# ALASKA WORKERS' COMPENSATION BOARD

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

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| WILLIAM HERMANS,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Sel-insured Employer,<br>Defendant. | ) | INTERLOCUTORY<br>DECISION AND ORDER<br><br>AWCB Case No. 201905513<br><br>AWCB Decision No. 21-0085<br><br>Filed with AWCB Anchorage, Alaska<br>on September 15, 2021. |

Employee William Hermans' April 15, 2021 petition for a second independent medical evaluation (SIME) was heard on August 17, 2021, in Anchorage, Alaska, a date selected on June 15, 2021. A May 19, 2021 hearing request gave rise to this hearing. Attorney Michael Patterson appeared and represented Employee. Attorney Henry Tashjian appeared telephonically and represented Employer State of Alaska. Employee and his spouse Jessie Hermans appeared and testified for Employee. The record closed at the hearing's conclusion on August 17, 2021.

## ISSUES

As a preliminary matter, Employee contended adjuster Robert Von Birgelen's May 14, 2019 note should be excluded because he was "not listed as a witness in the witness list" and the was created for litigation purposes.

Employer contended Birgelen's note should not be excluded because it is a business record created in the normal course of business; also he was not listed in the witness list because he is not a

witness. The panel issued an oral order denying Employee's request to exclude Birgelen's May 14, 2019 note.

**1) Was the oral order denying Employee's request to strike Birgelen's May 14, 2019 note correct?**

Employer contends Employee changed his attending physician when he saw Jim Cook, D.O; thus, he made unauthorized changes of physicians when he subsequently saw Drs. Bobby Lucas, Thomas DeSalvo and Edward Barrington.

Employee contends Dr. Lucas is his attending physician; he saw other doctors due to Dr. Lucas's unavailability or referral. Employee contends he did not make unauthorized changes of physicians.

**2) Did Employee make unlawful changes of physicians?**

Employer contends Dr. Cook is Employee's attending physician; thus, Drs. Lucas, DeSalvo and Barrington's medical records after Dr. Cook became Employee's attending physician should be excluded because they resulted from unlawful changes of physicians.

Employee contends Dr. Lucas is his attending physician; he saw Drs. DeSalvo and Barrington at Dr. Lucas' referral. Thus, he contends Drs. Lucas, DeSalvo and Barrington's medical records should not be excluded.

**3) Should Drs. Lucas, DeSalvo and Barrington's medical records be excluded?**

Employer contends Dr. Lucas's March 1, 2021 letter should be excluded because it is inadmissible hearsay created solely for litigation purposes and made "significant and skewed representations as to the legal standards in question."

Employee contends Lucas' letter should not be excluded because it is a relevant medical record; further, Employer had an opportunity to cross-examine him but did not.

**4) Should Dr. Lucas' March 1, 2021 letter be excluded?**

Employee contends there are significant medical disputes regarding his work injury between his attending physician and Employer's medical evaluator (EME) and requests an SIME to resolve these disputes.

Employer contends there is no medical evidence or dispute to warrant an SIME because Drs. Lucas and Barrington's opinions should be excluded.

**5) Should an SIME be ordered?**

At hearing, Employee orally requested additional time to comply with AS 23.30.110(c). He contended the April 15, 2021 SIME request tolled the two-year period and there is no prejudice to Employer. Employee did not show unusual and extenuating circumstances that prevented him from setting this issue for the August 17, 2021 hearing.

Employer contended the §110(c) issue could not be heard because it was not raised as an issue for hearing. It contended it needed time to properly address the issue.

**6) Should this decision address Employee's oral request to extend the §110(c) deadline?**

## FINDINGS OF FACT

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

1) On April 25, 2019, Employee saw Dr. Lucas and reported having "sharp pains in his hip" since April 24, 2019. (Lucas report, April 25, 2019).

2) On April 26, 2019, Dr. Lucas treated Employee and told him "if he had any problems at all to contact an emergency room because he was leaving for two weeks" on vacation. (Employee; Jessie Hermans).

