ALASKA WORKERS' COMPENSATION BOARD

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

SHAWN D. HUDAK, Employee, Claimant, v. PIRATE AIRWORKS, INC. (YES BAY LODGE, INC.), Employer, and LIBERTY MUTUAL INSURANCE CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200615619 AWCB Decision No. 16-0045 Filed with AWCB Juneau, Alaska on June 20, 2016.

Numerous petitions and stipulated issues were heard on May 24, 2016 in Juneau, Alaska. This hearing date was selected on March 22, 2016. Attorney Michael Jensen appeared and represented Shawn D. Hudak (Employee). Attorney Martha Tansik appeared and represented Pirate Airworks, Inc. (Yes Bay Lodge, Inc.) and Liberty Mutual Insurance Company (Employer). The record remained open to allow Employee to file a supplemental affidavit of attorney fees and to allow Employer to respond, and closed on June 1, 2016.

This case has a tortuous procedural history. Employee was injured on September 15, 2006 while working for Employer. In May 2008, the parties filed a compromise and release agreement (C&R) in which Employee waived all benefits except for future medical care. Subsequently, a dispute arose over medical care, and on March 28, 2014 Employee filed a claim. On April 28, 2014, Employer filed a petition alleging Employee had impermissibly changed physicians and seeking to exclude the resultant medical records. *Hudak v. Yes Bay Lodge, Inc.*, AWCB

Decision No. 15-0022 (February 24, 2015) (*Hudak I*), found Employee had impermissibly changed physicians and ordered that the medical records from those physicians would not be considered by the finder of fact in any form, proceeding, or for any purpose. Employee filed a petition for discretionary review of *Hudak I* with the Alaska Workers' Compensation Appeals Commission. On April 7, 2015, the Commission declined discretionary review, but did not explain its reasons for doing so. Employee appealed the Commission's order to the Alaska Supreme Court. On June 16, 2015, the Supreme Court ordered the Commission to explain in writing the reasons for denying the petition for review; the court retained jurisdiction until the Commission had done so. The Commission issued a memorandum of decision on July 24, 2015, AWCAC Decision No. 214, in which it explained its reasons for denying review. On September 25, 2015, the Supreme Court, without explanation, ordered the Commission to accept interlocutory review. In AWCAC Decision No. 222 (January 19, 2016), the Commission held the issues raised in Employee's motion for discretionary review did not warrant reversal of *Hudak I*.

ISSUES

Seven petitions and Employee's request for attorney fees and costs were scheduled for hearing on May 24, 2016, although many of the petitions involve the same legal issues. Additionally, the parties jointly requested the board address three issues to provide guidance as to how they should proceed given the records excluded by *Hudak I*. In addition, the parties' briefs revealed a dispute on two underlying legal issues: whether the law of the case doctrine prevents the reconsideration of matters addressed in *Hudak I*, and the validity of 8 AAC 45.082(c). One of the petitions at issue was Employer's petition to compel written discovery from Employee; at hearing, Employee represented that the documents had been mailed, and Employer agreed the petition need not be addressed.

In his hearing brief, Employee contended 8 AAC 45.082(b)(2) and (c), the regulations regarding changes in doctors and the exclusion of medical records from an unauthorized physician, were invalid for several reasons. Employee also asked that several factual findings in *Hudak I* be reconsidered. Employer responded that under the law of the case doctrine, neither the validity of

the regulation nor the facts found in *Hudak I* could be reexamined. Employee contended the law of the case doctrine was inapplicable.

1. Does the law of the case doctrine prevent the reexamination of factual determinations in Hudak I or the validity of 8 AAC 45.082?

Underlying several of the other issues is the question of whether *Hudak I* prevents other doctors from reviewing, commenting on, or testifying about the excluded medical records. For example, Employee contends he must be allowed to tell future doctors about his treatment by the unauthorized physicians, the reports of Employer's medical evaluator (EME) must be stricken because they summarize the excluded records, and board precedent requires the excluded records be sent to a second independent medical evaluator (SIME). Employer concedes Employee can tell future doctors about his treatment, but notes that doing so may create hearsay issues. Employer also contends the records should not be sent to an SIME physician, but the EME reports should not be stricken. However, if necessary the EME reports could be "cleaned" by redacting references to the excluded records.

2. Can other doctors review, comment on, or testify about the medical records excluded by Hudak I?

Employee contends that under *Hudak I* a return to Dr. Anderson, his last authorized physician, may be viewed as another unauthorized change in doctors; he asks for clarification. Employer contends Dr. Anderson remains Employee's attending physician and returning to him would not constitute a change.

3. Would Employee's return to Dr. Anderson be considered an unauthorized change in attending physician?

Employee contends he should be allowed to tell future treating doctors about the treatment he received from the unauthorized physicians. Because 8 AAC 45.082(c) and *Hudak I* preclude the board from considering those reports "in any form," Employee is concerned that any mention of that treatment would result in the future doctor's report being excluded as well. Employer concedes Employee can tell future treating doctors about the treatment he received, but argues that the inclusion of that information in the doctors' reports may result in hearsay objections.

