ALASKA WORKERS' COMPENSATION BOARD

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

CATRIN MCKINLEY, Employee, Claimant, v. KENAI PENINSULA BOROUGH & SCHOOL DISTRICT, Employer, and ALASKA MUNCIPAL LEAGUE JOINT INSURANCE, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201012918 AWCB Decision No. 21-0016 Filed with AWCB Anchorage, Alaska on February 25, 2021.

Catrin McKinley's petition for a Second Independent Medical Evaluation (SIME) and Kenai Peninsula Borough & School District's petitions to dismiss Employee's petition for an SIME and her claim were heard in Anchorage, Alaska on January 13, 2021, a date selected on November 29, 2020. A November 10, 2020 hearing request gave rise to this hearing. Attorney J.C. Croft appeared and represented Catrin McKinley (Employee). Attorney Colby Smith appeared and represented Kenai Peninsula Borough & School District (Employer). *McKinley v. Kenai Peninsula Borough*, AWCB Decision No. 201012918, July 28, 2020 (*McKinley I*) dismissed Employee's August 23, 2017 claim under AS 23.30.110(c). Witnesses included Employee, who

testified telephonically, and Dr. Thomas McCarty, who testified telephonically for Employee. The record closed when the panel concluded deliberation on February 12, 2021.

ISSUES

Employer contends Employee's April 23, 2020 claim is barred by *res judicata* as it is essentially identical to her August 23, 2017 claim, which was dismissed under AS 23.30.110(c).

Employee contends neither form of *res judicata*, either issue or claim preclusion, applies to her April 23, 2020 claim as there has never been a final decision on the merits of her claim. Furthermore, her April 23, 2020 claim is only for future benefits as opposed to the past benefits dismissed in *McKinley I* and is therefore not barred by either form of *res judicata*.

1) Should Employee's April 23, 2020 claim be dismissed?

Employer asserts the September 2020 SIME petition is also barred by *res judicata* as the medical opinions relied upon are the same as those in her prior SIME petition. Employer contends since *McKinley I* was issued in July 2020, there has been no new medical evidence indicating Employee's need for new hearing aids and although Dr. McCarty testified Employee did need new hearing aids, he has not treated Employee since July 2017. Employer contends Employee is entitled to file a new claim, but it must be for something new, based on medical evidence.

Employee contends there is a significant and relevant medical dispute in her case and an SIME will assist the board to resolve the dispute. Therefore, her petition for an SIME should be granted.

2) Should Employee's September 25, 2020 SIME petition be granted?

FINDINGS OF FACT

The findings of fact in *McKinley I* are incorporated herein and a review of the record establishes the following facts and factual conclusions:

1) Richard Hodgson, M.D., otolaryngologist, conducted a records review Employer's Medical Examination (EME) on April 7, 2014. (EME report.)

2) Dr. Hodgson's EME report was filed with the board on May 7, 2014, and mailed to Employee on May 6, 2014, per Employer's Certificate of Service. (Agency files.)
3) As the EME report was mailed to Employee on May 6, 2014 to her address of record at the time, service was complete on May 6, 2014. (Agency files.)
4) Employee's August 23, 2017, workers' compensation claim (WCC)requested the following:
    1. A board order that hearing loss and related treatment is compensable regardless of Medicare coverage.
    2. Payment of hearing aid and related treatment.
    3. Penalty, interest.
    4. Attorney fees and costs.

(WCC, August 23, 2017.)

5) On July 28, 2020, *McKinley I* dismissed Employee's August 23, 2017 WCC, in part, for failure to timely request a hearing under AS 23.30.110(c). *McKinley I* dismissed the following claims:

1. Payment of hearing aids and related treatment
2. Penalty and interest
3. Attorney fees and costs

(*McKinley I.)*

6) *McKinley I* also denied Employee's October 3, 2019 SIME petition as moot, as it related to the August 23, 2017 claim, which was dismissed. (*Id.*)

7) On April 23, 2020, Employee filed a second claim for benefits, requesting the following:

1. For a board order that employee's hearing loss occurred in the course and scope of her employment
2. Payment of hearing aid related treatment
3. Penalty and interest
4. Attorney fees and costs

(WCC, April 23, 2020.)

