ALASKA WORKERS' COMPENSATION BOARD

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

ANDY JAMES, Employee, Respondent, v. NORTHERN CONSTRUCTION, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Petitioners.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201500569 AWCB Decision No. 19-0014 Filed with AWCB Anchorage, Alaska on February 5, 2019

Northern Construction's (Employer) January 15, 2019 petition appealing a prehearing conference order was heard on the written record on January 23, 2019, in Anchorage, Alaska, a date selected on January 18, 2019. Employer's petition gave rise to this hearing. Attorney Eric Croft represents Andy James (Employee). Attorney Adam Sadoski represents Employer and its insurer. The record closed on January 23, 2019.

ISSUE

Employer contends the designee abused his discretion when he denied Employer's petition to exclude hired expert witnesses' medical opinions, reports and testimony.

Employee contends the designee's denial of Employers' petition was correctly decided and Employer's appeal should be denied.

Should medical evidence developed in other cases be stricken from this case?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On December 31, 2014, while working for Employer, Employee was fueling a grader when he slipped, fell and injured his shoulder. (First Report of Injury, January 15, 2015).

2) On August 9, 2017, SIME physician Jon Scarpino, M.D.'s examination synopsis stated:

> Andy James is a 47-year-old gentleman who fell off the tire of a grader at work on 12/31/14, and sustained injuries to his cervical and lumbar spine, his left shoulder, as well as injury to his brachial plexus and cervical nerve roots.
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> The examinee has a chronic pain syndrome with both nociceptive and neuropathic pain at this point in time.
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> The most substantial cause of Mr. James' disability at this point in time is the injury to the cervical root/brachial plexus on the left side. This has left him with severe neuropathic pain, sensory changes, and muscular weakness, with EMG findings consistent with multiple chronic muscular dysfunctions.
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> The examinee's condition is not considered permanent and stationary for the purposes of rating.

Dr. Scarpino said Employee did not have the physical capacities to return to his job and the prognosis for his return to his previous functional level and ability to perform heavy work was guarded. If Employee's underlying neck, low back, and shoulder pain was better controlled and he regained strength and a more normal pattern of muscle use, Dr. Scarpino said it was possible Employee could go back to doing his previous work, but would have to do so with ongoing neuropathic pain. Dr. Scarpino opined Employee has limitations and restrictions resulting from the work-related injury and said:

> If one wishes exact restrictions, it would be best to obtain a Functional Capacity Evaluation.

> Mr. James' actual functional limitations are complicated by the fact that he has avoidance behavior and really does not want to do anything that might cause discomfort, and he has developed substitution patterns that he uses to try and prevent pain. These are not necessarily very efficient as far as any consideration of work return.

Dr. Scarpino did not consider him medically stable. (Scarpino SIME report, August 9, 2017).

3) On January 8 and 9, 2018, Theodore Becker, Ph.D., conducted a physical capacity evaluation on Employee and sent the 122 page report to attorney Dennis Mestas. Dr. Becker confirmed Employee put forth maximum effort. His "neurological, biomechanical and work physiological profiles show no assignment is warranted." Dr. Becker made no recommendations for adaptive equipment and said, "There is significant presentation of neurological dysfunction profiles for the cervical and lumbar spine. Functionality for work tasks shows significant barriers which restricted applications in all postures and positions." (Performance-Based Physical Capacity Evaluation, Dr. Becker, February 1, 2018).

4) On February 27, 2018, Rex Head, M.D., performed a neurological exam in connection with Employee's application for Social Security disability benefits. Employee did not retain Dr. Head to perform the evaluation; it was arranged through Idaho's Department of Labor's Disability Determination Service Division and Dr. Head's report, among others, was used by Social Security to determine Employee met medical requirements entitling him to disability benefits due to neuropathy, brachial plexopathy, cervical radiculopathy, chronic denervation, spinal cord compression, spinal stenosis, thoracic scoliosis, degenerative disc disease, depression and chronic pain syndrome. (Social Security Notice, March 13, 2018; letter, Idaho Disability Determination Service Division, March 7, 2018; Neurological Exam, Dr. Head, February 27, 2018; Experience, observations and inferences drawn therefrom).

