ALASKA WORKERS' COMPENSATION BOARD

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

ERIC MCDONALD, Employee, Claimant, v. ROCK & DIRT ENVIRONMENTAL, INC, Employer, and NORTHERN ADJUSTERS, INC., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201410268 AWCB Decision No. 18-0076 Filed with AWCB Anchorage, Alaska on August 2, 2018

Rock & Dirt Environmental, Inc.'s (Employer) July 14, 2017 petition for a second independent examination (SIME), Eric McDonald's (Employee) February 23, 2017 petition to exclude the law firm Delaney Wiles from this case and to exclude the February 13, 2017 letter from Alaska Heart & Vascular Institute as evidence, and Exam Works' request for clarification of *McDonald v. Rock & Dirt Environmental, Inc.*, AWCB Decision No. 18-0039 (April 17, 2018) (*McDonald I*) were heard in Anchorage, Alaska, on June 19, 2018, a date selected on May 29, 2018. Employee appeared telephonically, represented himself and testified. Attorney Colby Smith appeared and represented Employer. Attorney Donna Meyers appeared and represented Exam Works and the law firm Delaney Wiles. The chair gave Employee 10 days to file a post-hearing brief and gave Employer 10 days to respond. The record closed on July 29, 2018, when the deadline for filing post-hearing briefs passed and the panel met to deliberate.

ISSUES

Employee contended he did not receive a hearing notice and was unaware of the June 19, 2018 hearing. He requested a continuance.

Employer contended the hearing had been set and confirmed at two prehearing conferences, one of which Employee attended. It contended no good cause existed to continue the hearing, and requested the hearing proceed as scheduled.

Exam Works and Delaney Wiles objected to a hearing continuance. An oral order denied Employee's oral request to continue the hearing.

1) **Was the oral order denying Employee's request to continue the June 19, 2018 hearing correct?**

Employer contends the parties stipulated to an SIME at a prehearing conference, and no good cause exists to relieve the parties from their stipulation. In the event an order relieves the parties from their stipulation, Employer contends significant medical disputes exist between Employee's treating physician and the employer's medical examiner (EME), warranting an SIME.

Employee contends he unwittingly agreed to an SIME based on an allegedly flawed and inaccurate EME report. Now that he has discovered the flawed EME report, Employee contends no grounds for an SIME exist. Employee seeks an order denying Employer's SIME request.

Exam Works and Delaney Wiles expressed no opinion on the SIME.

2) **Should the SIME proceed?**

Employee seeks an order excluding a February 13, 2017 letter from Alaska Heart & Vascular Institute discharging Employee from the care of David Chambers, M.D. He contends the letter is prejudicial, irrelevant and should be stricken from the record.

Employer contends the February 13, 2017 letter should remain in the record, because Employee contends Employer and its adjusters interfered with his care and meddled with his treatment. Employer contends the letter demonstrates there are other reasons why physicians may have refused to treat Employee, unrelated to alleged involvement by Employer or its adjusters.

Exam Works and Delaney Wiles expressed no opinion on the subject letter's admissibility.

3) Should the February 13, 2017 letter from Alaska Heart & Vascular Institute discharging Employee from care be excluded?

Employee seeks an order excluding Delaney Wiles from participating in this case. He contends there are conflicts of interest and privacy issues, which should bar Delaney Wiles from proceedings in this case and prevent the law firm from accessing his medical records.

Exam Works and Delaney Wiles contend Employee provided no basis for an order prohibiting Delaney Wiles from representing Exam Works in this proceeding.

Employer took no position on the Delaney Wiles issue.

4) Should Delaney Wiles be prohibited from representing a party in this case?

Delaney Wiles, representing Exam Works, requests clarification on whether or not *McDonald I*, which ordered Employee's August 3, 2017 subpoena *duces tecum* to nurse case manager Tracy Davis quashed, also quashes a subpoena issued against Exam Works.

Neither Employer nor Employee argued the *McDonald I* clarification issue.

5) Should *McDonald I* be clarified?

FINDINGS OF FACT

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

1) On June 6, 2014, Employee was working as an asbestos removal laborer at Service High School in Anchorage when a cement wall collapsed on him. The injury required a five week

hospital stay. (First Report of Occupational Injury or Illness, June 18, 2014; Workers' Compensation Claim, February 13, 2013).

