ALASKA WORKERS' COMPENSATION BOARD

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

YVONNE MEILI, Employee, Claimant, v. STERLING ASSISTED LIVING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CO, Insurer, Defendants.	FINAL DECISION AND ORDER ON MODIFICATION AWCB Case No. 200902068 AWCB Decision No. 20-0010 Filed with AWCB Anchorage, Alaska on February 28, 2020

Sterling Assisted Living, Inc.'s (Employer) October 16, 2019 petition for modification was heard on February 27, 2020, in Anchorage, Alaska, a date selected on December 18, 2019. A November 22, 2019 request gave rise to the hearing. Attorney Keenan Powell appeared and represented Yvonne Meili (Employee). Attorney Rebecca Holdiman-Miller appeared and represented Employer and its insurer. Employer sought to call its employer's medical evaluator (EME) Todd Fellars, M.D., as a witness but an oral order excluded his report and testimony as evidence on the petition; there were no other witnesses. Oral orders also excluded from consideration two "learned treatises" and a February 25, 2020 affidavit from Dawna Polmateer, but included a report from Bruce Hector, M.D., and all of Employee's post-*Meili I*-hearing treatment records. This decision examines the oral orders and decides Employer's petition for modification on its merits. The record closed at the hearing's conclusion on February 27, 2020.

ISSUES

Employer tried to call Dr. Fellars as a witness to explain surgical findings David Paulson, M.D., observed when he operated on Employee recently. Since the report was not available before the *Meili I* hearing, Employer contended Dr. Fellars' EME report and his related testimony were newly discovered evidence to support its October 16, 2019 petition for modification.

Employee contended Dr. Fellars' EME report reviewed no medical evidence not already in the agency file at the time of the *Meili I* hearing and had nothing new to add. She contended Employer threatened on several occasions to obtain an EME before the *Meili I* hearing but never did. Employee contended his report and testimony should not be admitted as evidence at this hearing.

1) Was the oral order excluding Dr. Fellars' report and testimony correct?

Employer contended the absence of clear opinions or testimony from treating physician David Paulson, M.D., and Dr. Fellars' reliance on two "learned treatises" justifies consideration of these treatises as evidence supporting Employer's petition for modification.

Employee contends the learned treatises alone are not admissible as evidence without a medical witness testifying about his reliance on those treatises. She contended if Dr. Fellars was not allowed to testify, the learned treatises should not be admitted as evidence.

2) Was the oral order excluding two learned treatises as evidence correct?

Employer contends it requested cross-examination of eight post-*Meili I*-hearing records. Its position on whether these records were admissible as evidence at this hearing was unclear.

Employee concedes her post-*Meili I*-hearing treatment records from her attending physicians are business records and admissible at this hearing. She did not express an opinion on whether Dr. Paulson's February 20, 2020 response to Employer's letter was admissible.

3) Are any of the Smallwooded records admissible?

Employer contends Drs. Hector's and Fellars' EME reports and post-*Meili I*-hearing treatment records from Dr. Paulson and other treating physicians are "new evidence" supporting its petition and justifying modification of *Meili I* based on a mistake of fact. It contends this decision should modify *Meili I* based on newly discovered evidence or a changed condition and hold Employee is not entitled to any additional benefits from her 2009 injury with Employer.

Employee contends Employer's petition was inadequately pled and should be denied on that basis alone. She further contends Employer failed to show a change in condition or provide newly discovered evidence that could not have been obtained with due diligence prior to the *Meili I* hearing. Employee contends Employer is using its modification petition as a "back-door route to retrying a case" where it failed to use due diligence to obtain evidence prior to the first hearing.

4) Should *Meili I* be modified based on newly discovered evidence or changed condition?

FINDINGS OF FACT

All factual findings and conclusions from *Meili I* are incorporated herein. A preponderance of the evidences establishes the following facts and factual conclusions:

1) At hearing on July 17, 2019, Employer offered five bases for its requested continuance: (1) to discover additional medical records; (2) to join Employee's last employer; (3) because Dr. Paulson was not available to testify at hearing; (4) the parties should be directed to mediate; and (5) a second independent medical evaluation (SIME) was necessary; oral orders denied all five continuance requests. An oral order denied Employer's request to continue the hearing because Dr. Paulson was not available and left the record open for 30 days so Employer at its option could depose Dr. Paulson; the oral order also provided if Dr. Paulson could not make himself available during the 30-day period, a party could petition for more time. (*Meili I* at 30-31).

2) At the *Meili I* hearing, an oral order also denied Employer's request for a continuance because it had not received from providers previously requested medical records, and stated "if Employer loses but obtains admissible, newly discovered evidence demonstrating the panel made 'a mistake in its determination of a fact,' Employer has a year to petition for modification based on this evidence." (*Meili I* at 30).

3) On August 16, 2019, the 30th day after the hearing, Employer notified the board and Employee that Dr. Paulson was not available for deposition within 30 days. Nevertheless, it withdrew its *Smallwood* objection against Dr. Paulson's reports and asked the record to close and a decision and order to issue. (Letter, August 16, 2019).

4) On September 9, 2019, *Meili I* after examining the oral orders entered at hearing, decided Employee's February 8, 2009 injury with Employer was the substantial cause of her current need for medical treatment. *Meili I* awarded additional medical benefits, denied past medical transportation expenses, awarded future medical transportation costs, awarded future temporary total disability benefits in the event she became disabled from her work injury, reserved ruling on any future permanent partial impairment claim that might arise following any injury-related surgery and awarded attorney fees and costs. (*Meili I* at 40-41).

