ALASKA WORKERS' COMPENSATION BOARD

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

KENNETH A. KESSLER, Employee, Claimant, v. FEDERAL EXPRESS CORPORATION, Self-Insured Employer, Defendant.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200208396 AWCB Decision No. 15-0159 Filed with AWCB Anchorage, Alaska on December 11, 2015

Kenneth A. Kessler's (Employee) July 16, 2015 Petition for a Protective Order and Petition to Strike Defense Medical Evaluations was heard on September 29, 2015 in Anchorage, Alaska. The hearing date was selected on August 6, 2015. Attorney Michael Jensen appeared and represented Employee. Attorney Vicki Paddock appeared and represented Federal Express Corporation (Employer). At hearing the parties agreed Employee's July 16, 2015 request for a board order canceling Employee's August 10, 2015 employer's medical evaluation (EME) with Dr. Douglas Bald was moot, as the evaluation had already taken place. There were no witnesses. The record was held open until November 13, 2015 to allow the parties to submit additional briefing on the applicability of a regulation on a past act. The record closed on November 13, 2015.

ISSUES

Employee contends Employer made an allowable physician change when it sent Employee to an EME with Dr. Thomas Dietrich, but then impermissibly changed physicians beginning July 25, 2003, when it sent Employee to an EME with Dr. James Robinson. Employee contends that subsequent EMEs with Dr. Arthur Williams and Dr. Douglas Bald were also unauthorized,

excessive physician changes. Employee contends all EME reports generated by Drs. Robinson, Williams and Bald should be stricken from the record.

Employer contends it has not yet exercised its one permissible physician change, and the EMEs with Drs. Robinson, Williams and Bald were conducted through the proper statutory and regulatory processes. Employer therefore contends no EME reports should be stricken from the record.

1) Did Employer make any unlawful physician changes?

2) Should any medical records from Employer's physicians be stricken from the record?

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) On May 2, 2002, Employee experienced back pain while driving a transporter loader on a ramp. Alaska Regional Hospital emergency room staff diagnosed thoracolumbar strain. Employee subsequently was treated conservatively for both back and neck pain. Imaging revealed disc abnormalities at L3-4, L4-5, L5-S1, C5-6 and C6-7. (Medical records.)

2) On July 26, 2002, Employee attended a panel EME with Dr. Scot Fechtel, chiropractic orthopedist and medical neurologist, and Dr. Edward Grossenbacher, orthopedic surgeon. The EME physicians opined Employee could not return to work. (EME report, July 26, 2002.)

3) On August 27, 2002 and October 23, 2002, Dr. Fechtel issued addendum reports. In the latter, after reviewing nuclear bone scan and electrophysiologic test results, Dr. Fechtel opined Employee was medically stable. (EME addendum reports, August 27, 2002 and October 23, 2002.)

4) On November 14, 2002, Employee returned to work for a four-hour shift. While squatting to put a sticker on a box he experienced a severe flare-up of his low back pain with radiation into his right buttock. Treating physician Dr. Larry Levine opined Employee had an L4-5 disc protrusion with an annular tear and an L3-4 disc herniation on top of preexisting L5-S1 spondylolisthesis. (Partial Compromise and Release Agreement, September 21, 2012.)

5) On November 18, 2002, Dr. Levine opined. "I think the return to work [has] certainly reaggravated the previous injury and we are looking at the same situation including a lumbar disc herniation giving him referral pain." (Levine letter, November 18, 2015.)

6) On May 23, 2003, Employee attended an EME with neurosurgeon Dr. Thomas Dietrich. There is no evidence of a referral to Dr. Dietrich from another physician. Dr. Dietrich opined, "It would be very helpful to obtain a psychological evaluation." (EME report, May 23, 2003; Observation.)

7) On July 25, 2003, Employee attended a panel EME with Dr. Dietrich and Dr. James Robinson, physiatrist and psychologist. Dr. Robinson dictated the EME report, in which the two physicians opine jointly on diagnoses and recommendations, including the statement, "Based on the medical and psychological evaluations today, we believe that [Employee] warrants a diagnosis of Pain Disorder." (EME report, July 25, 2003.)

