ALASKA WORKERS' COMPENSATION BOARD

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

FELIX M. CHAMBERS, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201411129 AWCB Decision No. 19-0138 Filed with AWCB Anchorage, Alaska on December 30, 2019

Felix Chambers' objection to the State of Alaska's notice of intent to call second independent medical evaluation (SIME) physician Jay Schapira, M.D., as a witness was heard in Anchorage, Alaska on December 3, 2019, a date selected on October 25, 2019. The parties' stipulation gave rise to this hearing. Attorney Eric Croft appeared and represented Felix M. Chambers (Employee). Assistant Attorney General Adam Franklin appeared and represented State of Alaska (Employer). There were no witnesses. The record closed at the hearing's conclusion on December 3, 2019.

After Dr. Schapira had issued his report, the parties agreed to depose him. Prior to the deposition, Dr. Schapira contacted Employer's attorney and asked to speak with him. Employer's attorney and Dr. Schapira spoke for about an hour without Employee's attorney present. Although Employer's attorney disclosed the conversation to Employee's attorney prior to the deposition, *Chambers v. State of Alaska*, AWCB Decision No. 19-0089 (September 4, 2019) (*Chambers II*) concluded all post-report opinions of Dr. Schapira physician should be stricken under 8 AAC 45.092(k) because the contact with the SIME doctor did not comply with the regulation. *Chambers*

v. State of Alaska, AWCB Decision No. 19-0100 (October 1, 2019) (*Chambers III*) denied Employer's petition for reconsideration of *Chambers II*.

ISSUE

Employer contends it should be allowed to call Dr. Schapira to testify at the hearing on the merits of Employee's claim. Employer contends Dr. Schapira's hearing testimony would not be evidence "obtained" by Employer's prior ex-parte contact. Employer contends it is improper to only rely on Dr. Schapira's report because it no longer represents his actual opinion, and denying the parties the right to cross-examine him is a denial of due process.

Employee contends that allowing Dr. Schapira to testify after the improper ex-parte contact would deny Employee's due process rights. He objects to Dr. Schapira's testimony and requests an order denying Employer the opportunity to call Dr. Schapira as a witness.

Does Chambers II preclude Dr. Schapira's testimony at a hearing on the merits of Employee's claim?

FINDINGS OF FACT

All factual findings in *Chambers II* and *Chambers III* are incorporated by reference. The following additional facts and factual conclusions are undisputed or established by a preponderance of the evidence:

1) Employee suffered a stroke while working as a correctional officer on March 23, 2014. (*Chambers II*).

2) On May 27, 2016, Employee filed a claim alleging he was injured in the course and scope of his employment and requesting temporary total disability (TTD), medical and transportation costs, penalty, interest, and attorney fees and costs. (*Chambers II*).

3) On June 14, 2016, Employer denied work was the substantial cause of Employee's disability or need for medical treatment. (*Chambers II*).

4) On December 27, 2017, the parties agreed to an SIME. The only issue was causation. (*Chambers II*).

5) Dr. Schapira, a cardiologist, was selected to perform the SIME. He reviewed medical records and examined Employee on September 21, 2018, and issued his report on December 5, 2018. (*Chambers II*).

6) In his report, Dr. Schapira did not give a strong opinion as to causation; at the August 8, 2019 hearing, both parties characterized it as a "50/50" report. (*Chambers II*).

7) On April 16, 2019, Employer scheduled Dr. Schapira's deposition for May 28, 2019. (Notice of Taking of Deposition, April 16, 2019). Through an email exchange, the parties agreed to provide Dr. Schapira with Employee's timesheets. (*Chambers II*).

8) On May 22, 2019, a member of Dr. Schapira's staff asked if Employer's attorney would have time to speak to Dr. Schapira before the deposition. (*Chambers II*).

9) On Sunday, May 26, 2019, Dr. Schapira sent Employer's attorney a text message asking him to call back. Employer's attorney was unable to do so, but arranged to call the next morning. (*Chambers II*).