3) On April 27, 2019, Employee reported having a low back pain "after moving heavy object at work four days ago" to David Grove, M.D., an emergency room physician at Mat-Su Regional Medical Center (Mat-Su). Dr. Grove diagnosed "herniated disk, sciatica and pulposus," and referred him to Dr. Cook for further evaluation and care. (Grove report, April 27, 2019).

4) On April 29, 2019, Employee reported he injured his low back and upper hip while working for Employer on April 23, 2019. (First Report of Injury, April 29, 2019).

5) On May 3, 2019, Dr. Cook saw Employee and diagnosed a back strain. He wrote a letter stating, "I have seen and evaluated [Employee]. He currently has a back injury. He should not return to work until he is reevaluated. I will see him back on 5/10/19 for reevaluation." (Cook report and letter, May 3, 2019).

6) On May 10, 2019, Dr. Cook saw Employee, diagnosed back strain, degenerative disk disease, and spondylosis, referred him to Northern Edge Physical Therapy, and prescribed a follow-up appointment in three weeks. (Cook report, May 10, 2019). On the same date, Jessie Hermans called Dr. Lucas' office and made an appointment for May 13, 2019, which was "the earliest [she] could get [Employee] in." (Jessie Hermans). April 26 and May 10, 2019, dates were Fridays. (Observation).

7) From April 29 through May 10, 2019, Dr. Lucas was not available. (Jessie Hermans; inferences from the above).

8) On May 13, 2019, Dr. Lucas saw Employee upon return from his vacation. (Lucas report, May 13, 2019; Jessie Hermans). On the same date, Employee signed a medical release for Dr. Lucas to obtain his medical records from Mat-Su and Dr. Cook. (Jessie Hermans; Authorization to Disclose/Release Medical Records, May 13, 2019).

9) On May 14, 2019, adjuster Birgelen wrote:

> Call to the employee- the employee's wife Jesse was there while we spoke- the employee spent a good portion of his day on the date of injury on a ladder straightening a road sign- had some low back pain when he went to bed- woke up the next day and it was worse- he went to work and thought he could just work through it- did not go to work Thus 4/25 went to his chiropractor- The employee has treated at Lucas Chiropractic for many years- his wife thinks he first went there in 2000. Went to the chiropractor the next day also-Fri 4/26- Saturday it got much worse and he went to the Mat Su Regional Emergency room and they referred him to Capstone Medical. He went to capstone Medical on 5/3/19- he saw Dr. Cook- he considers Dr. Cook to be treating - they asked the dr. how he felt about chiropractic and Dr. cook said he is in favor of treatment that helps patients. Discussed that if Dr. Cook is going to be the treating then he coordinates the referrals and he is aware of the treatment- the treating in the workers compensation system has broad authority to refer injured workers for all types of care but injured workers are not best served when medical providers are not working together as long Dr. Cook is aware of the chiro care and the chiro care does not interfere with other care/treatment that Dr. cook prescribes. Dr. Cook has talked to thew [sic] employee about physical therapy but it has not started yet. The employee had an MRI today- they do not know the results yet- the chiropractor-Bobby Lucas thinks the employee may have an annular tear.

> Discussed the 3 day wait - said based on the information we have the "waiting days" will be 4/27-4/29/19- did they know if Dr. Lucas took the employee off work when he saw him 4/25 or 4/26? - they do not know but will find out- Discussed that the employee will qualify for the Maximum compensation rate $1211. Discussed that payments are made very [sic] 14 days. Reviewed that there is no deductible or co-pay in workers compensation. The employee does not know about whether there will be light duty available- the Summer work is starting and this is a busy time- his supervisor is John Hoffman 907-822-3222- he is in Tazlina. The employee's wife gave me her email address-the packratt@yahoo.com and I made sure they had my direct line number and email as well. the employee's wife said they faxed back the medical release and provider list and a work status from Dr. cook Capstone- that keeps the employee off work until month end. Told her I did not see it this morning-she said they faxed it yesterday and I said it may be that it has not been uploaded yet. I will call them tomorrow if we have not received it.

