related benefits" and an employee hires an attorney who successfully defends on his or her behalf. The Act does not state who needs to benefit. An SIME is not intended to inure to the benefit of either party; instead the factfinders and, ultimately, the decision-making process are the expected beneficiaries; the SIME physician is the *board's expert*. *Bah*. The board has long awarded attorney fees in cases where an employer unsuccessfully resisted an employee's request for

an SIME, and that will be done here as well. *Carter; Worman; McCain; Crawford; MacConnell; Stepanoff.*

Two interlocutory board decisions, *Brewster* and *Coffin*, cited *Adamson, Childs and Cortay* in denying a request for interim attorney's fees where the employee prevailed on the issue of who was an attending physician; both cases labelled it a "collateral issue which had to be resolved on the way to deciding the employee's ultimate claim of compensability," and noted the fee issue could be revisited if the employee ultimately prevailed at a hearing on the merits. However the instant case is distinguishable from *Brewster* and *Coffin* because here attending physician status was integral, not collateral, to the SIME dispute for which fees are being awarded. *Black's.* At hearing Employer, based on information contained in Employee's hearing brief, dropped its unauthorized change of physician defense. If Employer had prevailed on that issue, neither Dr. Rhyneer's nor PA Metzger's opinions would have been considered here, and consequently there would have been no medical dispute to warrant an SIME under AS 23.30.095(k).

In summary, Employee's SIME petition was vigorously litigated by a highly experienced and competent attorney, whose efforts were instrumental in prevailing over Employer's resistance. Considering the actual work performed (including inducing Employer to withdraw its Petition to Strike), the nature, length and complexity of the legal services, and the expected resulting benefit to the board and the adjudicative process, an award of $14,599 ($14,570 in fees plus $29 in costs) is reasonable and will be ordered.

CONCLUSIONS OF LAW

1) An SIME should be ordered.
2) Attorney's fees and costs totaling $14,599 should be awarded.

ORDER

1) Employee's July 8, 2015 petition for an SIME with an orthopedic specialist is granted.

2) A prehearing conference to address deadlines and instructions for compilation of the SIME binders is scheduled for Monday, September 28 at 1:30 p.m. with Workers' Compensation Officer Harvey Pullen.

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

4) Employer is ordered to pay $14,599 in attorney's fees and costs.

Dated in Anchorage, Alaska on September 15, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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Margaret Scott, Designated Chair

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Patricia Vollendorf, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 JOANNE DEHUT, employee / claimant; v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201326345; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 15, 2015.

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Pamela Murray, Office Assistant