5) Employee did not hire Dr. Head to provide an opinion regarding compensability of Employee's workers' compensation claim. Dr. Head's report is, however, medical information relative to Employee's work injury. (Experience, judgment, observations, unique facts of the case and inferences drawn therefrom).

6) On March 1, 2018, Dr. Becker's February 1, 2018 physical capacity evaluation of Employee was filed on a medical summary. (Medical Summary, February 28, 2018).

7) On March 13, 2018, Employer requested cross-examination of Dr. Becker. (Request for Cross Examination, March 13, 2018).

8) On April 13, 2018, Employee filed the Social Security award notice, a letter from Social Security stating it needed more information about Employee's "workmans compensation," the Social Security notice of the evidence used to decide Employee's claim for Social Security disability benefits, the Idaho Disability Determination Service Division's March 7, 2018 letter to Lance Ingwersen, M.D., providing him Dr. Head's report at Employee's request and Dr. Head's February 27, 2018 neurological exam report. (Notice of Intent to Rely, April 13, 2018).

9) On December 17, 2018, Employer requested an order striking supplemental SIME records from the SIME binders and from the record. It contended the "records were created by a hired expert witness, which is not permissible under the Act and the records were not timely filed." (Petition, December 17, 2018).

10) The records at issue are Dr. Becker's February 1, 2018 physical capacity evaluation, addressing Employee's left shoulder, neck, cervical spine and back, and Dr. Head's February 27, 2018 neurological exam of Employee. (Record; observation).

11) On December 21, 2018, Employee opposed Employer's petition to exclude Drs. Becker and Head's reports and contended it should be denied because Employee filed Dr. Becker's report on February 28, 2018, and Dr. Head's on April 13, 2018, and Employer did not request they be excluded from the record until its December 17, 2018 petition. Further, he contended Employer is not prejudiced by these records' inclusion in the SIME binders; Employer has requested Dr. Becker's cross-examination and can, likewise, request Dr. Head's. Employee contended that far from prejudicing Employer, the records are relevant to address functional capacity, and Employee's ability to work, which are questions Employer submitted to the psychiatric SIME physician. He contended both Drs. Becker's and Head's reports directly address these issues and the SIME physician should review their reports to answer the SIME questions. Employee also contended Drs. Becker's and Head's reports address SIME physician Scarpino's August 9, 2017 recommendation he undergo a functional capacities evaluation, and is relevant admissible evidence. He contended Employer's petition should be denied and the records should be included in the SIME binders and not stricken from the record. (Opposition to Petition to Exclude Records, December 21, 2018).

12) On January 2, 2019, the designee requested supplemental briefing if the parties had any additional arguments to be considered, and postponed his determination on Employer's petition. (Prehearing Conference Summary, January 11, 2019).

13) On January 3, 2019, Employer contended injured workers' medical experts' reports have been barred from board consideration in workers' compensation cases by statute, regulation, board decisions and by legislative intent. Therefore, Employer contended Drs. Becker's and Head's reports should be excluded for any purpose, in any proceeding. Employer noted Employee filed an action in Superior Court for damages against a third-party defendant whom he believes was responsible for his work injury. It contended Employee's attorney in the third-party litigation, Dennis Mestas, hired Drs. Becker and Head to examine Employee and issue reports on Employee's behalf. Employer also contended Employee failed to meet "his established burden to show the doctors at issue are not unauthorized expert medical witnesses, and the employer is unequivocally not estopped from objecting to the evidence at this time or at any point in the future." Employer contended, applying AS 23.30.095(a) and 8 AAC 45.082, the board has excluded expert testimony and opinions. To support its arguments, Employer quoted *Phillips v. Bilikin Investment Group*, AWCB Decision No. 14-0020 (February 19, 2014) at 10, which states, "The Act and regulations contain no suggestion a party has a right, apart from those provided under AS 23.30.095(a) and (e), to obtain additional opinions or evaluations from medical experts. Such a practice would contravene the statutes and revert back to 'doctor shopping.'" It contended Employee's effort to have Drs. Becker's and Head's reports admitted into the record and reviewed by the SIME physician is an attempt to reinstate "doctor shopping." Employer contended if these reports are not stricken, AS 23.30.095, 8 AAC 45.082 and legislative intent underlying the statute's 1988 amendments will be undermined. It also contended it is not estopped from objecting to unauthorized expert medical witnesses and any related reports, opinions or testimony because there is no time limit to object and Employer never expressly waived its right to object to Drs. Becker's and Head's reports. Employer emphasized there was no referral to either doctor and contended the facts of Employee's case are "strikingly similar to those in *Phillips* and the same outcome should result." (Employer's Memorandum in Support of December 17, 2018 Petition in Limine, January 3, 2019).

