ALASKA WORKERS' COMPENSATION BOARD

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

JOSEPH TRAUGOTT, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201309316
ARCTEC ALASKA, Self-Insured Employer, Defendant.	)	AWCB Decision No. 16-0063
	)	Filed with AWCB Fairbanks, Alaska on July 29, 2016

ARCTEC Alaska's May 20, 2016 petition objecting to questions submitted to the board's medical evaluator was heard on June 30, 2016 in Fairbanks, Alaska. This hearing date was selected on June 14, 2016. Attorney Robert Bredesen appeared and represented ARCTEC Alaska (Employer). Attorney Eric Croft appeared and represented Joseph Traugott (Employee). The record closed at the hearing's conclusion on June 30, 2016.

ISSUE

A hearing on the merits of Employee's claim for benefits was heard on February 18, 2016. In the course of deliberations, the hearing panel noted both gaps in the medical record and its own lack of understanding of the medical evidence. As a result, *Traugott v. ARCTEC Alaska*, AWCB Decision No. 16-0018 (March 10, 2016) (*Traugott I*), ordered a second independent medical evaluation (SIME), an evaluation by a physician selected by the board. Each party was allowed to submit questions to the SIME physician in addition to the questions propounded by the board.

On May 20, 2016, Employer objected to three of Employee's questions and two of the questions submitted by the board. Employer contends Employee's questions misstate the law or

mischaracterize the evidence and should not be sent to the SIME physician. Employer also contends the board's questions do not use the term "injury" as it is defined in the Act, and they should not be sent as they may mislead the doctor. Employee contends that both his questions and the board's questions are proper, but he offered to revise his questions.

Should the questions to the SIME doctor be revised?

FINDINGS OF FACT

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

1. Employee was diagnosed with diabetes in 2002. (*Traugott I*).
2. Between August 2004 and March 2006, Employee was treated several times for blisters or ulcers on his big toes. (*Traugott I*).
3. On September 6, 2006, Patrick Crawford, D.P.M., diagnosed possible Charcot foot (Charcot neuroarthopathy) in Employee's right foot. (*Traugott I*).
4. On August 11, 2007, Employee was diagnosed with neuropathy. (*Traugott I*).
5. Neuropathy, or peripheral neuropathy, is a disruption in the function of peripheral nerves, commonly due to diabetes. It most often involves nerves related to sensation or proprioception. (Dr. Yodlowski, EME Report, January 5, 2016).
6. When a person develops neuropathy, their skin stops producing the oils that lubricate the skin and they do not sweat. Because they do not feel damage to the skin, they are at risk of skin ulcers. (Dr. Grimes, Deposition Testimony, February 6, 2016).
7. On February 4, 2010, an x-ray revealed evidence of joint destruction in Employee's right foot. Dr. Crawford diagnosed Charcot neuroarthopathy in Employee's right midfoot. It was noted that the second toe on Employee's right foot was a hammer toe. (Dr. Crawford, Chart Note, February 10, 2010).
8. Charcot neuropathy, or Charcot foot, is a condition that occurs in a small percentage of individuals with neuropathy. It appears as inflammation in a joint or bone, and the foot gets red, swollen, and looks infected, but there is no organism present. During the inflammation stage, the bones begin to crumble and fall apart. It is unknown why Charcot foot occurs. A flare of Charcot may lead to a deformity causing an abnormal weight-bearing surface. These

abnormal weight-bearing surfaces are at additional risk of ulceration because the skin breaks down very easily. (Dr. Grimes, Deposition Testimony, February 6, 2016).