5) On September 21, 2019, Dr. Fellars saw Employee for an EME; he took her history and examined her. Dr. Fellar's report lists and summarizes all medical records he reviewed for his EME. His examination found no nonorganic pain findings. Dr. Fellars diagnosed a "lumbar strain" as the only work-related condition arising from her 2009 injury. He discounted the contemporaneous magnetic resonance imaging evidence of an extruded disc and noted her symptoms were similar to pain she experienced in 2007 before the work injury with Employer, which had required epidural injections to treat. Dr. Fellars referenced her history of back pain before the 2009 work injury. Given this, he concluded it was not likely the extruded disc occurred as a result of the 2009 work injury with Employer. Dr. Fellars opined Employee now has stenosis from L2 to L5, which he characterizes as a progression of a degenerative condition. He states, "We know that degenerative disc disease is 74% genetic in nature." Dr. Fellars concluded her degenerative disc disease progression is the substantial cause for subsequent degeneration at multiple levels. He opined, "Her work event from February 2009 and subsequent treatment is not the substantial cause of the potential need to have additional decompressive surgery." Dr. Fellars offered, "Certainly, having a fused level can place stress on additional levels. Certainly, a fusion will contribute to adjacent segment degeneration." However, he cited a medical journal report and concluded Employee's "highly genetic condition is the substantial cause of her adjacent segment disc degeneration and resultant stenosis." While he conceded Employee may need additional surgery to address her stenosis, in Dr. Fellars' opinion "medical evidence does not support that her need for surgery was substantially caused by her work injury or subsequent treatment."

Addressing Employee's 2017 and 2018 injuries with another employer, Dr. Fellars stated, "There is no objective evidence that the 2017 or 2018 reported injuries caused temporary or permanent aggravation of her preexisting condition." He opined the most substantial cause bringing about the need for medical treatment after 2011 is Employee's "genetic makeup." (Fellars EME report, September 21, 2019).

6) On September 23, 2019, Employer appealed *Meili I* to the commission and moved for a stay. It contended *Meili I* erred by finding AS 23.30.105(a) did not bar Employee's claim, denying Employer's request for a second independent medical evaluation and finding Employee's 2009 work injury was the substantial cause of her current disability and need for medical treatment. Employer contended *Meili I* misapplied recent Alaska Supreme Court precedent, erred in not relying on Dr. Paulson's opinions, misinterpreted the opinion from David Bauer, M.D., improperly awarded Employee additional medical and transportation benefits, made inconsistent credibility findings, erred by awarding full attorney fees and costs and misapplied the facts and testimony to find in Employee's favor. (Notice of Appeal; Statement of Points on Appeal; Motion for Stay, September 23, 2019).

7) On September 23, 2019, Employer explained to the commission why it disagreed with *Meili I*'s decision declining to order an SIME. In its brief to support its request for a stay, Employer stated

> Dr. Bauer's IME addressed the same medical records, same claimant, and the same issues that another IME physician would address if the employer spent $10,000.00 more to retain its own IME physician. [Not] [u]sing Dr. Bauer's report rather than forcing the employee to submit to another IME is unfair, inefficient and an unreasonable waste of money. (Memorandum In Support of Motion for Stay, September 23, 2019, at 13).

8) On October 16, 2019, Employer filed and served approximately 440 medical records on a medical summary. This summary included Dr. Fellars' 2019 EME report, 2010-2012 Providence Hospital records related primarily to lumbar spine surgeries, a January 21, 2000 EME report from Bruce Hector, M.D., addressing a 1999 right wrist injury with Safeway and 1999 records from Michael Gevaert, M.D., who examined her right hand. (Medical Summary, September 21, 2019).

9) On October 16, 2019, Employer petitioned for modification of *Meili I* based on "new evidence authored by orthopedic surgeon, Todd Fellars, M.D., dated September 21, 2019." Dr. Fellars' report was attached to the petition as the only exhibit. (Petition, October 16, 2019).

10) On November 4, 2019, the commission granted Employer's request to stay payment of lump sum attorney fees awarded in *Meili I* but denied the stay request as to any future benefits Employee may be entitled to receive. The commission also stayed Employer's appeal, remanded the matter and gave jurisdiction to the board to decide Employer's petition for modification. (Order on Motion for Stay, November 4, 2019).

11) On November 13, 2019, Employer asked the commission to reconsider the portion of its November 4, 2019 order denying its stay request. (Motion for Reconsideration of Order Denying Stay, November 13, 2019).

12) On November 21, 2019, the commission denied Employer's request for reconsideration noting the commission did not retain jurisdiction after it remanded the case so the board could consider Employer's petition for modification. The commission also stated, "Here, the Commission remanded the entire appeal to the Board for consideration of the new evidence, the new EME report of Dr. Fellars." It also said, since the commission did not retain jurisdiction, Employer "needs to ask the Board for expedited consideration of its petition for modification." (Order on Motion for Reconsideration of Order Denying Stay, November 21, 2019).

13) On December 18, 2019, the parties agreed to a hearing on Employer's petition for modification set for February 27, 2020. Attorney fees and costs were not listed as an issue for hearing. (Prehearing Conference Summary, December 18, 2019).

