# ALASKA WORKERS' COMPENSATION BOARD

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

| | | |
|---|---|---|
| ERIC McDONALD, | ) | |
| | ) | |
| Employee, | ) | |
| Claimant, | ) | INTERLOCUTORY |
| | ) | DECISION AND ORDER |
| v. | ) | |
| | ) | AWCB Case No. 201410268 |
| ROCK & DIRT ENVIRONMENTAL, INC., | ) | |
| | ) | AWCB Decision No. 19-0066 |
| Employer, | ) | |
| and | ) | Filed with AWCB Anchorage, Alaska |
| | ) | on June 13, 2019 |
| INSURANCE COMPANY OF THE STATE | ) | |
| OF PENNSYLVANIA, | ) | |
| | ) | |
| Insurer, | ) | |
| Defendants. | ) | |
| | ) | |

Eric McDonald's August 20, 2018 petition for clarification of AS 23.30.095(e), his February 4, 2019 oral petition to cross-examine employer's medical evaluators (EME), his November 26, 2018 petition to compel discovery, and Rock & Dirt Environmental, Inc.'s January 31, 2019 petition to order Mr. McDonald to attend an EME without interference were heard on the written record on May 15, 2019, in Anchorage, Alaska, a date selected on April 26, 2019. This hearing arose from the parties' February 4, 2019 stipulation. Mr. McDonald (Employee) represented himself. Attorney Colby Smith represented Rock & Dirt Environmental, Inc. and Insurance Company of the State of Pennsylvania. (Employer). The record was reopened after deliberations on May 15, 2019. The parties were asked to file additional evidence and closed on June 4, 2019.

HISTORY OF THE CASE

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0039 (April 17, 2018) (*McDonald I*) determined Employer was entitled to releases for psychiatric and substance abuse records, ordered Employee to appear for a deposition within 45 days, and quashed Employee's subpoena *duces tecum* to Employer's nurse case manager.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0076 (August 2, 2018) (*McDonald II*) denied Employee's oral request to continue the hearing, granted Employer's petition for a second independent medical evaluation (SIME), denied Employee's petition to exclude the law firm Delaney Wiles from the case and to exclude a letter from Alaska Heart & Vascular Institute. *McDonald II* clarified that *McDonald I* had quashed the subpoena issued to Exam Works. *McDonald II* explained to Employee that if he had filed a request to cross-examine Employer's doctors, Employer would have to produce them for a deposition or call them as witnesses at a hearing on the merits of Employee's claim, or the doctor's report would not be admitted. *McDonald II* also explained to Employee he could depose Employer's doctors at his own expense.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0089 (August 30, 2018) (*McDonald III*) granted Employee's request for reconsideration and modification of *McDonald II*, allowed the parties to file additional briefing, and set the *McDonald IV* hearing.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0109 (October 23, 2018) (*McDonald IV*) denied Employee's petition for reconsideration of *McDonald II*.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0121 (November 19, 2018) (*McDonald V*) denied Employee's petition for reconsideration of *McDonald IV*.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 19-0006 (January 15, 2019) (*McDonald VI*) modified one factual finding in *McDonald IV* based on the Board's recognition it had misunderstood one piece of Employee's evidence.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 19-0016 (February 8, 2019) (*McDonald VII*) denied Employee's petition for reconsideration of *McDonald VI*.

*McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 19-0026 (February 27, 2019) (*McDonald VIII*) granted in part Employee's petition for a protective order preventing Employer from *ex parte* contacts with his doctors and denied Employee's petitions to strike various evidence and medical records. *McDonald VII* interpreted 42 U.S.C. §290dd-2 and 24 C.F.R. part 2 to require that Employee's substance abuse records be stricken from the record; however, there were no such records in his file. Therefore, Employee's petition to strike substance abuse treatment records from his file was denied.

*McDonald v. Rock & Dirt Environmental*, AWCB Decision No. 19-0030 (February 28, 2019) (*McDonald IX*) denied Employee's petition for reconsideration of the oral ruling at the *McDonald VIII* hearing which denied Employee's request to play audio recordings that had been filed and were part of the record.

ISSUES

Employee contends the portion of AS 23.30.095(e) that requires EME physicians to be "authorized to practice medicine under the laws of the jurisdiction in which the examination occurs" means the doctors must be licensed in Alaska. Employer contends the provision requires EME physicians to be licensed where the examination occurs.

***1) Does AS 23.30.095(e) require EME physicians to be licensed in Alaska?***

Employee contends that because he has filed requests to cross-examine Employer's EME physicians, Employer should be required to produce them for deposition before any procedural hearings or before an SIME. Employer contends it is not required to produce the doctors for deposition or call them as witnesses at a hearing on the merits unless it wishes to rely on the doctors' reports and this issue has been addressed by *McDonald II* and by the Alaska Workers' Compensation Appeals Commission (AWCAC) in its April 12, 2019 order.

***2) Is Employer required to produce its EME doctors for deposition before any procedural hearings or before an SIME?***

Employer contends Employee should be compelled to attend an EME without interference. Employee contends Employer has manipulated the EME process and misled the EME doctors in the past. Employee does not consider his requests to the doctors to be interference and contends he should not be barred from posing questions to the EME physicians or informing them he has a right to terminate the EME when he so chooses.

***3) Should Employee be compelled to attend EMEs without interference?***

Employee contends Employer's response to his request for the adjuster's file and correspondence was incomplete, and Employer should be ordered to produce the missing documents. Employer contends it has given Employee all of the non-privileged documents in its possession.

***4) Should Employer be compelled to produce additional documents?***

## FINDINGS OF FACT

All factual findings in *McDonald I* through *McDonald IX* are incorporated by reference. The following additional facts and factual conclusions are undisputed or established by a preponderance of the evidence:

1) The term "jurisdiction" may have different meanings in different contexts. It may mean the power and authority of a body to adjudicate and make decisions, and it may refer to the geographic area in which a body may exercise its power. (*Black's Law Dictionary* 853 (6th Ed. 1990).

2) In most states, the authorization to practice medicine is granted through a license. (Observation, Experience).

3) A license to practice medicine in Alaska does not require familiarity with the Alaska Workers' Compensation Act. (Observation, Experience, 12 AAC chapter 40).

4) On January 6, 2015, Employee was seen by Gary Olbrich, M.D., John Swanson, M.D, and David Glass, M.D., for an EME. (EME Reports, January 6, 2015).

5) On September 8, 2015, Drs. Olbrich, Swanson, and Glass again examined Employee. (EME Reports, September 8, 2015).

6) On October 14, 2015, Employee file a request to cross-examine Drs. Olbrich, Swanson, and Glass regarding their September 8, 2015 reports. (Request for Cross-examination, October 14, 2015).

7) On February 2, 2016, Employee was again seen by Dr. Swanson for an EME. (EME Report, February 2, 2016).

8) On March 18, 2016, Employee filed a request to cross-examine Dr. Swanson regarding his February 2, 2016 report. (Request for Cross-examination, March 18, 2016).

9) On March 28, 2017 Employee was seen by Stephen Fuller, M.D., for an EME, and on March 29, 2017 he was seen by William Baer, M.D. (Prehearing Conference Summary, September 20, 2017).

10) At the September 20, 2017 prehearing conference, the parties agreed Dr. Fuller's and Dr. Baer's EME reports would be stricken from the record. (Prehearing Conference Summary, September 20, 2017).

11) On April 25, 2018, Employee filed a request to cross-examine Drs. Fuller and Baer regarding their March 2017 EME reports. (Request for Cross-examination, April 25, 2018).

12) On April 25, 2018, Employee filed a petition asserting his right under *Smallwood* to cross-examine Employer's EME doctors. (Petition, April 25, 2018).

13) On August 22, 2108, Employee filed a petition asking that Employer be compelled to produce the EME doctors for deposition. (Petition, August 22, 2018).

14) At the October 11, 2018 prehearing conference, Employee stated he would not be attending EMEs scheduled for November 12, 13, and 14, 2018, as he had not received a scheduling letter. Employer stated the letter had recently been sent. The Board designee informed Employee that refusal to attend the EMEs could result in a suspension or forfeiture of his benefits. (Prehearing Conference Summary, October 11, 2018).

15) On October 22, 2018, Employee filed a petition asking that the EMEs Employer had scheduled for November 2018 not take place. (Petition, October 22, 2018).