9. Hammer toe can develop as a result of neuropathy. The damage to the nerve causes an imbalance in the muscles of the toe, causing the toe to curl. (Yodlowski).
10. May 2, 2011, Dr. Crawford noted Employee's hammer toe had become infected and recommended surgery to correct the hammer toe condition. (Dr. Crawford, Chart Note, May 2, 2011).
11. On May 21, 2012, Employee reported the lesions on his toe had increased in size. He was diagnosed with a diabetic ulcer and bone infection (osteomyelitis). (Amarillo Family Physicians Clinic, Chart Note, May 21, 2012).
12. On July 23, 2012, Employee was released to work after the hammer toe surgery. (Dr. Crawford, Work Release, July 31, 2012).
13. Employee was hired by Employer in March 2013. At the time of hiring, he was given a physical examination. He was approved for work without restriction, but was notified he should consult his doctor because a pulmonary function test had been abnormal. Employee worked about three weeks at the Indian Mountain site, and was transferred to Tin City. While at Tin City, Employee primarily worked replacing heating and cooling systems. The work was six days per week, at least 10 hours per day. Most of the work was overhead, requiring Employee to spend significant time standing on ladders. Standing on the ladders caused pressure on the middle of his feet. (Employee Deposition, October 16, 2015; Beacon Occupational Health, Hiring Physical, March 11, 2013; Employee).
14. In the middle of May 2013, Employee developed a blister, smaller than the size of a dime, located on the outside of his right foot, near the middle of the arch. Employee believed the blister was caused by the pressure on his foot while standing on ladders. Employee did not seek medical attention, and did not report the injury. He treated the blister himself by keeping it clean; he did not use any antibiotics. The blister healed and went away within a couple of weeks. (Employee Deposition, October 16, 2015).
15. On July 5, 2013, the skin on the sole of Employee's right foot cracked open about an inch away from where the blister was in May. There was a fetid discharge. Because there are no medical facilities at Tin City, Employee was flown to Nome the next day. (Employee Deposition, October 16, 2015).

16. Employee was hospitalized in Nome with an initial diagnosis of cellulitis of the foot, secondary to diabetes. He reported that while he had no recent injury to the foot, he had been experiencing foot problems for about a week. (Norton Sound Regional Hospital, Inpatient Admission Form and Admission History, July 6, 2013).
17. Employee was discharged from Norton Sound Regional Hospital on July 11, 2013 with a diagnosis of moderately severe cellulitis. X-ray and CT scans had shown a soft tissue ulcer with no evidence of osteomyelitis, although the possibility of osteomyelitis remained a concern. Wound and blood cultures were negative, suggesting an anaerobic infection. The wound was debrided, and Employee was to receive follow-up care when he returned home to Texas. (Norton Sound Regional Hospital, Discharge Summary, July 11, 2013).
18. On July 15, 2013, Employee was seen by Dr. Crawford. Dr. Crawford reported Employee had developed a blister on his right foot in May 2013, which had cracked open and become infected. Dr. Crawford diagnosed a diabetic ulcer, cellulitis, and Charcot foot. Another wound culture was done, and Employee was to continue on antibiotics. An MRI was scheduled for July 23, 2013. (Dr. Crawford, Chart Note, July 15, 2013).
19. Employee's foot improved initially, but by August 1, 2013, he was hospitalized when osteomyelitis was suspected, and the wound was drained and debrided. Cultures revealed a Staphylococcus epidermis infection, and Employee was started on a broad-spectrum antibiotic. (BSA Health System, Discharge Summary, August 5, 2013).
20. In September 2014, Employee's wound was found to be infected with methicillin resistant Staphylococcus aureus (MRSA). (PPL Laboratory, Microbiology Report, September 27, 2014).
21. By December 2, 2014, cultures showed no infection in Employee's foot. (BSA Health System, Laboratory Report, December 2, 2014).
22. By December 17, 2014, the wound had healed, although there was still some swelling and warmth. (Dr. Crawford, Chart Note, December 17, 2014).
23. On January 5, 2015, Employee returned to Dr. Crawford with a swollen right foot and ankle. An x-ray revealed partial dislocation of the right ankle, and Dr. Crawford diagnosed Charcot right foot and ankle, possibly aggravated by gout. (Dr. Crawford, Chart Note, January 5, 2015).