14) On January 30, 2020, Employer suggested changing the February 27, 2020 hearing to a written record hearing and moving up the date to expedite the board's consideration of its October 16, 2019 petition for modification. (Prehearing Conference Summary, January 30, 2020).

15) On February 20, 2020, Employer offered arguments supporting its petition for modification. It relied on an EME report from David Bauer, M.D., obtained by a different employer and insurer in a different injury involving Employee. Employer objects to many findings and conclusions and all orders from *Meili I*. It also relied on post-*Meili I* medical records primarily from Dr. Paulson including records related to Employee's January 13, 2020 lumbar decompression surgery he performed. Also relied upon is a January 31, 2020 letter from Holdiman-Miller to Dr. Paulson that he answered after Employer's brief was filed. Employer further relied on Dr. Fellars' post-*Meili I* September 21, 2020 EME report, an article from Asian Spine Journal, *Adjacent Segment Pathology after Lumbar Spinal Fusion* and a February 3, 2020 "Quick Note" from Dr. Paulson's office. Employer contends Employee or her lawyer placed a "gag order" on him. The note states:

> Quick Notes keenan powell calling in regards to patient this is her attorney needing to speak about dr. paulson changing his mind on his clauzation [sic] opinion for the insurance. she said they won the case but that they got another doctor to override that and so now they are reopening the case. this was a workers comp thing and now dr suller [sic] the ime doc is trying to say that this injury was not from 2009. it has not been reopened yet but they are trying and she said that she DOES NOT want dr. paulson to change his mind. now they are refusing to pay for anything surgery, walker, meds ect [sic]. they refuse to pay for her disability benefits as well. (Employer's Hearing Brief, February 20, 2020, and exhibits; emphasis in Quick Note in original).

16) On February 20, 2020, Employer filed a summary including post-*Meili I*-hearing treatment records from Shawn Johnston, M.D., and Dr. Paulson and Dr. Paulson's response to Employer's January 31, 2020 letter. Dr. Paulson's responses, incorrectly dated April 20, 2020, appear to generally support Employee's position on causation. (Medical Summary, February 20, 2020; experience, judgment and inferences drawn from the above).

17) On February 21, 2020, Employee objected to Employer's petition for modification, made her arguments and offered a compendium showing each medical record Dr. Fellars reviewed for his post-*Meili I* EME report was previously in the record before the July 17, 2019 *Meili I* hearing. Employee seeks an order denying modification of *Meili I* based primarily on its contention that there is no "newly discovered" evidence. (Employee's Hearing Brief, February 21, 2020).

18) On February 25, 2020, Employer filed a Quick Note medical record from Dr. Paulson's office, a learned treatise from the Journal of the American Academy of Orthopedic Surgeons and an affidavit from Dawna Polmateer from Dr. Paulson's office explaining why Dr. Paulson could not testify at hearing. (Notice of Intent to Rely, February 25, 2020).

19) EME reports are routinely obtained in workers' compensation cases. They are easy to obtain and in some instances, if a particular EME physician is unavailable to perform an examination or time is short, a "record review" EME report based on an injured worker's medical records are frequently substituted for an in-person evaluation. EME reports are often obtained before employers have all the injured worker's medical records. (Experience, judgment).

20) At hearing, Employer stated it had the right to select any position it wanted as it EME physician; it contended it had selected Dr. Bauer, which was within its right to do. (Record).

21) Employer's explanation at this hearing about Dr. Bauer was diametrically opposed to the statement it gave the commission in its September 23, 2019 brief to support its stay motion. (Memorandum In Support of Motion for Stay, September 23, 2019, at 13; factual finding 7, above).

22) Employer with due diligence could have obtained an EME and related report, and could have sent a letter to Dr. Paulson seeking his causation opinions prior to the July 17, 2019 hearing but chose not to for tactical or cost reasons. (Experience, judgment and inferences drawn from the above; Memorandum in Support of Motion for Stay, September 23, 2019, at 13).

23) At hearing, Employer intended to call Dr. Fellars as a witness. The designated chair questioned how his report and related testimony could be admissible and relevant to the issue before the board given that Employer had not shown that it could not, with due diligence, have obtained his report and testimony before or at the *Meili I* hearing. Employer contended it could not have obtained his opinion before the initial hearing because its discovery was not complete and could not arrange for an EME without complete medical records. It also contended the commission in its stay order directed the board to consider this evidence. Employee contended the commission did not predetermine the modification issue by directing the board to admit and accept Dr. Fellars' report or testimony. After considerable discussion, and a long recess for the parties to identify the categories of evidence sought to be admitted or excluded at hearing, the panel derived four categories of evidence at issue: (1)Drs. Fellars' and Hector's EME reports; (2) all post-*Meili I*-hearing treatment records for Employee; (3) two learned treatises Employer filed post-*Meili I*-hearing; and (4) an affidavit from Dr. Paulson's staff member explaining why he was unavailable to testify at this hearing. (Record).

24) The commission's two orders, read together, did not order the board to admit Dr. Fellars' report or testimony without first determining if his report and testimony were admissible. (Experience, judgment and inferences drawn from the above).