8) On September 25, 2020, Employee filed an SIME petition. (SIME petition, September 25, 2020.)

9) On October 12, 2020, Employer asserted it was inappropriate to proceed with an SIME as Employee's claim had been dismissed as time barred in *McKinley I* and thus the September 25, 2020 claim and petition were barred by *res judicata*. (Answer, October 12, 2020.)

10) On October 21, 2020, Employer filed a petition to dismiss Employee's April 23, 2020 claim for workers' compensation benefits and her September 25, 2020 SIME petition as barred by *res judicata*. (Employer's petition, October 21, 2020.)

11) On November 19, 2020, Employee amended her April 23, 2020 claim to be for future medical costs and not past medical costs. (Prehearing conference (PHC) summary, November 19, 2020.)

12) Employee testified she is married and has lived with her husband in Alaska during two time periods, the first in June of 2001 for less than a year and the second being from June 2007 to June 2018. She now lives in Cleveland, Tennessee. (McKinley.)

13) Employee testified she worked for Northwest Airlines from December 1995 to June 2001. While employed there she had yearly hearing tests as part of her job. She recalled those tests showed she had not suffered any hearing loss at that time. (*Id*.)

14) Employee worked as a substitute teacher in Michigan off and on starting in September 2002 while she earned her education degree, which she did in June 2007. She then moved back to Alaska and applied for teaching jobs, but only substitute teaching jobs were available. Therefore she obtained a position as a 911 dispatcher with the Kenai Peninsula Borough starting in April or May of 2008. (*Id*.)

15) Employee wore headsets that plugged into the console used to answer the phone, and talk with anyone within the 911 system and also record calls. (*Id*.)

16) Employee believes she suffered hearing loss as a result of her work as a dispatcher. After about a month working as a dispatcher, she started losing hearing in one of her ears, then in her other ear. She went to several doctors who were unable to determine what the problem was. She had a hearing test at that time and was then referred to a specialist who diagnosed ear infections and attributed the infections to the type of "inside-the-ear" headsets she was using. Her ear infections were treated with antibiotics and cleared up. (*Id*.)

17) After two years working as a dispatcher, Employee felt she needed a hearing test as she was experiencing tinnitus. She saw Thomas McCarty, Au.D., an audiologist, who diagnosed hearing loss and prescribed hearing aids. Employee did purchase and start wearing hearing aids shortly after they were prescribed. (*Id*.)

18) Employee's hearing aids were replaced in 2013, but she has not replaced them since that time. She does not recall if she has had any other treatment for her hearing loss since 2013. (*Id*.)

19) Employee would like to have her hearing checked again. Her tinnitus is really bad. She did see a doctor within the last couple months as her ears started to be "impacted" again. Her ears were flushed and she was given medication, which she said it turned out she did not need. (*Id*.)

20) She would like treatment in the future in the form of a hearing test, the blockage she experiences in her ears, and new hearing aids. (*Id*.)

21) Employee has never been on Medicare. Employee has not treated with Dr. McCarty since she left Alaska in June 2018. She has no unpaid medical bills with Dr. McCarty. She has no unpaid medical bills concerning hearing treatment since July 2020. (*Id*.)

22) Currently Employee does use her hearing aids periodically, although she does not wear them at work when she must wear a face mask. When she does not have her hearing aids on she has to turn the volume up high on the television. She also cannot hear all the conversations at her table at a restaurant without hearing aids. (*Id*.)

23) Employee is still using the same hearing aids, prescribed by Dr. McCarty, that she obtained in 2013. She has not treated with Dr. McCarty since she left Alaska in 2018. No other doctor has told her she needs hearing aids. (*Id*.)