4. Can Employee tell his treating physicians about the treatment he received from the "unauthorized" physicians?

Employee contends the EME reports must be stricken as they include an extensive summary of the excluded medical records. Employer contends the EME reports should not be stricken, but references to the excluded reports could be redacted.

5. Can the prior EME reports be "cleaned" of references to the excluded medical records?

Employee contends an SIME is warranted because there are medical disputes between Employee's attending physician and Employer's EME. Employee also contends the excluded medical records should be sent to the SIME physician, as the board has done so in other cases. Employer contends that if the excluded records are disregarded, no medical dispute exists, or if a dispute does exist, it is not significant enough to justify an SIME. Employer contends the excluded medical records should not be sent to the SIME doctor.

6. Is an SIME warranted, and if so, what records should be sent to the SIME physician?

After *Hudak I* was issued, Employee filed several medical summaries that included medical records from the unauthorized physicians. Employer contends the medical records must be excluded under *Hudak I*. Employee contends the Act imposes a duty on all parties to file medical reports, and he would be remiss if he did not do so.

7. Should medical records from the unauthorized physicians that were filed after the issuance of Hudak I be excluded?

Employee contends his attorney provided valuable services and he should be awarded attorney fees and costs. Employer contends that because Employee should not be awarded further benefits, he is not entitled to attorney fees.

8. Is Employee entitled to attorney fees and costs, and, if so, in what amount?

FINDINGS OF FACT

All findings in *Hudak I* are incorporated herein. The following facts are reiterated from *Hudak I* or are established by a preponderance of the evidence:

1. On September 15, 2006, Employee injured his right shoulder while working for Employer as a fishing guide. Following the injury, Employee returned to his home in Minneapolis, Minnesota. (*Hudak I*).
2. Employee first treated with orthopedic surgeon, David Anderson, M.D. He then sought a second opinion from Michael Nemanich, M.D., which was Employee's first change in physicians. Employee then returned to Dr. Anderson, which was another change in physicians. (*Hudak I*).
3. On May 23, 2008, Dr. Anderson performed a right arm open long head of biceps tenotomy on Employee. (*Hudak I*).
4. On May 29, 2008, the parties filed a settlement agreement (C&R) which resolved all disputes other than future medical treatment and related transportation costs. The agreement contained stipulated factual statements, including the statement that Dr. Anderson was Employee's treating physician. It also specified Employer did not waive its right to assert defenses and contest liability for future medical benefits under the Act, case law, and board regulations. (*Hudak I*).
5. On March 30, 2009, Employee was seen by Laura Wilson, PT, at Park Nicollet Methodist Hospital (Park Nicollet). She noted Employee was referred to physical therapy by Employee's family doctor, internist Samuel Dardick, M.D. who suspected Employee's "low back pain is due to compensation after his right sided proximal biceps tenodesis. There were two surgeries for this, one to repair, and one to release the long head." (*Hudak I*).
6. No medical record showed a referral from Dr. Anderson to Dr. Dardick or from Dr. Dardick to PT Wilson. (*Hudak I*).
7. On March 3, 2010, Dr. Anderson treated Employee for right shoulder pain and performed a right bicep cortisone injection. On this date, Dr. Anderson did not discharge Employee from his care, refuse to provide services or refer Employee to Dr. Dardick or to any other physician. Rather, Dr. Anderson stated Employee "will follow up as needed." (*Hudak I*).
8. On April 27, 2010, Employee self-referred to Dr. Dardick who treated Employee for his work injury with Employer, although the primary purpose of the visit was to perform a

physical. This was Employee's first unlawful change of physician, as there is no documentary evidence of a referral or any other documentary basis to make this something other than a physician "change." Dr. Dardick stated Employee was "quite bothered by chronic right upper extremity pulling pain up to 6/10 in severity in the anterior biceps area of his scar particularly with supination." Dr. Dardick noted Employee "[s]ees an outside orthopedist who did these Workman's Comp surgeries. The orthopedist felt there is nothing more to do." Dr. Dardick referred Employee to orthopedic surgeon Kirk Aadalen, M.D., at Tria Orthopaedic Center, and physical medicine and rehabilitation specialist Daniel Kurtti, M.D., at Park Nicollet, for evaluation of Employee's continued right upper extremity post-surgical pain. As Dr. Dardick was an unauthorized change of physician, his referrals to Drs. Aadalen and Kurtti were also unauthorized. (*Hudak I*).