25) After hearing the parties' arguments, the panel deliberated and issued oral orders on the four categories of records at issue as follows:

(1) Dr. Fellars' report and testimony were not admissible because Employer had presented no affidavit as required prior to hearing or valid explanation at hearing explaining why it could not, with due diligence, have obtained his report and testimony before the initial hearing. Employer stated it chose not to get its own EME both at this hearing and before the commission. The panel determined the lack of full medical record discovery had never been related to obtaining an EME before this hearing and Employer had never requested a continuance of the original hearing so it could obtain an EME. Applying *Lindhag*, the panel held Dr. Fellars' report and testimony also did not apply to a "change of condition" theory and Employer could not hire an expert post-hearing to

address an already litigated "original issue" like causation. The oral order stated because Employer had failed to meet its prerequisite duty under 8 AAC 45.150(d), particularly (d)(2), anything Dr. Fellars could say would not be admissible because it would not be relevant under 8 AAC 45.120(e), which allows for exclusion of irrelevant evidence. The panel ordered that Dr. Hector's EME report would be reviewed and considered because it existed prior to the hearing and was part of the medical records that Employer had requested before the first hearing but not yet been received.

(2) The panel ordered it would consider Employee's post-hearing medical records because these obviously could not have been provided before the first hearing because they did not yet exist.

(3) The panel declined to accept or consider the two learned treatises Employer submitted post-*Meili I*-hearing because there was no evidence Employer with due diligence could not have provided these before the hearing; they were irrelevant and because without a doctor to testify about them, they were not useful.

(4) The panel would not consider the February 25, 2020 affidavit of Dr. Paulson's staff member because it is not relevant to any issue before the board at this hearing.

26) In its closing arguments on its petition's merits, Employer contended Dr. Fellars should be heard because his report and opinions are based on new findings from Employee's recent surgery. Employer contended Dr. Paulson "refused to testify" without offering evidence to support this fact. It also suggested Powell had called Dr. Paulson's office and told him that he should not change his opinion if "you want to get your bills paid." When asked if Employer had evidence to support the statement, Holdiman-Miller cited the February 3, 2020 Quick Note attached to its hearing brief. Employer noted it had Smallwooded eight medical reports including Dr. Paulson's February 20, 2020 response to Employer's January 31, 2020 letter. While seeming to acknowledge that treating medical records were admissible as evidence over a Smallwood objection, Employer refused to withdraw its Smallwood objection to Dr. Paulson's response to Employer's letter. (Record).

27) In her closing argument, Employee contended Employer had its day in court and cannot get an EME after the hearing in an attempt to "trump a decision." She contended Dr. Hector's report was irrelevant and Dr. Paulson's post-hearing reports simply repeated the same information from earlier records, already in evidence. Powell said she called Dr. Paulson's office, but never spoke to him, because she wanted to let him know that Holdiman-Miller's January 31, 2020 letter was convoluted and did not come from her, to avoid any possible confusion as to the letter's source. Employee contended *Meili I* should not be modified. (Record).

28) An experience, seasoned workers' compensation attorney represents Employer. (Judgment).

29) Two of the original three panel members that heard and decided *Meili I* read and reviewed *Meili I*, Employer's hearing brief and exhibits and Employee's hearing brief and exhibit in preparation for the February 27, 2020 hearing on Employer's petition for modification. The panel reflected on the original decision and gave due consideration to the parties' arguments and relevant and admissible evidence, in accordance with the Act and Alaska Supreme Court precedent. (Experience, judgment and inferences drawn from the above).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony and other tangible evidence, but also on its "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

Interior Paint Company v. Rodgers, 522 P.2d 164 (Alaska 1974) set forth the standards for the board's modification under AS 23.30.130. *Rodgers* stated, "We find that an examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of a fact under AS 23.30.130(a)." The *Rodgers* court warned of potential abuse and said:

> The concept of "mistake" requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back-door route to retrying a case because one party thinks he can make a better showing on the second attempt. (*Id*. at 168; citing 3 Larson, *The Law of Workmen's Compensation*, §81.52, at 354.8 (1971).

Rodgers further held that though the board "may" review a case, and its review can consist "merely of further reflection on the evidence initially submitted," there is no requirement that the board must go over all prior evidence. (*Id*. at 168). The board "must only give due consideration to any argument and evidence presented with a petition for modification." (*Id*.).

When alleging a factual mistake or change in condition, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). A request for reconsideration, and not a request for modification, is the appropriate remedy when a party alleges a legal, as opposed to a factual, error. *Lindekugel*, 117 P.3d at 743, n. 36.

Lindhag v. State, Department of Natural Resources, 123 P.3d 948 (Alaska 2005), held the board has discretionary authority under AS 23.30.130 to rehear and modify a case. In *Lindhag*, shortly after the board issued its decision and order denying her claim based on evidence her illness was caused by dust mites at her home, the claimant "had experts perform a blood test and analyze her home." The blood tests showed antibodies in her blood were too insignificant to support a claim of asthma caused by dust mite allergies. She contended this new evidence arose and resulted from her "continuing treatment." (*Id*. at 955). The expert examining the claimant's home found no evidence of dust mites in her bed. Another physician stated this new evidence refuted any claim and by inference the board's finding that her asthma was due to dust mite allergies. The claimant petitioned the board for a rehearing and modification of the original order. In the claimant's view, this new evidence would have disproved the board's finding that her condition was caused by a dust mite allergy rather than exposure to toxins at her work site.