24) Employee did not present any new medical evidence of her need for current or future treatment for her hearing loss. (Hearing record; Experience, judgment.)

25) Dr. McCarty received a bachelor's degree in 1975 and a Master's degree in audiology in 1977, both from the University of Maryland. He also has a Ph.D. in audiology from the University of Florida. Obtaining his audiology degrees required study of patient diagnostic evaluations, electrophysiological examinations, calculation of percentage of hearing loss for workers' compensation cases, noise studies, and more. (McCarty.)

26) Dr. McCarty described audiology as the science of hearing which involves the diagnostic evaluation and medical treatment of hearing loss using hearing instruments. Otolaryngologists or Ear, Nose and Throat (ENT) physicians are medical doctors and surgeons who specialize in treating with surgery and prescription medication. ENT physicians and audiologists are both trained in diagnosing and treating hearing loss. ENT physicians rely on testing performed by audiologists to diagnose and treat patients. (*Id*.)

27) Dr. McCarty is licensed as an audiologist in Alaska. He is board certified by the American Academy of Audiology and he is a member of the Academy of Doctors of Audiology. His practice is the only certified practice of audiology in Alaska. (*Id*.)

28) Dr. McCarty originally came to Alaska to work as a state public health audiologist, which he did for 14 years. He has been in his own practice since 1991. He estimated he had examined over 100,000 patients. (*Id*.)

29) The examination of a patient for hearing loss includes taking a history and examining the ears' external components. There is also electronic diagnostic testing of the hearing. There are tests for the eardrum function and the middle ear and a separate test for the auditory nerve and the cochlea or inner ear. In a workers' compensation case, his office does a comprehensive examination, which typically starts with the objective measures, testing the eardrum and the auditory nerve. The responses are automatic and cannot be controlled by the patient being tested. (*Id.*)

30) Dr. McCarty first treated Employee in 2010 or 2011. He found bilateral nerve-type hearing loss in the inner ear or cochlea. The high frequency hearing loss was in the 40 to 45 decibel range. The eardrum tests were normal and the otoacoustic emissions showed abnormal response. All the tests were consistent with a cochlear or inner ear hearing loss. (*Id*.)

31) Employee reported to Dr. McCarty she was working as a dispatcher and was using a headset over which she was exposed to intermittent loud sounds, which was what she felt had caused the hearing loss. This type of hearing loss is what is typically seen when one is exposed to loud noise. Employee reported difficulty hearing speech when there was background noise. (*Id*.)

32) Dr. McCarty, based on the testing results, diagnosed Employee with bilateral cochlear sensorineural hearing loss, which is a permanent, progressive disorder. Patients with this type of hearing disorder are not candidates for surgery or medication. They are candidates for hearing instruments. Dr. McCarty opined Employee's hearing loss was caused by the headsets she was using while working as a 911 dispatcher for Employer. He has seen this injury in many people who use headsets due to exposure to loud tones intermittently presented to their ears. (*Id*.)

33) Dr. McCarty last saw Employee in 2017. He recommended routine replacement of hearing aids for patients with the type of hearing loss suffered by Employee both because the technology improves and because the hearing loss is progressive. The hearing aids are routinely replaced

based on the amount of hearing loss and the amount of difficulty they are reporting. Employee did return about three years after her first set of hearing aids as she was noticing more difficulty hearing and the advances in technology addressed the screeching noise she was reporting. (*Id*.)

34) Dr. McCarty said Employee will need her hearing monitored and her hearing aids replaced periodically. Dr. McCarty stated there is a Johns Hopkins study which shows there is a correlation of cognitive decline with hearing loss, even with slight hearing loss. (*Id*.)

35) Dr. McCarty had reviewed Dr. Richard Hodgson's April 7, 2014 EME report and stated he did not agree with Dr. Hodgson's conclusion Employee did not need hearing aids, which is totally at odds with generally accepted audiological practice, especially with the amount of hearing loss Employee was experiencing. Dr. Hodgson did note Employee had good hearing in the speech frequencies, but he ignored the hearing loss in the high frequencies, which is the hearing loss being treated. (*Id*.)

