# ALASKA WORKERS' COMPENSATION BOARD

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

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| KENNETH A. KESSLER,<br>Employee,<br>Claimant, | ) | INTERLOCUTORY<br>DECISION AND ORDER |
| v. | ) | AWCB Case No. 200208396 |
| FEDERAL EXPRESS CORPORATION,<br>Self-Insured Employer,<br>Defendant. | ) | AWCB Decision No.16-0107<br><br>Filed with AWCB Anchorage, Alaska<br>on November 8, 2016 |

Kenneth A. Kessler's July 26, 2016 petition to strike the report of employer's medical evaluator was heard on October 12, 2016 in Anchorage, Alaska. This hearing date was selected on August 18, 2016. Attorney Michael Jensen appeared and represented Mr. Kessler (Employee). Attorney Vicki Paddock appeared and represented Federal Express Corporation (Employer). No witnesses testified. The record closed at the hearing's conclusion on October 12, 2016.

## ISSUES

*Kessler v. Federal Express Corp.*, AWCB Decision No. 15-0159 (December 11, 2015) (*Kessler I*), found Employer exercised its one allowable change in physician when it changed to Thomas Dietrich, M.D. *Kessler I* held Employer's subsequent changes, to James Robinson, M.D, and Douglas Bald, M.D., were unauthorized under AS 23.30.095(e) and struck Dr. Robinson's and Dr. Bald's reports from the record.

Employee contends Employer's return to Dr. Dietrich constitutes yet another unauthorized change in physician, and, as a result, Dr. Dietrich's report should be stricken. Employer

contends *Kessler I* found Dr. Dietrich was Employer's authorized physician, and any unauthorized changes do not change that status.

***1. Was Employer's return to Dr. Dietrich a change in physician?***

Employee also contends Dr. Dietrich's report should be stricken because in forming his opinions he reviewed reports which had been stricken by *Kessler I*. Employer contends Dr. Dietrich's report should not be stricken because he was instructed to ignore the opinions or conclusions and only reviewed the medical history in those reports.

***2. Should Dr. Dietrich's EME report be stricken because he reviewed the reports stricken by Kessler I?***

## FINDINGS OF FACT

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

1. On May 2, 2002, Employee experienced back pain while driving a transporter loader on a ramp. Alaska Regional Hospital emergency room staff diagnosed thoracolumbar strain. Employee subsequently was treated conservatively for both back and neck pain. Imaging revealed disc abnormalities at L3-4, L4-5, L5-S1, C5-6 and C6-7. (*Kessler I*).
2. On July 26, 2002, Employee attended a panel EME with Dr. Scot Fechtel, chiropractic orthopedist and medical neurologist, and Dr. Edward Grossenbacher, orthopedic surgeon. (*Kessler I*).
3. On November 14, 2002, Employee returned to work for a four-hour shift. While squatting to put a sticker on a box he experienced a severe flare-up of his low back pain with radiation into his right buttock. Treating physician Dr. Larry Levine diagnosed an L4-5 disc protrusion with an annular tear and an L3-4 disc herniation on top of preexisting L5-S1 spondylolisthesis and opined "I think the return to work [has] certainly reaggravated the previous injury and we are looking at the same situation including a lumbar disc herniation giving him referral pain." (*Kessler I*).
4. On May 23, 2003, Employee attended an EME with neurosurgeon Dr. Thomas Dietrich. There is no evidence of a referral to Dr. Dietrich from another physician. Dr. Dietrich opined, "It would be very helpful to obtain a psychological evaluation." (*Kessler I*).

5. On July 25, 2003, Employee attended a panel EME with Dr. Dietrich and Dr. James Robinson, physiatrist and psychologist. Dr. Robinson dictated the EME report, in which the two physicians opine jointly on diagnoses and recommendations, including the statement, "Based on the medical and psychological evaluations today, we believe that [Employee] warrants a diagnosis of Pain Disorder." (*Kessler I*).
6. On February 22, 2008, Employee attended an EME with Dr. Robinson, who performed both physical and psychological evaluations, and wrote two separate reports: an "Independent Medical Evaluation" and a "Psychological Evaluation." (*Kessler I*).
7. On April 21, 2009, Dr. Robinson wrote Employer's counsel that, as part of his next evaluation, scheduled for June 27, 2009, he wanted to refer Employee to neuropsychologist Dr. Arthur Williams on June 29, 2009. (*Kessler I*).
8. On June 27, 2009, Employee was evaluated by Dr. Robinson, who again conducted both physical and psychological evaluations and wrote two separate reports. (*Kessler I*).
9. Employee attended an EME with Dr. Williams, who conducted a neuropsychological evaluation on June 29, 2009. Dr. Williams' chart review included Dr. Robinson's diagnoses from the July 25, 2003, February 22, 2008 and June 27, 2009 EME reports. However, Dr. Williams declined to answer any questions regarding the physical aspects of Employee' condition, and confined his opinions to Employee's psychological and cognitive state. (*Kessler I*).
10. On October 10, 2009 and December 5, 2009, Dr. Robinson provided addendum reports in which he opined on Employee's physical condition. (*Kessler I*).
11. On June 1, 2013, Employee attended an EME with Dr. Robinson, who again performed both physical and psychological evaluations, and wrote two separate reports. (*Kessler I*).
12. On July 6, 2015, Dr. Robinson responded to a question from employer asking whether it was necessary to address an injury to Employee's left shoulder, and, if so, whether Dr. Douglas Bald, orthopedic surgeon, had the necessary expertise to conduct the EME. Dr. Robinson replied that in his opinion the Employee's left shoulder was unrelated to the work injury, but it would be appropriate for Dr. Bald to conduct an examination. (*Kessler I*).
13. On July 16, 2015, Employee petitioned: (1) for a protective order from attending an EME scheduled with Dr. Bald on August 10, 2015; and (2) to strike Dr. Williams' EME July 27,

