ALASKA WORKERS' COMPENSATION BOARD

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

ALEXANDER G. DE LORETTO, Employee, Claimant, v. TRIDENT SEAFOODS, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No(s). 201121320 AWCB Decision No. 16-0049 Filed with AWCB Juneau, Alaska on June 27, 2016

Trident Seafoods and Liberty Insurance Corporation's (Employer) February 12, 2016 petition to strike all medical records for Alexander De Loretto's (Employee) treatment with Michael Gitter, M.D was first heard on April 26, 2016, a date selected on March 8, 2016. Attorney Jeffrey Holloway appeared telephonically and represented Employer. Employee appeared telephonically, represented himself, and testified. At hearing, Employee sought to introduce testimony from a non-party witness, Employer objected and the designated chair issued an oral ruling sustaining Employer's objection. At hearing it was discovered that medical records had not been properly filed and served on Employer. The hearing was continued and scheduled for June 14, 2016 with additional briefing due by June 7, 2016. This decision examines the oral order to sustain Employer's objection to Employee's non-party witness testimony, the oral order to continue the hearing and decides Employer's petition. As board member Charles Collins was

unavailable for the continued hearing on June 14, 2016, the panel consisted of two members, a quorum under AS 23.30.005(f). The record closed at the hearing's conclusion on June 14, 2016.

ISSUES

Employee sought to have a non-party witness testify at hearing. Employee did not file a witness list. Employee contended that he is not an attorney and was not familiar with the witness list deadline and his non-party witness should be allowed to testify.

Employer objected to the testimony of Employee's non-party witness as Employee failed to file a witness list under 8 AAC 45.112, which requires exclusion of the non-party witness testimony if the party fails to file the witness list with the board and serve it upon all parties at least five working days before the hearing. Employer's objection was sustained and Employee's non-party witness was not permitted to testify.

1) **Was the oral order sustaining Employer's objection to Employee's witness testimony correct?**

At hearing, Employee cited an April 2015 letter from Bruce Holmes, D.C. to a workers' compensation hearing officer. Employer stated he had not received the letter. The letter was received by the board on April 30, 2016 with additional medical documents but was not filed nor served with a medical summary form on Employer. Because the medical records had not been properly filed and served, the panel exercised its discretion and continued the hearing to allow the Employer to receive and review the medical records and file a supplementary brief.

2) **Was the oral order continuing the hearing correct?**

Employer contends Employee made an excessive or unlawful change of physician in violation of AS 23.30.095(a) and 8 AAC 45.082(c) when he changed his attending physician from Jonathan Nissanoff, M.D. to Dr. Gitter. Employer contends Employee had previously changed attending physicians from Dr. Holmes to Dr. Nissanoff without a referral. Employer also contends the April 22, 2015 letter from Dr. Holmes does not qualify as a referral to Dr. Nissanoff because

Employee had already been treated by Dr. Nissanoff and referrals cannot be made retroactively. Employer contends there is no referral from Dr. Nissanoff to Dr. Gitter and Employee did not provide notice of change of physician before that change. Employer asserts that the Dr. Gitter letter dated January 5, 2016 and any other reports, opinions or testimony of Dr. Gitter must be stricken from the record.

Employee contends that he did not make an unauthorized change in his attending physician. He contends that the April 22, 2015 letter by Dr. Holmes qualifies as a referral to Dr. Nissanoff and thus the change to Dr. Nissanoff from Dr. Holmes did not constitute his one change of attending physician under AS 23.30.095(a). He contends Dr. Gitter's January 5, 2016 letter and any other reports, opinions or testimony of Dr. Gitter should remain in the record.

3) Did Employee make an unlawful change of physician in violation of AS 23.30.095(a)?