The claimant contended her "newly discovered evidence" showed the board had made a mistake of fact in its original decision. Citing 8 AAC 45.150, *Lindhag* referenced the "key language" requiring that any new evidence "could not have been discoverable prior to the hearing through due diligence." The claimant's attorney submitted an affidavit suggesting dust mite testing prior to the initial hearing was never considered and the related post-decision expert reports could not have been produced before hearing simply because they did not exist. The affidavit further said the testing was not done in reaction to the board's decision. The board found no evidence showing

the post-decision reports could not have been obtained prior to the initial hearing and held the absence of the tests prior to the board's decision "can only be considered a tactical choice" by the claimant and her lawyer. *Lindhag* said, "Whatever the merits of this 'newly discovered evidence,' it plays no role in the question of whether the board's decision was supported by substantial evidence. The board cannot be expected to deliberate on evidence that was not presented at the hearing." The court affirmed the board's decision on this "mistake of fact" basis. (*Id*. at 956-57).

The claimant in *Lindhag* also contended her physical condition had changed post-decision. The court rejected this argument as well noting the claimant merely alleged a different cause or source for the same unchanging condition, which is an allegation insufficient under the board's regulation governing modifications to justify a different result. (*Id*. at 957-58). *Lindhag* made it clear that "neither party can raise original issues such as *work-connection*, employee or employer status, occurrence of the compensable accident, and degree of disability at the time of the first award" using the "change in conditions" rule. (*Id*. at 958; emphasis in original). *Lindhag* concluded:

> Here, Lindhag is introducing new evidence for proof of causation, to support the notion that her injury is work-related. This is an "original issue" not contemplated by change-in-conditions modification. Thus, the board did not abuse its discretion in denying Lindhag's request for modification on these grounds. (*Id*.).

In *Griffiths v. Andy's Body & Frame, Inc*., 165 P.3d 619 (Alaska 2007), the board had dismissed a self-represented litigant's petition for modification because he failed to include the affidavit required by 8 AAC 45.150. In its original decision, the board had stated, in denying his claim for permanent partial impairment benefits, if the claimant obtained an appropriate impairment rating from his physician he could file for modification within one year under AS 23.30.130. Claimant obtained a rating, filed it with the board and requested modification but did not provide the required affidavit setting forth the requirements mandated by the regulation. On appeal, *Griffiths* vacated and remanded the board's decision noting that it was an abuse of discretion to hold the *pro se* litigant to the affidavit requirement when a layperson would reasonably understand that all he had to do was obtain a permanent partial impairment rating from his doctor, petition for modification and file his newly obtained medical report with the board. (*Id*. at 624).

> **8 AAC 45.112. Witness list**. . . . If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in

accordance with this section, the board will exclude the party's witnesses from testifying at the hearing. . . .

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .
. . . .

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;
(2) to introduce exhibits;

. . . .

(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. . . . Irrelevant . . . evidence may be excluded on those grounds. . . .

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
. . . .

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;

(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence,

> the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
>
> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

8 AAC 45.900. Definitions. (a) In this chapter
. . . .

(11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician. . . .

Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
. . . .

> (6) **Business records.** A memorandum, report, record, or data compilation, in any form, of . . . conditions, . . . or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of the preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes . . . profession, occupation, and calling of every kind, whether or not conducted for profit. . . .

In *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000), a personal injury case, the Alaska Supreme Court held "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule," unless there is some reason to doubt the records' authenticity. (*Id*. at 1027). Ingersoll asked Dobos to admit that Ingersoll's medical records were genuine under the Alaska Civil Rules. Dobos refused, arguing the evidence was hearsay. He wanted Ingersoll to put the records' author on the stand at her expense so he could question them. During

trial, Ingersoll called her doctors to testify and lay a foundation for the records. On appeal, the Alaska Supreme Court noted medical records are exceptions to the hearsay rule under Evidence Rule 803(6) and imposed sanctions against Dobos for failing to admit the genuineness of Ingersoll's medical records. The court reasoned, "Requiring testimony that medical records were made and kept in the regular course of business is a waste of time unless there is some reason to believe that the records are not genuine or trustworthy." (*Id.* at 1028). Further, the Court said Dobos could have called Ingersoll's doctors to the stand himself after he denied Ingersoll's request to admit their records. (*Id.*). *Parker v. Power Constructors,* AWCB Decision No. 91-0150 (May, 17, 1991), addressed "trustworthiness" under Alaska Rule of Evidence 803(6), and noted:

> Statements by professionals, such as doctors, expressing their opinion on a relevant matter, should be excluded only in rare circumstances, particularly if the expert is independent of any party, and especially if the reports have been made available to the other side through discovery so that rebuttal evidence can be prepared. (*Id.* at 7, *citing* 4 Weinstein's Evidence Rule 803 at 803-211 (1990)).

In *Parker,* an insurer petitioned the board to admit three documents, contending they fell within exceptions to the hearsay rule. The employee contended the documents should not be admitted over his cross-examination request. The three documents pertaining to the employee included: (1) a discharge summary from a nursing home; (2) a physical examination report prepared during the employee's residence at the nursing home; and (3) a letter written to the employee's attorney from the employee's attending physician giving an opinion on compensability. After discussing the history of the *Smallwood* objection, the board reviewed relevant Alaska Supreme Court cases and relied heavily upon *Frazier.* *Parker* noted Alaska Supreme Court precedent, including *Frazier,* represented an "extension rather than a limitation of our regulation permitting admission of certain documents over *Smallwood* objections." *Parker* determined the three documents in question had long been in the employee's possession and were trustworthy enough to permit admission under exceptions to the hearsay rule. *Parker* also noted while *Frazier* did not agree to "re-examine *Smallwood,"* it also did not overrule or refuse to apply the board's regulations permitting certain documents to be admitted over *Smallwood* objections. (*Id.* at 11).