36) Dr. Hodgson's April 7, 2014 EME report referenced testing done in September 2010 by Dennis Tidwell, a safety inspector with Employer, on the headsets used by Employee. Dr. McCarty questioned whether the September 2010 testing was done when the loud noises were coming through the headsets. Furthermore, the EME report stated the equipment used to do the testing was not calibrated, so the results could not be relied upon. (*Id*.)

37) Dr. McCarty opined the charts attached to Dr. Hodgson's April 7, 2014 EME report showing a difference in the pattern of hearing loss between noise-induce hearing loss and age-related hearing loss were inaccurate. (*Id*.)

38) Employee's hearing loss when Dr. McCarty first saw her was greater than he would expect for someone in their early fifties. He said age related hearing loss occurs in the same frequency range, but it typically starts in the sixties. Also, noise related hearing loss is typically sudden, whereas age related hearing loss is more gradual. Dr. McCarty concluded Employee's hearing loss was more sudden. (*Id*.)

39) Dr. McCarty testified he can state with certainty Employee needs new hearing aids now as she is using the same hearing aids she obtained in 2013. This is because hearing aid technology continually improves and because the nature of Employee's hearing loss is progressive. He also stated the current workers' compensation schedule allows for hearing aid replacement every four years, based on medical necessity. However, hearing aids are not replaced without testing an

individual. He said if Employee was tested now and hearing aid replacement was not necessary, it would not be done. (*Id*.)

40) Dr. McCarty did not know if he had any outstanding medical bills related to his treatment of Employee. (*Id*.)

41) Employee's diagnosis is bilateral sensorineural work-related progressive degenerative disorder. It will progress during her lifetime, but at different rates over time. The progress can also plateau, but in general it will become worse with time. (*Id*.)

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;

3) this chapter may not be construed by the courts in favor of a party;

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 23.30.005. Alaska Workers' Compensation Board.

. . . .

(b) The commissioner shall act as chair and executive officer of the board and chair of each panel. The commissioner may designate a representative to act for the commissioner as chair and executive officer of the board. The commissioner may designate hearing officers to serve as chairs of panels for hearing claims.

. . . .

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee ... It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board

> may authorize continued treatment or care or both as the process of recovery may require ....
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> (h) all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.
>
> (k) In the event of a medical dispute regarding determination of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board….
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> . . . .

The board may base its decisions not only on direct testimony 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, 741* P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.110. Procedure on Claims**.
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> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. ... If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

The Supreme Court found the language of AS 23.30.110(c) clear, requiring an employee to

request a hearing within two years of the controversion date or face claim dismissal. *Tipton* v. ARCO Alaska, Inc. 922 P.2d 910, 913 (Alaska 1996). Citing *Jonathon v. Doyon Drilling, Inc.,* 890 P.2d 1121 (Alaska 1995), *Tipton* also noted dismissal under AS 23.30.110(c) does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury. *Tipton* at 913 n.4. The Court distinguished dismissal of a specific claim from dismissal of the entire case, stating § 110(c) is not a comprehensive "no progress rule." *Wagner v. Stuckagain Heights*, 926 P.2d 456, 459 n.7 (Alaska 1996).

Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Egemo v. Egemo Construction Company*, 998 P.2d 434, 440 (Alaska 2000). In *Egemo* the Court held, "new medical treatment entitles a worker to restart the statute of limitations for medical benefits," and in *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005), the Court held dismissal of a claim does not necessarily preclude an employee from filing a later claim for medical costs incurred subsequent to that dismissal.