FINDINGS OF FACT

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

1) On July 28, 2011 Employee injured his back while working for Employer. (Report of Occupational Injury or Illness, May 7, 2012).
2) Dr. Holmes treated Employee's back both prior to and after his July 28, 2011 work injury. (Chart Notes, Dr. Holmes, September 20, 2008 through July 27, 2012).
3) On July 27, 2012 Dr. Holmes referred Employee to an "orthopedic surgeon/neurosurgeon." (Letter from Dr. Holmes, July 27, 2012).
4) On January 3, 2014, Dr. Nissanoff, an orthopedic surgeon, treated Employee for cervical radicular pain and referred Employee to pain management specialist, Javid Ghandehari, M.D. (Request for Authorization, Dr. Nissanoff, January 3, 2014).
5) On April 30, 2015 the board received a letter dated April 22, 2015 from Dr. Holmes addressed to a workers' compensation hearing officer; it was accompanied by additional medical documents. The letter included the following statement:

> This patient has already been evaluated by Dr. Jonathan Nissanoff, MD, spinal surgeon who recommended spinal surgery in the midthoracic spine in consideration of the myelopathy effects of the compression fracture, his recommendation was that this surgery should be performed as soon as possible. This patient is recommended

> for additional pre-surgical evaluation by Dr. Jonathan Nissanoff, MD, spinal surgeon. (Letter from Dr. Holmes, April 22, 2015).

6) On October 12, 2015, *De Loretto v. Trident Seafoods Corp.,* AWCB Decision No. 15-0133 issued. *De Loretto I* ordered that "a panel [Second Independent Medical Evaluation (SIME)] will be conducted by an SIME physician with expertise in orthopedic surgery and with expertise in neurosurgery, as selected by the designee." (*De Loretto I*).
7) On December 11, 2015 Employer filed and served on the board and Employee a complete chronological set of Employee's medical records in a SIME medical binder. The binder did not contain the letter from Dr. Holmes dated April 22, 2015. (Record, SIME Medical Records, December 9, 2015 and December 11, 2015; Observation).
8) On December 16, 2015, a workers' compensation officer notified the parties that the scheduled SIME appointments were to be conducted on February 5, 2016 with orthopedist Sidney H. Levine, M.D, in San Diego, California and neurosurgeon Bruce M. McCormack, M.D. in San Francisco, California. (Employee Notification Letter, December 16, 2015).
9) On January 6, 2016 Employee called the Division's office and spoke with a workers' compensation officer regarding his inability to attend the scheduled SIME appointments because "he was unable to walk and may need an MRI" and he "wants to see [physicians] in LA." The officer told Employee to obtain a note from his physician and provide it to the board and Employer and to discuss with Employer the possibility of postponing the SIME appointments. The officer explained that the SIME appointments were still scheduled and he was expected to attend. (Record, Phone Call Event, January 6, 2016).
10) On January 7, 2016 Employee called the Division's office and spoke with a workers' compensation technician about his inability to attend the SIME appointments. The technician repeated the same information from the January 6, 2016 call to Employee. (Record, Phone Call Event, January 7, 2016).
11) On February 1, 2016, a workers' compensation officer received an email with a letter from the Employee and a letter from Dr. Gitter dated January 5, 2016 stating:

> Mr. Alexander De[L]oretto suffers from severe generalized spinal pain and left shoulder pain. Mr. Delorett[o] is nearly immobilized with pain. He is unable to travel beyond short distances from his home. Please arrange for his independent medical exams to be done in Los Angeles. (Employee Letter, February 1, 2016; Letter from Dr. Gitter, January 5, 2016).

12) Employee did not attend the SIME appointments. (Record).
13) On February 10, 2016 the board received the letter from Dr. Gitter dated January 5, 2016, filed by Employer on a medical summary form. There is no referral from Dr. Nissanoff to Dr. Gitter on record. (Dr. Gitter, Chart Notes, January 5, 2016; Observations).
14) On February 12, 2016 Employer filed a petition to strike all medical records pertaining to Employee's treatment with Dr. Gitter contending Employee changed physicians excessively. (Employer's Petition, February 12, 2016).
15) On March 8, 2016, the parties attended a prehearing conference. The board designee scheduled Employee's petition to strike to be heard on April 26, 2016. The prehearing conference summary stated the "parties are reminded witness lists and hearing briefs must be served upon all parties and filed with the board by close of business on April 19, 2016." Employee confirmed receipt of the prehearing conference summary. (Prehearing Conference Summary, March 8, 2016; Employee testimony).
16) Employee did not file a brief containing his arguments or any evidence he intended to rely on to support his contentions prior to hearing. This decision relies on Employee's testimony and oral argument for his contentions. (Record).
17) Employee did not file a witness list. (Record).
18) At the hearing on April 26, 2016, Employee testified Dr. Holmes was his first his attending physician. He testified Dr. Holmes provided a referral to Dr. Nissanoff. Employee testified that he had a copy of a referral letter by Dr. Holmes dated April 22, 2015 addressed to a workers' compensation officer in his possession and that Dr. Holmes sent it to the board. Employee stated he assumed the board would serve the letter on Employer. (Employee).
19) At the hearing on April 26, 2016, Employer's attorney indicated he had not received the April 22, 2015 letter from Dr. Holmes and its accompanying medical records. Employer's attorney also stated that Employer had not received notice of the change to Dr. Gitter prior to Employee's change of physician. (Record).
20) At hearing on April 26, 2016, Employee indicated he wished Dr. Holmes to testify, and Employer objected to the testimony. The board orally sustained Employer's objection to Employee's non-party witness testimony (Record).
21) At hearing on April 26, 2016 the board orally ordered the continuance of the hearing on its own motion. (Record).