(Birgelen note, May 14, 2019). Birgelen no longer works for Employer. (Record). Birgelen's May 14, 2019 note was first produced as an exhibit to Employer's August 13, 2021 hearing brief. (Agency file; Employer's Hearing Brief, Exhibit A, August 13, 2021).

10) Employee told Birgelen Dr. Cook was his "treating" doctor because he was "seeing" Dr. Cook; he did not mean Dr. Cook was his attending physician. Dr. Lucas has always been his attending physician. (Employee; Jessie Hermans).

11) On May 15, 2019, Dr. Lucas referred Employee to Dr. DeSalvo for lumbar traction. (Lucas report, May 15, 2019).

12) On May 16, 2019, Dr. DeSalvo performed lumbar traction. (DeSalvo report, May 16, 2019).

13) On May 31, 2019, Dr. Cook saw Employee and noted, "[Employee is] here for follow up. He is going to see [Drs.] Lucas and Desalvo. He has been doing spinal decompression. He feels a lot better. He is off his medications. . . . I will see him back if worsens or when he feels ready to go back to work." (Cook report, May 31, 2019). Jessie Hermans said Employee did not see Dr. Cook on May 31, 2019; Employee does not recall. (Jessie Hermans; Employee).

14) On June 25, 2019, Dennis Chong, M.D., saw Employee for an EME and diagnosed (1) chronic morbid obesity; (2) preexisting chronic mechanical low back pain; (3) preexisting lumber spine multilevel degenerative disease and spondylosis; and (4) work-related lumbar sprain/strain. Dr. Chong opined "no future medical treatment [is] recommended for the soft tissue injury of lumbar sprain/strain," and Employee did not sustain a ratable permanent partial impairment (PPI).

He also opined the work-related injury reached medical stability by the end of May 2019. (Chong report, June 25, 2019).

15) On August 14, 2019, Employer denied temporary total disability (TTD), temporary partial disability (TPD), and PPI benefits, and further medical treatment based on Dr. Chong's June 25, 2019 opinion. (Controversion Notice, August 14, 2019).

16) On April 27, 2020, Patterson began representing Employee. (Substitution of Counsel, April 27, 2020).

17) On March 7, 2021, Dr. Lucas opined Employee's April 23, 2019 injury is the substantial cause for the treatment he has provided since that date; he needs ongoing treatment including spinal traction at least two times per or as needed; and he was not medically stable from June 29, 2019, through July 8, 2019. (Lucas letter, March 7, 2021).

18) On March 15, 2021, Dr. Barrington, at Dr. Lucas' referral, rated Employee with an eight percent PPI. (Barrington report, March 15, 2021).

19) On April 8, 2021, Employee claimed medial costs. (Claim for Workers' Compensation Benefits, April 8, 2021).

20) On April 15, 2021, Employee claimed TTD and PPI benefits, medical and transportation costs, attorney fees and costs, interest, and a penalty. He also asked for an SIME. (Amended Claim for Workers' Compensation Benefits; Petition, April 15, 2021).

21) On April 26, 2021, Employer denied all benefits based on based on Dr. Chong's June 25, 2019 opinion. (Controversion Notice, April 26, 2021).

22) On June 15, 2021, the parties agreed the only issue for the August 17, 2021 hearing was Employee's April 15, 2021 SIME petition. (Prehearing Conference Summary, June 15, 2021). The June 15, 2021 prehearing conference summary was not modified. (Agency file).

23) On August 14, 2021, the §110(c) deadline to request a merits hearing expired. (Agency file; observation; inferences from the above).

24) At hearing on August 17, 2021, Employee added an oral request to extend the §110(c) deadline without showing unusual and extenuating circumstances to circumvent the prehearing conference summary. (Agency file; record). Employer contended the §110(c) issue could not be heard because it was not raised as an issue for the August 17, 2021 hearing and Employer needs time to prepare its response to this issue. (Record).