2) On March 7, 2016, Employee filed a petition for an SIME, which listed the following disputes:

> Lumbar, thoracic & cervical spine, R shoulder, adjustable bed, adrenal insufficiency, central sleep apnea, PTSD, Dizziness, Spinocerebellar disease, counseling, anxiety, brain injury, R clavicle fracture, personal care attendant services, Time loss benefits for anything other than the left shoulder, Autonomic nervous system abnormalities, heat intolerance, difficulty swallowing, ringing in ears, sensitivity to heat, sound, and light, left hip, right hip pain, improperly healed first rib fracture, heart, sacroiliac joint dysfunction, pelvis fractures, ratings on all body parts injured in accident and conditions as a result.

Employee's March 7, 2016 petition also states certain EME reports should be stricken from the record. The petition requests a one page questionnaire completed by Leon Chandler, M.D., also be stricken. (Petition, March 7, 2016).

3) On April 6, 2016, the parties stipulated to an SIME. (Prehearing Conference Summary, April 6, 2016).

4) On July 19, 2016, the parties stipulated to proceed with the SIME. (Prehearing Conference Summary, July 19, 2016).

5) On July 25, 2016, Employee claimed permanent total disability (PTD), medical and related transportation costs, penalty, interest and a finding of unfair or frivolous controversion. The claim states Employee also suffers from severe stress, anxiety, and Posttraumatic Stress Disorder (PTSD) episodes related to the June 6, 2014 work injury. (Workers' Compensation Claim, July 25, 2016).

6) On July 14, 2017, Employer requested an SIME and stated:

> The employer respectfully requests the Board issue an order compelling the employee to participate in the SIME process as agreed upon by the parties in the April 6, 2016 prehearing. . . . The employer and adjuster contend disputes exist between the employee's treating physicians, Dr. Thiele, and Dr. Humphries, and the employer/adjuster's physicians, Dr. Swanson, Dr. Glass, and Dr. Olbrich. (Petition, July 17, 2017).

7) On August 3, 2017, Employee filed and served on Employer a subpoena *duces tecum* directed at "records custodian for Tracy Davis, nurse case manager." The subpoena attached two main requests, with 23 sub-requests, detailed over three pages. (Subpoena, August 3, 2017).

8) On April 17, 2018, *McDonald I* granted Employer's August 4, 2017 petition to quash Employee's August 3, 2017 subpoena *duces tecum* for records from Employer's nurse case manager. *McDonald I* held:

> Employee requests discovery information concerning any and all materials produced by nurse case manager Tracy Davis and Exam Works. Employer has stated in pleadings, briefs, letters, and during oral argument it has already provided Employee all non-protected or privileged documentation concerning those entities. While Employee has made allegations of criminal wrongdoing on behalf of Employer or its representatives, such allegations are insufficient to defeat attorney-client privilege here. More importantly, as a quasi-judicial agency of limited jurisdiction, the Board is without authority to consider allegations of crimes or fraud not enumerated by the Act. In the event Employee wishes to obtain information concerning Ms. Davis' knowledge of the provided records, Employee may seek to have Ms. Davis deposed at his expense, or may call her as a witness at a hearing on the merits of his claims. (*McDonald I*).

9) On April 24, 2018, Employee attended a telephonic prehearing conference and twice terminated the call when the designee's rulings did not go in his favor. At no time did Employee state he needed to continue the prehearing conference because he had a concurrent medical issue. The designee warned Employee if he disconnected from the conference again, the conference would proceed in his absence. Later in the prehearing conference, as reflected in the summary, "Employee disconnected for the second time at this point. Since Employee left the prehearing, he was not available to set issues for hearing or the date, and they were addressed in his absence." The designee initially set a hearing for June 5, 2018. The summary also gave notice of joinder vis-à-vis Exam Works and afforded the parties an opportunity to object to joinder within 20 days. The division served this summary on all parties on April 27, 2018, at their service addresses. (Prehearing Conference Summary, April 24, 2018).

10) On May 8, 2018, the division served a notice on Employee for the June 5, 2018 hearing, by first-class and certified mail at his service address. (Hearing Notice, May 8, 2018).

11) On May 8, 2018, the division also served Employee by first-class mail at his service address, with notice for a May 29, 2018 prehearing conference. (Prehearing Notice, May 8, 2018).