ANALYSIS

Employer's October 16, 2019 petition seeks *Meili I*'s modification under AS 23.30.130(a). However, it's hearing brief offers numerous contentions addressing alleged legal rather than factual errors. This decision cannot address alleged legal errors properly raised in a petition for reconsideration, not in a petition for modification. Therefore, this decision will not address allegations not raised under AS 23.30.130. *Lindekugel*.

1) Was the oral order excluding Dr. Fellars' report and testimony correct?

a) Dr. Fellars' report and testimony are not admissible to show a mistake of fact.

Employer's first contention is that Dr. Fellars' report and testimony are admissible to prove *Meili I* made a mistake of fact. AS 23.30.130(a); *Rodgers*. His report and offered testimony are "newly discovered evidence" in Employer's view. To support this, Employer first contends the commission required the panel on remand to consider and admit Dr. Fellars' report and testimony.

In its November 4, 2019 order on Employer's motion for a stay, the commission said, "The appeal is STAYED and the commission REMANDS jurisdiction to the board to decide Sterling Assisted Living's petition for modification." It is clear the commission remanded the case so this panel could decide Employer's petition. The commission did not direct or determine how Employer's petition for modification should be decided; in other words, it did not order a specific result. In its order on Employer's motion to reconsider its stay order, the commission said, "Here, the commission remanded the entire appeal to the board for consideration of the new evidence, the new EME report of Dr. Fellars." Citing an Alaska Supreme Court opinion addressing a party's motion based on a civil rule similar to AS 23.30.130, the commission then said the "trial court" determines if the motion should be granted. Employer reads the quote from the commission's second order as *requiring* this panel to consider Dr. Fellars' report as admissible evidence and allow Dr. Fellars to testify at hearing. Read together with the commission's first order, its second order cannot be read as broadly as Employer suggests; otherwise, as Employee contended, the commission has already decided that both Dr. Fellars' report and his testimony are admissible evidence that must be considered on Employer's petition for modification, notwithstanding the prerequisite requirements set forth in 8 AAC 45.150(d)(2). Those requirements comprise part of

this panel's analysis for addressing a petition for modification. *Lindhag*. It is this panel's right and duty, not the commission's, to hear and decide Employer's petition for modification including prerequisite requirements for granting it. AS 23.30.130; 8 AAC 45.150(c), (d)(1)-(3).

Employer had a prerequisite to meet before the panel could consider Dr. Fellars' report as evidence or allow his testimony. It had to demonstrate that it could not have, with due diligence, obtained and presented an EME report from Dr. Fellars, and his testimony, prior to or at the July 17, 2019 hearing. 8 AAC 45.150(d). This prerequisite may be met by presenting with the petition for modification (1) facts upon which the original award was based; (2) facts alleged to be erroneous, evidence in support of the alleged mistakes and if a party has newly discovered evidence, an affidavit stating the reason why, with due diligence, the newly discovered evidence supporting the allegations could not have been discovered and produced at the initial hearing and (3) the effect finding alleged mistakes would have on *Meili I*. 8 AAC 45.150(d)(1)-(3). It is undisputed Employer did none of these things when it filed its October 16, 2019 petition. Employer, represented by experienced counsel, gave no explanation for this. Without the required explanation and affidavit, Employer's petition and Dr. Fellars' attached report became nothing more than a "bare allegation of change of conditions or mistake of fact" and it "will not support a request for a rehearing or modification." 8 AAC 45.150(e). Accordingly, Employer's October 16, 2019 petition will be denied for failure to follow the regulation and provide the required affidavit and explanation supporting its contentions. 8 AAC 45.150(d)(1)-(3).

This case is distinguished from *Griffiths*, where the *pro se* injured worker would reasonably have understood that the decision he sought to modify simply required him to obtain evidence from his physician, file it and seek modification without further explanation. That is exactly what he did. The court held it was an abuse of discretion to deny his petition for modification for his failure to file the required affidavit under these facts. By contrast, Employer is represented by a seasoned workers' compensation attorney; Employer's petition did not comply with 8 AAC 45.150. But Employer relies on language from *Meili I* stating, "Furthermore, if Employer loses but obtains *admissible, newly discovered evidence* demonstrating the panel made a 'mistake in its determination of fact,' Employer has a year to petition for modification based on this evidence." Nothing in the quoted passage from *Meili I* promises to accept any and all "newly obtained

evidence," versus "newly discovered evidence," without Employer meeting the requirements for such evidence set forth in 8 AAC 45.150. In other words, the evidence proffered as newly discovered must be evidence that, with due diligence, Employer could not have obtained prior to the initial hearing. This is the "key language." *Lindhag*.