24. On January 20, 2015, Employee was seen by Mark Drew, M.D., at BSA Health System. Dr. Drew diagnosed severe right foot and ankle Charcot arthropathy. Dr. Drew noted that the ulcer on the sole of Employee's foot had not recurred, but he had a thick callus at the site. (BSA Health System, Chart Note, January 20, 2015).
25. On February 9, 2015, Dr. Drew noted the deformity in Employee's right ankle was worsening due to Charcot arthropathy. The sole of his foot remained intact with no ulceration. (BSA Health System, Chart Note, February 9, 2015).
26. By March 30, 2015, Employee had developed a small ulceration between the third and fourth toe of his right foot. (BSA Health System, Chart Note, March 30, 2015).
27. On July 6, 2015, Dr. Crawford filed a Physician's Report stating Employee's right foot condition was work related. He explained "stress to right foot caused blister/open area leading to infection and ulcer." (Dr. Crawford, Physician's report, July 16, 2015).
28. On November 4, 2015, Employee met with Jerry Grimes, M.D., an orthopedic surgeon. Dr. Grimes noted that midfoot radiographs of Employee's ankle were consistent with Charcot neuroarthropathy, but the talus was essentially gone and did not show significant fragmentation. Dr. Grimes concluded the lack of fragmentation could be secondary to infection, Charcot, or an avascular necrotic process. Based on blood tests, Dr. Grimes concluded Employee did not have active osteomyelitis. (Dr. Grimes, Chart Note, November 4, 2015).
29. On November 12, 2015, Dr. Grimes performed the fusion surgery on Employee's right ankle using internal hardware. (University Medical Center, Surgical Documentation, November 12, 2015). Because of the unusual appearance of the talus during surgery, Dr. Grimes sent biopsy samples for pathology and microbiology evaluation. (Dr. Grimes, Deposition, February 5, 2016).
30. The pathology tests took several days to complete. On November 24, 2015, the pathologist reported to Dr. Grimes that the bone destruction could be consistent with Charcot, but it was more likely that osteomyelitis was an initiating or complicating factor. (Pathology Report, November 24, 2015). The microbiology reports subsequently confirmed osteomyelitis in Employee's talus. (Dr. Grimes, Deposition, February 5, 2016).
31. Determining whether the damage to a bone was caused by osteomyelitis or Charcot neuroarthropathy is very difficult using imaging such as x-rays, MRIs, and CT scans. The

best way to distinguish is through a bone biopsy. (Dr. Grimes, Deposition, February 5, 2016).

32. While osteomyelitis can develop from a blood borne infection, the infection is most commonly acquired through a break in the skin, such as a blister, cut, or ulcer. It is one of the most frequent infections of a diabetic foot. (Dr. Grimes, Deposition, February 5, 2016).
33. After receiving the pathology and microbiology reports, Dr. Grimes revised his diagnosis, concluding the collapse of Employee's talus was due to osteomyelitis rather than Charcot foot. He was convinced the osteomyelitis infection originated with the May 2013 blister on Employee's foot. Dr. Grimes stated that while Employee was at a higher risk than someone with a healthy foot, Employee would probably not have developed the ulceration and osteomyelitis with normal activities. Dr. Grimes relied, in part, on Dr. Crawford's July 16 2015 report which stated stress to right foot caused a blister or open area leading to the infection and ulcer. (Dr. Grimes, Deposition, February 5, 2016).
34. On January 25, 2016, Dr. Yodlowski performed an employer's medical evaluation (EME). Because Employee was unable to travel, Dr. Yodlowski's evaluation was limited to a review of the medical records. While Dr. Yodlowski had Employee's medical records dating to 2002, she did not have records from the November 2015 surgery. Dr. Yodlowski noted Employee had been diagnosed with both Charcot foot and osteomyelitis well before the work injury. She opined the loss of bone in Employee's ankle was most likely due to Charcot foot, but could be due to a combination of Charcot and osteomyelitis. She explained the underlying cause of Charcot foot was the peripheral neuropathy due to Employee's diabetes, and the Charcot foot develops with normal activities of living, and was not due to trauma. She further explained that MRSA was often found on a person's skin, and Employee was not at a higher risk of infection because of his work activities. In response to a question asking her to identify the substantial cause of "the diagnosed condition," Dr. Yodlowski responded the cause of the Charcot and the infections was Employee's diabetes, not his employment. (Dr. Yodlowski. EME Report, January 5, 2016).
35. At the February 18, 2016 hearing, Dr. Yodlowski testified about causation: "countless people climb ladders every day . . . and it doesn't cause a diabetic ulcer;"; "what causes a diabetic ulcer is having these underlying abnormalities . . . in your foot structure and then doing activities that people do every day without sustaining injury." She noted that "if you climb