Dismissal under § 110(c) can create a later issue. In *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2002), the Court held *res judicata*, or claim preclusion, applies to workers' compensation cases; however it is not always applied as rigidly in administrative proceedings as in judicial proceedings. *Id.* at 779-780. When applicable, *res judicata* precludes a subsequent suit between the same parties asserting the same claim for relief when the matter raised was, or could have been, decided in the first suit. *Id.* at 780. Application of the principle requires the issue to be decided to be identical to that already litigated, and a final judgment on the merits. *Id.*

> **AS 23.30.395. Definitions**. In this chapter,
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> (26) "medical and related benefits" includes…transportation charges to the nearest point where adequate medical facilities are available;
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> **8 AAC 45.060. Service.**
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> (b)….Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address….
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> **8 AAC 45.082. Medical treatment.**
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> (b) A physician may be changed as follows:
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> (4) regardless of an employee's date of injury, the following is not a change of attending physician:
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> (A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitute of physicians and not a change of physicians; …
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> **8 AAC 45.092. Selection of an independent medical examiner**.
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> (g) If there exists a medical dispute under AS 23.30.095(k),
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> (2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;
> . . . .

ANALYSIS

1) Should Employee's April 23, 2020 claim be dismissed?

The doctrine of *res judicata* (claim preclusion) applies to workers' compensation cases, although it is not always applied as strictly in administrative proceedings as it is in judicial proceedings. *Robertson*. Claim preclusion bars the re-litigation of a claim that was, or could have been, raised in a prior case between the same parties. The doctrine applies when (1) the prior case is the subject of a final judgment on the merits; (2) the court issuing the judgment had jurisdiction; and (3) the case involved the same parties or their privies and the same cause of action. *Robertson*.

McKinley I dismissed Employee's August 23, 2017 claim for hearing aids and related treatment, penalty and interest and attorney fees and costs as time barred pursuant to AS 23.30.110(c). Although *McKinley I* was entitled as an Interlocutory Decision and Order, its dismissal of Employee's August 23, 2017 claim was a final order on the merits of Employer's petition to dismiss. In addition, although Employee had the option of requesting a review, reconsideration, or modification of *McKinley I*, she has not done so. Therefore, the dismissal of the August 2017 claim is a final judgment on the merits of Employer's petition to dismiss and is "the law of the case." Thus the first prong of the test for claim preclusion is met. The second prong of the test is met as the Alaska Workers' Compensation Board is the adjudicative body with jurisdiction to decide workers' compensation claims. AS 23.30.001; AS 23.30.005. Her April 23, 2020 claim, as amended by at the November 19, 2020 prehearing, requested: 1) a Board order that employee's hearing loss occurred in the course and scope of her employment; 2) payment of hearing aid related treatment in the future; 3) penalty and interest; and 4) attorney fees and costs. The claim is based on the same injury as her 2017 claim; that is, her noise exposure while working for Employer. The August 2017 and April 2020 claims are not identical; the April 23, 2020 claim is for future benefits, and thus the third prong of the test is not met. Therefore, Employee's April 23, 2020 claim, as amended, is not barred by *res judicata*.

Since Employee's April 23, 2020 claim is for future treatment of her hearing loss in the form of hearing aids and related treatment, the question remains whether there is a medical or factual basis for a new claim for benefits. Employee did not provide any current or new evidence in the form of medical opinions or hearing test results which indicate her current or future need for hearing aids or related treatment. Dr. McCarty testified at hearing concerning his examination and treatment of Employee while she lived in Alaska. He opined her hearing loss was work related and explained the reasons for this opinion. However, he also stated he has not treated her since 2017 and before he would prescribe new hearing aids he would have to examine Employee and perform hearing testing. Dr. McCarty also stated while Employee's hearing loss will continue to worsen, the rate of decline can vary and also plateau for periods of time. Employee testified she was still using the same hearing aids she purchased in 2013. Although she testified she would like a new pair of hearing aids, she has not sought any medical treatment for her

hearing loss except for a visit to a health care provider for "blockage" in her ears. Her ears were flushed out and the problem was resolved without her having to take the medication prescribed for her. A medical report of this treatment was not provided prior to hearing.