9. On July 6, 2010, Dr. Aadalen operated on Employee's right arm, removing extensive scarring from the biceps tendon, and performing a tenodesis. (Tria Surgery Center, Operative Report, July 6, 2010).
10. Employee received physical therapy following the surgery. (*e.g.*, Tria Othopaedic Center, Progress Note, September 30, 2010).
11. An MRI performed on November 30, 2010 revealed possible rotator cuff and SLAP tears. (Tria Othopaedic Center, Progress Note, November 30, 2010).
12. On December 21, 2010, Employee was seen by Dr. Aadalen, who noted: "This is a workman's comp injury dating to an accident of September 16, 2006." (Park Nicollet Clinic, Progress Note, December 20, 2010).
13. On December 29, 2010, Dr. Aadalen performed arthroscopic surgery on Employee's right shoulder, cleaning and debriding his superior labrum and performing a subacromial decompression. (Tria Surgery Center, Operative Report, December 29, 2010).
14. Employee continued his physical therapy. (*e.g.*, Medical Pain Clinics, Physical Therapy Progress Note, July 8, 2011).
15. On July 9, 2011, 8 AAC 45.082(c) became effective. The section states that when a party makes an unauthorized change in physicians, the board cannot consider the reports, opinions, or testimony from the unauthorized physicians. (8 AAC 45.082(c)). *Hudak I* held that no reports, opinions, or testimony from Dr. Darden, Dr. Aadalen, or any other provider in the "Darden chain" of referrals after July 9, 2011 could be considered by the board. (*Hudak I*).

16. On May 29, 2013, Employee was seen by Rajan Jahnjee, M.D. for an EME. Dr. Jahnjee noted Employee had undergone extensive treatment for the 2006 work injury, including four surgeries, and Employee reported a fifth surgery. Dr. Jahnjee concluded Employee had chronic right upper arm pain from the 2006 work injury, and he opined Employee did not require further medical treatment as it would not produce any objective measurable improvement. He specifically stated that he did not believe prolotherapy, neural therapy or the Graston technique were reasonable or necessary in Employee's case. (Jahnjee EME Report, June 12, 2013).
17. On October 21, 2014, David Winecoff, PA-C, with Dr. Anderson's office authored a "to whom it may concern" letter stating Employee was last seen by Dr. Anderson on March 3, 2010, and, "Since that time, he has been referred to Dr. Samuel Dardick for further care. He was also seen by Dr. Nemanich at Twin Cities Orthopedics. Shawn has been discharged from our care. We have not seen him since 2010. He reports ongoing care with Dr. Dardick." (*Hudak I*). .
18. Dr. Dardick was Employee's family doctor for at least ten years prior to his work injury. At the *Hudak I* hearing, Employee testified he was discharged from Dr. Anderson's care, and Dr. Anderson referred him to Dr. Dardick in March 2010. (Employee).
19. The *Hudak I* hearing was held December 16 2014. *Hudak I* was issued and served on the parties on February 24, 2015. Relying on 8 AAC 45.082(c), it held the "fact-finders will not consider any reports and opinions of Dr. Dardick, or any physician within his referral chain, from July 9, 2011 forward in any form, proceeding or for any purpose in this case." (*Hudak I*).
20. On March 10, 2015, Employee filed a petition for discretionary review with the Commission. In a summary order without explanation, the Commission denied Employee's petition on April 7, 2015. (AWCAC Motion for Discretionary Review, March 10, 2015; AWCAC Order, April 7, 2015).
21. On April 6, 2015, PA-C Winecoff responded to a letter to Dr. Anderson's office stating that Employee had further treatment since he was last seen by Dr. Anderson on March 3, 2010. The letter asked that Employee's medical records since June 12, 2013, which were enclosed, be reviewed and asked if the responder agreed the right shoulder and upper right extremity

treatment since June 2013 had been reasonable and necessary. Blanks were provided for a "yes" or "no" answer. PA-C Winecoff did not use the provided blanks, but stated:

> We last saw this patient on 3/3/2010. At that time he was struggling with persistent right shoulder pain following multiple surgeries for a work injury. Having not assessed him since 2010, it is difficult to comment on his treatment. Cortisone, chiropractic care, prolotherapy are all reasonable treatments for chronic shoulder pain. On 3/3/2010, his pain was still work related. (Winecoff, Response, April 6, 2015).

22. On April 22, 2015, Employee petitioned the Supreme Court for review of the Commission's denial of discretionary review. (Supreme Court Docketing Statement, April 22, 2015).
23. Neither party petitioned the board for modification or reconsideration of *Hudak I*. (Record).
24. Employee filed medical summaries on February 16, 2016, March 5, 2015, May 5, 2015, and April 7, 2016 that included reports from unauthorized providers in the "Dardick chain" after July 9, 2011. (Medical Summaries, February 16, 2016, March 5, 2015, May 5, 2015, and April 7, 2016)
25. On March 11, 2016, May 12, 2015, May 19, 2015, and April 27, 2016, Employer filed petitions to exclude the February 16, 2016, March 5, 2015, May 5, 2015, and April 7, 2016 medical summaries under *Hudak I*. (Petitions, March 11, 2016, May 12, 2015, May 19, 2015, and April 27, 2016).
26. On May 20, 2015, Employer petitioned to compel Employee to produce the correspondence to Dr. Anderson's office that lead to PA-C Winecoff's April 6, 2015 response. (Petition, May 20, 2015).
27. On May 26, 2015, Employee filed a petition seeking an SIME on the issue of treatment. Employee pointed to Dr. Jahnjee's June 12, 2013 EME report stating Employee did not need further treatment and PA-C Winecoff's April 6, 2015 response as establishing a medical dispute. (Petition, May 26, 2015).
28. Employer filed its opposition to an SIME on June 10, 2015, asserting there was no current medical dispute. (Opposition, June 10, 2015).
29. On June 16, 2015, the Supreme Court ordered the Commission to explain in writing its reasons for denying Employee's petition for review. The Supreme Court retained jurisdiction in the matter. (Alaska Supreme Court, Order No. 88, June 16, 2015).