ladders and get a blister, you don't get hospitalized unless you have other pathology." She did note, however, that if an individual "didn't follow medical advice on prevention, substantial pressure on middle of foot could likely cause him to develop an ulcer." She did not know how much of the day Employee spent on a ladder, but she had not seen nor read about ulcers as a result of standing on ladders. (Dr. Yodlowski).

36. *Traugott I* was issued on March 10, 2016. The decision noted the findings of fact were based on the record at the time of the hearing and were limited to the facts necessary to resolve the limited issues presented. Due to apparent gaps and its lack of understanding of the medical records, the panel was unable to decide the key legal issues of what caused the osteomyelitis in Employee's midfoot and what caused the collapse of Employee's talus. Consequently, an SIME with Carol Frey, M.D., an orthopedic surgeon and a foot and ankle specialist, was ordered. *Traugott I* ordered the following questions be asked in addition to the standard questions to SIME doctors:

> 1. How likely is it that a blister that healed within a couple of weeks without treatment, including antibiotics, would be the portal of entry for the infection in the diabetic ulcer on Employee's foot that occurred about five weeks later?
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> 2. If the blister was not the portal of entry for the infection in Employee's subsequent midfoot ulcer, could such an ulcer develop because Employee's preexisting diabetic neuropathy and Charcot foot were aggravated by significant time spent standing on ladders?
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> 3. What is the likelihood Employee would have developed the midfoot ulcer had he not been engaged in work activities – in other words, how likely it was the ulcer would have developed if Employee had only engaged in his normal activities of daily living?
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> 4. Was the collapse of Employee's talus was more likely due to Charcot neuroarthropathy or to osteomyelitis?
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> 5. If the collapse of Employee's talus was due to Charcot neuroarthropathy, did the osteomyelitis aggravate the collapse?
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> 6. Is it probable that the source of the osteomyelitis in Employee's talus was his midfoot osteomyelitis, or was there another, more likely, source? (*Traugott I*).

37. The board's letter to Dr. Frey was accompanied by 2,983 pages of medical records and included several legal definitions, but did not include the definition of "injury" in

AS 23.30.395(24). In addition to the questions ordered in *Traugott I*, several of the board's standard questions were included. Two of the standard questions are at issue here:

> 2. If, in your opinion, one cause of Joseph Traugott's disability, or need for medical treatment is a pre-existing condition, did the 2013 employment injury aggravate, accelerate, or combine with the pre-existing condition to cause disability or need for treatment?
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> 5. If in your opinion, the 2013 injury was "the substantial cause" of Joseph Traugott's disability, does the work-related disability continue?

Question 1 asked Dr. Frey to list all the causes of Employee's disability or need for medical treatment, and Question 4 asked which of the causes identified in her answer to Question 1 would be "the substantial cause" of his disability or need for medical treatment. (SIME Referral Letter, June 6, 2016).