25) Dr. Lucas has treated Employee for more than 20 years. (Employee; Jessie Hermans).

26) Insurance adjusters regularly log communication with claimants, claimants' representatives, doctors, and anyone related to their assigned workers' compensation cases. (Observation).

27) Employer did not request cross-examination of Drs. Lucas or Barrington. (Record; agency file).

## PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (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. . . .
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> (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.

The board may base its decision 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*, 747 P.2d 528, 533-34 (Alaska 1987).

> **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. . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . . .
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> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional

> capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

The Alaska Workers' Compensation Appeals Commission in *Bah v. Trident Seafoods Corp*., AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k). *Bah* confirmed "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer." *Id*. It further stated when deciding whether to order an SIME, the board considers the following questions, though the statute does not require it:

> (1) Is there a medical dispute between Employee's physician and an EME?
> (2) Is the dispute significant?
> (3) Will an SIME physician's opinion assist the board in resolving the disputes?

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.395. Definitions.** In this chapter,
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> (3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
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> (A) a licensed medical doctor;
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> (B) a licensed doctor of osteopathy;
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> (C) a licensed dentist or dental surgeon;
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> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
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> (E) a licensed advanced practice registered nurse; or

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

The workers' compensation system in Alaska favors production of written medical evidence; this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id*. at 824. The medical summary and request for cross-examination process set out in 8 AAC 45.052 was developed in response to the Alaska Supreme Court's decision in *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976) (holding the employer did not waive its right to cross-examine the employee's treating physicians). This decision is so firmly entrenched in the Alaska's workers' compensation system that the

objection to the admission of medical reports based on the unavailability of the author for cross-examination is commonly referred to as a "Smallwood objection." 8 AAC 45.900(11).

Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000). However, letters written by a physician to a party or a party's representative to express an expert medical opinion on an issue before the tribunal are not admissible as a business record unless the requisite foundation is established showing it is the physician's regular practice to prepare and send such letters. *Liimatta v. West*, 45 P.3d 310 (Alaska 2002).

> **8 AAC 45.065. Prehearings**. . . .
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> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issue for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
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> **8 AAC 45.070. Hearings**. . . .
> . . . .
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> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary . . . governs the issues and the course of the hearing.
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> **8 AAC 45.082. Medical Treatment.**
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> (b) A physician may be changed as follows:
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> (2) . . . . an employee. . . . designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service
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> (A) at a hospital or an emergency care facility. . . .
> . . . .

> (4) . . . . the following is not a change of an attending physician:
> . . . .
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> (B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians. . . .
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> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer. . . .
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> **8 AAC 45.092. Second independent medical evaluation**. . . .
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> (h) If the board requires an evaluation under AS 23.30.095(k), the board may direct
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> (1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder. . . .

*Wilson v. Eastside Carpet Co*., AWCB Decision No. 09-0029 (February 10, 2009), addressed the definition of "medical records" as intended in 8 AAC 45.092(h):

> Cognizant of our authority "to formulate [our] policy [and] interpret [our] regulations," and in order to clarify our policy, we conclude that "medical records," as that term is intended under 8 AAC 45.092(h), are those records maintained in the regular course of business by a physician or other medical provider which the medical provider has prepared, or which has been generated at the direction of the physician or other medical provider, for the purpose of providing medical diagnosis or treatment on behalf of the patient. We include in the definition of "medical records" the reports of physicians prepared at the employer's direction in accordance with AS 23.30.095(e). *Wilson*, at 7 (citation omitted).
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> **8 AAC 45.120. Evidence**. . . .
> . . . .
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> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness

> for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .
> . . . .
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> (h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that
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> (1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible;
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> (2) the document is not hearsay under the Alaska Rules of Evidence; or
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> (3) the document is a report of an examination performed by a physician chosen by the board under AS 23.30.095(k) or AS 23.30.110(g). . . .
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> **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:
> . . . .
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> (6) Business records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, 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. . . .