30. On July 24, 2015, the Commission issued its decision explaining the reasons it had denied Employee's petition for review. (AWCAC, Decision No. 214 (July 24, 2015)).
31. On September 25, 2015, the Supreme Court, without explanation, ordered the Commission to accept review of *Hudak I*. (Supreme Court, Order, September 25, 2015).
32. On January 19, 2016, the Commission issued its decision holding that Employee's petition for review did not support reversal of *Hudak I*. Employee had raised three issues in his petition. First, whether obtaining a second opinion constituted a change in attending physician and whether a return to the original attending physician resulted in a second change in attending physician. The Commission held that under 8 AAC 45.082(b)(2), both the second opinion and return to the original treating physician were unauthorized changes. Second, whether Employer waived earlier physician changes by stipulating in the 2008 C&R that Dr. Anderson was Employee's attending physician. Noting that the C&R specifically preserved Employer's defenses and the agreement only stated that Dr. Anderson was Employee's current treating physician, the Commission held the earlier physician changes were not waived. Third, whether the board improperly concluded it could not apply equitable principles to bar Employer from raising 8 AAC 45.082(b)(2). The Commission held that while the board recognized that it could bar Employer under equitable principles, Employee had not established the grounds for relying on those principles. (AWCAC Decision No. 222, January 19, 2016).
33. In its decision, the Commission noted that while Employee argued that 8 AAC 45.082(b)(2) was invalid, he had not raised the issue in his petition for review. As a result, the Commission did not address the validity of the regulation. (AWCAC Decision No. 222, January 19, 2016).
34. Neither party has petitioned for reconsideration or modification of *Hudak I*. (Record).
35. On March 14, 2016, Employee filed a second petition for an SIME. In the petition, Employee contended the medical records excluded by *Hudak I* should be sent to the SIME physician. Employee again contended a medical dispute existed based on Dr. Jahnjee's EME report and PA-C Winecoff's April 6, 2015 response, but also included a 2007 medical report from Dr. Nemanich. Alternatively, Employee contended that if the excluded records were not sent the SIME doctor, Employer's EME reports must be stricken as they included significant references to the excluded records. (Petition, March 10, 2016).

36. At the March 23, 2016 prehearing conference, several pending petitions were set for hearing, including Employer's March 9, 2015, May 12, 2015, and May 19, 2015, petitions to exclude medical records; Employer's May 20, 2015 petition to compel discovery; and Employee's May 21, 2015 and March 10, 2016 petitions for an SIME. The parties stipulated to hearing three other issues as well: whether Employee could testify or tell other providers about the treatment documented in the excluded records, whether Employee could return to Dr. Anderson without triggering another change in physician, and how the EME reports could be "cleaned" of references to the excluded records. (Prehearing Conference Summary, March 23, 2016).
37. On May 18, 2016, Employee filed an affidavit of attorney fees and costs. The affidavit identified the fees and costs incurred prior to *Hudak I*, those incurred after *Hudak I*, and the fees and costs incurred before the Commission and Supreme Court. The affidavit identified $24,577.50 in fees and $1,423.07 in costs incurred since *Hudak I* related to work at the board. (Affidavit of Attorney's Fees and Costs, May 18, 2016).
38. At the May 24, 2016 hearing, Employee's attorney stated that the information sought in Employer's May 20, 2015 petition to compel had been mailed to Employer's attorney. Employer's attorney agreed the issue need not be addressed at hearing. (Hearing Representations).
39. On May 25, 2016, Employee filed a supplemental affidavit of attorney fees and costs from May 18, 2016 through the May 24, 2016 hearing. The affidavit identifies an additional $3,270.00 in fees and no additional costs. (Supplemental Affidavit of Attorney's Fees and Costs, May 25, 2016). For work at the board level since *Hudak I*, Employee is seeking $27,872.50 in attorney fees and $1,423.07 in costs. (Observation).
40. On June 1, 2016, Employer filed an objection to Employee's claimed attorney fees. Employer contends that other, less experienced attorneys worked on the case, but are billed at the same hourly rate as Mr. Jensen, an experienced workers' compensation attorney. Employer also contends the cursory descriptions preclude an accurate evaluation of the work done, that the bill includes double billings, and that the charges are excessive. (Opposition to Affidavit of Attorney Fees and Cost, June 1, 2016).