38. Pursuant to 8 AAC 45.092(h)(5), both parties propounded questions to be submitted to Dr. Frey as part of the SIME referral letter. As an introduction to the parties' questions, the letter states:

> Please note that the parties' questions may include statements of the law that differ from each other or from that provided by the Board. Additionally, they may ask you to assume that certain facts are true. At a hearing on Mr. Traugott's claim, the parties will be free to advocate both for their interpretation of the law and their view of the facts. Recognizing that there may be inconsistencies between the Board's questions and the parties' questions, please answer the following:

Three of Employee's questions are at issue here:

> 2. Working for Arctec at Tin City, Mr. Traugott was wearing new boots, was working 60 hours a week, which involved a substantial amount of walking and carrying, and was working on ladders more than on any other job he had ever had. (SIME #2235- 2236). "Being on ladders all the time . . . creates a lot of pressure on the middle of your foot." (SIME #2236) In May 2013, he developed a blister in his arch that did not ulcerate and healed cleanly. In July 2013, he developed a blister near the first that ulcerated. (SIME #2427-2428)
>
> In your professional opinion, is this the type of work activity that would lead to the blisters Mr . Traugott experienced in May and July 2013?
>
> 3. In the medical records, there are two potential causes of Mr. Traugott's osteomyelitis, a 2012 hammertoe procedure with no complications and the 2013 blisters, with substantial osteomyelitis complications.

> Do you agree with Dr. Grimes that if "you compare the second toe surgery in 2012 to the ulcer on the plantar aspect of Mr. Traugott's foot, because of the close time relationship and closer geographic location, the ulcer on the bottom of the foot is a much more likely cause of the osteomyelitis of the hind foot than the toe."? (SIME #2172)
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> 5. The Alaska Supreme Court has recognized that sometimes workplace injuries or exposures combine with other preexisting conditions to produce disability or need for treatment. In *Fairbanks North Star Borough v. Rogers and Babler*, 747 P.2d 528, 532-33 (Alaska 1987), the court described the appropriate test for aggravations of underlying conditions.
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> > Where, as here, a claimant has a degenerative injury, the claimant can be expected to experience some degree of disability regardless of any subsequent trauma. It can thus never be said that "but for" the subsequent trauma the claimant would not be disabled. The proof required, however, is not so difficult. Rather, the claimant need only prove that "but for" the subsequent trauma **the claimant would not have suffered disability at this time, or in this way, or to this degree** . In other words, to satisfy the "but for" test, the claimant need only prove, as indicated above, that **the aggravation, acceleration or combination was [the] substantial [cause of] the resulting disability**. We perceive no conceptual basis for supposing that the employee would have any greater difficulty in proving this element of his claim than in proving any other. (emphasis added)
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> Did the July 2013 infections aggravate, accelerate, or combine with a pre -existing condition, such as diabetes or Charcot Foot, and is this combination now the substantial cause of the need for medical treatment or disability? (SIME Referral Letter, June 6, 2016).

39. Dr. Frey is an assistant clinical professor of orthopaedic surgery at the University of California, Los Angeles. She has authored or coauthored 57 articles in medical journals since 1975 and has authored six books on orthopedics and contributed to more than 60 others. (Carol Frey, M.D., Curriculum Vitae).
40. On May 20, 2016, Employer wrote a letter to the board designee arranging the SIME. Employer objected to Employee's questions 2, 3, and 5, and objected to the use of the term "injury" in the board's questions. (Letter, May 20, 2016). Although the letter did not meet all of the technical requirements, it was deemed to be a petition, and a hearing was set for June 30, 2016. (Prehearing Conference Summary, June 15, 2016).