16) On October 23, 2018, Employee sent two documents to the EME physicians. The first was a four-page Americans with Disabilities Act (ADA) accommodation request that included 11 items:

1. The doctors keep any mention of Employee's substance use disorder in sustained remission private and confidential.
2. The doctors make no physical contact with Employee.
3. Employee be allowed to take breaks in the event of stress or panic.
4. Employee be allowed to videotape the evaluations due to his inability to remember.
5. The doctors abide by Alaska and Oregon laws and constitutions as well as the U.S. constitution.
6. Each doctor sign a statement consenting to any investigation in the event a complaint is filed against them.
7. Employee be allowed to end the examination at any time.
8. Employee not be forced to discuss the traumatic events surrounding the work injury.
9. The doctors adhere to EEOC standards concerning his injury.
10. The doctors abide by 42 CFR part 2.

11 The doctors not be abusive or assaultive toward Employee. (Employee, ADA Accommodation Request, October 24, 2018).

17) The second item Employee sent to the EME doctors and their office managers was a "Statement of Submission to Investigation." Employee asked that the individuals agree to submit to an investigation in the event a lawsuit, medical complaint, or ADA complaint was filed, and, should they fail to do so, they would withdraw their opinions and return all records provided to them. (Employee, Statement of Submission to Investigation, October 24, 2018).

18) At the February 4, 2019 prehearing conference, Employee explained the intent of his petitions to cross-examine the EME doctors was that he be allowed to do so before a procedural hearing or an SIME. (Prehearing Conference Summary, February 4, 2019).

19) On January 22, 2019, Employee petitioned the Alaska Worker's Compensation Commission (Commission) for review of three decisions by the Board. (Commission, Order on Petition for Review and Order on Motion to Stay SIME, April 12, 2019).

20) On January 28, 2019, Employee filed a motion with the Commission to stay the SIME ordered in McDonald II. (Commission, Order on Petition for Review and Order on Motion to Stay SIME, April 12, 2019).

21) On April 12, 2019, the Commission denied Employee's petition for review and denied his motion to stay the SIME. One of Employee's arguments for staying the SIME was that he had not yet been able to depose the EME doctors. The Commission stated:

> As to his concerns that he has not yet been able to depose the EME doctors, this is, again, a concern for a hearing on the merits. The filing of a Smallwood request, i.e., a request to cross-examine a doctor, means R&D must either schedule the deposition of the doctor(s) prior to a hearing on the merits or produce the doctor(s) for cross-examination at hearing. Mr. McDonald states he has filed such requests. The filing of the request does not mean the doctor must be produced immediately for a deposition - the law does not require a specific time for setting the deposition. The only requirement is that the doctor be made available, either by deposition or at hearing. However, if R&D does not produce the doctor for a deposition prior to hearing and does not produce the doctor at hearing for cross-examination, then Mr. McDonald is in a poslt1on to ask the Board to remove the EME report from the Board's file and/or not rely on the report in reaching its decision.

(AWCAC Order on Petition for Review and Order on Motion to Stay SIME, Appeal No. 180025, April 12, 2019).

22) On April 25, 2018, Employee filed a petition seeking all records missing from the adjuster and Employer's attorney's files that had been produced in response to his discovery request. The petition form noted "See attached," but nothing was attached to the petition. (Petition, April 24, 2018).

23) On November 26, 2018, Employee filed a petition seeking to compel Employer to produce all records missing from the adjuster and Employer's attorney's files, and referring to an attached exhibit. Attached to the petition was a list of was a list of 76 numbered paragraphs referring to documents Employee contended had not been produced. Employee included documents as exhibits corresponding to most of the numbered paragraphs. The documents referred to in the numbered paragraphs are as follows:

1. Paragraph 1 refers to a March 11, 2018 email from Employer's attorney to Employee stating all documents in the attorney's possession had been produced to Employee.

2. Paragraph 2 refers to a June 26, 2017 letter from Employer's attorney stating the entire adjuster's file had been produced, except privileged materials.

3. Paragraph 3 refers to a February 25, 2018 Notice of Intent to Rely filed by Employee.

4. Paragraph 4 refers to a June 3, 2015 email from the adjuster to Employer's attorney asking if they could ethically use a nurse case manager after Employee declined to meet with her.

5. Paragraph 5 refers to a May 4, 2015 email chain between the nurse case manager and the adjuster. This portion of the email chain includes an email from the nurse case manager saying Employee had declined to meet with her and a later email asking if the adjuster would like her to work behind the scenes.

6. Paragraph 6 refers to an April 26, 2016 email from the EME office to the adjuster asking for approval of fees for an upcoming EME.

7. Paragraph 7 refers to a March 30, 2016 fax cover sheet from Mayo Clinic to the adjuster and the adjuster's March 28, 2016 letter offering to settle the amount of Mayo Clinic's bill in excess of the Alaska Fee schedule. Handwritten on the letter is the word "Denied."

8. Paragraph 8 refers to a two page December 14, 2015 email exchange between Stanford Health Care and the adjuster about the controversion of benefits for sleep apnea.

9. Paragraph 9 refers to a July 7, 2015 email from an investigator to the adjuster about contact with Employee's probation officer.

10. There is no document associated with paragraph 10; however, it refers to an audio tape of Employee's EME with Dr. Samoil and asserts Employer did not provide Dr. Samoil all relevant records relating to his cardiac issues.

11. There is no document associated with paragraph 11; however it refers to an audio tape of Employee's EME with Dr. Baer and asserts Employer did not provide Dr. Baer all relevant records relating to his claims for vision loss and traumatic brain injury.

12. Paragraph 12 refers to a September 4, 2015 email from Employee's non-attorney representative to Employer's attorney regarding discussions about travel arrangements and a stipulation.

13. Paragraph 13 refers to an August 31, 2015 letter from Employer's attorney to both of Employee's non-attorney representatives stating that an updated payment spreadsheet was enclosed.

14. Paragraph 14 refers to an October 19, 2015 letter from a drug testing and monitoring program to the adjuster stating Employee was enrolled in the program.

15. Paragraph 15 refers to the drug testing and monitoring company's October 19, 2015 Patient Prescription Profile for Employee.

16. Paragraph 16 refers to the drug testing and monitoring company's October 19, 2015 quarterly summary report.

17. Paragraph 17 refers to a December 30, 2014 email from Ms. Lyons, a legal assistant for Employer's attorney to the EME office asking if the EME doctors would consent to being videotaped.

18. Paragraph 18 refers to two February 1, 2016 emails. The EME office inquired about two letters and surveillance video. Ms. Lyons replied saying one surveillance DVD was being copied, and another would be sent later.

19. Paragraph 19 refers to four pages of the adjuster's log. The first is marked page 1 of 1, and includes an August 15, 2016 entry that has been redacted. The following pages are marked 1, 2, and 3 of 3, and are all redacted except for an August 26, 2014 status entry regarding a conversation with Employee.

20. Paragraph 20 refers to a May 26, 2015 email from the nurse case manager to the adjuster asking for a meeting on June 2nd at 1:30, and the adjuster's response stating that was a good time.

21. Paragraph 21 refers to a January 12, 2017 email chain beginning with an email from a Workers' Compensation Officer to Employer's attorney suggesting Employee's concerns about the EMEs might be resolved by letting Employee ask the EME doctor some questions. It is followed by the attorney's response that doing so would be inappropriate.

22. Paragraph 22 refers to more of the May 4, 2015 email chain in Paragraph 5. The adjuster responded "Yes, please" to the nurse case manager's question about working behind the scenes. The adjuster also discusses contacting Dr. Wickler, who had performed surgery on Employee's left shoulder, about the need for a personal care attendant.

23. Paragraph 23 refers to two email chains. The first, dated July 7, 2016 begins with an email from Employee's non-attorney representative to the Board's SIME designee asking about SIME records. The designee forwarded the email to Employer's attorney without comment. Employer's attorney responded saying she had requested a prehearing and would follow up with Employee's non-attorney representative. In the second email chain, dated November 8, 2016, the Board's SIME designee wrote to Employee's non-attorney representative and Employer's attorney saying he had received supplemental SIME records, but, despite numerous requests, he had not received an SIME form or questions.

24. Paragraph 24 refers to a May 21, 2015 email from the nurse case manager to the adjusters saying Dr. Wickler's response to their questions was attached and suggesting they meet to review the response. Another email on the page has been redacted.

25. Paragraph 25 refers to part of a June 1, 2015 email exchange between Employee and the adjuster. The adjuster informed Employee that Dr. Wickler had indicated he no longer needed a personal care attendant. Employee replied, informing the adjuster he was no longer seeing Dr. Wickler, and the personal care attendant was also needed because of his knee and right shoulder injuries.

26. There is no document associated with paragraph 26.

27. Paragraph 27 refers to part of a November 17 and 18, 2014 email chain between Ms. Lyons and the EME office. In one email, the EME office states it has included a CV and sample report from Dr. Doppelt.