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;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> (3) this chapter may not be construed by the courts in favor of a party;
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

> **AS 23.30.095. Medical treatments, services, and examinations.**
> (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. 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.
>
> . . . .
>
> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.
>
> . . . .

(e) . . . 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. . . . .

(h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.

. . . .

(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. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . .

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;

(3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records; to constitute a panel, for purposes of this paragraph, the panel must complete its examination, but not necessarily the report, no later than five days after the first physician sees the employee; if more than five days pass between the time the first and last physicians see the employee, the physicians do not constitute a panel, but rather a change of physicians;

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

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

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

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

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

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not

> consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

Prior to 1988, the Act and regulations did not restrict the parties' ability to change doctors. As a result parties often engaged in "doctor shopping," the practice of changing doctors until they found one who would support their position. The 1988 amendment to AS 23.30.095(a) and (e) provided that the parties could make only one change in doctors without the written consent of the other party. §§13, 15 Chapter 79 SLA 1988. However, the amendments did not include sanctions if a party made an excessive change. After the 1988 amendments to the Act, 8 AAC 45.082 was also revised; it provided that the board could order that an employer did not have to pay for services resulting from an excessive change in doctors.

The excessive change of physician issue continued to arise, and several board decisions held that medical records and opinions resulting from an unauthorized change would not be considered as evidence. The extent of the exclusion varied, however. *Miller v. Houston NANA, LLC*, AWCB Decision No. 03-0287 (December 5, 2003) held that the records resulting from an unauthorized change in physicians must be excluded for all purposes. In *Clette v. Arctic Lights Electric, Inc.*, AWCB Decision No. 05-0160 (June 10, 2005) (Decision on Reconsideration), the board held that while the medical records from an unauthorized physician must be excluded, reports of other doctors who relied on or referenced the excluded reports were not excluded. And *Lopez v. Q1 Corporation*, AWCB Decision No. 05-0259 (October. 6, 2005) (footnote 40), stated: "To the extent these records have been legally rehabilitated by other physicians, the records will be considered."

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 the exclusion of evidence as a sanction for an unauthorized change in physicians. The Commission said all otherwise admissible relevant evidence should be considered. *Guys With Tools Ltd. v. Thurston*, AWCAC Decision No. 062 (November 8, 2007). Effective July 9, 2011, regulation

8 AAC 45.082(c) overruled *Guys With Tools* and provides that reports, opinions or testimony from unauthorized physicians will not be considered by the board.

The question of how to deal with medical records resulting from an unauthorized change in doctors still continues to arise. *Freeman v. ASRC Energy Services, et al.*, AWCB Decision No. 15-0073 (June 26, 2015) held that interference in the employee's medical care by the employer's nurse case manager excused an unauthorized change in physicians, but medical records resulting from another unauthorized change were excluded.

In *Janousek v. North Slope Borough School District*, AWCB Decision No. 15-0090 (July 27, 2015), the board panel deferred ruling on the unauthorized change in physician issue, but held that even if there had been an unauthorized change, the medical records should be sent to the SIME doctor. *Janousek* noted that striking the reports would "decimate" the medical records in the case and that it would be virtually impossible for an SIME doctor to opine on whether surgery was due to the work injury when records related to the surgery were excluded.

> **AS 23.30.110. Procedure on claims.**
> . . .
>
> (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.

AS 23.30.095(k) and AS 23.30.110(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). Wide discretion exists under AS 23.30.110(g) for the board to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." *Hanson v. Municipality of Anchorage*, AWCB Decision No. 10-0175 at 18 (October 29, 2010).

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the AWCAC

confirmed "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer." *Id.* Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an opinion would help the board. *Id.* at 5.

The AWCAC further stated, before ordering an SIME, it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Id.* at 4. Under either AS 23.30.095(k) or AS 23.03.110(g), the purpose for ordering an SIME is to assist the board. It is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id.*

> **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;
> (2) sufficient notice of the claim has been given;
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Municipality of Anchorage v. Carter,* 818 P.2d 661, 665 (Alaska 1991); *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

The application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. See, e.g., *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex

medical case. *Burgess Constr. V. Smallwood*, 623 P.2d 603,610 (Alaska 1999). In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The employee need only adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson,* J.V., 742 P.2d 239, 244 (Alaska 1987). "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

An employer may rebut the presumption of compensability with an expert opinion the claimant's work was probably not a substantial cause of the disability or need for medical treatment. *Gillispie v. B&B Foodland*, 881 P.2d 1106, 1110 (Alaska 1994). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985). If the board finds the employer's evidence is sufficient, the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). This means the employee must "induce a belief" in the minds of the board members the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers credibility.

> **AS 23.30.130. Modification of awards.**
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175 , a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180 , 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110 . Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
>
> (b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an

award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

AS 44.62.540. Reconsideration.
(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.

AS 23.30.130(a) allows the workers' compensation board to modify a previous decision based on changed conditions or a mistake of a fact. The board may modify the prior decision on its own initiative or upon application by an interested party so long as the board's review process begins within one year of the last payment of compensation or the rejection of the claim. *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007).