41. At the June 30, 2016 hearing, Employer contended that because the Act defines "injury" as an accidental injury arising out of and in the course of the employment, the use of the term in the board's questions 2 and 5 is argumentative in that it suggests to Dr. Frey that the board has already concluded Employee's injury arose out of the employment. Employer contended Employee's question 2 was factually inaccurate in that it refers to "blisters" while there is only evidence of one blister in the medical records. Employer also contended the question is inaccurate in that it implies Employee's boots, which were new when he began the job in March were still new in July 2013. Employer objected to Employee's question 3, first because it uses "blisters" and second in that it identifies only two potential causes of the osteomyelitis. Employer asserted there are other potential causes and Dr. Frey should be asked to evaluate all of them. Finally, Employer objects to the legal definition in Employee's question 5. Employer contended the definition is a misstatement of "old law" which it contended did not survive the 2005 amendments to the Act. (Employer's Hearing Argument).
42. In medical usage, "injury" means the damage or wound of trauma. (Stedman's Medical Dictionary 903 (27th Edition 2000)).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted 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;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . .
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> (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 23.30.010. Coverage.**
> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

Prior to November 7, 2005, benefits were payable under AS 23.30.010 if employment was a substantial factor in an employee's disability or need for medical treatment. In *Rogers and Babler* at 533, the Supreme Court addressed the situation in which the employment causes an aggravation, or acceleration of a preexisting condition:

> Where, as here, a claimant has a degenerative injury, the claimant can be expected to experience some degree of disability regardless of any subsequent trauma. It can thus never be said that "but for" the subsequent trauma the claimant would not be disabled. The proof required, however, is not so difficult. Rather, the claimant need only prove that "but for" the subsequent trauma the claimant would not have suffered disability at this time, or in this way, or to this degree. In other words, to satisfy the "but for" test, the claimant need only prove, as indicated above, that the aggravation, acceleration or combination was a substantial factor in the resulting disability. We perceive no conceptual basis for supposing that the employee would have any greater difficulty in proving this element of his claim than in proving any other. (Citations omitted).

Subsequently, in *Doyon Universal Services v. Allen.*, 999 P.2d 764, 770 (Alaska 2000), the court stated an employee had to show that: "(1) the disability would not have happened "but for" an injury sustained in the course and scope of employment; and (2)

reasonable persons would regard the injury as a cause of the disability and attach responsibility to it."

The change from "a substantial factor" to "the substantial cause" in 2005 "originated with the legislature's desire to limit aggravation claims," *Huit v. Ashwater Burns, Inc.* Slip Op. No. 7111 (June 17, 2016) at 28, and there was a question as to whether aggravation claims survived the amendment. In *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 185 (August 21, 2013) at 17-18, the Commission determined that aggravation and acceleration claims did survive the amendment, but the board now had to weigh the preexisting condition and the work incident and determine which was the substantial cause of the employee's need for medical treatment.

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . . .
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> (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. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence.

> **8 AAC 45.092. Selection of an independent medical examiner**
> . . . .
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> (g) If there exists a medical dispute under in AS 23.30.095(k),
> . . . .
> (3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if
> (A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or
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> (B) the board on its own motion determines an evaluation is necessary.

(h) If the board requires an evaluation under AS 23.30.095(k), the board will, in its discretion, direct

. . . .

(5) that, . . each party may submit to the board designee up to three questions per medical issue in dispute under AS 23.30.095(k), as identified by the parties, the board designee, or the board, as follows:

. . .

(C) if any party objects to any questions submitted to the physician, that party shall file a petition with the board and serve all other parties within 10 days after receipt of the questions; the objection must be preserved in the record for consideration by the board at a hearing on the merits of the claim, or, upon the petition of any party objecting to the questions, at the next available procedural hearing day; failure by a party to file and serve an objection does not result in waiver of that party's right to later argue the questions were improper, inadequate, or otherwise ineffective;

. . . .

(j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to

(1) submit interrogatories or depose the examiner, the party must

(A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves interrogatories; and . . . .