28. Paragraph 28 refers to a June 24, 2016 email exchange between Employee's non-attorney representative and Employer's attorney. Employer's attorney sent a letter regarding treatment of Employee's adrenal condition. Employee's non-attorney representative responded saying Employee had been suicidal, and if he committed suicide she would never be finished going after Employer's attorney, the adjuster, and the insurance company.

29. Paragraph 29 refers to a January 27, 2016 email from the EME office to the adjuster asking for a cover letter and any additional records for Employee.

30. Paragraph 30 refers to a January 6 to January 15, 2015 email exchange between the EME office and Ms. Lyons. On January 6, 2015, the EME requested additional endocrinology records from Employee's treatment at the Mayo Clinic. On January 7, 2015, Ms. Lyons wrote that they would try to obtain them, and on January 15, 2015, the EME office asked if Ms. Lyons had heard anything about the records.

31. Paragraph 31 refers to a November 18, 2014 Email from Ms. Lyons to the EME office asking if they had an endocrinologist.

32. Paragraphs 32 and 33 each refer to one page of a two-page email chain. Paragraph 32 refers to the EME office's November 20, 2014 response to an email exchange from Ms. Lyons following up on the question about an endocrinologist. The EME office replied that they had two. Another email on the page has been redacted.

33. Paragraph 33 refers to a November 20, 2014 email from Ms. Lyons asking about her earlier question regarding an endocrinologist.

34. Paragraph 34 refers to an April 24, 2017 email exchange between Ms. Lyons and the EME office. Ms. Lyons asked about a referral to a Dr. Green. The EME office responded the referral should be in the upcoming EME report.

35. Paragraph 35 refers to part of a July 21, 2016 email from a medical billing service to the adjuster saying they had received a denial and it had been a pleasure to speak with her.

36. Paragraph 36 refers to an August 11, 2015 email from the rehabilitation specialist assigned to Employee's case to the adjuster. The rehabilitation specialist explains that Employee's doctor, Dr. Thiele, did not want to comment on Employee's final capacity, so she could not move forward with a reemployment plan.

37. Paragraph 37 refers to a February 26, 2015 email from an investigator to the adjuster asking if the file was still open as he had just received a response to an FOIA request to OSHA.

38. Paragraph 38 refers to an April 30, 2015 email from the investigators to the adjuster thanking her for an assignment.

39. Paragraph 39 refers part of the December 14, 2015 email exchange referred to in paragraph 5 between the adjuster and Stanford Health Care. The adjuster refers to the October 23, 2015 controversion notice which included benefits related to sleep apnea.

40. Paragraph 40 refers to a refers to a March 23, 2017 letter from Employer's attorney to several EME doctors about an EME scheduled for March 28-29, 2017, and states medical records had been provided previously.

41. Paragraph 41 refers to an April 29, 2016 letter from Employer's attorney to Dr. Swanson, who had performed an EME. Employer's attorney explains that in accordance with Dr. Swanson's prior EME report it had reimbursed Employee for an adjustable bed. Subsequently, Dr. Thiele had prescribed a king-size adjustable bed and Employer's attorney asked Dr. Swanson to respond to questions based on new medical records.

42. Paragraph 42 refers to an August 4, 2015 fax from Home Instead Senior Care to the adjuster. The fax includes a cover letter, an assessment and care plan for Employee, and a July 23, 2015 email exchange between Home Instead Senior Care employees that was copied to the adjuster.

43. Paragraph 43 refers to a March 4, 2016 "fill-out-the-blank" letter from the adjuster to Dr. Ireland thanking her for chart notes, requesting authorization to bill the insurer, and asking her questions about the cause of the need for a cardiac stress test. The letter does not include Dr. Ireland's responses.

44. Paragraph 44 refers to a December 16, 2015 letter from the adjuster denying Stanford Health Care's request for the evaluation and treatment of Employee's sleep apnea.

45. Paragraph 45 refers to a December 1, 2015 letter and fax cover sheet to Dr. Chandler asking him to review and respond to recent EME reports.

46. Paragraph 46 refers to a release for health care information signed by Employee on June 17, 2014 authorizing the release of records to CorVel. The space identifying the health care providers authorized to release records is blank.

47. Paragraph 47 refers to one page of the email chain identified in paragraphs 5 and 22.

48. Paragraph 48 refers to the same December 14, 2015 email chain between Stanford Health Care and the adjuster as paragraphs 8, 39, 44, and 50. One email on the page has been redacted.

49. Paragraph 49 refers to an authorization request from Vital Point Express regarding two prescriptions from Brent Adcox, M.D., that Employee had sought to fill and the adjuster's response. Vital Point Express requested authorization, and the adjuster responded in a January 5, 2017 email that she had been told by Dr. Adcox's office that neither of the two prescriptions were authorized.

50. Paragraph 50 refers to a portion of the December 14, 2015 email exchange referred to in paragraphs 8, 39, 44, and 48.

51. Paragraph 51 refers to a December 16, 2015 email exchange between Employee's non-attorney representative and the adjuster. Employee's non-attorney representative explained Employee could not get financial assistance from Stanford for autonomic testing unless the adjuster issued a denial. The adjuster responded attaching a copy of the letter and controversion she had sent to Stanford that was referred to in paragraph 39.

52. Paragraph 52 refers to a June 24 to June 26, 2015 email chain involving the insurer, and the investigator regarding surveillance of Employee. One of the emails to the insurer states "We will just need a surveillance request form from you," and the response states "Here's the paperwork for surveillance." In the last email in the chain, the investigator forwarded the email chain to the adjuster.

53. Paragraph 53 refers to an April 17, 2019 email chain between the adjuster, the insurer, and Helios, a prescription monitoring service, regarding prescriptions that are related to Employee's workers' compensation claim. One email in the chain has been redacted.

54. Paragraph 54 refers to a May 15, 2015 email from the adjuster to the nurse case manager asking her to check whether supplies for a TENS unit are still needed. The remainder of the five page exhibit is redacted.

55. Paragraph 55 refers to a membership application in the Captain Cook Athletic Club signed by Employee on May 5, 2015.

56. Paragraph 56 refers to an August 25 and 26, 2015 email exchange between Vital Point Express and the adjuster regarding prescriptions for Oxycontin and Roxicodone written by Dr. McNamara or PA Robert Thomas. Vital Point Express requested authorization to fill the two prescriptions, and the adjuster approved.

57. Paragraph 57 refers to December 1 and 2, 2016 emails between employees of a medical bill review company regarding medical bills that have been processed and should be available for payment. The adjuster was copied on the emails.

58. Paragraph 58 refers to a one-page email printout. The first email is redacted, and the second is a February 4, 2016 email from the rehabilitation specialist to the reemployment benefits administrator (RBA), the adjuster and Employer's attorney regarding Employee. It is unclear if the email is complete as it contains no text.

59. Paragraph 59 is a June 19, 2014 email from the insurance agent for Black Gold in Fairbanks to the adjuster asking for an update on Employee's claim. This email is part of a chain of emails referred to in paragraphs 59, 60, 61, 62, and 63.

60. Paragraph 60 is two June 18, 2018 emails that are part of the email chain referred to in paragraphs 59, 61, 62, and 63. These emails precede the one referred to in paragraph 59. In the first email, the insurance agent asks if an individual with the insurer is the main point of contact on Employee's claim. That individual responded with the name of the adjuster and said he would email the adjuster and forward what she had.

61. Paragraph 61 refers to an email from the insurance agent for Black Gold introducing himself to an individual with the insurer and asking for an update on Employee's claim.

62. Paragraph 62 refers to a June 18, 2014 email between two employees of the insurer providing basic information about Employee's injury which was copied to the insurance agent.

63. Paragraph 63 refers to a June 17, 2014 email confirming Employee's injury had been reported and the claim information had been confirmed.

64. Paragraph 64 refers to a July 10, 2014 email from the insurer to the adjuster. The contents of the email have been redacted.

65. Paragraph 65 refers to a July 10, 2014 email chain between the adjuster and the insurer discussing payment of temporary total disability (TTD) to Employee, and the adjuster asking for reimbursement of $502. A portion of the emails have been redacted.

66. Paragraph 66 refers to July 28, 2014 email chain between the insurance agent for Black Gold and the adjuster. The adjuster agrees to provide an update.

67. Paragraph 67 refers to a July 31, 2014 email exchange between the insurance agent for Black Gold and the adjuster in which the insurance agent arranged a conference call.

68. Paragraph 68 refers to a June 20, 2014 email exchange between the adjuster and the nurse case manager. The adjuster explained Employee's significant other had concerns about his care. She asked if the nurse case manager could give her any insight.