8) On February 22, 2008, Employee attended an EME with Dr. Robinson, who performed both physical and psychological evaluations, and wrote two separate reports: an "Independent Medical Evaluation" and a "Psychological Evaluation." In the former, Dr. Robinson notes, "On 7/25/03, [Employee] underwent a medical [EME] performed by me and Dr. Dietrich. Also, I performed a psychological [EME] on 7/25/03." In the latter report, Dr. Robinson twice refers to the contemporaneous physical evaluation:

> As indicated in my medical report, he appears to be significantly symptomatic in both the neck and the low back despite [surgical] procedures. . . . He did demonstrate dramatic pain behaviors during the physical examination. These are discussed in the medical report. (Two EME reports, February 22, 2008.)

9) On April 21, 2009, EME physician Dr. Robinson wrote Employer's counsel that, as part of his next evaluation, scheduled for June 27, 2009, he wanted to refer Employee to neuropsychologist Dr. Arthur Williams on June 29, 2209. (EME report and letter, April 21, 2009.)

10) On June 27, 2009, Employee was evaluated by Dr. Robinson, who again conducted both physical and psychological evaluations and wrote two separate reports. In his psychological report, Dr. Robinson made no specific reference to the contemporaneous physical examination, though he did opine Employee "has very chronic spinal pain that cannot readily be explained on the basis of structural lesions." (Two EME reports, June 27, 2009.)

11) Employee also attended an EME with Dr. Williams, who conducted a neuropsychological evaluation. It is unclear whether the evaluation took place as scheduled on June 29, 2009, because Dr. Williams' report is dated July 27, 2009; however at hearing Employee did not challenge

Employer's assertion Dr. Williams dated his report when he submitted it, not the date of the evaluation. Dr. Williams' chart review included Dr. Robinson's diagnoses from the July 25, 2003, February 22, 2008 and June 27, 2009 EME reports. However, Dr. Williams declined to answer any questions regarding the physical aspects of Employee' condition, instead deferring those questions to Dr. Robinson to answer. Dr. Williams' opinions were confined to Employee's psychological and cognitive state. (EME report, dated July 27, 2009; Record.)

12) On October 10, 2009, Dr. Robinson provided an addendum report in which he opined on both Employee's physical condition and psychological (specifically cognitive) abilities. (EME addendum report, October 10, 2009.)

13) On December 5, 2009, Dr. Robinson provided an addendum report in which he opined only on the physical aspects of Employee's condition. There was no psychological component to this report. (EME addendum report, December 5, 2009.)

14) On June 1, 2013, Employee attended an EME with Dr. Robinson, who again performed both physical and psychological evaluations, and wrote two separate reports. In the psychological report, Dr. Robinson referred twice to the contemporaneous physical examination, stating that both a description of Employee's daily activities and Dr. Robinson's Axis III diagnosis were found in the accompanying medical report. (Two EME reports, June 1, 2013.)

15) On July 6, 2015, Employer provided Dr. Robinson with updated medical records and asked him whether he believed an EME was necessary to address an injury to Employee's left shoulder, and if so, whether Dr. Douglas Bald, orthopedic surgeon, had the necessary expertise to conduct the EME. Dr. Robinson responded:

> I have been asked whether [Employee] should undergo an independent medical examination for his left shoulder problem I have trouble understanding the rationale for this request since, in my opinion, [Employee's] left should condition is unrelated to his work injuries of 5/2/02 and 11/14/02. . . . However, if, for administrative purposes, it is felt that [Employee] should be referred for an independent medical evaluation regarding his left shoulder condition, it would be very appropriate for Dr. Doug Bald to conduct said examination.

Dr. Robinson did not address Employee's psychological or cognitive conditions. (EME chart review, July 6, 2015; Employer hearing argument; Observation.)