12) On May 29, 2018, Employer, Delaney Wiles and Exam Works attended a prehearing conference, but Employee did not attend. Delaney Wiles and Exam Works added a request to clarify *McDonald I*'s ruling quashing a subpoena, as an issue for the hearing. The designee overruled Employee's prior written objection to joining Exam Works as a party to his case and joined it. Citing a lack of grounds, the designee also denied Employee's request to recuse the designee from participating in any further prehearing conferences. The summary further states:

> On May 15, 2018, Employee filed a message with the Board, stating he would not be available until after June 10, 2018. This was addressed as a request to continue the June 5, 2018 hearing, which Employer and Exam Works stipulated at prehearing, in order to prevent duplicative procedures. A new hearing was set for June 19, 2018. Since the added issues for hearing are procedural, no factual evidence should be necessary beyond what might have been required for the June 5 hearing date. The evidence deadline will be extended to match the briefing and witness list deadlines, in order to accommodate the extended hearing date. (Prehearing Conference Summary, May 29, 2018).

The division served the summary on Employee on May 31, 2018, at his service address. (Prehearing Conference Summary, May 31, 2018).

13) On June 5, 2018, the division served a separate notice on Employee, by first-class and certified mail at his record address, advising him the case had been set for hearing on June 19, 2018. (Hearing Notice, June 5, 2018).

14) The division gave Employee more than 10-days' notice of the June 19, 2018 hearing. (*Id*.).

15) On June 9, 2018, Employee signed for the notice for the June 5, 2018 hearing. (U.S. Postal Service "green card," signed June 9, 2018).

16) On June 9, 2018, Employee also signed for the notice for the June 19, 2018 hearing. (U.S. Postal Service "green card," signed June 9, 2018).

17) The signatures on the "green cards" appear similar to the signatures on other "green cards" returned to the board indicating receipt by Employee. (Observations).

18) At hearing on June 19, 2018, Employee said he had been given absolutely no notice whatsoever of a hearing date and had no knowledge of a hearing. Consequently, he said he had no time to file his hearing evidence or otherwise prepare. Employee contended he previously told all parties involved and the board he would not be available until June 10, 2018 for a hearing. Employee said he was getting medical care, was out of state and never received any email or other notice of a hearing "in any way." (Employee).

19) Given his June 9, 2018 signature on the "green card" attached to the notice for the June 19, 2018 hearing, Employee's testimony that he had absolutely no notice of the June 19, 2018 hearing is not credible. (Experience, judgment and inferences drawn from the above).

20) At hearing, Employer contended Employee participated in a prehearing conference on April 24, 2018, at which time a hearing was scheduled for June 5, 2018, which was later changed to the June 19, 2018 date to accommodate Employee's alleged absence from the state. Employer further contended it does no party any good to delay a determination on the issues set for hearing. (Employer's hearing arguments).

21) In response, at hearing Employee contended he was not given an opportunity to participate in scheduling a hearing date and advised all parties he was not available for hearing between April 26, 2018 and June 10, 2018. Though his correct mailing address remains constant, Employee contended he was not at his mailing address when prehearing conference summaries including the hearing date, and the hearing notice, arrived. He further contended the board was "bullying" him and he has medical issues that are "freaking" him out. Therefore, he contended he had inadequate notice and his due process rights have been violated. (Employee).

22) The U.S. Postal Service has returned no prehearing conference summaries or other relevant documents regarding the June 19, 2018 hearing mailed to Employee at his service address to the board as unclaimed or undeliverable for any reason. (Observations).

23) At hearing, Delaney Wiles and Exam Works agreed with Employer and contended Employee is well aware of the issues set for hearing, they have been raised and pending for a long time and need to be resolved promptly. It objected to continuing the hearing. (Delaney Wiles and Exam Works hearing arguments).

24) After deliberating, the panel found no good cause to continue the hearing and it proceeded as scheduled. (Oral order at hearing).

25) Employee reiterated his objections to going forward and contends, while he did terminate his participation twice in the April 24, 2018 prehearing conference where the instant hearing was initially scheduled June 5, 2018, he did so only because of the designee's alleged conduct at that prehearing conference. He again contended he received no notice of the hearing. Employee contends the designee's conduct resulted in him "not being allowed to participate" in scheduling the hearing. (Employee).