69. Paragraph 69 refers to a January 15, 2015 report from the rehabilitation specialist to the RBA recommending Employee be found eligible for reemployment benefits. In her recitation of Employee's medical history, the rehabilitation specialist refers to June 13, 2014 notes by a paramedic. The report was served on Employee and the adjuster.

70. Paragraph 70 refers to an undated check request form from the adjuster asking the insurer for a $292.50 check. The check request refers to an invoice from the investigator.

71. Paragraph 71 refers to a March 28, 2016 fax cover page from the adjuster to the Mayo Clinic saying "Please see the attached offer." The attachment is not included.

72. Paragraph 72 refers to three documents: The first is an August 18, 2015 health insurance claim form from A.A. Spine & Pain Clinic for services provided to Employee on August 10, 2015. The second is a September 9, 2015 letter from the adjuster to A.A. Spine & Pain Clinic asking for all chart notes and records from Employee's August 10, 2015 visit. The third document is a September 12, 2015 fax cover sheet from A.A. Spine & Pain Clinic with a note saying Employee had not had a procedure on August 10, 2015.

73. There is no document associated with paragraph 73, but it references the document referred to in paragraph 72.

74. Paragraph 74 refers to an April 4, 2016 fax cover sheet from Diversified Health Care Management and two health insurance claim forms from Cornerstone Medical Clinic. The fax was sent to the Workers' Compensation Division.

75. Paragraph 75 refers to a March 4, 2016 fax cover sheet from Alaska Heart and Vascular Institute to the adjuster. The cover sheet indicates Employee's chart notes were being sent in response to the adjuster's request, but it does not indicate that any pages were attached.

76. Paragraph 76 refers to a February, 18, 2016 letter from the adjuster to Dr. Thiele with blanks for him to respond to questions about Employee's migraines. The letter does not include Dr. Thiele's responses. (Petition, November 25, 2018).

24) On most computers it is possible to set the clock to an incorrect time. Also, many email programs allow the user the option of displaying the time of the sender's email using either the sender's local time or the recipient's local time. (Observation, Experience).

25) Employer is insured for workers' compensation liability under a policy issued to Black Gold Express. (ICERS Database, Case Screen, Case Number 201410268).

26) On April 4, 2016, Diversified Health Care Management filed a claim for medical costs in Employee's case. (Claim, April 4, 2016).

27) After the May 15, 2019 written record hearing, a letter was sent to the parties informing them the record was being reopened, asking them to provide several documents and answer several questions. (Letter, May 15, 2019).

28) Neither party responded to the May 15, 2019 letter. The record closed on June 4, 2019. (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;
>
> . . . .

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).

In construing the Workers' Compensation Act, the Supreme Court has stated: "We recognize a presumption that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." *Rydwell v. Anchorage Sch. Dist.,* 864 P.2d 526, 530–31 (Alaska 1993).

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.
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> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence.

In *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249 (Alaska 2007) an employee who lived in Florida refused to attend an EME in Utah, contending she could not travel alone. The Board noted EME physicians could have been found in Florida. The employee subsequently attended an EME in Alabama. The Board held the employee's benefits should be suspended from the date of the Utah evaluation until she attended the Alabama EME because her failure to attend the Utah

EME was unexcused. The Supreme Court reversed, holding that the provision in AS 23.30.095(e) limiting EMEs to "reasonable times" indicated the legislature intended some consideration of an employee's ease in attending the evaluation. The Court explained the proximity of the physician must be taken into account.

In *ASRC Energy Services, Inc. v. Kollman*, AWCAC Decision No. 186 (August 21, 2013), the Commission reversed a Board decision that held the employee could have a witness present and could record EMEs. The Commission examined the language of AS 23.30.095(e), which is the only section of the Act addressing EMEs, and reversed stating the section "leaves the choice of an EME physician *exclusively to the employer*, with the only restriction being that the physician must be licensed to practice where the EME takes place."

In *Commercial Union Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976), an employer had objected to the admission of reports by the employee's doctor unless employer was given the opportunity to cross-examine the physicians. The doctor was not made available for cross-examination, and Board declined to consider the reports. The superior court remanded the case to the Board holding the employer had waived its right to cross-examine the doctor by not deposing him in the several months between the objection and the Board hearing. The Supreme Court reversed the superior court, holding that when a party introduces a written medical report in evidence before the Board, that party must provide his opponent with an opportunity to cross-examine the author of the report. *Id.* at 1266. Further, since the right of cross-examination should not carry a price tag, the party introducing the report must bear the cost of providing the opportunity for cross-examination. *Id.*

In *Frazier v. H.C. Price*, 794 P.2d 103 (Alaska 1990) Frazier gave notice he intended to introduce into evidence a medical report prepared at H.C. Price's request and expense. The employer asserted a right to cross-examine the reports' authors and the Board held Frazier should bear the costs of the cross-examination. The Board's holding was reversed. The Supreme Court held written medical reports prepared at the employer's request and expense and which the employee intends to introduce before the Board, are not hearsay, and thus the employee is not obligated to bear the costs of employer's cross-examination of the reports' authors. The employer, by

requesting that the employee submit to examination by clinical physicians of its choice, vouches for credibility and competence of those physicians. *Id.* at 105.

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

> **8 AAC 45.052. Medical summary.**
> . . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.
>
> (1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination, together with the affidavit of readiness for hearing and an updated medical summary and copies of the medical reports listed on the medical summary, if required under this section.
>
> (2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.
>
> (3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,
>
> (A) All updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and
>
> (B) If a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.

(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

**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. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

(g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.

. . . .

**Alaska Rule of Civil Procedure Rule 26. General Provisions Governing Discovery; Duty of Disclosure.**

. . . .

(b) Discovery Scope and Limits.
Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.*
Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

. . . .

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

. . .

(C) Unless manifest injustice would result,
(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph;

**Alaska Rule of Civil Procedure Rule 30. Depositions Upon Oral Examination.**

. . . .

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

It is important that both parties be able to thoroughly investigate claims and defenses. *Granus v. Fell*, AWCB Decision No. 99-016 (January 20, 1999) at 6. The board has adopted a two-step analysis for discovery requests. The first step is a determination of what matters are at issue or in dispute in the particular case. The second step is to determine whether the information sought is reasonably calculated to lead to facts having a tendency to make any question at issue more or less likely. *Granus* at 13-14. To be "reasonably" calculated to lead to admissible evidence, both the scope of information and the time periods it covers must be reasonable. *Granus*, at 16.

Although the Alaska Rules of Civil Procedure regarding discovery do not apply in workers' compensation cases (AS 23.30.135), they are looked to for guidance. The Alaska Supreme Court has long recognized that the civil rules should be construed to allow liberal discovery. *See, e.g., United Services Auto. Ass'n. v. Werley*, 526 P.2d 28, 31 (Alaska 1974). In particular, Civil Rule 26(b)(1), which governs the general scope of discovery in civil actions, provides guidance on releases. *See e.g., Granus*.

**Rule 503. Lawyer – Client Privilege.**

. . . .

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the

> lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

In *Seybert v. Cominco Alaska Expl.*, 182 P.3d 1079, 1098 (Alaska 2008), the Supreme Court held documents regarding the existence and amount of loss reserves are not privileged from discovery when they are relevant and were not prepared at the direction of an attorney.

The ADA, set out in 42 U.S.C. Chapter 126, prohibits discrimination against individuals with disabilities. 42 U.S.C § 12182 prohibits discrimination by public accommodations, which includes doctors' offices. 42 U.S.C. § 12181(7)(F). Public accommodations must provide accommodations to a disabled individual to allow them to access to the facility and service provided unless doing so would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii). A "fundamental alteration" is a change that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. ADA Title III Technical Assistance Manual, III-4.3600.

## ANALYSIS

### *1) Does AS 23.30.095(e) require EME physicians to be licensed in Alaska?*

Employee contends the word "jurisdiction" in AS 23.30.095(e) requiring EME physicians to be "authorized to practice medicine under the laws of the jurisdiction in which the examination occurs" means the physicians must be licensed in Alaska. Employee recognizes that "jurisdiction" can mean either a government's power to exercise its authority or the geographic area in which that authority may be exercised. He argues that because the evaluations are done pursuant to the Alaska Workers' Compensation Act, the authority to practice medicine, or jurisdiction, must be Alaska. He contends that because EME physicians must be familiar with Alaska law, the legislature must have intended they be licensed here.

A license to practice medicine in Alaska does not require knowledge of or familiarity with the Alaska Workers' Compensation Act. Nothing in the Act limits an employee's treatment to only doctors licensed in Alaska, and nothing in AS 23.30.095(k) requires SIME doctors, who are the Board's experts, to be licensed in Alaska. Consequently, it is unlikely the legislature intended to impose such a limitation on EME physicians.