## ANALYSIS

### 1) Was the oral order denying Employee's request to strike Birgelen's May 14, 2019 note correct?

The panel issued an oral order denying Employee's request to exclude Birgelen's May 14, 2019 note. Employee contended adjuster Birgelen's note was created for litigation purposes and he was "not listed as a witness in the witness list." Employer contended Birgelen's note was is a business

record created in the normal course of business, and he was not listed in the witness list because he no longer works for Employer and is not a witness.

Insurance adjusters regularly log communication with anyone related to their assigned workers' compensation cases. *Rogers & Babler*. The note was created on May 14, 2019, the date Birgelen spoke to Employee; it is a part of Birgelen's job to contact Employee, seek facts relevant to this case, and log them. There is no evidence suggesting Birgelen's method or circumstances of the preparation indicate lack of trustworthiness. Thus, Birgelen's May 14, 2019 note is a business record created in the normal course of business.

However, if Employer wanted to rely on Birgelen's note, Employer should have filed and served it 20 or more days before the hearing; it did not do so. 8 AAC 45.120(f). Birgelen's note was first produced as an exhibit to Employer's August 13, 2021 hearing brief. Employee did not seek to strike the note on this ground. Regardless, Employer should have either filed Birgelen's note 20 or more days before August 13, 2021, or produced Birgelen as a witness for examination. It did not do so. Thus, the oral order denying Employee's request to strike Birgelen's May 14, 2019 note was incorrect. Birgelen's note will not be considered in this decision.

**2) Did Employee make unlawful changes of physicians?**

The law allows an injured worker to select an attending physician. AS 23.30.095(a). Employee may get innumerable referrals from his attending physician to specialists. These referrals do not count as changes in Employee's choice of attending physician. *Id*. The law also allows Employee to make one change in his choice of attending physician without Employer's written consent.

Dr. Lucas first treated Employee for his April 24, 2019 work injury and became his "attending physician." AS 23.30.395(3)(F); 8 AAC 45.082(b)(2). On April 26, 2019, Dr. Lucas informed Employee he would not be available for the following two weeks. In essence, Dr. Lucas by going on vacation refused to provide services to Employee when he needed them. Thus, from April 27 through May 10, 2019, Employee could see a different doctor without making "a change of an attending physician." 8 AAC 45.082(b)(4)(B).

On April 27, 2019, Employee saw Dr. Grove at Mat-Su emergency room; this was not a change of physician regardless of Dr. Lucas' availability. 8 AAC 45.082(b)(2)(A). At Dr. Grove's referral, Employee saw Dr. Cook on May 3, 10 and 31, 2019. Employer contends Dr. Cook became Employee's attending physician. As analyzed above, Employee's May 3 and 10, 2019 visits to Dr. Cook could have not been a change of physician because Dr. Lucas refused to provide services until May 10, 2019. 8 AAC 45.082(b)(4)(B). So the question is whether the May 31 follow-up visit constituted a change of physician to Dr. Cook; relevant evidence show it was not.

First, all visits with Dr. Cook resulted from Employee's emergency room visit; thus, they cannot be counted as a physician change. AS 23.30.095(a); 8 AAC 45.082(b)(2)(A). Further, on May 10, 2019, Jessie Hermans contacted Dr. Lucas' office to make an appointment; the earliest one she could get was on May 13. On May 13, Employee saw Dr. Lucas and provided his office with medical releases to obtain records from Mat-Su and Dr. Cook. On May 15, 2019, Dr. Lucas referred Employee to Dr. DeSalvo for lumber traction. On May 16, 2019, Dr. DeSalvo performed it. Then, on May 31, Employee saw Dr. Cook and told him he will continue treatment with Drs. Lucas and DeSalvo. Dr. Cook's May 31 chart note confirms such: "[Employee is] here for follow up. He is going to see [Drs.] Lucas and Desalvo [sic]. He has been doing spinal decompression. He feels a lot better. He is off his medications. . . . I will see him back if worsens or when he feels ready to go back to work." There is no evidence Employee returned to see Dr. Cook thereafter; the purpose of the May 31 visit was to conclude their patient-provider relationship, and that cannot be viewed as a change of physician.