2009 report and Dr. Robinson's October 10, 2009, December 5, 2009, and June 1, 2013, EME reports pursuant to AS 23.30.095(e). (*Kessler I*).

14. On August 10, 2015, Employee attended an EME with Dr. Bald, who opined Employee's left shoulder symptomatology was unrelated to either the May 2, 2002 or November 14, 2002 injuries. (*Kessler I*).
15. At hearing on September 29, 2015, the parties agreed the protective order seeking to cancel Employee's August 10, 2015 EME with Dr. Bald was a moot point, as the EME had already occurred. The parties agreed the sole issue to be heard that day was whether the EME reports of Dr. Robinson, Williams and Bald should be stricken from the record. Employee clarified he was seeking all EME reports on or after July 25, 2003 be stricken from the record, instead of the specific reports listed in his July 16, 2015 petition. (*Kessler I*).
16. On December 11, 2015, *Kessler I* was issued. It held that Employer's change from Dr. Fechtel and Dr. Grossenbacher to Dr. Dietrich was its one allowable change in physician under AS 23.30.095(e). Because Dr. Dietrich's referral to Dr. Robinson was as a psychologist, the panel found his psychological opinions permissible. Likewise, Dr. Robinson's referral to Dr. Williams, a neuropsychologist, was also permissible as a referral to a subspecialist. However, the panel found no referral to Dr. Robinson as a physiatrist; as a result, his reports as a physiatrist were held to be the result of an unauthorized change in physician. Dr. Robinson's subsequent referral to Dr. Bald was also found to be an unauthorized change, and, as a result Dr. Robinson's June 1, 2013 and July 6, 2015 physical medicine reports were stricken from the record, as was Dr. Bald's August 20, 2015 report. *Kessler I* ordered that those reports "not be considered in any form, in any proceeding, or for any purpose" related to the case. (*Kessler I*).
17. On July 27, 2016, Employee filed a petition seeking to bar Employer from requiring him to attend an EME with Dr. Dietrich on August 11, 2016. Employee contended by returning to Dr. Dietrich, Employer was again impermissibly changing physicians. Employee also contended that even if Employer was allowed to return to Dr. Dietrich, he should be precluded from reviewing the reports stricken by *Kessler I*. (Petition, July 26, 2016).
18. Employee attended the EME with Dr. Dietrich on August 11, 2016. In his report, Dr. Dietrich states the cover letter from Employer's attorney stated that Dr. Robinson's June 1, 2013 report and Dr. Bald's August 10, 2015 report were not to be relied on when forming an

opinion, but he did not mention Dr. Robinson's July 6, 2015 report. In his record review, Dr. Dietrich did not review Dr. Robinson's June 1, 2013 report, except the portion relating to Employee's history. While Dr. Dietrich did review Dr. Robinson's July 6, 2015 report, his reference is only to note that Dr. Robinson reported on treatment in 2014. As to Dr. Bald's August 10, 2015 report, Dr. Dietrich again stated he only reviewed the history portion of the report. (Dr. Dietrich, EME Report, August 11, 2016).

19. At the August 18, 2016 prehearing conference, the parties stipulated to a hearing on Employee's July 27, 2016 petition, but agreed the issue should be whether Dr. Dietrich's August 18, 2016 report should be stricken. (Prehearing Conference Summary, August 18, 2016).
20. At the October 12, 2016 hearing, Employee contended Employer's return to Dr. Dietrich was an unauthorized change in doctors, as the board had previously held that "going back" to a previous doctor was a change. Employee also contended Dr. Dietrich should not have reviewed the reports stricken by *Kessler I.* Employer contended *Kessler I* found that Dr. Dietrich was Employer's allowable change in physician. Employer also noted that Dr. Dietrich had been instructed to ignore the opinions in the stricken reports, and he only reviewed them for Employee's medical history. (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;

(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.
. . . .