26) Employer contends moving forward with the stipulated SIME will benefit all parties. It contends there are clear-cut medical disputes, which an SIME physician can address and help the board resolved. On the second issue, Employer contends the Alaska Heart & Vascular Institute letter should not be stricken from the record because it explains why this clinic refuses to treat Employee. Employer contends this letter is relevant to show there are other reasons besides Employee's allegations of interference by various players, to explain why Alaska Heart & Vascular Institute refuses to treat Employee any further. (Employer's hearing arguments).

27) Delaney Wiles, representing Exam Works, contends its involvement became necessary when Employee served a subpoena on Exam Works. It contends Employee provides no basis for preventing a subpoenaed third-party from legal representation at hearing before the board. Delaney Wiles further suggests it has no conflict of interest even though a different attorney from the firm, representing another client Alaska Heart & Vascular Institute, wrote a "trespass letter" to Employee advising him to not appear on the client's premises due to alleged issues between Employee's significant other, Heather Johnson, and a clinic physician. Therefore, Delaney Wiles contends it has a right to represent Exam Works in relation to the subpoena. Exam Works' second hearing issue is for clarification of *McDonald I*, which quashed a subpoena against nurse case manager Tracy Davis. Exam Works wants clarification whether or not *McDonald I* also applies to a subpoena against Exam Works. (Delaney Wiles' and Exam Works' hearing arguments).

28) In response, Employee contends he filed a *Smallwood* objection against all EME physicians and the author of the Alaska Heart & Vascular Institute letter at issue. He further contends there is no medical dispute warranting an SIME because he subsequently learned, after previously stipulating to an SIME, that the adjuster illegally interfered with his care and gave false information to the EME physicians thus tainting their opinions. Employee further contends the EME doctors are not qualified as they are not licensed to practice in Alaska. He requested additional time to file his evidence related to fraud allegations before the board issues an SIME decision. (Employee).

29) Employee admitted he stipulated to an SIME in 2016. He seeks relief from the stipulation because he contends Employer's alleged fraud tainted the EME process. Employee further contends the parties stipulated that an EME should occur with all medical records provided to the examiner, but that examination never happened. He contends Employer agreed an SIME should

not occur unless and until this happened. Therefore, since the EME process was "improper," in Employee's view, an SIME is premature and the board should relieve him from his prior stipulation. (Employee).

30) Employee's prior pleadings and his oral arguments are cogent and skillful. (Experience, judgment and inferences drawn from the above).

31) Given his repeated objections, and to afford him due process, the hearing chair gave Employee until July 3, 2018, to file a 15 page brief, with reference to documents already filed, and gave Employer and Delaney Wiles until July 17, 2018, to respond. Employee expressed satisfaction with this process and did not voice an objection to the July 3, 2018 deadline to file his brief and arguments. (Oral order at hearing; record).

32) On July 2, 2018, Employee filed a notice stating he intended to rely on an attached, June 11, 2018 letter from Steven Isono, M.D.; an audio recording of Dr. Isono; an audio recording of Stanford University Emeryville Clinic informing Employee that Becky McCloud had allegedly canceled his March 5, 2018 appointment; an audio recording of Diane Noble admitting to speaking with Becky McCloud on numerous occasions; an audio of office staff at the Emeryville Clinic stating Employee was still a clinic patient even after McCloud allegedly canceled his March 5, 2018 appointment; an audio recording of Michael Torno stating that only Employee or Dr. Isono could cancel his appointments and stating Torno did not believe Dr. Isono had canceled the appointment; and an audio recording of Emeryville Clinic staff stating Employee was confirmed for a March 5, 2018 appointment. (Notice of Intent to Rely, June 30, 2018).

33) Employee did not file the actual audio recordings on July 2, 2018. (Record).

34) Other than Employee's June 30, 2018 notice, he filed no brief or other documentation by the July 3, 2018 deadline. (ICERS electronic database, accessed July 27, 2018).

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.**
> . . . .
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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. . . .
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> **AS 23.30.110. Procedure on claims.**
> . . . .
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> (c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. 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. . . .
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> **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 findings of the board are subject to the same standard of review as a jury's finding in a civil action.
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> **AS 23.30.135. Procedure before the board.** 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 45.050. Pleadings. . . .
. . . .

(f) **Stipulations.**
. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.074. Continuances 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. . . .