16) On July 16, 2015, Employee petitioned: (1) for a protective order from attending an EME scheduled with Dr. Bald on August 10, 2015; and (2) to strike EME reports from July 27, 2009, October 10, 2009, December 5, 2009, and June 1, 2013, pursuant to AS 23.30.095(e). (Petition for

Protective Order and Objection to Scheduled Defense Medical Evaluation and Petition to Strike the Defense Medical Evaluations, July 16, 2015.)

17) At a prehearing conference on August 6, 2015, a hearing was set for September 29, 2015 on the issues of Employee's "Petition for Protective Order -- Objection to EME's [sic] and resulting reports based on excessive physician change." (Prehearing Conference Summary, August 6, 2015.)

18) On August 10, 2015, Employee attended an EME with Dr. Douglas Bald, orthopedic surgeon, who diagnosed chronic pain syndrome dating back to May 2, 2002; post-op two cervical fusions C4-C7; post-op decompression and fusion lumbar spine L5-S1; and mild impingement syndrome left shoulder. Dr. Bald opined Employee's left shoulder symptomatology was unrelated to either the May 2, 2002 or November 14, 2002 injuries. (EME report, August 10, 2015.)

19) At hearing on September 29, 2015, the parties agreed the protective order seeking to cancel Employee's August 10, 2015 EME with Dr. Bald was a moot point, as the EME had already occurred. The parties agreed the sole issue to be heard that day was whether the EME reports of Dr. Robinson, Williams and Bald should be stricken from the record. Employee clarified he was seeking all EME reports on or after July 25, 2003 be stricken from the record, instead of the specific reports listed in his July 16, 2015 petition. (Record.)

20) At hearing Employee contended Dr. Robinson represented Employer's first unlawful change of physician. In the alternative, Employee contended even if Dr. Robinson were found to be an allowable physician change, (1) the physical evaluation portions of Dr. Robinson's reports should be stricken as resulting from an excessive physician change, because Dr. Dietrich had only stated a psychological evaluation would be helpful, and Dr. Robinson performed both physical and psychological evaluations; (2) all of Dr. Robinson's reports dating after Employee saw Dr. Williams should be stricken, because Dr. Williams did not refer back to Dr. Robinson; (3) Dr. Robinson's referral to Dr. Bald was invalid, because it was done for administrative, not medical purposes, and therefore Dr. Bald's report should be stricken. (*Id.*)

21) At hearing Employer contended it had not yet exercised its one allowable physician change, because there were two separate work injuries: Drs. Fechtel and Grossenbacher evaluated Employee for the May 2, 2002 injury, and Dr. Dietrich evaluated him for the November 14, 2002 injury.

Employer further contended Dr. Robinson was a lawful referral from Dr. Dietrich, and Drs. Williams and Bald were lawful referrals from Dr. Robinson. (*Id.*)

22) The record was held open until November 13, 2015 to allow the parties to submit additional briefing on the applicability of a regulation on a past act. (*Id.*)

23) Employee has not given written consent to a change in EME physician. (ICERS computer database.)

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

Table I

Date:	**Providers:**	**Selected/Referred by:**
July 26, 2002	Grossenbacher and Fechtel	Selected by Employer
August 27, 2002	Fechtel	Selected by Employer
October 23, 2002	Fechtel	Selected by Employer
May 23, 2003	Dietrich	Selected by Employer
July 25, 2003	Dietrich	Selected by Employer
July 25, 2003	Robinson	Referred by Dietrich
November 8, 2007	Commission Issues *Guys with Tools*	*Guys with Tools* Effective
February 22, 2008	Robinson	Referred by Dietrich
June 27, 2009	Robinson	Referred by Dietrich
July 27, 2009	Williams	Referred by Robinson
October 10, 2009	Robinson	Referred by Dietrich
December 5, 2009	Robinson	Referred by Dietrich
July 9, 2011	8 AAC 45.082(c) became effective	*Guys with Tools* Overruled
June 1, 2013	Robinson	Referred by Dietrich
July 6, 2015	Robinson	Referred by Dietrich
August 10, 2015	Bald	Referred by Robinson