(2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or

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. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so

> requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

The purpose of an SIME is to have an independent expert provide an opinion to the board about a contested issue. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). The SIME physician is the **board's expert**, not the employee's or employer's expert. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 5; (emphasis original). An SIME is not intended to give the parties an additional medical opinion or bolster their position. Id. at 4-5. See also *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 at 3 (July 23, 1997). See also *Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991).

> **AS 23.30.115. Attendance and fees of witnesses.**
> (a) . . . the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure.

> **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
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> (1) the claim comes within the provisions of this chapter; . . . .

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. *Carter*, 818 P.2d at 665; *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 presumption does not apply to an issue if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1244 (Alaska 2005). The presumption analysis does not apply to "every possible issue in a workers' compensation case." *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010).

In *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782,791 (Alaska 2007), the court cited 8 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 130.06[2][e] (2006) for the proposition that workers' compensation is not a game of "say the magic word;" what counts is the substance of a witness's testimony rather than whether the witness used the language of the Act. Recently, in *Huit* at 33, the Court reiterated that merely reciting the proper words may not be substantial evidence as well.

> **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. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.
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> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
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> (24) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury; "injury" includes breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices that function as part of the body and further includes an injury caused by the wilful act of a third person directed against an employee because of the employment;
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> **Alaska Rule of Civil Procedure 30. Depositions Upon Oral Examination.**
> . . . .
>
> (c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under provisions of the Rules of Evidence. . . . All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.
>
> (d) Schedule and Duration; Motion to Terminate or Limit Examination.

> (1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. No specification of the defect in the form of the question or the answer shall be stated unless requested by the party propounding the question. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

ANALYSIS

Should the questions to the SIME doctor be revised?

The presumption of compensability need not be applied in this case. Employee's entitlement to benefits, and the determination of facts upon which that entitlement might rest, are not at issue. The only question is what questions should be submitted to the SIME physician – a procedural question.

Employer's objections to the board's questions.

Employer objects to two of the board's questions:

> 2. If, in your opinion, one cause of Joseph Traugott's disability, or need for medical treatment is a pre-existing condition, did the 2013 employment injury aggravate, accelerate, or combine with the pre-existing condition to cause disability or need for treatment?
>
> 5. If in your opinion, the 2013 injury was "the substantial cause" of Joseph Traugott's disability, does the work-related disability continue? (SIME Referral Letter, June 6, 2016).

Employer contends that because AS 23.30.395(24) defines "injury" as an accidental injury or death arising out of and in the course of employment, the questions suggest to Dr. Frey that the board has already concluded Employee was injured at work.

While the board's questions might have been worded better, the use of "injury" or "employment injury" is not likely to confuse Dr. Frey, particularly when placed in context. First, Dr. Frey was not provided with the definition from AS 23.30.395(24) and doctors typically use "injury" to refer to any damage or wound of trauma. Second, Question 1 asked Dr. Frey to list all the causes of Employee's disability or need for medical treatment, Question 2 then seeks to determine whether the employment aggravated, accelerated, or combined with a preexisting condition. Similarly, Question 4 asked which of the causes identified in her answer to Question 1 would be

"the substantial cause" of Employee's disability. If the employment is the substantial cause, Question 5 then seeks to determine whether the disability continues.

Because workers' compensation is not a game of "say the magic word," whether Dr. Frey uses "injury" as defined in the Act or fails to use it altogether, is not determinative. *Smith*, *Huit*. Far more important is the substance of her answers. If, after receiving Dr. Frey's report, Employer has concerns she may have been confused, it is free to explore those concerns through interrogatories or a deposition as provided in 8 AAC 45.092. The board's Questions 2 and 5 will not be revised.

Employer's objections to the Employee's questions.

Employer contended Employee's Questions 2 and 3 are factually inaccurate in that they refer to "blisters" while there is only evidence of one blister in the medical records. Dr. Frey was directed to review the almost 3,000 pages of medical records before answering the questions. In addressing the second blister, Question 2 specifically directs Dr. Frey to two pages in the medical record (The July 6, 2013 admission history at the hospital in Nome). She is highly educated, has years of experience, and is very literate. It is improbable she will be misled by the use of the plural if she determines only one blister occurred, particularly given the citation the a specific medical record and the paragraph in the referral letter informing her the parties statements of the facts might differ.