Employers routinely obtain EME reports and depose their EME physicians before hearing or present their testimony at hearing. *Rogers & Babler*. Employer failed to demonstrate why it could not have obtained an EME report from Dr. Fellars or some other physician prior to the *Meili I* hearing. Employer attempted to explain why it *did not* but never adequately explained why it *could not*. It contended it could not obtain an EME before the *Meili I* hearing because its discovery was not yet complete and it would not have had complete medical records to give to its EME physician. There are three problems with this argument: First, Employers routinely obtain EME reports without having all medical records potentially relevant to a work injury. *Rogers & Babler*. Second, while it offered no less than five reasons to continue the *Meili I* hearing (*i.e.*, to discover additional medical records; to join another employer; it had "Smallwooded" Dr. Paulson's report and he was unavailable to testify; to require mediation; and because it wanted an SIME) Employer never requested a continuance of the *Meili I* hearing so it could obtain an EME. Third, its hearing explanation for why it did not obtain its own EME before hearing is inconsistent with the explanation Employer gave the commission in its memorandum in support of its motion for a stay. Before the commission, when discussing its SIME argument, Employer stated clearly why it did not obtain its own EME before the *Meili I* hearing:

> Dr. Bauer's IME addressed the same medical records, same claimant, and same issues that *another IME* physician would address *if the employer spent $10,000 more to retain its own IME physician*. [Not] [u]sing Dr. Bauer's report *rather than forcing the employee to submit to another IME* is unfair, inefficient and an unreasonable waste of money (emphasis added).

Employer presumably meant to say "*Not* using Dr. Bauer's report. . . ." The point is that its SIME argument to the commission makes it clear Employer consciously chose not to obtain "its own" EME and chose to rely upon Dr. Bauer's EME from another employer and insurer in another case. To be clear, contrary to Employer's contentions, *Meili I* did not exclude Dr. Bauer's report from

consideration as evidence on the merits of the claim; in fact, *Meili I* relied on his report in part; it just did not consider his report as "the employer's" EME for purposes of justifying an SIME. Employer's insistence on calling Dr. Fellars as a witness at hearing is peculiar given its position on January 30, 2020, suggesting the instant hearing be changed to a written record hearing to expedite consideration of its October 16, 2019 petition; no witnesses are called at such hearings.

Employer's litigation strategy was similar to the claimant's strategy in *Lindhag*. There, the claimant lost on her claim that her workplace gave her respiratory problems; the decision found her issues were caused by dust mites at home. After the decision issued, the claimant decided to hire an EME and another expert to test her blood for allergy markers and her home for dust mites. These tests demonstrated compelling evidence that the original decision could be wrong. The claimant even filed an affidavit with her petition for modification contending why she could not, with due diligence, have obtained this evidence before the hearing. The claimant's lawyer averred the idea that the claimant's respiratory issues could be caused by dust mites simply never occurred to her. *Lindhag* rejected these arguments and found the absence of these tests prior to the initial decision "can only be considered a tactical choice" by the claimant and her lawyer. The same is true here; Employer according to its own words made a similar tactical choice to save money and purportedly save Employee from the inconvenience of going to "another" EME by using Dr. Bauer's EME and did not obtain "its own IME physician" prior to the *Meili I* hearing.

b) Dr. Fellars' report and testimony are not admissible to show a changed condition.

At hearing, Employer said it also sought modification under AS 23.30.130(a) based on a "change in conditions." It relied on Dr. Fellars' report and his expected testimony to support this prong as well. *Lindhag* makes it clear that a party cannot raise "original issues such as *work-connection*," using AS 23.30.130(a)'s "change in conditions" theory. *Lindhag* held original issues are not "contemplated by the change-in-conditions modification." Employer is trying to do exactly the same thing as the claimant in *Lindhag*. As in *Lindhag*, Dr. Fellars' report and testimony cannot be used to support modification based on changed conditions; they are not admissible and thus not relevant and were properly excluded under this modification theory as well.

Parties have the right to present evidence and call witnesses at hearing. 8 AAC 45.120(c), (1), (2). However, this right is not unfettered. 8 AAC 45.120(e). For example, though not an issue in this case, witnesses other than parties are excluded from testifying if a party fails to file a timely witness list. 8 AAC 45.112. The condition precedent to calling witnesses at a hearing is timely filing a conforming witness list. By analogy, in the instant case an 8 AAC 45.150(d)(2) condition precedent for Employer to rely on Dr. Fellars' report and expected testimony to support its petition for modification was to show why, with due diligence, this newly discovered evidence could not have been discovered and produced at the *Meili I* hearing. Employer wanted to skip the critical step in the rehearing and modification process; it wanted to skip over the "key language" and not discuss why it could not with due diligence have obtained an EME report and testimony prior to the *Meili I* hearing. *Lindhag*. It wanted to go directly to its newly obtained evidence as if it was automatically admissible. Once Employer failed to meet its prerequisite and could not show that with due diligence it could not have obtained an EME report or testimony prior to or at hearing, Dr. Fellars' report and his expected testimony were inadmissible and therefore simply not relevant evidence to support Employer's petition for modification. There would have been no point in allowing Dr. Fellars to testify subject to a sustainable objection from Employee as to every proffered question; stated another way, given these facts Dr. Fellars' testimony would have been a waste of time. When Dr. Fellars' evidence became inadmissible it became irrelevant. Irrelevant evidence "may be excluded" as evidence at a hearing. 8 AAC 45.120(e). Thus, the oral order excluding Dr. Fellars' report and testimony on the modification petition was correct.

2) Was the oral order excluding two learned treatises as evidence correct?

The Asian Spine Journal and Journal of American Academy of Orthopedic Surgeons treatises are inadmissible and irrelevant for the same reason. Employer has not suggested this same information could not have been provided through due diligence before or at the July 17, 2019 hearing. The oral order excluding these treatises as evidence for this modification hearing was correct.

3)Are any of the Smallwooded medical records admissible?