In *Blanas v. Brower Co.*, 938 P.2d 1056 (Alaska 1997), an injured worker entered into a compromise and release agreement which was approved by board order. After the one-year period in AS 23.30.130(a) had elapsed, the worker filed a petition to set aside the compromise and release agreement for fraud, among other reasons. The Supreme Court held that the one-year limitation did not apply to allegations of fraud. The court cited with approval *Estelle v. Board of Educ.,* 14. N.J. 256, 102 A2.d 44 (1954) which held that the Workmen's Compensation Division had "that power inherent in all tribunals to reopen judgments in instances of fraud."

The law of the case doctrine prevents re-litigation of issues previously decided in a case. In *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758 (Alaska 1977) at 763, the Alaska Supreme court held:

> The doctrine of the Law of the Case prohibits the reconsideration of issues that have been adjudicated in a previous appeal in the same case . . . . Even issues not explicitly discussed in the first appellate opinion, but directly involved with or "necessarily inhering" in the decision will be considered the law of the case.

In *Dieringer, Jr. v. Martin*, 187 P.3d 468 (Alaska 2008) at 474, the Alaska Supreme court held:

> The Law of the case is both a doctrine of economy and of obedience to judicial hierarchy. The doctrine applies to all previously litigated issues unless there are "exceptional circumstances presenting a clear error constituting manifest injustice." (Footnotes omitted).

In *Beal v. Beal*, 209 P.3d 1012 (Alaska 2009) at 1016-1017, the Alaska Supreme court held:

> The law of the case doctrine, which is "grounded in the principle of stare decisis" and "akin to the doctrine of res judicata," generally "prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case." Previous decisions on such issues - even questionable decisions - become the "law of the case" and should not be reconsidered on remand or in a subsequent appeal except "where there exist 'exceptional circumstances' presenting a 'clear error constituting a manifest injustice.'" (Footnotes omitted).

The law of the case doctrine applies in workers' compensation cases. *See, e.g. Failla v Fairbanks Resource Agency, Inc.*, AWCAC Decision No. 162 (June 8, 2012).

> **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, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. 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.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the

> claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id*. at 152-153.

> **AS 44.62.030. Consistency between regulation and statute.**
> If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute

> **AS 44.62.300. Judicial review of validity.**
> (a) An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid
> (1) for a substantial failure to comply with AS 44.62.010 - 44.62.320; or
>
> (2) in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the statement do not constitute an emergency under AS 44.62.250 .

ANALYSIS

1. Does the law of the case doctrine prevent the reexamination of factual determinations in Hudak I or the validity of 8 AAC 45.082?

In his hearing brief, Employee argued *Hudak I* included several factual and legal errors. Employer contended the issue had been addressed by *Hudak I* and the Commission, and should not be readdressed. Although the law of the case doctrine applies in workers' compensation

cases, it is constrained by the limits on modification and reconsideration imposed by AS 23.30.130 and AS 44.62.540.

Under AS 44.62.540, the power to order reconsideration expires 30 days after a decision is mailed to the parties. *Hudak I* was served on the parties on February 24, 2015, and neither party petitioned for reconsideration. The 30-day time period has long expired, so it cannot be reconsidered under AS 44.62.540.

Under AS 23.30.130(a), the board may not modify a decision more than one year after the last payment of compensation benefits or the rejection of a claim. In the May 29, 2008 C&R, Employee waived all further compensation benefits; only medical and medical related transportation costs remained open. It has been far more than one year since Employee was paid compensation benefits. Additionally, *Hudak I* only addressed the unauthorized change in physician issue; it did not reject Employee's claim. And even if *Hudak I* had rejected Employee's claim, neither party filed a petition for modification within one year. *Hudak I* cannot be modified under AS 23.30.130.

The Supreme Court has recognized that in exceptional situations, such as cases involving fraud, the board may reexamine a decision after the one-year time period in AS 23.30.130 has expired. There are no allegations of fraud or other exceptional circumstances in this case, either relating to the 2008 C&R or the *Hudak I* hearing. Even if, as Employee alleges, *Hudak I* was a questionable decision, the law of the case doctrine precludes its reconsideration.

To the extent Employee contends *Hudak I* should have found 8 AAC 45.082(c) invalid, the board lacks jurisdiction to resolve the issue. Under AS 44.62.300, jurisdiction as to the validity of regulations is vested in the superior court.

2. Can other doctors review, comment on, or testify about the medical records excluded by Hudak I?

The language of 8 AAC 45.082(c) is clear: it states "*the board* will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose"

(emphasis added). The holding in *Hudak I* is likewise limited; it states "the fact-finders" will not consider the excluded records. Neither *Hudak I* nor the regulation addresses whether other doctors can review, comment on, or testify about the excluded reports. However, to the extent the regulation precludes the board from considering the reports in any form, it might be viewed as precluding other doctors from mentioning, commenting on, or testifying about the excluded records.

