ALASKA WORKERS' COMPENSATION BOARD

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

ROBERT S. NATHAN,	)	
	)	
Employee,	)	INTERLOCUTORY
Claimant,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201903478
	)	
STATE OF ALASKA,	)	AWCB Decision No. 21-0108
	)	
Self-Insured	)	Filed with AWCB Juneau, Alaska
Employer,	)	on November 22, 2021
Defendant.	)	
	)	

Robert S. Nathan's (Employee) September 15, 2020 petition for a Second Independent Medical Evaluation (SIME) and August 25 2021 requests for an extension under AS 23.30.110(c) and attorney fees and costs was heard on October 19, 2021 in Juneau, Alaska, a date selected on August 25, 2021. A July 29, 2021 affidavit of readiness for hearing gave rise to this hearing. Attorney David Grashin appeared and represented Employee, who appeared and testified. Attorney Henry Tashjian appeared and represented State of Alaska (Employer). All parties appeared telephonically. The record remained open for Employee to file a supplemental fee affidavit and Employer to file a response. It initially closed after receipt of Employee's supplemental fee affidavit and Employer's response. The record reopened to determine whether Employee's second brief and second supplemental fee affidavit could be considered. The record closed again after deliberation on November 9, 2021.

ISSUES

Employer objects to Employee's second brief and second supplemental fee affidavit and it contends it cannot be considered as the record already closed and the hearing was complete. Employer requests an order denying consideration of Employee's second brief and second supplemental fee affidavit. Alternatively, it requests an order granting an opportunity to respond to Employee's second brief.

It is assumed Employee seeks consideration of his second brief and second supplemental fee affidavit.

1) Should Employee's second brief and second supplemental fee affidavit be considered?

Employer contends Cody Williams, PA-C, is not Employee's attending physician because a physician assistant (PA) is not a physician under the Alaska Workers' Compensation Act (Act) and there is no evidence his records were supervised by a licensed medical doctor or doctor of osteopathy. It also contends Employee excessively changed physicians and PA-C Williams opinion cannot be considered. Employer contends Employee changed his attending physician when he saw Neil Schneider, M.D., and subsequently made unauthorized changes of physician when he saw Steven Becker, M.D., and then sought an opinion from PA-C Williams. It contends PA-C Williams opinion is hearsay, does not fit under a hearsay exception and cannot support a factual finding. Employer contends PA-C Williams' responses are too unreliable to support an SIME because Employee's letter seeking his opinion contained argument, a biased summary of the record, a factually incorrect summary of the Employer's physician opinion, language implying finding the claim compensable would be beneficial to Employee and his medical providers and a legally incorrect "the substantial cause" standard. Consequently, it contends there is no dispute between Employer's physician and Employee's attending physician and if there is a dispute, it is not significant. Employer requests an order denying Employee's petition for an SIME.

Employee contends PA-C Williams is an attending physician because he was and is required by the Alaska State Medical Board to be supervised by a licensed medical doctor. He contends the statute defining a physician is not exclusive and case law interpreting the definition of physician to permit Employer's to rely upon non-physician medical experts should be extended to permit

employees to rely upon non-physicians. Employee contends he did not make an unauthorized change of physician because PA-C Williams referred him to Dr. Becker. He contends there is a significant dispute between Employer's physician and PA-C Williams and an SIME will assist in resolving the dispute. Employee requests an order granting his petition for an SIME.

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

Employee contends the time to request a hearing under AS 23.30.110(c) should be extended to provide time to conduct an SIME. He contends the COVID pandemic and Bulletin 20-02 prevented him from vigorously pursuing the SIME for some time. Employee requests an order tolling the two-year period from his September 15, 2020 petition seeking an SIME until a specific number of days following the issuance of the SIME report.

Employer contends Employee failed to pursue his claim and petition for an SIME for a long period without reason. It requests an order denying Employee's request for an extension of AS 23.30.110(c). Alternatively, Employer requests an order specifying "the exact term and date" the time under AS 23.30.110(c) "will run."

3) **Should the deadline for Employee to file a hearing request be extended?**

Employee contends Employer resisted paying for an SIME because it refused to stipulate to an SIME. He requests an order awarding full attorney's fees for the time spent pursuing his September 15, 2020 petition for an SIME.

Employer contends an SIME is not a benefit and is not compensation. It contends an order granting an SIME is not the "successful prosecution of the claim" because a hearing on the merits would still be required after the SIME. Employer seeks an order denying Employee's request for attorney's fees and costs.