Employer contends Employee's request for a board order determining Employee's hearing loss and related treatment is compensable is barred by *res judicata.* This is incorrect for two reasons. First, *McKinley I* only dismissed Employee's August 23, 2017 claim for medical costs, penalty, interest and attorney's fees and costs. Second, a request for a board order determining an injury's compensability is not a claim for benefits. A "claim" is distinct from an employee's right to compensation. *Egemo*. Whether a claim is compensable is typically decided in relation to a claim for particular benefits, not as a separate "claim" in itself. To dismiss a "claim" for a board order determining a claim for benefits' compensability would be tantamount to a dismissal of the entire case and all rights of Employee based on her injury report, which is counter to the Alaska Supreme Court decisions and not permissible. *Jonathon; Tipton*; *Egemo; Bailey*.

In *Bailey*, the employee had filed three claims for medical treatment including prescriptions for narcotics and benzodiazepines in each claim. Although the first two claims were dismissed under AS 23.30.110(c), the third was not as it was a claim for different medical expenses. In addition, although Employer had previously controverted payment for these medications based on the opinion of the EME physician, that EME physician had not opined Employee would never need those medications. In the instant case, the EME physician did not opine Employee would never need hearing aids. In addition, the dismissal of Employee's claims in *McKinley I* for hearing aid and related treatment, penalty and interest and attorney's fees and costs does not mean she may not claim those benefits in the future. However, those claims must be supported by new medical evidence.

As Employer conceded at hearing, Employee here, as in *Bailey*, remains free to claim, and Employer remains free to controvert, compensation for subsequent medical benefits. Employee is advised because she has moved more than fifty miles away from Anchorage, Alaska, treatment by an ENT physician or an audiologist where she now lives would not be considered an unauthorized change of physician. 8 AAC 45.082. If Employee chooses to continue to treat

with Dr. McCarty, Employer will not be responsible for Employee's transportation expenses. AS 23.30.395 (26).

2. Should Employee's September 25, 2020 SIME petition be granted?

Employee's September 25, 2020 SIME petition is based on the conflict of opinion between Employee's treating health care provider, Dr. McCarty, who last treated Employee in 2017, and Dr. Hodgson's April 7, 2014 EME report. AS 23.30.095(k). Although Dr. McCarty, in response to Employee's request, provided a September 21, 2020 opinion statement that work is the substantial cause of Employee's bilateral hearing loss while working for Employer, this is not new evidence based on a recent examination or treatment of Employee. It is merely a restatement of his August 15, 2019 response to a similar request from Employee, and his January 24, 2014 treatment note. Employee was notified of the dispute between Dr. McCarty and Dr. Hodgson upon service to her of Dr. Hodgson's EME report on May 6, 2014 and should have requested an SIME within 60 days of receiving Dr. Hodgson's report. 8 AAC 45.060; 8 AAC 45.092(g)(2). Additionally, because there is no new evidence to support Employee's September 25, 2020 SIME petition, and Employee's April 23, 2020 claim is being dismissed, the SIME petition will be dismissed.

CONCLUSIONS OF LAW

1) Employee's April 23, 2020 claim should be dismissed.
2) Employee's September 25, 2020 SIME petition should not be granted.

ORDER

1) Employee's September 25, 2020 petition for an SIME is denied.
2) Employer's October 21, 2020 petition to dismiss Employee's April 23, 2020 workers' compensation claim for hearing aids and related treatment, penalty and interest and attorney's fees and costs, is granted.
3) Employer's October 21, 2020 petition to dismiss Employee's September 25, 2020 SIME petition is granted.

Dated in Anchorage, Alaska on February 25, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Judith A. DeMarsh, Designated Chair

/s/_____
Sara Faulkner, Member

/s/_____
Justin Mack, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 CATRIN MCKINLEY, employee / claimant v. KENAI PENINSULA BOROUGH & SCHOOL DISTRICT, employer; ALASKA MUNICIPAL LEAGUE JOINT INSURANCE, insurer / defendants; Case No. 201012918; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on February 25, 2021.

/s/
Nenita Farmer, Office Assistant