8 AAC 45.082. Medical treatment. . . .
. . . .

(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. . . .

8 AAC 45.900. Definitions. In this chapter
. . . .

(11) '*Smallwood objection*' means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976). . . .

ANALYSIS

1) Was the oral order denying Employee's request to continue the June 19, 2018 hearing correct?

On April 24, 2018, Employee had an opportunity to participate in scheduling a hearing date in his case on various issues. He chose not to. Rather than participate fully in the prehearing

conference, Employee hung up on the designee on two occasions. After the first termination, the designee warned Employee that if he terminated his telephonic participation again, the prehearing conference would nonetheless continue in his absence. When things did not go Employee's way, he terminated his prehearing conference participation a second time. Thereafter, the remaining parties agreed to a June 5, 2018 hearing date. The division served this prehearing conference summary with this initial hearing date noticed in it on Employee at his service address on April 27, 2018. The US Postal Service did not return this document as undeliverable. *Rogers & Babler*.

On May 29, 2018, Employee had another opportunity to participate in a prehearing conference at which the parties amended the issues for hearing and, as a convenience to Employee, continued the June 5, 2018 hearing to June 19, 2018, to take into account Employee's unexplained absence. Even if Employee was out of state, he could have participated telephonically in this prehearing conference but again chose not to. Employee stated at hearing that he had absolutely no knowledge whatsoever in any form that a hearing was scheduled for June 19, 2018. However, the US Postal Service "green card" Employee signed on June 9, 2018, for the June 19, 2018 hearing, belies his assertion. It is direct evidence proving Employee knew, on June 9, 2018, that a hearing was scheduled in his case on June 19, 2018. Employee is not credible. AS 23.30.122. Furthermore, the division served the May 29, 2018 prehearing conference summary on Employee at his service address on May 31, 2018. This provided additional fair notice of the June 19, 2018 hearing. AS 23.30.001(1), (4). The US Postal Service did not return this document as undeliverable. *Rogers & Babler*.

Scheduled hearings are only continued for "good cause." AS 23.30.110(c). Given the above, and given Employee's lack of credibility, he failed to provide evidence of good cause to continue the June 19, 2018 hearing. The oral order denying his continuance request was correct. 8 AAC 45.074(b).

2) Should the SIME proceed?

On April 6, 2016, during a prehearing conference the parties stipulated to an SIME. Stipulations between the parties are binding on them and have the effect of an order unless a party is relieved

from the terms of the stipulation for "good cause." 8 AAC 45.050(f)(2), (3). One of Employee's contentions in support of his opposition to proceeding with an SIME is that the EME physicians in this case are not licensed to practice medicine in Alaska, so their reports cannot be relied on to find a medical dispute justifying an SIME. He also contends the EME physicians are victims of, or complicit with, Employer's allegedly deceptive and fraudulent behavior. Employee further contends the EME physicians did not have all his records when they rendered their opinions.

As for his first two contentions, these go to the weight accorded the EME physician's opinions, not the admissibility for evidentiary or for procedural SIME purposes. AS 23.30.095(k). Employee does not contend the EME physicians were "unlawful changes" in Employer's choice of physicians. If that were the case, their reports would not give rise to a medical dispute. 8 AAC 45.082(c). Here, Employee objects to the EME's licensure. But he has not cited any law to prohibit their use as the basis for an SIME.

Employee's contention that Employer deceived the physicians, if true, may weaken the weight accorded these physicians at a merits hearing. When Employee attends an SIME, he will provide a history. If he disagrees with the history set forth in the EME reports, either because Employer or its agents misled the EME physicians, or if for any other reason, he believes the history is incorrect, Employee can point out discrepancies to the SIME physician. The truth will be ferreted out at a merits hearing. *Rogers & Babler*; AS 23.30.135. His contentions do not rise to "good cause" to relieve Employee from his stipulated SIME. 8 AAC 45.050(f).

Lastly, as it will take months to arrange for an SIME with one or more physicians, Employee may pursue discovery of any allegedly missing medical records. The law requires that all medical records in all parties' possession go to the SIME physician. 8 AAC 45.092(h). Even if records are discovered after an SIME physician renders his or her report, a party may send questions about the records to the physician, depose or call SIME physicians as witnesses at hearing and question them regarding any newly-discovered medical records. Employee's allegation of missing medical records is not good cause to relieve him from his stipulation to proceed with the SIME. 8 AAC 45.050(f). It has been over two years since the parties stipulated to an SIME, and it is time for this evaluation to occur. *Rogers & Babler*.