Even if Birgelen's May 14, 2019 note, which stated Employee identified Dr. Cook as his "treating" doctor, were considered, Employee explained he said Dr. Cook was his "treating" doctor because he was "seeing" Dr. Cook, not because Dr. Cook was his attending physician in a legal sense. Employee and Jessie Hermans's testimony is credible. AS 23.30.122; *Smith*. In short, Employee did not make unlawful changes of physicians; Dr. Lucas has always been Employee's attending physician; thus, his referrals to Drs. DeSalvo and Barrington were valid. AS 23.30.095(a).

**3) Should Drs. Lucas, DeSalvo and Barrington's medical records be excluded?**

If a party made an unlawful change of physician, the reports, opinions, or testimony of the physician cannot be considered in any form, in any proceeding or for any purpose. 8 AAC 45.082(c). Employer contends Dr. Cook is Employee's attending physician; thus, Drs. Lucas, DeSalvo and Barrington's medical records should be excluded because they resulted from unlawful changes of physicians. However, as analyzed above, Dr. Lucas is Employee's attending physician, and his referrals to Drs. DeSalvo and Barrington were valid; thus, their medical records should not be excluded on this basis. *Schoen*.

**4) Should Dr. Lucas' March 1, 2021 letter be excluded?**

Employer contends Dr. Lucas's March 1, 2021 letter should be excluded because it is inadmissible hearsay created solely for litigation purposes and made "significant and skewed representations as to the legal standards in question."

Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. *Dobos*. However, Dr. Lucas's March 1, 2021 letter was created in response to attorney Patterson's questions seeking expert medical opinions on Employee's workers' compensation issues for litigation purposes. This letter lacks the normal trustworthiness associated with an ordinary medical record; Employer would be particularly interested in cross-examining Dr. Lucas on his expressed opinions in the letter. *Liimatta*. In short, this letter is inadmissible as a business record under Alaska Rule of Evidence 803(6). Therefore, Employer had an absolute statutory right to cross-examine Dr. Lucas; however, Employer did not file and serve a *Smallwood* objection; it confirmed so at hearing. 8 AAC 45.052(c)(3)(B); 8 AAC 45.900(11); *Schoen*.

In addition, the applicable regulation states "all medical records, including medical providers' depositions regarding the employee in the party's possession" will be sent to the SIME physician, excluding records obtained by unlawful changes in physicians. 8 AAC 45.082(c); 8 AAC 45.092(h)(1). Neither the statute nor the regulations contain a definition of "medical record." A dispute over what constitutes a "medical record" is not uncommon. However, *Wilson* stated the term "medical records," as intended under 8 AAC 45.092(h) include reports from physicians, prepared at the employer's direction under AS 23.30.095(e). Using *Wilson's* definition, EME

reports from physicians prepared at Employer's direction are medical records. In fairness, reports from physicians prepared at Employee's direction are also medical records. AS 23.30.001(1); (4). Consequently, Dr. Lucas's March 1, 2021 letter was prepared at Employee's direction and therefore is a "medical record."

In short, Dr. Lucas' March 1, 2021 letter is a relevant medical record. However, because it was prepared for litigation purposes, Employer had an absolute right to cross-examine him; it chose not to do so. Dr. Lucas' March 1, 2021 letter will not be excluded as evidence or for an SIME.

**5) Should an SIME be ordered?**

Employee asked for an SIME. AS 23.30.095(k). The purpose of an SIME is not to assist any party but to assist the fact-finders. *Bah*. When there is a medical dispute between an injured worker's attending physician and an EME physician, an SIME may be ordered. AS 23.30.095(k). There are three requirements before an SIME can be ordered. *Bah*.