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;
> . . . .
>
> (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. . . .

An employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. 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).

> **AS 23.30.110 Procedure on claims**
> (c). . . After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .
>
> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and

> reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.135. Procedure before the board**.
> (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **8 AAC 45.052. Medical Summary.**
> (d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.
>
> **8 AAC 45.070. Hearings.**
> (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.
> . . . .
>
> **8 AAC 45.074. Continuations and Cancellations.**
> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
> (1) good cause exists only when
> . . . .
>
> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
>
> . . . .
>
> (N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;
>
> **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; . . . .
>
> . . . .
>
> (4) regardless of an employee's date of injury, the following is not a change of an 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.

. . . .

8 AAC 45.112. Witness list

A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider

> (1) the testimony of a party, and
>
> (2) deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list.

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1) Was the oral order sustaining Employer's objection to Employee's witness testimony correct?

Employee did not file a witness list and sought to have a non-party witness testify at hearing. Testimony from a party's witness must be excluded by the board if the party fails to file the witness list with the board and serve it upon all parties at least five working days before the hearing. 8 AAC 45.112. Because Employee failed to file and serve a witness list as directed by the board designee in the prehearing conference summary, Employee's non-party witness must be excluded from testifying at hearing.

Employee testified that he is not an attorney and was not familiar with the witness list deadline. While the board may waive a procedural requirement if manifest injustice would result from strict application of the regulation, it may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law. 8 AAC 45.195. Employee failed to produce evidence establishing manifest injustice. Employee spoke with workers' compensation officers and technicians on several occasions and was served with the prehearing conference summary from March 8, 2016 containing the witness list deadline. He confirmed receipt of the prehearing conference summary. This evidence conflicts with his statement that he was not familiar with the witness list deadline. Because Employee failed to produce evidence establishing manifest injustice would result from strict application of 8 AAC 45.112, the panel will not waive the procedural requirements of 8 AAC 45.112. The oral order sustaining Employer's objection to Employee's witness testimony is correct.

2) Was the oral order continuing the hearing correct?

Alaska Workers' Compensation statutes and regulations are to 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 employers. AS 23.30.001(1). Hearings in workers' compensation cases shall be impartial and fair to all parties. AS 23.30.001(2). Parties must also be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered. *Id.*

Hearing continuances are not favored and will not be routinely granted. Continuances are granted by the board at its discretion for good cause only. 8 AAC 45.070(a); 8 AAC 45.074(b). 8 AAC 45.074(b)(1)(L) provides that good cause exists when the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing. Employer had not been served with Dr. Holmes April 22, 2015 letter and accompanying medical documents. Employee also did not file a brief with his arguments and the evidence which would be used to support his arguments. Therefore, Employer had neither notice nor actual knowledge of the Dr. Holmes' letter. The board determined that Dr. Holmes April 22, 2015 letter constituted additional evidence that must be reviewed by Employer and the board to complete the hearing. Furthermore, the board determined that additional arguments by Employer in response to the surprise additional evidence were necessary to complete the hearing.

8 AAC 45.074(b)(1)(N) also provides that good causes exists when the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing. On December 11, 2015 Employer filed and served an SIME binder with the board and Employee containing all of the medical records in his possession. Employer demonstrated due diligence in properly filing and serving upon Employee and the board all medical records in its possession. Failure to grant the requested continuance may result in irreparable harm to Employer as due process requires that Employer have reasonable opportunity to review evidence filed by Employee and to present arguments at hearing. The continuance and opportunity for supplemental briefing provided Employer time to review the letter and medical documents and to present arguments at hearing.