The parties continued to file Employee's treatment records post-*Meili I*. Employer filed a "Smallwood" objection to some medical reports. 8 AAC 45.900(11). For example, on February

20, 2020, Dr. Paulson responded to Employer's January 31, 2020 letter requesting his opinions and answers to certain questions. The parties agree Dr. Paulson misdated his response to Employer's letter; though he wrote "4/20/20" he actually completed his answers and signed his responses on February 20, 2020.

Employer's position at hearing on the admissibility of the eight Smallwooded reports at this hearing was confusing. The reports included Drs. Johnston's and Paulson's treatment records and Dr. Paulson's February 20, 2020 responses to Employer's January 31, 2020 letter. No party offered a foundational objection to any record. *Dobos*. The treatment records are "business records" admissible over a Smallwood objection under Rule 803(6). *Dobos*; *Parker*. The parties agreed Employee's ongoing treatment records following *Meili I* were newly discovered evidence. Consequently, these records are admissible and may be considered on Employer's petition for modification. However, Employer refused to waive its Smallwood objection on Dr. Paulson's February 20, 2020 responses to Employer's January 31, 2020 letter.

Employee would like to rely on Dr. Paulson's February 20, 2020 opinions; Employer intends to keep it out. Dr. Paulson's opinions appear to support Employee's position. Nevertheless, neither party demonstrated that they could not, with due diligence, have obtained this same information from Dr. Paulson prior to, or even after, the *Meili I* hearing; either party clearly could have. The record remained open for at least 30 days following the initial hearing so Employer could depose Dr. Paulson; if he was not available within the initial 30 days, the parties could have obtained additional time to depose him. Neither party took the opportunity to depose him, the record closed and *Meili I* issued. Accordingly, there is no reason to consider Dr. Paulson's February 20, 2020 opinions at this hearing. 8 AAC 45.150(d)(2).

4) Should *Meili I* be modified based on newly discovered evidence or changed condition?

The panel has reviewed and considered *Meili I*, the parties' briefs for this hearing and all the admissible attachments. It also reviewed Dr. Hector's EME report and the post-*Meili I*-hearing treatment records from Employee's attending physicians. The panel reviewed but did not consider the inadmissible evidence discussed above.

Dr. Hector's January 10, 2000 EME report discussed Employee's 1999 injury while working for another employer. He examined her neck and upper extremities. Employee's complaints were to her hands and wrists. Dr. Hector diagnosed a right wrist contusion and carpal tunnel syndrome. His report does not offer any evidence to warrant modifying *Meili I*. Obviously, Drs. Johnston's and Paulson's post-hearing medical records could not have been obtained prior to July 17, 2019, because the appointments reported therein did not occur until after that date. Nevertheless, nothing in these reports suggest *Meili I* is not supported by substantial evidence. *Lindhag*. Nothing in these reports change any prior statements or opinions. Employee's post-*Meili I* treatment records are largely redundant as Dr. Paulson appears to cut and paste prior records into his current reports. Upon close review, the post-*Meili I* treatment records, including the surgical report, do not offer evidence warranting modification of *Meili I*.

Exhibit 12 to Employer's hearing brief, a Quick Note from Dr. Paulson's office summarizing a teleconference between Powell and an office staff member, is irrelevant because it does not bear on the issue presented in Employer's petition for modification. First, it is not as Employer suggests, a "gag order" directing Dr. Paulson not to answer the January 31, 2020 letter from Employer; nor does it support Employer's statement at hearing that Powell told Dr. Paulson he should not change his opinions "if you want your bills paid." Taken at face value, the note simply states Powell, and presumably Employee, did not want Dr. Paulson to change his opinions. Nothing in the note suggests or demands that Dr. Paulson not respond to Employer's letter; in fact he responded on February 20, 2020. Second, even if Dr. Paulson's response to Employer's January 31, 2020 letter had fully supported Employer's position or fully supported Employee's position, his responses would still not be relevant six months after *Meili I* had decided the case on its merits. *Lindhag*. If either party wanted to hear from Dr. Paulson they should have and could have deposed him before or after hearing, in accordance with *Meili I*.

Employer's petition for modification is a classic "back-door route to retrying a case" because Employer thinks it can make a better showing on the second attempt. This case is similar to *Lindhag*, except in this instance it is the employer rather than the claimant that is trying to obtain and produce evidence after the fact. For all these reasons, Employer's October 16, 2019 petition for modification will be denied.

As the controlling December 18, 2019 prehearing conference summary did not list attorney fees and costs as an issue for this hearing, this decision cannot decide this issue at this time. However, Employee's right to be heard on her request for additional attorney fees and costs is retained.

CONCLUSIONS OF LAW

1) The oral order excluding Dr. Fellars' report and testimony was correct.
2) The oral order excluding two learned treatises as evidence was correct.
3) Some of the Smallwooded medical records are admissible.
4) *Meili I* will not be modified based on newly discovered evidence or changed condition.

ORDER

1) Employer's October 16, 2019 petition for modification is denied.
2) Employee may request a hearing on her claim for attorney fees and costs for successfully defending against Employer's petition.

Dated in Anchorage, Alaska on February 28, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Kimberly Ziegler, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of Yvonne Meili, employee / claimant v. Sterling Assisted Living, Inc., employer; Liberty Northwest Insurance Co., insurer / defendants; Case No. 200902068; 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, CRRR to Keenan Powell and Rebecca Holdiman Miller on February 28, 2020.

/s/
Kimberly Weaver, Office Assistant