Whether other doctors can review, comment on, or testify about the excluded medical records presents the board with a choice between Scylla and Charybdis. One of the most difficult tasks facing a hearing panel occurs when there is conflicting medical evidence in a case. Neither board members nor hearing officers are doctors, let alone medical specialists, yet they must decide which opinions should be given the greatest weight. One of the primary means of doing so is to examine the records on which the doctors relied in forming their opinions.

Clearly, if other doctors are not allowed to review the excluded records, their opinions will be of little, if any, value to the board. All the board would know for sure is that the doctors did not have all the facts. Assigning weight to conflicting opinions would be, at best, a guessing game. Indeed, it seems unlikely that if doctors were aware they lacked significant records they would offer anything more than a conditional opinion.

If the doctors are allowed to review the excluded records, but not mention or comment on them in their reports, a hearing panel has no way to determine what records were reviewed, whether all of the records were considered, and which of those records led a doctor to reach a particular conclusion. The board is deprived of any justifiable, rational way in which to evaluate differing opinions.

Finally, if the doctors are allowed to review and comment on the excluded records, a hearing panel can at least confirm a doctor considered all of the available evidence, and the doctor can explain what medical records influenced his or her opinion. However, if, as sometimes happens, doctors differ on the significance of a particular record, the panel is still deprived of the ability to examine the record itself, which significantly increases the risk of an erroneous decision.

All of the choices are likely to lead to problems if the case proceeds to a hearing on the merits of Employee's claim. The best option is to allow other doctors to review, comment on, and testify about the excluded medical records. While that might be seen as a "form" of the excluded records, nothing suggests that when enacting 8 AAC 45.082(c), the board intended the exclusion to be more restrictive than its pre-*Guys with Tools* practice. Although the board's practice prior to *Guys with Tools* was inconsistent, both *Colette* and *Lopez* suggest the exclusion was not always extended to preclude other doctors from reviewing, commenting on, and testifying about the excluded records. Additionally, this approach comes closest to ensuring that the parties will be provided an opportunity for their evidence to be fairly considered and for the case to be decided on the merits as required by AS 23.30.001(2) and (4). And there is no reason treating doctors, EME doctors, or SIME doctors should be treated differently when it comes to reviewing, commenting on, or testifying about the excluded medical records.

3. Would Employee's return to Dr. Anderson be considered an unauthorized change in attending physician?

Employee contended that under *Hudak I*, his return to Dr. Anderson could be considered yet another change in attending physicians. In its hearing brief, Employer stated that a return to Dr. Anderson was not a change in attending physicians, noting that to do so would leave Employee with no attending physician. Employee expressed concerns that Dr. Anderson might no longer treat him after such a long absence, and he indicated he no longer had confidence in Dr. Anderson, as the treatment he provided had not been effective. In any event, Employee asked for a board order clarifying that a return to Dr. Anderson would not be yet another change in attending physicians.

While Employee may have concerns about returning to Dr. Anderson, Dr. Anderson remains his attending physician. Under AS 23.30.001(1), the Act is to be interpreted to provide the quick, efficient, fair, and predictable delivery of medical benefits to injured workers at a reasonable cost to employers. An unauthorized change in physician does not divest the last authorized physician of his or her status as an employee's attending physician. To construe AS 23.30.095 and

8 AAC 45.082 otherwise would be contrary to the dictate of AS 23.30.001(1). Dr. Anderson remains Employee's attending physician.

Employee's concerns about returning to Dr. Anderson can be easily addressed. If Dr. Anderson does, in fact, refuse to treat Employee, Employee can then designate another attending physician under 8 AAC 45.082(b)(4)(B), and it will not be considered a change in attending physician. Similarly, if Employee is dissatisfied with Dr. Anderson's care, he can ask Dr. Anderson for a referral. Should Dr. Anderson provide the referral, it would not trigger an unauthorized change in physician.

4. Can Employee tell his treating physicians about the treatment he received from the "unauthorized" physicians?

Employee contended that he should be able to tell future treating doctors about any treatment by the unauthorized physicians, and his inability to do so could compromise his medical care. Employer conceded Employee could tell his doctors about the treatment, but contended that doing so could raise hearsay objections, depending on what the doctors were told.

The decision above, that doctors can consider the excluded medical records, resolves much of this issue. If the doctors can review and consider the underlying records, there is no reason that Employee cannot tell the doctors about the treatment reported in the records themselves.

5. Can the prior EME reports be "cleaned" of references to the excluded medical records?

Employee contended references to the excluded medical records in the EME reports were another form of the records, and the EME reports should thus be excluded as well. Employer contended the EME reports could be redacted to remove references to the excluded medical records, or another EME could be done in which the EME doctor would not be provided with the excluded records.

This issue is resolved by the decision above that other doctors can review, comment on, or testify about the excluded records. The EME report will not be stricken, and need not be redacted. Employer is free to schedule another EME as it sees fit, within the confines of the Act.