First, there must be a medical dispute between an Employee's attending physician and an EME. On June 25, 2019, Dr. Chong diagnosed a work-related lumbar sprain/strain. He opined "no future medical treatment [is] recommended for the soft tissue injury of lumbar sprain/strain," and Employee did not sustain a ratable permanent impairment. He also opined the work-related injury reached medical stability by the end of May 2019. Dr. Lucas disagreed; he opined Employee's April 23, 2019 injury is the substantial cause for the treatment he has provided since that date; he needs ongoing treatment including spinal traction at least two times per or as needed; and he was not medically stable from June 29, 2019, through July 8, 2019. Thus, there is a medical dispute between Employee's attending physicians and the EME physician.

Second, the dispute must be significant. Employee seeks disability and medical benefits. Because Employee's entitlement to those benefits depends on whether he is disabled, needs further treatment, is medically stable, sustained partial impairment, or can return to work, the dispute is significant because these benefits may be substantial. *Rogers & Babler*.

Third, an SIME physician's opinion would assist the factfinders in resolving the dispute. The parties' physicians are not in agreement on the above described medical issues, there are insufficient medical opinions for the fact-finders to weigh in and make credibility findings to issue a merits decision. In short, an additional medical opinion would aid the fact-finders in resolving the disputes; an SIME will be ordered. AS 23.30.001(1); (4); AS 23.30.095(k); *Bah*.

**6) Should this decision address Employee's oral request to extend the §110(c) deadline?**

The only issue identified on the June 15, 2021 prehearing conference summary for the August 17, 2021 hearing was Employee's April 15, 2021 SIME petition. Prior to a scheduled hearing, parties must ensure that the controlling prehearing conference summary for a hearing includes all issues they intend to have heard at the scheduled hearing. Unless modified, the prehearing conference summary will "limit the issues" at hearing and "governs the issues and the course of the hearing." 8 AAC 45.065(c). This requirement helps avoid misunderstandings and allows all parties to properly prepare their evidence and arguments. Once the parties are at the hearing, absent "unusual and extenuating circumstances," that have not been shown to exist in this case, the prehearing conference summary still "governs the issues and the course of the hearing." 8 AAC 45.070(g).

Patterson began representing Employee on April 27, 2020; he should have known about the §110(c) deadline and had ample time to address it. He did not. Also, Employee did not show unusual and extenuating circumstances to circumvent the prehearing conference summary which limited the hearing issue to his SIME request. As Employer objected, this decision cannot address the §110(c) extension issue because it was not properly raised as an issue for the August 17, 2021 hearing; Employer is entitled to sufficient time to respond to this issue. AS 23.30.001(4); 8 AAC 45.065(c); 8 AAC 45.070(g). Therefore, this decision will not address Employee's oral request to extend §110(c) deadline.

## CONCLUSIONS OF LAW

1) The oral order denying Employee's request to strike Birgelen's May 14, 2019 note was incorrect.
2) Employee did not make unlawful changes of physicians.

3) Drs. Lucas, DeSalvo, and Barrington's medical records will not be excluded.

4) Dr. Lucas' March 1, 2021 letter will not be excluded.

5) An SIME will be ordered.

6) This decision will not address Employee's oral request to extend the §110(c) deadline.

## ORDER

1) Birgelen's May 14, 2019 note will not be considered in this decision.

2) Employee's April 15, 2021 SIME petition is granted.

3) The parties are directed to appear at a mutually convenient prehearing conference so the designee can begin the SIME process.

4) Employee's oral request to extend the §110(c) deadline is not addressed.

Dated in Anchorage, Alaska on September 15, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Sara Faulkner, Member

## PETITION FOR REVIEW

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

## RECONSIDERATION

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

## MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to

modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of William Hermans, employee / claimant v. State of Alaska, self-insured employer/ defendant; Case No. 201905513; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 15, 2021.

/s/
Nenita Farmer, Office Assistant