3) Should the February 13, 2017 letter from Alaska Heart & Vascular Institute discharging Employee from care be excluded?

On February 13, 2017, an Alaska Heart & Vascular Institute representative wrote a letter discharging Employee from the clinic's care. Employee claims Employer and its representatives have interfered with his medical care, thus allegedly increasing his disability and need for additional treatment. He seeks an order excluding the February 13, 2017 letter from evidence in this case. Given Employee's meddling accusations against Employer and its representatives, the February 13, 2017 letter is clearly relevant to why at least one clinic will no longer see him. Employee offers no valid, convincing reason why the letter should not be admissible. Therefore, Employee's request to strike this letter from evidence will be denied.

If Employee has filed a timely request for cross-examination, also known as a *Smallwood* objection, to this document, an issue not decided here, Employer will have to present the letter's author for cross-examination either through deposition or by calling the author as a witness at hearing, if Employer intends to rely on the statements made in the letter at a future hearing. 8 AAC 45.900(11). This affords Employee additional protection to challenge the author's statements. *Rogers & Babler*.

4) Should Delaney Wiles be prohibited from representing a party in this case?

Parties have a right to representation in legal matters. *Rogers & Babler*. Employee subpoenaed a third-party. Exam Works hired counsel to represent its interests in this case. Employee has cited to no provision to support his contention that Exam Works does not have a right to hire anyone it wants to represent it in this case. This decision has no jurisdiction over allegations of unethical behavior against an attorney or a law firm. Such allegations are better suited to resolution through processes available with the Alaska Bar Association. Therefore, Employee's petition to exclude Delaney Wiles as Exam Works' representative will be denied.

5) Should *McDonald I* be clarified?

McDonald I quashed a subpoena Employee obtained against nurse case manager Tracy Davis. Exam Works seeks clarification as to whether or not *McDonald I* also applies to quash Employee's subpoena against Exam Works. Employee did not address this issue at hearing.

The reasoning in *McDonald I* for quashing Employee's subpoena against Tracy Davis applies equally well to Exam Works. Employee may depose Exam Works' physicians or staff at his expense, or he may call relevant witnesses associated with Exam Works at a merits hearing. AS 23.30.001(1), (4). Alternately, as was the case with the February 13, 2017 clinic letter, if Employee has filed a timely *Smallwood* objection to Exam Works' records, an issue not decided here, Employer will have to present the records' authors for cross-examination either through deposition or by calling the authors as witnesses at hearing, if Employer intends to rely on the statements made in the records at a future hearing. 8 AAC 45.900(11). This affords Employee additional protection to challenge the authors' statements. *Rogers & Babler*. Exam Works' request for clarification will be granted.

CONCLUSIONS OF LAW

1) The oral order denying Employee's request to continue the June 19, 2018 hearing was correct.
2) The SIME will proceed.
3) The February 13, 2017 letter from Alaska Heart & Vascular Institute discharging Employee from care will not be excluded.
4) Delaney Wiles will not be prohibited from representing a party in this case.
5) *McDonald I* will be clarified.

ORDER

1) The appropriate designee is directed to move the SIME process in this case forward. The SIME panel will include a psychiatrist to address Employee's PTSD allegations and either an orthopedic surgeon or a physiatrist, dependent upon the latter two specialties' availability.
2) The February 13, 2017 Alaska Heart & Vascular Institute letter is admissible as evidence, subject to a timely and substantially complete *Smallwood* objection.
3) Employee's request to exclude Delaney Wiles' participation in this case is denied.
4) *McDonald I* is clarified. The subpoena against Exam Works is quashed.

Dated in Anchorage, Alaska on August 2, 2018.

ALASKA WORKERS' COMPENSATION BOARD

Resigned his position and is unavailble for signature
Matthew Slodowy, Designated Chair

/s/
Linda Murphy, Member

/s/
Nancy Shaw, 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 Eric Mcdonald, employee / claimant v. Rock & Dirt Environmental, Inc., employer; Northern Adjusters, Inc., insurer / defendants; Case No. 201410268; 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 August 2, 2018.

/s/
Nenita Farmer, Office Assistant