4) **Is Employee entitled to attorney's fees and costs?**

FINDINGS OF FACT

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

1) On February 1, 2019, Employee said he slipped on the boat yard ramp while working and twisted his right knee. He complained of continuing knee pain. PA-C Williams observed a nonantalgic gait and no edema, effusion or ecchymosis and found mild tenderness at the medial joint line but no "crepitance" on "McMurray." He diagnosed a right knee sprain and placed Employee on modified duty for two weeks, including no ladder use and no high impact activity, and said he could go back to full duty in two weeks. (Williams chart note, February 1, 2019).

2) On February 15, 2019, Employee recovered from a mild to moderate right knee sprain and wanted a "Fit for Duty" signed so he could return to work. PA-C Williams noted "no pain, nonantalgic gait" and directed Employee to follow up as needed for acute pain. He found Employee was fit for duty. (Williams chart note, February 15, 2019; Williams Fit for Duty form, February 15, 2019).

3) On February 22, 2019, Employee said he slipped on his porch that morning and his right knee hurt. He fell directly onto both knees. Employee reported injuring his knee in January and he was still having some right lateral thigh pain. He described right knee pain as aching but sharp with some movements in the posterior and lateral aspect of his knee joint which radiated up into the lateral thigh. It worsened with knee flexion and walking and improved with rest. Keils Kitchen, PA-C, noted no ecchymosis, swelling, tenderness over insertion of the hamstrings and insertion and distal third of IT band, and negative McMurray's. He diagnosed right iliotibial band friction syndrome, knee pain and knee strain and found Employee fit for duty. (Kitchen chart note, February 22, 2019; Kitchen Fit for Duty form, February 22, 2019).

4) On March 8, 2019, Employee complained of right knee pain, tightness and swelling. Since the work injury, he slipped and fell at his residence. PA-C Williams observed a new effusion and pain with range of motion, diagnosed right knee sprain. He ordered an x-ray of Employee's right knee. He arranged follow up to aspirate Employee's knee, and if bloody, he planned to refer him to orthopedics for further evaluation. (Williams chart note, March 8, 2019).

5) On March 12, 2019, Employee said his right knee was stiff painful and swelling affected his mobility and work performance. Employer's dispatcher told Employee if he could not work, they would have to "let him go." PA-C Williams observed "positive antalgic gait" favoring Employee's right knee, continued mild edema and a "positive McMurray." He aspirated Employee's knee and saw normal synovial fluid without "frank blood." PA-C Williams suspected a meniscal tear requiring arthroscopic repair and evaluation. He "advised" Employee

to file a claim because he needed to be evaluated by orthopedics and would refer him to orthopedics "once the file has been claimed." PA-C Williams directed Employee to follow up, "As needed for acute symptoms and as directed by specialty clinic to include Orthopedics and Radiology." (Williams chart note, March 12, 2019).

6) On March 12, 2019, Dr. Schneider reviewed Employee's right knee x-rays and found "Questionable effusion. No Apparent fracture or subluxation." He noted Employee's provider was "C. Williams." (Schneider radiologist report, March 12, 2019).

7) On March 13, 2019, Employer reported Employee slipped on the vehicle ramp apron and twisted his right knee on January 27, 2019. (First Report of Injury, March 13, 2019).

8) On April 4, 2019, Employee said he injured his right knee when he fell at work "with a hyperflexion and external rotation type injury." He was diagnosed with a sprain and attended physical therapy, which he did not think helped. Employee underwent a right knee injection two weeks prior but still experienced difficulty with pain and swelling. Dr. Becker opined Employee may have sustained a medial meniscal tear based upon the mechanism of injury and the physical exam findings. He ordered a right knee MRI. (Becker progress notes, April 4, 2019).

9) On April 12, 2019, a right knee MRI revealed a "ruptured popliteal cyst" and medial meniscus "degenerative type tear." (MRI report, April 12, 2019).

10) On April 15, 2019, Dr. Becker reviewed the April 12, 2019 MRI and noted Employee had a large tear of the medial meniscus posterior horn, a ruptured Baker's cyst and associated mild degenerative arthritic changes. Dr. Becker opined the majority of the symptoms were due to the meniscal tear and recommended a right knee arthroscopy and partial medial meniscectomy. (Becker progress note, April 15, 2019).

11) On May 24, 2019, Jared Kirkham, M.D., examined Employee for an Employer's Medical Evaluation (EME) and diagnosed a right knee medial meniscus tear with extrusion from the joint space, preexisting mild to moderate right knee medial compartment osteoarthritis and chronic pain syndrome. He opined the work injury was the substantial cause of the right knee medial meniscus tear but the osteoarthritis and chronic pain syndrome was unrelated to the work injury. Dr. Kirkham stated Employee's current symptoms were due to a permanent aggravation of his preexisting medial meniscus pathology and recommended the right knee partial medial meniscectomy followed by four to six weeks of physical therapy. He did not review the

February 1, 15, 22, March 8 and 12, 2019 medical records and Employee did not describe the February 22, 2019 fall at home. (Kirkham EME Report, May 24, 2019).