6. Is an SIME warranted, and if so, what records should be sent to the SIME physician?

Employee contends significant medical disputes exist and the excluded medical records should be sent to the SIME physician. Employer contends the excluded medical records cannot be considered in determining whether an SIME is warranted, and without those records there is no evidence of a significant medical dispute. Consequently Employer contends an SIME is not warranted at this time. In any event, Employer contends the excluded medical records should not be sent to the SIME doctor.

The above decision that other doctors can review, comment on, or testify about the excluded records resolves the question of whether the excluded medical records can be sent to an SIME doctor. The question of whether an SIME is warranted remains.

It is clear, under 8 AAC 45.082(c) and *Hudak I*, that the board cannot consider the excluded medical records in determining whether to order an SIME. Given that virtually all of Employee’s treatment since July 9, 2011 is addressed in the excluded records, there is little left to work with.

As the Commission stated 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. Second, the dispute must be significant. Third, an SIME physician's opinion would assist the board in resolving the dispute. In his May 21, 2015 petition, Employee requested an SIME on the issue of treatment on the grounds there was a dispute between Dr. Jahnjee and PA-C Winecoff. In his June 12, 2013 EME Report, Dr. Jahnjee opined Employee did not require any further medical treatment. In his April 6, 2015 response to the questions to Dr. Anderson’s office, PA-C Winecoff stated that cortisone, chiropractic care, and prolotherapy were all reasonable treatments for chronic shoulder pain. In his March 14, 2016 petition, Employee also contends a dispute exists as to treatment based on a 2007 medical report from

Michael Nemanich, M.D. PA-C Winecoff offers only a generalized opinion on the reasonableness of the treatments for chronic shoulder pain. He does not say that, at this point in his care, Employee still suffers from shoulder pain or whether he needs or would benefit from additional treatment. Employee has undergone significant treatment since Dr. Nemanich's 2007 opinion, and there is nothing showing he still believes additional treatment would benefit Employee. There is no current medical dispute as to Employee's need for treatment. Employee's petition for an SIME will be denied.

7. Should medical records from the unauthorized physicians that were filed after the issuance of Hudak I be excluded?

After the issuance of *Hudak I*, Employee filed several medical summaries containing records from the unauthorized physicians dated after the effective date of 8 AAC 45.082(c). Employer responded with several petitions to exclude the records. Employer contends the records cannot be considered by the board and must be excluded under *Hudak I*. Employee contends AS 23.30.095(h) imposes a continuing duty on all parties to file "reports of all physicians relating to the proceeding" with the board.

Both parties are correct. Despite *Hudak I*, records from the "Dardick chain" of referrals after July 9, 2011 still relate to the proceeding and must be filed. Under *Hudak I*, the board cannot consider those reports in any proceeding, however. This case may be appealed yet again, and questions about the excluded records may arise. Although the board can no longer consider the records, they must remain in the file for potential appellate review.

8. Is Employee entitled to attorney fees and costs, and, if so, in what amount?

An award of compensation or other benefits is a prerequisite to the award of attorney fees under either AS 23.30.145(a) or (b). Because Employee did not prevail on his petitions and no benefits were awarded, attorney fees must be denied.

CONCLUSIONS OF LAW

1. The law of the case doctrine prevents the reexamination of factual determinations in *Hudak I*, and the board lacks jurisdiction to rule on the validity of 8 AAC 45.082.

2. Other doctors can review, comment on, or testify about the medical records excluded under *Hudak I*.

3. Employee's return to Dr. Anderson would not be an unauthorized change in attending physician.

4. Employee can tell his treating physicians about the treatment he received from the "unauthorized" physicians.

5. The prior EME reports need not be "cleaned" of references to the excluded medical records.

6. Employee's May 26, 2015 and March 14, 2016 petitions for an SIME are denied.

7. Medical records from the unauthorized physicians that were filed after the issuance of *Hudak I* will not be considered by the board, but must remain in the board's file.

8. Employee is not entitled to attorney fees and costs.

ORDER

1. The factual determinations in *Hudak I* will not be reexamined.
2. The board lacks jurisdiction to determine the validity of 8 AAC 45.082.
3. Other medical providers may review, comment on, or testify about the medical records excluded under *Hudak I*.
4. Dr. Anderson is Employee's current attending physician. It would not be a change in physician for Employee to return to Dr. Anderson.
5. Employee may tell his treating physicians about the treatment he received from the unauthorized physicians.
6. The EME reports need not be "cleaned" of references to the excluded medical records.

7. Employee's March 9, 2015, May 12, 2015, and May 19, 2015 petitions to exclude medical records are granted to the extent the board will not consider the records; the records, however, will remain in the board's file.

8. Employee's claim for attorney fees and costs is denied.

Dated in Juneau, Alaska on June 20, 2016

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Brad Austin, Member

/s/
Ronald Nalikak, 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 SHAWN D. HUDAK, employee / claimant; v. PIRATE AIRWORKS, INC. (YES BAY LODGE, INC.), employer; LIBERTY MUTUAL INSURANCE CO., insurer / defendants; Case No. 200615619; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on June 20, 2016.

/s/

Vera James, Office Assistant