Employee's proposed construction is contrary to the presumption in *Rydwell* that the legislature intended every word, sentence, or provision of a statute to have some purpose and that no words or provisions are superfluous. Had the legislature meant to say "licensed in Alaska," they could have easily done so, and the fact they did not indicates they meant something else. Finally, in *Kollman* the Commission interpreted the provision as meaning the physician must be licensed to practice where the EME takes place. That construction is binding on the Board. AS 23.30.095(e) does not require an EME physician to be licensed in Alaska

***2) Is Employer required to produce its EME doctors for deposition before any procedural hearings or before an SIME?***

Employee first contends *Smallwood* recognizes the constitutional right to cross-examine the authors of written reports, in this case doctors, and it should make no difference whether the report is used in a procedural hearing or a merits hearing.

Employee misapprehends *Smallwood*. *Smallwood*, does not create a right to cross-examine an individual merely because they have written a report. The right arises if the report is to be used as evidence against a party in determining the party's rights. Here, the EME reports will not be weighed against other evidence in determining whether Employee is entitled to benefits until there is a hearing on the merits. In procedural hearings, such as a hearing on whether an SIME should be ordered whether discovery should be ordered, or whether *Smallwood* applies, the credibility of the author of a medical report or the weight to given to the opinions expressed in the report are not considered. Indeed, without an SIME, the Board often lacks the ability to make those determinations. Additionally, employers need not determine at an early stage of the litigation whether they will rely on a particular EME report at a hearing on the merits. After subsequent evidence is filed, an employer may decide the probative value of the EME report no longer justifies

the cost of producing the doctor for deposition, and the report would be excluded at hearing. *Smallwood* does not require Employer to present its EME doctors for deposition prior to a procedural hearing or an SIME.

Employee next contends the statement in *McDonald II* that Employee could depose the EME doctors at his expense is equivalent to an order, and Employer has refused to allow him to do so. Employer did not specifically address this contention. Whether the statement in *McDonald II* is equivalent to an order is irrelevant; as a matter of due process, Employee can depose any potential witness, albeit at his expense. However, Employee's contention illustrates the explanation in *McDonald II* was incomplete. Employer is not obligated to arrange the deposition, even if Employee pays for it. AS 23.30.115(a) states the testimony of a witness may be taken by deposition according to the Rules of Civil Procedure. Under Alaska Civil Rules 26 and 30 it is the party desiring to take the deposition who must notice the deposition, arrange for the court reporter, and pay the witness's fee. Until Employee has done so, and until Employer objects, Employer will not be ordered to produce the EME doctors for deposition.

***3) Should Employee be compelled to attend EMEs without interference?***

Employer contends it is entitled to an order that Employee not interfere with future EMEs. Employee contends his requests to the doctors are not interference. Under the Commission's ruling in *Kollman* and the Supreme Court's ruling in *Thoeni*, there are only three limits on an EME – the time and place of the evaluation must be reasonable, and the physician must be licensed to practice in the stated where the EME takes place. Under the Act, an employee may not impose other conditions or demand other concessions from the EME doctors.

Therefore, restrictions Employee desires to place upon EME physicians are an interference with Employee's obligation to submit to an examination by a physician Employer selects. Employee will not be permitted to insist the EME physicians keep Employee's substance use disorder in sustained remission private and confidential. The EME physicians may or may not include information about Employee's substance use disorder which is in sustained remission in their reports, copies of which shall be filed on a medical summary as required under the Act. In conducting evaluations, EME physicians frequently make physical contact with the examinee,

which is necessary to evaluate range of motion, heart rate and other vital signs, amongst other medical issues in dispute in Employee's case. Employee must submit to the EME examinations, which will most certainly involve physical contact. Employee is not permitted to request the EME physicians sign statements consenting to any investigation in the event a complaint is filed against them. If Employee chooses to file a complaint against an EME physician, evidence development will be governed by the court in which the complaint is filed. Employee is not permitted to end the examination at any time; Employee is required to submit to an examination by a physician Employer selects. The EME physicians shall determine when the examination is concluded. AS 23.30.095(e); *Kollman*.

Regardless of the Act, however, an employee may be entitled to reasonable accommodations under the ADA. Several of Employee's requests are not accommodations under the ADA. For example, all individuals and entities are required to abide by the law; that is not an accommodation provided to disabled individuals. Some of Employee's other requests, such as not being touched by the doctors or asked about the work injury may so significantly restrict the evaluation as to be a fundamental alteration of the doctor's services and will interfere with the Employee's obligation to submit to an examination by a physician of Employer's choice.

Should Employee request accommodations under the ADA, those requests should be addressed to Employer's attorney well in advance of any EME appointment. Because the EME doctor is Employer's expert witness, accommodation requests should be directed to Employer's attorney rather than the EME doctor.

***4) Should Employer be compelled to produce additional documents?***

Neither Employee nor Employer have filed the entirety of Employers' response to Employee's request for Employer's attorney's and the adjuster's records. Additionally, neither party provided the requested documents or responded in any way when the record was reopened. Consequently, this decision is based on the documents filed with Employee's November 25, 2018 petition, Employer's April 30, 2019 letter to Employee regarding documents he alleged were missing, and the parties' hearing briefs.

Much of Employee's argument relates to the significance of documents that Employer has already produced. Those arguments go the weight that should be accorded to the various document or to other testimony. They have no bearing on whether Employer should be compelled to produce other documents, and they will not be addressed in this decision. Employer contends it has produced all documents in its possession that are not privileged. If communications have been redacted, Employer contends the communication is protected by the attorney-client privilege or

Each numbered paragraph in the list attached to Employee's November 25, 2018 petition will be addressed in turn:

> **Paragraph 1:** Employee contends statements in the March 11, 2018 email from Employer's attorney to him are inaccurate, but he does not identify a document that Employer could be compelled to produce.
>
> **Paragraph 2:** Employee contends statements in the June 26, 2017 letter from Employer's attorney are inaccurate, but he does not identify a document that Employer could be compelled to produce.
>
> **Paragraph 3:** Employee contends the February 25, 2018 Notice of Intent to Rely he filed is a list of missing records, but several of the listed documents are the subject of other paragraphs. It is unclear what documents Employer could be ordered to produce.
>
> **Paragraph 4:** Employee contends Employer's attorney's response to the June 3, 2015 email from the adjuster asking if they could ethically use a nurse case manager after Employee declined to meet with her was not produced. Employer contends its response, if any, to its nurse case manager is privileged. If Employer's attorney responded, the response would have been privileged. Employer will not be ordered to produce the response.
>
> **Paragraph 5:** Employee contends Employer did not produce the adjuster's response to the May 4, 2015 email from the nurse case manager asking if the adjuster would like her to work behind the scenes. This is part of the same email string as the documents referred to in paragraphs 22 and 47. The adjuster's response is included in the portion of the email exchange referred to in paragraph 22. The adjuster's response was, "Yes please." As Employer has produced the document, it will not be ordered to do so again.
>
> **Paragraph 6:** Employee contends Employer did not provide the adjusters' response to the April 26, 2016 email from the EME office asking the adjuster to approve fees for an upcoming EME. Employee is incorrect. In an email on the same page; the adjuster said "Agreed." Employer will not be ordered to produce the document again.
>
> **Paragraph 7:** Employee contends Employer did not provide Mayo Clinic's response to the adjuster's March 28, 2016 letter offering to settle Mayo Clinic's bill. Employee has mischaracterized this document. This is the response from Mayo Clinic, and the

word "denied" is handwritten on the letter. The letter was sent to the Mayo Clinic with the March 28, 2016 fax cover sheet referred to in paragraph 71.

**Paragraph 8:** Employee contends Employer did not produce the complete email chain between Stanford Health Care and the adjuster about the controversion for sleep apnea of which the two page December 14, 2015 email exchange is a part. Employee refers to other portions of the email exchange in paragraphs 39, 48, and 50. Taken together, the email chain is complete. Employer will not be ordered to reproduce it.

**Paragraph 9:** Employee contends Employer did not produce the adjuster's response to a July 7, 2015 email from an investigator to the adjuster about contact with Employee's probation officer or any documentation of the investigator's contacts with a physical therapist's office. In the email, the investigator is informing the adjuster about the progress of the investigation; nothing in the email suggests a response was expected. Nothing in the email suggests the investigator contacted the physical therapist's office, or that any documents regarding the contact exist. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 10:** Employee argues about documents that were, or were not, provided to EME doctors. He does not identify a document Employer could be ordered to produce.