14) On January 11, 2019, the designee issued his decision on Employer's December 17, 2018 petition to exclude Drs. Becker's and Head's reports and testimony from this case. The designee's decision included the following:

> The documents ER is petitioning the board to exclude are Dr. Becker's [sic, Head's] neurological evaluation, dated February 27, 2018 (filed with the Notice

> of Intent to Rely on April 13, 2018, and in the SIME binder Bates stamped 2151-2159 on December 14, 2018) and Dr. Becker's evaluation for a PCE on February 1, 2018 (filed on a medical summary on March 1, 2018, and an SIME binder Bates stamped 2029-2150. On December 14, 2018).
> . . . .
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> EE's arguments opposing the petition, are set forth in its Opposition to Petition filed on 12/21/2018. ER's argument in support of its petition are set forth in its Memorandum in Support filed on 1/3/2019.
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> EE is arguing, *inter alia*, that the opinion, reports and testimony of Drs. Head and Becker should not be excluded (from the SIME and any future hearing) because:
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> (a) They have been part of the record for almost a year and ER has never raised an objection;
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> (b) The records are directly relevant to the SIME and to the questions included therein;
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> (c) Their opinions were gathered at the behest of a previous SIME physician, Dr. Scarpino, who recommended that these tests be administered; and
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> (d) These doctors, although paid expert witnesses, were not paid as expert witnesses in this WC case; rather, in a 3rd party companion civil suit.
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> ER has responded by arguing, *inter alia*, that per *Phillips v. Bilikin Investment Group*, AWCB Decision No. 14-0020:
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> (a) The opinion, reports and testimony of Drs. Head and Becker should be excluded (from the SIME and any future hearing) because they are unauthorized expert medical witnesses; and
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> (b) They are not estopped from raising this argument even 10-11 months after these reports had been filed with the board, without objection.

The designee considered the parties' arguments, denied Employer's petition and ordered Dr. Head's February 27, 2018 neurological evaluation report and Dr. Becker's February 1, 2018 PCE report shall not be removed from the SIME binders and will remain in the record for consideration at any future hearings. The designee analyzed the issue as follows:

> As argued by EE, the Board favors broad inclusion of medical records in SIME binders, so the SIME physicians have all relevant evidence, even the SIME records that might contain information that the Board may not consider at hearing.

> Minimally, these reports will offer context to several of the SIME questions posed to Dr. Ling.
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> In addition, EE has offered a credible explanation why these doctors' reports, and subsequent testimony, may be relevant and ER has offered no argument countering that argument; merely they argued that this report was from 'expert witnesses' and therefore should be disallowed per *Phillips v. Bilikin Investment Group*. However, this case differs from the *Phillips* case in that *Phillips* involved an unlawful change in physician in violation of AS 23.30.095(a) and (e) and 8 AAC 45.082(c), and the (expert) physician was hired within the context of the employee's workers' compensation case. In our instant case, the expert physician was hired to evaluate Mr. James in his civil case, and the reports were also possibly requested by Mr. James' previous SIME physician. Finally, ER will still maintain the ability to take the SIME physician's, as well as Drs. Head and Becker's deposition if ER feels any of their reports necessitate such action. For all the reasons above, the reports will not be excluded from the SIME binders and will remain in the Board file (emphasis in original).

The parties were noticed that if Employer did not agree with the designee's ruling and appealed it under AS 23.30.108(c), the designee's determination would be reviewed on the written record. (Prehearing Conference Summary, January 11, 2019).

15) On January 15, 2019, Employer requested review and oral argument on the designee's January 2, 2019 determination. (Petition, January 15, 2019).