25) Table II, below, finds pertinent facts and law related to Dr. Robinson's and Dr. Bald's EME reports:

Table II

Date:	**Providers:**	**Type of EME Report:**
July 25, 2003	Dietrich and Robinson	Physical and psychological report
November 8, 2007	Commission Issues *Guys with Tools*	*Guys with Tools* Effective
February 22, 2008	Robinson	Physical report
February 22, 2008	Robinson	Psychological report
June 27, 2009	Robinson	Physical report
June 27, 2009	Robinson	Psychological report
October 10, 2009	Robinson	Physical and psychological addendum report
December 5, 2009	Robinson	Physical addendum report
July 9, 2011	8 AAC 45.082(c) became effective	*Guys with Tools* Overruled
June 1, 2013	Robinson	Physical report
June 1, 2013	Robinson	Psychological report
July 6, 2015	Robinson	Physical chart review
August 10, 2015	Bald	Physical report

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . .

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, 533-534 (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 23.30.095. 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.
> . . .
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. . . .

An employee and an employer may each make only one change in designated physicians without the written consent of the other party. The purpose of the "one change of physician" rule is to curb potential abuses, especially doctor shopping. *Bloom v. Tekton, Inc.*, 5 P.3d 235, 237 (Alaska 2000).

In an 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.

Miller v. NANA Regional Corporation, AWCB Decision No. 13-0169 (December 26, 2013) held once a change in physician is made by either party, if that party returns to a previous physician without the written consent of the opposing party, an unauthorized physician change has occurred; parties "cannot go back and forth" between their physician choices. However under

the express language of AS 23.30.095(a) and (e), referral to a specialist by either the employee's attending physician or the employer's physician is not considered a physician change.

Coppe v. United Parcel Service, Inc., AWCB Decision No. 11-0084 (June 17, 2011), found that adding a second EME physician to create a panel evaluation, where the first physician had not made a referral to a specialist, constituted a change of physician. *Kollman v. ASRC Energy Services, Inc.*, AWCB Decision No. 15-0004 (January 7, 2015) held an EME physician's referral to a specialist, without naming a particular physician, did not constitute a violation of AS 23.30.095(e).

> **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 effect only. A regulation adopted under this chapter that is primarily an 'interpretative 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.

In *Atlantic Richfield Co. v. State*, 705 P.2d 418, 424 n. 17 (Alaska 1985), the Alaska Supreme Court noted: "AS 44.62.240, however, is concerned with the issues of fairness and notice." In *Kelly v. Zamarello*, 486 P.2d 906, 909-11 (Alaska 1971), the Alaska Supreme Court distinguished between "quasi-legislative" and "interpretative" rule-making and said:

> Professor Davis characterizes the difference in judicial attitude toward certain administrative rules as a distinction between 'legislative regulations' and 'interpretative regulations.' He has defined 'legislative rule' as 'the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.' 'Interpretative rules,' he states, 'are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law.' The distinction is not always easy to draw, since as Davis points out, 'Interpretative rules sometimes rest upon statutory authority to issue them.' (*Id*. at 909).
> . . .
> We believe, nonetheless, that the distinction between legislative and interpretative rule-making is a helpful one when reviewing regulations adopted by state administrative agencies. We hold, therefore, that when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to

> judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute. (*Id*. at 911).
> . . .
>
> We upheld the construction which the Personnel Board had placed upon the statute, but had there been 'weighty reasons,' we would not have hesitated to substitute our own construction of the statute. (*Id*.; footnote omitted).

At the time of Employee's two reported injuries in 2002, 8 AAC 45.082 read in part:

> **8 AAC 45.082. Medical treatment**. **[FORMER]**
> . . .
> (c) Physicians may be changed as follows:
> . . .
> (3) For an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records. To constitute a panel, for purposes of this paragraph, the panel must complete its examination, but not necessarily the report, within five days after the first physician sees the employee. If more than five days pass between the time the first and last physicians see the employee, the physicians do not constitute a panel, but rather a change of physicians.
> . . .