10) On May 27, 2019, Employer's attorney spoke with Dr. Schapira for approximately one hour. (*Chambers II*).

11) Prior to Dr. Schapira's deposition on May 28, 2019, Employer's attorney informed Employee's attorney about the telephone conversation and offered him the opportunity to question Dr. Schapira about the conversation at the beginning of the deposition. (*Chambers II*).

12) In response to Employee's attorney's question about the meeting, Dr. Schapira testified, "He sent some new records, which I reviewed, which were time sheets. That's the gist, and we went around and around on that." (*Chambers II*).

13) At the deposition, Dr. Schapira changed his opinion on causation based on the time cards. He stated work was not the substantial cause of Employee's disability or need for medical treatment. (*Chambers II*).

14) *Chambers II* noted post-report communication with an SIME doctor is limited to the methods set out in 8 AAC 45.093(j), and no other communications are permitted. Because Employer's attorney's communications were contrary to subsection (j), subsection (k) required Dr. Schapira's post-report opinions to be excluded. (*Chambers II*).

15) On October 23, 2019, Employer filed a notice of intent to rely on Dr. Schapira's testimony at a future hearing on the merits of Employee's claim. (Notice of Intent, October 23, 2019).

16) At the October 24 2019 prehearing conference, the parties agreed to a hearing on the admissibility of Dr. Schapira's testimony at a future hearing. (Prehearing Conference Summary, October 24, 2019).

PRINCIPLES OF LAW

AS 23.30.001. Legislative Intent.
It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

. . . .

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

AS 23.30.095. Medical treatments, services, and examinations.
. . . .

(k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence.

8 AAC 45.092. Second independent medical evaluation
. . . .

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

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

> (A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves interrogatories; and
>
> (B) initially pay the examiner's charges to respond to the interrogatories or for being deposed; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the charges may be awarded as costs to the prevailing party;
>
> (2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or
>
> (3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.

(k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing and may not consider it in connection with an agreed settlement.

8 AAC 45.082. Medical treatment

. . . .

(b) A physician may be changed as follows:

> . . . .
>
> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury;
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> . . . .

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose.

> **8 AAC 45.120. Evidence**
> . . . .
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> (i) If a hearing is scheduled on less than 20 days' notice or if a document is received by the board less than 20 days before hearing, the board will rely upon that document only if the parties expressly waive the right to cross-examination or if the board determines the document is admissible under a hearsay exception of the Alaska Rules of Evidence.

ANALYSIS

Does Chambers II preclude Dr. Schapira's testimony at a hearing on the merits of Employee's claim?

Employer's argument that it would be improper to only rely on Dr. Schapira's report when it no longer represents his actual opinion goes to the root of the dilemma. From Employee's perspective, it would be improper to allow Dr. Schapira to testify when the improper ex-parte contact may be the reason his current opinion differs from the opinion set out in his report. While every case might be addressed on an ad hoc basis, 8 AAC 45.092(k) provides a blanket rule – evidence obtained by the communication may not be admitted at hearing. It is clear from Dr. Schapira's deposition that he significantly changed his opinion from that expressed in his report. Any testimony as to his current opinion is evidence obtained by the communication, and is not admissible. Similarly, any attempts to clarify the opinion in Dr. Schapira's report are likely to be affected by his current knowledge. Exclusion of evidence is a harsh remedy, but there are other instances where otherwise relevant evidence is excluded as a sanction for violating the regulations. For example, reports from an unauthorized physician or late-filed evidence may be excluded despite their relevance. Dr. Schapira will not be allowed to testify at a hearing on the merits of Employee's claim.

CONCLUSION OF LAW

Chambers II precludes Dr. Schapira's testimony at a hearing on the merits of Employee's claim.

ORDER

Dr. Schapira will not be allowed to testify at a hearing on the merits of Employee's claim.

Dated in Anchorage, Alaska on December 30, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Nancy Shaw, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of FELIX M. CHAMBERS, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201411129; 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 December 30, 2019.

/s/
Charlotte Corriveau, Office Assistant