**Paragraph 11:** Employee contends certain medical records were not provided to EME doctors. He does not identify a document Employer could be ordered to produce.

**Paragraph 12:** Employee contends Employer failed to produce documents regarding the travel arrangements and stipulation mentioned in the September 4, 2015 email from Employee's non-attorney representative to Employer's attorney. Nothing indicates the discussions were in writing, but if they were, Employee or his non-attorney representative should have a copy. Employer will not be ordered to produce the documents, if they exist.

**Paragraph 13:** Employee contends Employer did not produce his non-attorney representatives' request for an updated payment spreadsheet referred to in the August 31, 2015 letter from Employer's attorney. Nothing indicates the request was in writing, but if it was, it was generated by Employee's non-attorney representative, and should be in his possession. Employer will not be ordered to produce the document.

**Paragraph 14:** Employee contends he did not consent to the drug testing and monitoring program referred to in the October 19, 2015 letter to the adjuster, but he does not identify a document that Employer could be ordered to produce.

**Paragraph 15:** Employee again argues he did not consent to the drug testing and monitoring referenced in the October 19, 2015 Patient Prescription Profile, but he does not identify a document that Employer could be ordered to produce.

**Paragraph 16:** Employee argues the October 19, 2015 quarterly summary report from the drug testing and monitoring company is inaccurate, but he does not identify a document that Employer could be ordered to produce.

**Paragraph 17:** Employee contends Employer did not produce the response to the December 30, 2014 email from Ms. Lyons to the EME office asking if the EME doctors would consent to being videotaped. There is no evidence the response was in writing. Employer will not be ordered to produce the document.

**Paragraph 18:** Employee contends Employer did not produce either the surveillance videos or the letter referred to in the February 1, 2016 email exchange between the EME office the medical case manager. It is unclear what letters the EME office was referring to, and it cannot be determined whether they have been produced or not. Employer will not be ordered to produce them. Employer will be ordered to produce the surveillance videos.

**Paragraph 19:** Employee contends material redacted from the adjuster's log is not privileged, but he does not provide any explanation for his conclusion. Employer contends the redacted materials are protected under the attorney-client privilege. Without some explanation as to why the redactions are improper, Employer will not be ordered to produce the redacted material.

**Paragraph 20:** Employee contends Employer did not produce any record of the meeting referred to in the May 26, 2015 email exchange between the nurse case manager and the adjuster about meeting on June 2, 2015. Employee does not point to anything suggesting the June 2, 2015 meeting was documented. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 21:** Employee contends Employer did not provide Employer's attorney's response to the January 12, 2017 email from the Workers' Compensation Officer to Employer's attorney suggesting Employee's concerns about the EMEs might be resolved by letting Employee ask the EME doctor some questions. Employer's attorney's response is on the same page. As Employer has produced the response, it will not be ordered to do so again.

**Paragraph 22:** Employee contends Employer did not provide the nurse case manager's response to the adjuster's May 4, 2015 email about contacting Dr. Wickler. This email is part of the email chain referenced in Paragraph 5 and 47, however, contrary to Employee's contention, the exchange referred to in paragraph 22 ends with the nurse case manager's response. The response was provided, and Employer will not be ordered to produce it again.

**Paragraph 23:** Employee contends Employer did not provide the Board designee's responses to two email chains dated July 7, 2016 and November 8, 2016 regarding SIMEs. In the July 7, 2017 email, the designee forwarded an ex-parte email from Employee's non-attorney representative to Employer's attorney without comment. In the November 8, 2016 email, the designee informed both parties he had not received an SIME form and asked that they be ready to address it at an upcoming prehearing. Nothing in the emails indicates there was any further response by the designee, and had there been, the designee would have communicated with both parties. *Rogers v.*

*Babler*. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 24:** Employee contends Employer did not produce the reply to the May 21, 2015 email from the nurse case manager to the adjuster regarding Dr. Wickler's response to their questions and suggesting a meeting, and questions the redaction of the second email. Employee has not pointed to anything suggesting there was a written reply that Employer could be ordered to produce. Employer contends the redacted email includes communications with Employer's attorney and is privileged. Employee has not identified anything suggesting the redaction was improper, and Employer will not be ordered to produce the second email.

**Paragraph 25:** Employee argues about the significance of his June 1, 2015 email to the adjuster regarding Dr. Wickler, but he does not identify a document that Employer could be ordered to produce.

**Paragraph 26:** Employee contends information showing a lack of communication between the adjuster and the rehabilitation specialist should have been in the adjusters' file. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 27:** Employee contends Employer did not produce Dr. Doppelt's CV and sample report referred to in the November 17 and 18, 2014 email chain between the nurse case manager and the EME office. It is not reasonably likely that the CV or a sample report for a doctor that was not selected to perform an EME would lead to the discovery of any admissible evidence. AS 23.30.095(3); *Granus*. Employer will not be ordered to produce the CV or the sample report.

**Paragraph 28:** Employee contends Employer did not produce its attorney's response to his non-attorney representative's June 24, 2016 email. Nothing suggests Employer's attorney replied to the email, but if she did, Employee's non-attorney representative would have the response. Employer will not be ordered to produce the document, if it exists.

**Paragraph 29:** Employee contends Employer did not produce it's response to the January 27, 2016 email from the EME office to the adjuster asking for a cover letter and any additional records for Employee. There is no indication the adjuster responded to the email. However, there is also no evidence Employer produced is cover letter to the EME physicians for the February 2, 2016 EME's. Employer will be ordered to produce the cover letter.

**Paragraph 30:** Employee contends Employer did not produce the Mayo Clinic endocrinology records requested in the January 6, 2015 email from the EME physician. The Mayo Clinic records were filed on a medical summaries dated February 23, 2015 and June 1, 2015 by Employer and served upon Employee. Because Employee has the records, Employer will not be ordered to produce them again.

**Paragraph 31:** Employee contends Employer did not produce a response to the November 18, 2014 email from Ms. Lyons to the EME office asking if they had an endocrinologist. Employer represented the response by telephone. There is no evidence of a written response that Employer could be ordered to produce.

**Paragraphs 32:** Employee contends Employer did not produce the response to Ms. Lyon's November 20, 2014 email to the EME office asking about endocrinologists, and he contends the other email on the page was improperly redacted. The EME office's response is on the same page; they replied they had two endocrinologists. Employee offers no explanation or evidence to support his contention the other email on the page was improperly redacted. Employee has not identified a document Employer could be ordered to produce.

**Paragraph 33:** Employee contends Employer did not provide Ms. Lyon's response to November 20, 2014 email from the EME offices regarding an endocrinologist. Employee makes this contention in error; Ms. Lyon's response is included in the email referenced in paragraph 32. The document was produced, and Employer will not be ordered to produce it again.

**Paragraph 34:** Employee contends Employer did not produce Ms. Lyon's response to the EME office's April 24, 2017 email notifying her the requested referral would be in the upcoming EME report. Nothing in the email exchange suggests a response by Ms. Lyons was expected or exists; her inquiry was satisfactorily answered. Employee has not identified a document Employer could be ordered to produce.

**Paragraph 35:** Employee contends Employer did not produce any documentation of the discussion between the medical billing service and the adjuster mentioned in the July 21, 2016 email regarding two dates of service that had been denied. Employee fails to point to anything suggesting such a document exists; Employer will not be ordered to produce it.

**Paragraph 36:** Employee contends Employer did not produce a response to the rehabilitation specialist's August 11, 2015 email to the adjuster explaining she could not move forward with a reemployment plan because Employee's doctor, Dr. Thiel, would not provide necessary information. There is no evidence the adjuster responded to the email. Employee has not identified a document Employer could be ordered to produce.

**Paragraph 37:** Employee contends OSHA's response to the FOIA request referred to in the February 26, 2015 email from the investigator was not produced. There are some discrepancies in the record regarding the weight of the wall the fell on Employee, which might be addressed in OSHA's response. As OSHA's response may lead to the discovery of admissible evidence, Employer will be ordered to produce OSHA's response.

**Paragraph 38:** Employee contends Employer did not produce the "assignment" referred in the April 30, 2015 email from the investigators to the adjuster. There is no

evidence the assignment was in writing. Employee has not identified a document Employer could be ordered to produce.

**Paragraph 39:** Employee contends the response to Stanford Health Care's December 14, 2015 email regarding the controversion of sleep apnea was not produced The email referred to in paragraph 39 is part of the email chain referred to in paragraphs 8, 48, and 50. Employer's response to the portion of the email chain referred to in paragraph 39 is in the portion of the email referred to in paragraph 50. Employer produced the response, and it will not be ordered to do so again.