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 impermissible change in physician choice. However board decisions had long ruled that an appropriate sanction was to exclude unlawfully obtained reports and opinions from consideration at hearing. *See, e.g., Colette v. Arctic Lights Electric, Inc.,* AWCB Decision No. 05-0135 (May 19, 2005); *Anderson v. FedEx*, AWCB Decision No. 98-0104 (April 24, 1998); *Sherrill v. Tri-Star Cutting*, AWCB Decision No. 95-0118 (May 1, 1995).

In *Guys With Tools, LTD v. Thurston,* AWCAC Decision No. 062 (November 8, 2007), the commission reviewed a case where the board 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). Overruling decades of contrary board decisions, *Guys With Tools* held that, absent a regulation to the contrary, the board lacked legal authority to impose a medical record

"exclusionary" sanction against parties who exceeded the one allowed change of physician. The commission said all otherwise admissible, relevant evidence should be considered.

Effective July 9, 2011, former 8 AAC 45.082(c)(3) became 8 AAC 45.082(b)(3), and the current 8 AAC 45.082(c) overruled *Guys With Tools*:

> **Medical treatment**. **[CURRENT]**
> . . .
> (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. . . .

ANALYSIS

1) Did Employer make any unlawful physician changes?

After his first injury, Employee was evaluated by an EME panel consisting of Dr. Fechtel, who specializes in chiropractic orthopedics and medical neurology, and Dr. Grossenbacher, who is an orthopedic surgeon. After his second injury, Employee went to an EME with neurosurgeon Dr. Dietrich. Substantial medical evidence indicates Employee's two injuries were not, as Employer contends, separate and distinct. Treating physician Dr. Levine opined Employee's return to work for four hours on November 14, 2002 "reaggravated the previous injury and we are looking at the same situation including a lumbar disc herniation giving him referral pain." There is no evidence of a referral to Dr. Dietrich from either Dr. Fechtel or Dr. Grossenbacher. Dr. Dietrich therefore represents Employer's one lawful physician change. AS 23.30.095(e); *Witbeck.*

Dr. Dietrich's first EME report, dated May 23, 2003, opined a psychological evaluation would be helpful, and on July 25, 2003 Employee attended a panel EME with Dr. Dietrich and Dr. Robinson, who is a psychologist and physiatrist. Nothing in the Act or controlling law precludes a non-specific referral; Dr. Dietrich's referral to a medical specialty, without naming a particular physician, is not a violation of AS 23.30.095(e). *Kollman.* Dr. Robinson's opinions regarding Employee's psychological condition are therefore the permissible result of a referral to a specialist. Consequently, Dr. Robinson's April 21, 2009 referral to a subspecialist, neuropsychologist Dr. Williams, was not an unlawful physician change under AS 23.30.095(e).

Because Dr. Williams was a referred specialist, there was no need for him to refer back to Dr. Robinson. Unlike in *Miller*, here there was no going back and forth between Employer's physicians, and Employee's contention, that all of Dr. Robinson's reports dating after Employee saw Dr. Williams should be stricken because Dr. Williams did not refer back to Dr. Robinson, is misplaced. Employee's subsequent returns to Dr. Robinson for psychological evaluations were lawful under AS 23.30.095(e).

However Dr. Robinson's physical evaluations of Employee are another matter. Dr. Dietrich requested input only from a psychologist. He did not refer to a physiatrist, nor did Employee give written consent to a physical evaluation by an additional EME physician. Dr. Robinson's physical evaluations of Employee therefore represent an unlawful physician change. AS 23.30.095(e); *Witbeck.*

Also misplaced is Employee's contention Dr. Robinson's referral to orthopedic surgeon Dr. Bald was invalid because Dr. Robinson believed it was requested "for administrative purposes" and because Employer asked Dr. Robinson if Dr. Bald would be an appropriate EME physician. Nothing in the Act or controlling law precludes a referral to a specialist on these grounds. However because, in his capacity as a physiatrist Dr. Robinson himself was an impermissible physician change, he had no lawful authority to refer Employee for any sort of physical evaluation. (This is distinguishable from the situation noted above where, in his lawful capacity as a psychological specialist, Dr. Robinson made an allowable referral to a neuropsychological subspecialist.) Dr. Bald therefore represents Employer's second unlawful physician change.