Employer also objects to the reference to "new boots" in Employee's Question 2. Employer contends that while the boots may have been new when Employee began working for Employer, they would have been "broken in" by the time of the July 2013 incident. "Newness" is a relative concept, but whether the boots may have been new enough to still cause blisters or other some injury in May or July would seem to be well within the purview of an orthopedic foot and ankle specialist. Again, it seems highly unlikely Dr. Frey would be misled, particularly given the explanatory paragraph in the referral letter.

Employer objects as well to Employee's Question 3 in that it states there are two potential causes of Employee's osteomyelitis; Employer contends the question is misleading in that there may be

more potential causes. The question, however, asks if Dr. Frey agrees with Dr. Grimes' analysis of the two causes and refers her to the page of the hearing transcript at which Dr. Grimes was making his comparison. It is improbable that someone with Dr. Frey's experience and education would be misled by the question.

Lastly, Employer contends the quotation from *Rogers and Babler* in Employee's Question 5 misstates the law and is incomplete. The quotation is accurate; it repeats exactly what *Rogers and Babler* said, with two minor alterations to reflect the 2005 amendment to AS 23.30.010, and both of the alterations are appropriately indicated. Even if Employer is correct that the question fails to include the second part of the test, i.e., that reasonable persons would attach responsibility to the injury as the cause of the disability, that does not make the question objectionable. There is no requirement that Employee establish every element of his case through a single question, or even through a single witness. Nor is Employee required to establish every element of his case prior to the conclusion of the hearing on the merits. Employee may well rely on another witness to establish the "reasonable person" prong of the test, or he may choose to ask Dr. Frey by interrogatory or deposition after the SIME has concluded. Employee's recitation of the law may be incomplete, but it is not inaccurate.

The board's fact-finding is not yet complete. *Traugott I* was limited to the facts necessary to resolve the limited issues presented in that decision; it did not make all the findings necessary to decide Employee's claim. Under AS 23.30.001(4), parties must be afforded an opportunity to be heard and for their arguments and evidence to be fairly considered. Limiting a party's ability to present their arguments and evidence to the SIME physician, who is the board's expert, may well deny them that opportunity.

While 8 AAC 45.092(h)(5) allows parties to submit questions to an SIME physician as well as the opportunity to object to questions submitted by other parties, it provides no guidance as to what questions are acceptable. However, 8 AAC 45.092(j) allows parties to question the SIME physician, either by written interrogatories or by deposition, after the SIME report has been received. Under AS 23.30.115(a), depositions are to be taken in accordance with the Rules of Civil Procedure. Under Rule 30(d), a party may object to the form of a question, and the party

propounding the question may, but is not required to, revise the question. Unless the objection relates to an evidentiary privilege or limitation imposed by the court, the witness is required to answer. Here, none of Employee's questions involve an evidentiary privilege, and the board has not imposed any evidentiary limitations. Dr. Frey would be required to answer the question if they were asked at a deposition. There is no apparent rational basis for striking questions, or requiring a party to revise questions, submitted to an SIME physician with the board's referral letter when the physician would be required to answer the same question in a deposition. Employee's Questions 2, 3, and 5 will not be revised.

CONCLUSION OF LAW

Employee's questions to the SIME doctor will not be revised.

ORDER

Employer's May 20, 2016 petition is denied.

Dated in Fairbanks, Alaska on July 29, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Jacob Howdeshell, 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 JOSEPH TRAUGOTT, employee / claimant; v. ARCTEC ALASKA, a self-insured employer / defendant; Case No. 201309316; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 29, 2016.

/s/
Elizabeth Pleitez, Office Assistant