The board properly exercised its discretion in continuing the hearing to allow the board and the Employer an opportunity to review the additional evidence and to provide the Employer opportunity for supplemental briefing and arguments. The oral order to continue the hearing and to provide additional opportunity for briefing was correct.

3) Did Employee make an unlawful change of physician in violation of AS 23.30.095(a)?

Employee designated his attending physician by obtaining treatment, advice, an opinion or any type of service from a physician for the work injury. 8 AAC 45.082(b)(2). Employee first treated with Dr. Holmes for his work injury. Employee treated with Dr. Nissanoff beginning on January 3, 2014. Employee treated with Dr. Gitter on January 5, 2016, documented by his obtaining a letter from Dr. Gitter seeking a medical opinion.

A referral by Employee's attending physician to a specialist is not considered a change of physician. AS 23.30.095(a). Employee contends he had a referral to Dr. Nissanoff from Dr. Holmes, as evidenced by the April 22, 2015 letter from Dr. Holmes.

AS 23.30.095(a) provides that, "Referral to a specialist by the employee's attending physician is not considered a change in physicians." Employee's contention that he had a valid referral at the time be began treating with Dr. Nissanoff is not supported by the evidence. Employee began treatment with Dr. Nissanoff on January 3, 2014 and the referral letter from Dr. Holmes is dated April 22, 2015. The referral letter dated April 22, 2015 is given little weight on whether there was a referral from Dr. Holmes to Dr. Nissanoff when Employee began treatment with Dr. Nissanoff as it only recommends "additional" or future treatment. The letter states, "This patient has already been evaluated by Dr. Jonathan Nissanoff, MD." This statement simply confirms that Employee received medical treatment with Dr. Nissanoff prior to the date of the letter. The letter goes on to state, "This patient is recommended for additional pre-surgical evaluation by Dr. Jonathan Nissanoff, MD, spinal surgeon." This statement only proves Employee is referred for "additional" or future treatment. The letter did not state that Employee had been referred to Dr. Nissanoff by Dr. Holmes in the past, the date of such a prior referral, and that the past evaluation by Dr. Nissanoff had been made upon that referral. Because Employee did not have a referral to Dr. Nissanoff from Dr. Holmes prior to receiving medical treatment from Dr. Nissanoff, that change constituted a change of physician under AS 23.30.095(a).

The medical records support Employer's contention Employee then changed physicians to Dr. Gitter from Dr. Nissanoff without a referral, as there is no referral on record. The medical records support Employer's contention that Employee also did not provide notice of his change in physician to Dr. Gitter as there is no document providing such notice in the record. As

Employee had already made his one change in physician to Dr. Nissanoff from Dr. Holmes, the change to Dr. Gitter from Dr. Nissanoff constitutes an unlawful change of physician. The evidence demonstrates Employee did not have a referral from Dr. Holmes to Dr. Nissanoff prior to January 3, 2014, nor a referral from Dr. Nissanoff to Dr. Gitter, and Employee did not provide written notice of his change in physician to Dr. Gitter. Employee made an unlawful change of physician to Dr. Gitter, and those records must be excluded from the record.

CONCLUSIONS OF LAW

1) The oral order sustaining Employer's objection to Employee's witness testimony was correct.
2) The oral order continuing the hearing was correct.
3) Employee has made an unlawful change of physician in violation of AS 23.30.095(a).

ORDER

1) Employers' February 12, 2016 petition to exclude is GRANTED.
2) The board will not consider the reports, opinions, or testimony of Dr. Gitter in any form, in any proceeding, or for any purpose. Employer is not liable for medical bills incurred for the unlawful change of physician to Dr. Gitter.

Dated in Juneau, Alaska on June 27, 2016

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
Amanda Eklund, Designated Chair

_____/s/_____
Bradley Austin, 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 ALEXANDER G DE LORETTO, employee / claimant; v. TRIDENT SEAFOODS, employer; LIBERTY INSURANCE CORPORATION, insurer / defendants; Case No. 201121320; 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 28, 2016.

_____/s/_____
Drew Campbell, Workers' Compensation Technician