**Paragraph 40:** Employee argues about the significance of the March 23, 2017 letter from Employer's attorney to several EME doctors, but does not identify a document that Employer could be ordered to produce.

**Paragraph 41:** Employee refers to the April 29, 2016 letter from Employer's attorney to Dr. Swanson, asking him to respond to questions about an adjustable bed. Employee contends "these records" were not provided. It is unclear what records Employee is referring to, but Dr. Swanson addressed the issue of an adjustable bed in his May 6, 2016 EME report, which was filed on a medical summary filed May 11, 2016 and served on Employee. Employee does not identify any other document that Employer could be ordered to produce.

**Paragraph 42:** Employee contends pages were omitted from the August 8, 2015 fax from Home Instead Senior Care to the adjuster saying Employee had inquired about home care and was asking for a follow-up. The fax cover sheet and header indicate six pages were sent, but the second and third page are not included. Employer will be ordered to produce the missing pages.

**Paragraph 43:** Employee contends Employer did not produce the request to bill or the chart notes referred to in the March 4, 2016 letter to Dr. Ireland. Dr. Ireland's chart notes were filed on medical summaries on December 14, 2017 and October 26, 2018. Employee filed Dr. Ireland's responses to the question in the March 26, 2017 letter on a February 26, 2018 notice of intent to rely. Employee already has these documents, and Employer will not be ordered to produce them again. Frequently, physicians who regularly treat injured workers contact adjusters by phone to request authorization to bill. *Rogers & Babler.* There is nothing indicating Dr. Ireland's request to bill was in writing, and Employer will not be ordered to produce it.

**Paragraph 44:** Employee contends the request for authorization for autonomic testing referred to in the adjuster's December 16, 2015 letter to Stanford Health Care was not produced. Employee is mistaken. This is part of the same email chain as the documents referred to in paragraphs 8, 39, 48, and 50. Stanford's request for authorization was produced; Employer will not be ordered to produce it again.

**Paragraph 45:** Employee contends Employer did not produce Dr. Chandler's response to the adjuster's December 1, 2015 letter asking him to review and respond to recent EME reports. Employer contends the letter was sent to Dr. Chandler in error, and no

response was received. On December 1, 2015, the same letter was sent to Dr. McNamara. Dr. McNamara's response was filed on a medical summary on April 4, 2016. There is no evidence Dr. Chandler responded to the letter. Employee does not identify a document that Employer could be ordered to produce.

**Paragraph 46:** This is a release for health care information signed by Employee on June 17, 2014. Employee contends the release is evidence of bad acts by Employer, but he does not identify a record that Employer could be ordered to produce.

**Paragraph 47:** This refers to one page of the email chain between the medical case manager and the adjuster identified in paragraphs 5 and 22. Employee contends half of the email was not produced. Employee is mistaken. Taken together, the documents referred to in paragraphs 5, 22, and 47 contain the entire exchange. As Employer produced the document, it will not be ordered to do so again.

**Paragraph 48:** This paragraph refers to part of the December 14, 2015 email chain between Stanford Health Care and the adjuster referred to in paragraphs 8 and 39 and 44. Employee does not identify a document to be produced, but contends the redacted email on the same page was improperly redacted. Employer contends the redacted communication is protected by the attorney-client privilege. Employee offers explanation or evidence to support his contention, and nothing suggests the redactions was improper. Employer will not be ordered to produce the redacted email.

**Paragraph 49:** Employee contends Employer did not produce any documentation that the adjuster contacted Dr. Adox's office as stated in the January 5, 2017 email to Vital Point Express regarding prescriptions. Nothing suggest the adjuster's contact with Dr. Adcox's office was in writing. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 50:** This is a portion of the email chain referred to by paragraphs 8, 39, 44 and 48. Employee contends the email chain is incomplete and that the pages were manipulated because the time stamps on the emails are out of order. Taken together, the documents referred to in paragraphs 8, 39, 44, 44, and 50 are the complete email chain. There are several reasons the "sent" time in the emails makes them appear to be out of sequence, but a review of the entire email chain shows the exchange took place in a logical, consistent order. There is no evidence the emails were manipulated. Employee has not identified a document Employer could be ordered to produce.

**Paragraph 51:** This refers to a December 16, 2015 email exchange between Employee's non-attorney representative and the adjuster. Employee does not identify a document Employer could be ordered to produce.

**Paragraph 52**: Employee contends the surveillance request form referred to in the June 24 to June 26, 2015 email chain between the insurer and the investigator was not produced. The surveillance request form may lead to admissible evidence related to the surveillance videos Employer was ordered to produce in paragraph 18. Employer will be ordered to produce the surveillance request.

**Paragraph 53:** Employee contends the redacted email in the April 17, 2019 email chain between the adjuster, the insurer, and Helios, was improperly redacted. Employer contends the redacted emails are protected by the attorney-client privilege. Employee offers no explanation or evidence to support his contention, and nothing suggests the redaction was improper. Employer will not be ordered to produce the redacted email.

**Paragraph 54:** Employee contends the redactions in the email chain beginning with the May 15, 2015 email from the adjuster to the nurse case manager are not privileged and should not have been redacted. Employee contends the communications are about TENS unit supplies. Employer contends the redacted communications are protected by the attorney client privilege. Employee offers no explanation or evidence to support his contention, and nothing suggests the redaction was improper. Employer will not be ordered to produce the redacted email.

**Paragraph 55:** Employee argues about the significance of the membership application in the Captain Cook Athletic Club, but he does not identify a document Employer could be ordered to produce.

**Paragraph 56:** Employee contends Employer did not produce any documentation showing Dr. McNamara or PA Thomas prescribed Oxycontin and Roxicodone referred to in the August 25 and 26, 2015 email exchange between Vital Point Express and the adjuster. Employee was seen by PA Thomas on August 25, 2015, and on August 26, 2015, Employee left a message for A. A. Spine & Pain Clinic that PA Thomas had temporarily increased his Oxycontin and Roxicodone dosages. Those chart notes were filed on medical summaries dated September 29, 2015 and November 5, 2015. There is no evidence to indicate the actual prescription was a written document that Employer could be ordered to produce.

**Paragraph 57:** Employee contends the medical bills referred to in the December 1 and 2, 2016 emails between the employees of a medical bill review company were not produced. Employer will be ordered to produce the bills.

**Paragraph 58:** Employee contends the redactions on the email printout containing the February 4, 2016 email from the rehabilitation specialist to the RBA, the adjuster and Employer's attorney regarding Employee are improper. Employer contends the other email is privileged communications between the adjuster and Employer's attorney. Employee offers no explanation or evidence to support his contention, and nothing suggests the redaction was improper. Employer will not be ordered to produce the redacted email.

**Paragraph 59:** Employee contends Employer did not produce the adjuster's response to the June 19, 2014 email from the insurance agent for Black Gold asking for an update on Employee's claim. This email is part of the same email chain referred to by paragraphs 59, 60, 61, 62, 63, 66, and 67. The adjuster responded in the email referenced in paragraph 66, and agreed to a telephone conference in the email referred

to in paragraph 67. Employer has either already produced the document or Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 60:** This is two June 18, 2018 emails that are part of the email chain referred to in paragraphs 59, 61, 62, 63, 66, and 67. These emails precede the one referred to in paragraph 59. In the first email, the insurance agent asks if an individual with the insurer is the mail point of contact on Employee's claim. That individual responded with the name of the adjuster and said he would email the adjuster and forward what she had. Employee contends Employer did not produce the documents that the insurer forwarded to the insurance agent. As stated in reference to paragraph 59, there is no indication the adjuster responded to the email. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 61:** This is also part of the email chain that is also referred to 59, 60, 62 and 63, and portion of the email is redacted. This email precedes the ones referred to in paragraphs 59 and 60. Employee contends the redaction was improper, but he offers no explanation or evidence to support his contention, and nothing suggests the redactions was improper. Employer will not be ordered to produce the redacted emails.

**Paragraph 62:** This is also part of the email chain that is also referred to 59, 60, 61 and 63. This is an email between two individuals with insurer discussing basic information about Employee's injury which was copied to the insurance agent. Employee disputes the accuracy of statements in the email, but he does not identify a document that Employer could be ordered to produce.

**Paragraph 63:** This is the June 17, 2014 email that begins the email string referred to in paragraphs 59, 60, 60, 62, and 63. The email confirms Employee's injury had been reported and the claim information had been confirmed. Employee does not identify a document that Employer could be ordered to produce.