(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. Referral to a specialist by the employer's physician is not considered a change in physicians. . . . .

(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.

Under AS 23.30.095(e), employers are only allowed one change in physician; while the section clearly states that referrals are not changes, it does not explain what constitutes a change. However, 8 AAC 45.082 provides further guidance. Most significantly, it allows a "substitution" of physicians when it would be impossible or impractical for an attending doctor to continue providing services. In *Miller v. NANA Regional Corp.,* AWCB Decision No. 13-0169 (December 26, 2013), the board interpreted "change" according to its common meaning of "replace with" or "substitute for." In *Miller*, the employer made its one allowable change, but wished to return to the first doctor. The board held that would constitute another change, which would be impermissible without the employee's consent. More recently, in *Meier v. Three Bears Alaska, Inc.*, AWCB Decision No. 16-0073 (August 23, 2016), the employer had improperly changed physicians. *Meier* rejected the employee's contention that the employer's return to its last authorized doctor was yet another change in physicians, noting the last legitimate attending physician remains the current physician despite unauthorized changes.

Although the 1988 amendments to the Act restricted doctor shopping, they did not include sanctions if a party made an excessive change. As a result, 8 AAC 45.082 was also revised; it provided that the board could relieve an employer from paying 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* 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. *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). Regulation 8 AAC 45.082(c), which became effective July 9, 2011, 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, in regard to both EMEs under AS 23.30.095(e), and second independent medical evaluations (SIMEs) under AS 23.30.095(k). *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.

In *Hudak v. Pirate Airworks, Inc.*, AWCB Decision 16-0045 (June 20, 2016), the employee had made unauthorized changed in doctors and numerous medical records had been stricken. The issues included whether the employee could return to his last attending physician and whether other doctors could consider the stricken medical records. The decision held that an unauthorized change in physician does not divest the last authorized physician's status as attending physician. Consequently, going back to the last authorized doctor would not be a change. *Hudak* pointed out that 8 AAC 45.082(c) only states that "the board" will not consider the records resulting from an unauthorized change. The panel noted that if other doctors were not allowed to review the records the accuracy of their conclusions would be suspect because they were not based on all available information at best, and, at worst, the lack of information could compromise an employee's health care. *Hudak* held other doctors could review, comment on, and testify about the excluded records.

## ANALYSIS

### *1. Was Employer's return to Dr. Dietrich a change in physician?*

Employee contends Employer should be precluded from returning to Dr. Dietrich. He argues that while *Hudak* recognized an employee could return to his last authorized doctor, *Miller* established a "no going back" rule. In *Miller*, the question was whether the employer, having made its one allowable change in physician, could return to its first doctor. The "no going back" rule in *Miller* does not conflict with either *Hudak* or *Meier*, which held that returning to the last authorized physician after an unauthorized change was not a change in physician. All three cases are consistent; once a party has made its one allowable change, the second physician remains the party's physician absent consent from the other party or an allowable substitution under 8 AAC 45.082. Employer's return to Dr. Dietrich was not a change in physician.

***2. Should Dr. Dietrich's EME report be stricken because he reviewed the reports stricken by Kessler I?***

Employee contends Dr. Dietrich's August 11, 2016 EME report should be stricken because he reviewed medical reports stricken in *Kessler I*. *Hudak* and *Janousek* noted the potential problems if other doctors are precluded from reviewing all of the available medical records. Although not an issue in this case, denying such information to Employee's treating physician could compromise Employee's medical care. Further, denying the excluded records to any physician, whether the treating physician, an EME doctor, or an SIME doctor, renders their conclusions unreliable. Regulation 8 AAC 45.082(c) states only that "the board" will not consider the stricken reports. AS 23.30.001(2) mandates that workers' compensation cases be decided on their merits. Expanding the 8 AAC 45.082(c) prohibition to include doctors would not further that mandate. Dr. Dietrich's EME report will not be stricken.

## CONCLUSIONS OF LAW

1. Employer's return to Dr. Dietrich was not a change in physician.
2. Dr. Dietrich's August 11, 2016 EME report will not be stricken.

## ORDER

1. Employee's July 26, 2016 petition is denied.

Dated in Anchorage, Alaska on November 8, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Mark Talbert, Member

## PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

## RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

## MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

## CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of KENNETH A. KESSLER, employee / claimant; v. FEDERAL EXPRESS CORPORATION, self-insured employer / defendant; Case No. 200208396; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on November 8, 2016.

/s/
Vera James, Office Assistant