In summary, Dr. Dietrich was Employer's one lawful physician change. Dr. Robinson as a psychologist and Dr. Williams were valid specialist referrals. Dr. Robinson as a physiatrist and Dr. Bald were impermissible physician changes in violation of AS 23.30.095(e).

2) Should any medical records from Employer's physicians be stricken from the record?

The legislature in AS 44.62.240 set retroactivity limitations for regulatory action. Applying current 8 AAC 45.082(c) to unlawful physician changes before July 9, 2011 raises concerns with "issues of fairness and notice." *Atlantic Richfield*. If a regulation adopted by an agency under

the Administrative Procedures Act (APA) is primarily "legislative," the regulation has "prospective effect only." A regulation adopted under the APA that is primarily "interpretative" has retroactive effect only if the agency adopting it (1) has adopted no earlier inconsistent regulation; and (2) "has followed no earlier course of conduct inconsistent with the regulation." AS 44.62.240; *Kelly*.

Here only the first element of the AS 44.62.240 definition of an interpretative regulation is present. Despite the fact that years of board decisions had excluded medical evidence that was the product of an excessive physician change, no earlier regulation inconsistent with current 8 AAC 45.082(c) existed. However, the division's earlier course of conduct, beginning November 11, 2007 with the controlling law of *Guys with Tools*, was clearly inconsistent with 8 AAC 45.082(c), enacted July 9, 2011. The new regulation overruled *Guys with Tools* by giving the board, for the first time, legal authority to impose an exclusionary sanction in cases where either party exceeded its allowable physician changes in violation of AS 23.30.095(a) or (e). Current 8 AAC 45.082(c) therefore was primarily legislative, not interpretative, and may not be applied retroactively. AS 44.62.240; *Kelly*.

Consequently, in accord with *Guys with Tools*, Dr. Robinson's physical reports generated prior to the July 9, 2011 effective date of revised 8 AAC 45.082(c) will not be excluded. However all subsequent reports, opinions, and testimony of both Dr. Robinson in his capacity as a physiatrist and Dr. Bald will not be considered in any form, in any proceeding, or for any purpose. Dr. Robinson's June 1, 2013 physical report, Dr. Robinson's July 6, 2015 physical chart review, and Dr. Bald's August 10, 2015 physical report will be stricken from the record.

CONCLUSIONS OF LAW

1) Dr. Robinson as a physiatrist and Dr. Bald were unlawful physician changes.

2) The following EME reports should be stricken from the record: Dr. Robinson's June 1, 2013 physical report, Dr. Robinson's July 6, 2015 physical chart review, and Dr. Bald's August 10, 2015 report.

ORDER

1) Employee's July 16, 2015 Petition to Strike Defense Medical Evaluations is denied in part and granted in part.

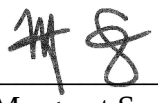
2) All EME reports generated prior to July 9, 2011 will not be stricken from the record.

3) Dr. Robinson's June 1, 2013 physical report, Dr. Robinson's July 6, 2015 physical chart review, and Dr. Bald's August 10, 2015 report will be stricken from the record.

4) All reports, opinions, and testimony of Dr. Robinson in his capacity as a physiatrist and Dr. Bald, dating on or after July 9, 2011, will not be considered in any form, in any proceeding, or for any purpose related to this case.

Dated in Anchorage, Alaska on December 11, 2015.

ALASKA WORKERS' COMPENSATION BOARD



Margaret Scott, Designated Chair

David Kester, 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 KENNETH A. KESSLER, employee / claimant; v. FEDERAL EXPRESS CORP., self-insured employer / defendant; Case No. 200208396; 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 December 11, 2015.

Vera James, Office Assistant