**Paragraph 64:** This is a July 10, 2014 email from the insurer to the adjuster, and the contents have been redacted. The email was forwarded to another of the adjuster's employees without comment. Employee contends Employer failed to produce the contents of the email between the adjuster's employees. The adjuster merely forwarded the email without comment. *Rogers & Babler*. There are no email contents which Employer could be ordered to produce. Employee also contends the contents of the email from the insurer was not privileged and should have been provided. Employer contends the redaction was of privileged communications. Given the timing and parties, it is likely the email from the insurer relates to reserve information, which, while not privileged, needs only to be produced if relevant. *Rogers & Babler*. Employee offers no explanation or evidence as to how reserve information would be relevant, and Employer will not be ordered to produce the email.

**Paragraph 65:** Employee contends the redaction of a portion of the July 10, 2014 email chain between the adjuster and the insurer discussing payment of temporary total disability (TTD) to Employee, and the Adjuster's request for reimbursement of $502 were improper. Given the date and the parties involved, the redactions likely dealt with

reserve information, which, while not privileged, need only be produced if relevant. He offers no explanation or evidence as to how the Employer's reserve information would be relevant to any issues in his case, and nothing suggests the redactions was improper. Employer will not be ordered to produce the redacted emails.

**Paragraph 66:** This is a July 28, 2014 email chain between the insurance agent for Black Gold and the adjuster. The adjuster agrees to provide an update. Employee contends the documents have been altered because the "sent" times for the emails are out of order. As noted previously, many email programs allow the "sent" time to be set to either the sender's or receiver's local time. When read in order, the emails show a logical coherent exchange. Employee has not identified a document Employer could be ordered to produce.

**Paragraph 67:** Employee contends Employer failed to produce any record of the conference call referenced in the July 31, 2014 email exchange between the adjuster and insurance agent for Black Gold. However, Employee fails to point to anything suggesting the call was recorded or otherwise documented. He has not identified a document Employer could be ordered to produce.

**Paragraph 68:** Employee contends the nurse case manager's insights requested in the June 20, 2014 email from the adjuster were not produced. Employer contends it has produced all discoverable documents. If the nurse case manager provided her insights, there is no evidence suggesting she did so in documentary form. Employee has not identified a document that Employer could be ordered to produce.

**Paragraph 69:** In her January 15, 2015 report, the rehabilitation specialist referred to June 13, 2014 notes by a paramedic. Employee contends Employer did not produce the paramedic's report. Employee is incorrect. The report was filed on a medical summary and served on Employee on February 23, 2015. Employer has produced the document and will not be ordered to produce it again.

**Paragraph 70:** Employee contends Employer did not produce the invoice from the investigator referred to in the check request form from the adjuster. The invoice could lead to the discovery of admissible information relating to the surveillance video ordered produced in paragraph 18. Employer will be ordered to produce the invoice.

**Paragraph 71:** This is a March 28, 2016 fax cover page from the adjuster to the Mayo Clinic saying, "Please see the attached offer." The offer is the March 28, 2016 letter referred to in paragraph 7. Employer has produced the document, and it will not be ordered to produce it again.

**Paragraph 72:** This is a September 12, 2015 fax cover sheet from A.A. Spine & Pain Clinic to the adjuster with two pages attached for a total of three pages. The fax cover sheet and the fax header indicate four pages were sent. Employee contends Employer did not produce all of the pages. The document is incomplete. Employer will be ordered to produce the entire four-page fax.

**Paragraph 73:** Employee argues the significance of previously referenced documents, but does not identify a document that Employer could be ordered to produce.

**Paragraph 74:** This paragraph refers to an April 4, 2016 fax cover sheet from Diversified Health Care Management and two health insurance claim forms from Cornerstone Medical Clinic for a total of three pages. The fax was sent to the Workers' Compensation Division. The fax cover sheet and fax header indicate 15 pages were sent. Employee contends Employer failed to produce the remaining pages. These documents were filed as part of Diversified Health Care Management's April 4, 2016 claim. The claim was served on Employee and his non-attorney representative on April 5, 2016. The documents have already been served on Employee, and Employer will not be ordered to produce them.

**Paragraph 75:** Employee contends the medical chart notes referred to in the March 4, 2016 fax cover sheet from Alaska Heart and Vascular Institute to the adjuster were not included in the adjuster's file. Employee has not pointed to anything requiring an adjuster to maintain all documents it receives in one file. The Alaska Heart and Vascular Institute records were filed on medical summaries on September 14, 2016, December 14, 2017, and October 26, 2018. Employee has not identified any Alaska Heart and Vascular Institute records that were not produced.

**Paragraph 76:** Employee contends Employer did not provide Dr. Thiele's responses to the February, 18, 2016 letter from the adjuster asking him to respond to questions about Employee's migraines. Dr. Thiele responded to the question on April 18, 2016, and his response was filed on an April 25, 2016 medical summary. Employer will not be ordered to produce the document again.

In summary, Employer will be ordered to produce the following:

1. The surveillance videos referred to in paragraph 18.
2. Employer's cover letter to the EME physicians who conducted the February 2, 2016 EME referenced in paragraph 29.
3. OSHA's response to the FOIA request referred to in the February 26, 2015 referred to in paragraph 37.
4. The missing pages from the August 8, 2015 fax from Home Instead Senior Care to the adjuster referred to in paragraph 42.
5. The surveillance request mentioned in the June 24 to June 26, 2015 emails chain between the insurer and the investigator referred to in paragraph 52.
6. The medical bills discussed in the December 1 and 2, 2016 emails between the employee' of the bill review company referred to in paragraph 57.
7. The invoice from the investigator referred to in paragraph 70.

8. The entire September 12, 2015 fax from A.A. Spine & Pain Clinic to the adjuster referenced in paragraph 72.

## CONCLUSIONS OF LAW

1) AS 23.30.095(e) does not require EME physicians to be licensed in Alaska

2) Employer is not required to produce its EME doctors for Deposition before any procedural hearings or before an SIME, but Employee may depose the doctors at his expense.

3) Employee be compelled to attend EMEs without interference.

4) Employer will be ordered to produce the following:

1. The surveillance videos referred to in paragraph 18 of Employee's November 25, 2018 list.

2. Employer's cover letter to the EME physicians who conducted the February 2, 2016 EME referenced in paragraph 29.

3. OSHA's response to the FOIA request referred to in the February 26, 2015 referred to in paragraph 37.

4. The missing pages from the August 8 fax from Home Instead Senior Care to the adjuster referred to in paragraph 42 of Employee's November 25, 2018 list.

5. The surveillance request mentioned in the June 24 to June 26, 2015 emails chain between the insurer and the investigator referred to in paragraph 52 of Employee's November 25, 2018 list.

6. The medical bills discussed in the December 1 and 2, 2016 emails between the employee' of the bill review company referred to in paragraph 57 of Employee's November 25, 2018 list.

7. The invoice from the investigator referred to in paragraph 70 of Employee's November 25, 2018 list.

8. The entire September 12, 2015 fax from A.A. Spine & Pain Clinic to the adjuster referenced in paragraph 72 of Employee's November 25, 2018 list.

ORDER

1) Employee's August 20, 2018 petition for clarification of AS 23.30.095(e) is granted. AS 23.30.095(e) does not require EME physicians to be licensed in Alaska.
2) Employee's February 4, 2019 oral petition to cross-examine EME doctors is denied.
3) Employer's January 31, 2019 petition to order Mr. McDonald to attend an EME without interference is granted.
4) Employee's November 26, 2018 petition to compel discovery is granted in part. Employer is ordered to produce the following within 30 days of the date of this decision:

1. The surveillance videos referred to in paragraph 18 of Employee's November 25, 2018 list.

2. Employer's cover letter to the EME physicians who conducted the February 2, 2016 EME referenced in paragraph 29.

3. OSHA's response to the FOIA request referred to in the February 26, 2015 referred to in paragraph 37.

4. The missing pages from the August 8 fax from Home Instead Senior Care to the adjuster referred to in paragraph 42 of Employee's November 25, 2018 list.

5. The surveillance request mentioned in the June 24 to June 26, 2015 emails chain between the insurer and the investigator referred to in paragraph 52 of Employee's November 25, 2018 list.

6. The medical bills discussed in the December 1 and 2, 2016 emails between the employee' of the bill review company referred to in paragraph 57 of Employee's November 25, 2018 list.

7. The invoice from the investigator referred to in paragraph 70 of Employee's November 25, 2018 list.

8. The entire September 12, 2015 fax from A.A. Spine & Pain Clinic to the adjuster referenced in paragraph 72 of Employee's November 25, 2018 list.

Dated in Anchorage, Alaska on June 13, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Bronson Frye, Member

/s/
Robert Doyle, 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; INSURANCE COMPANY. OF THE STATE OF PENNSLYVANIA, 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 June 13, 2019.

/s/
Elizabeth Pleitez, WC Technician