16) On January 18, 2019, Employee opposed Employer's appeal of the designee's January 11, 2019 decision. (Opposition to Petition to Exclude Records, January 18, 2019).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent**. It is the intent of the legislature that
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> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and . . . their . . . 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 care and related benefits. The employee may not make more than one change in the employee's choice of an 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. . . .
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> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
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> (15) other matters that may aid in the disposition of the case.
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> **8 AAC 45.082. Medical treatment.**
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> (b) A physician may be changed as follows:
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> (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. . . .
> . . . .
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> (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.

Phillips v. Bilikin Investment Group, Inc., AWCB Decision No. 14-0020 (February 19, 2014), addressed the employer's contention the employee made an unlawful physician change when the employee's attorney selected Thomas Gritzka, M.D., expressly as an expert and, therefore, he was not a "change," "referral" or "substitution" physician. The employee stipulated he selected Dr. Gritzka, and arranged and paid for his examination and his reports. The employee contended his due process rights were violated by the employer's silence on the issue "until the last minute." Dr. Gritzka evaluated the employee on September 26, 2012, and his report created a dispute warranting a second independent medical evaluation (SIME). The employer

objected to Dr. Gritzka on February 10, 2014, eight days before hearing. On February 13, 2014, the employee expressed concern over the employer's objection. The board heard the employer's objection as a preliminary matter and advised the employee had the burden to demonstrate Dr. Gritzka was a valid physician under the Act and regulations. Employee did not provide evidence showing Dr. Gritzka was a change, referral or substitution physician and, in fact, conceded he was a hired medical expert. *Phillips* rejected the employee's argument that he had a right to hire an independent expert outside the Act's limitations. It stated:

> The Act and regulations contain no suggestion a party has a right, apart from those provided under AS 23.30.095(a) and (e), to obtain additional opinions or evaluations from medical experts. Such practice would contravene the statutes and revert back to 'doctor shopping,' which the legislature eliminated years ago. In some cases, parties have procured medical experts without objection from opposing parties and these experts' opinions have been considered. This is not one of those cases. Employer objected to Dr. Gritzka's participation alleging he was an unlawful change in Employee's choice of attending physician. Regulation 8 AAC 45.082(c) codifies decisional law disallowing reliance by a party on unlawfully obtained medical opinions. If a party makes an unlawful change of physician in violation of AS 23.30.095(a) or (e), or 8 AAC 45.082, the panel 'will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose.' The panel has no discretion. Employee stipulated the evaluation with Dr. Gritzka was arranged and paid for solely by his attorney. Employee failed to show any exception applied to his situation. He also failed to demonstrate Dr. Gritzka was a valid change, referral or substitution physician.

Consequently, *Phillips* found Dr. Gritzka was a hired medical expert retained outside the limitations of AS 23.30.095(a) and 8 AAC 45.082(c), sustained the employer's objection and did not consider Dr. Gritzka's report for any purpose. *Phillips* also found there is no time limit for a party to object to an unauthorized medical expert and neither the law nor the regulation provide a timeliness waiver of a party's right to object to an unlawful physician.

> **8 AAC 45.092. Selection of an independent medical examiner**.
> . . . .
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> (h) If the board requires an evaluation under AS 23.30.095(k), the board will, in its discretion, direct
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> > (1) a party to make two copies of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put

> the copies in chronological order by date of treatment with the initial report on top and the most recent report at the end, number the copies consecutively, and put the copies in two separate binders; . . . .

An SIME is an administrative tool used to facilitate resolution of disputed claims and is controlled and governed by the board, in reliance upon the exercise of discretion by its designees. *Cossette v. Providence Health Systems*, AWCB Decision No. 08-0013, at 16 (January 11, 2008).

The abuse of discretion standard applies to designee's decisions regarding SIME issues. *See Keith v. Norton Sound Health Corp.*, AWCB Decision No. 03-0175, at 5 (finding AS 23.30.108(c) applied to a designee decision to order an SIME); and *Groom v. State*, AWCB Decision No. 02-0217 (October 24, 2002) (applying the abuse of discretion standard to a designee's selection of an SIME physician). Although no definition of "abuse of discretion" appears in the Act, the Alaska Supreme Court has interpreted this phrase to mean "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). On appeal, designee determinations are subject to reversal under the abuse of discretion standard, which incorporates a substantial evidence test. "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Services*, 577 P.2d 1044, 1049 (Alaska 1978). In applying the substantial evidence standard, a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Id.*

> **8 AAC 45.120. Evidence.**
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . .

ANALYSIS

Should medical evidence developed in other cases be stricken from this case?

If an employer, or as is alleged here, an injured worker makes an unlawful change of physician, the reports, opinions or testimony of that physician will not be considered in any form, in any proceeding, or for any purpose. AS 23.30.095(a); 8 AAC 45.082(c). Employer contends Drs. Head's and Becker's reports should be stricken from SIME binders and from the record. Employer does not directly assert there was an excessive change of physician. AS 23.30.095(a); 8 AAC 45.082(b)(2). Rather, it contends the records should be stricken because there was no referral under the Act made to either of these evaluators and the facts of Employee's case are "strikingly" similar to those in *Phillips* and therefore the same outcome should result -- excluding these reports.

Employee's case is distinguishable from *Phillips*. Drs. Head and Becker were not unlawful physician changes because unlike the doctor in *Phillips*, their reports were not created for Employee's workers' compensation claim or at the request of his counsel in this case. Employee applied for and was granted Social Security disability benefits. Dr. Head evaluated him in connection with his application for those Social Security benefits. In addition to the instant claim, Employee has also sued a third-party whom he believes is liable for his work injury. Employee's attorney in the third-party litigation, not his counsel in his workers' compensation claim, obtained a physical capacities evaluation from Dr. Becker. Employee's Social Security disability benefits claim and his third-party suit are separate and distinct from his workers' compensation case and the Act and associated regulations do not apply to or control those actions. Likewise, evidence developed in those proceedings is distinct from his workers' compensation case. However, this does not mean medical evidence developed in those proceedings is not relevant to or inadmissible in Employee's workers' compensation case. AS 23.30.001(4); 8 AAC 45.120(e).

Designees have broad authority pertaining to SIMEs, which includes directing parties to construct SIME binders containing all an employee's medical records in the parties' possession. 8 AAC 45.065(a)(15); 8 AAC 45.092(h)(1). "All" medical records does not mean only those

medical records created or developed in the treatment or defense of an injured workers' work-related injury. 8 AAC 45.120; *Rogers & Babler*. Dr. Head's report was relied upon by Social Security's adjudicator to find Employee eligible for Social Security disability benefits and is exactly "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." His report is relevant admissible evidence and the designee did not abuse his discretion when he denied Employer's petition to strike Dr. Head's report from the SIME binders. 8 AAC 45.120; *Keith*; *Groom*; *Cossette*; *Sheehan*; *Miller*. Subject to a cross-examination request, this record is also admissible evidence at hearing.

The physical capacities evaluation Dr. Becker conducted was not requested by Employee's counsel to develop evidence for his workers' compensation claim. The evaluation was addressed to Employee's attorney in his third-party litigation, Dennis Mestas, who does not represent Employee in his workers' compensation claim. Dr. Becker's report is extensive and the type of evidence on which factfinders typically rely to determine if injured workers have the physical capacity to return to their work at the time of injury or to any work at all. *Rogers & Babler*. Dr. Scarpino said if it was necessary to determine Employee's actual restrictions, "it would be best to obtain a Functional Capacity Evaluation." A physical capacity evaluation is evidence upon which SIME physicians and others typically rely to determine an injured worker's physical restrictions. 8 AAC.45.120; *Rogers & Babler*. Dr. Becker's report is relevant admissible evidence and the designee did not abuse his discretion when he denied Employer's petition to strike it from SIME binders. 8 AAC.45.120; *Keith*; *Groom*; *Cossette*; *Sheehan*; *Miller*. Subject to a cross-examination request, this record is also admissible evidence at hearing.

CONCLUSION OF LAW

Medical evidence developed in other cases should not be stricken from this case.

ORDER

Employer's petition appealing the January 11, 2019 designee order is denied.

Dated in Anchorage, Alaska on February 5, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Bradley Evans, Member

/s/
Justin Mack, 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 Andy James, employee / respondent v. Northern Construction, employer; Liberty Northwest Insurance Corp., insurer / petitioners; Case No. 201500569; 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 February 5, 2019.

/s/
Nenita Farmer, Office Assistant