12) On July 23, 2019, Dr. Becker performed a right knee arthroscopy, trans-arthroscopic partial medial meniscectomy. (Becker operative report, July 23, 2019).

13) On July 30, 2019, Employee sought temporary total disability (TTD) benefits, penalty for late paid compensation, interest and a finding of unfair or frivolous controvert. He attached a letter stating:

> I was able to collect Unemployment while working on call for the Alaska Marine Highway during the winter months. I slipped on an icy ramp on the Lutuya Ferry in Ketchikan and injured my right knee on Jan 27, 2019. I filed an injury report and called the Dr where I live in Metlakatla. The following day was my last scheduled workday and since I couldn't see the Dr until the end of the week, I went ahead and finished my hitch even though I was hurt. When I saw the Dr he said I had a sprain and it would be better in a couple weeks so I thought I'd just wait it out and didn't file a Workmen's Comp Claim
>
> After Feb 15 my dispatcher called and said I was scheduled to work on the Columbia on Feb 24. I told him my knee was still in terrible pain and I couldn't do it. He told me I had to have another Unfit for Duty signed by a Dr so I went back to the clinic. I was only able to see the Dr Assistant and he said the sprain should be healing and I could go back to work. My dispatcher said I'd get written up for Failure to Report for Duty if I didn't show. I knew I couldn't work but I couldn't risk losing my job so I had no choice, was forced to go. I told my supervisor I was hurt so they tried to accommodate me by switching me to a spot that required less walking and allowing me to take the elevator instead of climbing stairs. It was the most excruciating experience of my life and I collapsed from pain and exhaustion when I got home. That's when I knew I had to go see a real Orthopedic Dr and file for Workman's Compensation. . . . (Claim for Workers' Compensation Benefits, July 30, 2019; Letter, July 30, 2019).

14) On August 27, 2019, Dr. Kirkham reviewed the February 1, 15, 22, March 8 and 12, 2019 medical records. He opined Employee sustained a right knee sprain/strain "casually related" to the work injury which resolved by February 15, 2019, and a right knee medial meniscus tear substantially caused by the February 22, 2019 fall at home. Dr. Kirkham stated the work injury, the February 22, 2019 fall at home, his preexisting right knee medial compartment osteoarthritis, age, genetics, obesity and smoking were potential causes of his right knee medial meniscus tear and need for medical treatment. However, the substantial cause of the medial meniscus tear was the February 22, 2019 fall at home:

> On a more probably than not basis, this is substantially caused by the fall at his home on February 22, 2019. The supplied notes do not indicate an effusion or a positive McMurray test prior to the fall at his home on February 22, 2019. The clinic notes from after this fall indicate a right knee effusion on March 8, 2019 and a positive McMurray test on March 12, 2019. There was no positive exam findings after the work injury on January 27, 2019 and before the fall at home on February 22, 2019. Therefore, on a more probably than not basis, the work injury from January 27, 2019 is not the substantial cause of the medial meniscus tear. (Kirkham EME report, August 27, 2019).

15) On September 9, 2019, under AS 23.30.097(d), Employer denied an invoice from CIOX Health for Peacehealth Medical Group medical records. (Controversion Notice, September 9, 2019).

16) On September 13, 2019, Employer denied all benefits based upon Dr. Kirkham's August 27, 2019 addendum EME report and TTD benefits from January 27, 2019 through February 14, 2019 as Employee received unemployment benefits. It was served upon Employee by first-class mail. (Controversion Notice, September 13, 2019).

17) On October 24, 2019, Patterson & Hegna, LLC, appeared on behalf of Employee. (Entry of Appearance, October 24, 2019).

18) On October 29, 2019, Employee sought TTD benefits, medical and transportation costs, penalty for late paid compensation, interest, a finding of unfair or frivolous controvert and attorney's fees and costs. He also requested an SIME. (Claim for Workers' Compensation Benefits, October 29, 2019).

19) On November 4, 2019, Employer denied all benefits and its reasons remained identical to its September 13, 2019 controversion notice. (Controversion Notice, November 4, 2019).

20) On November 6, 2019, Employer opposed Employee's request for an SIME, contending he failed to demonstrate a sufficient medical dispute under AS 23.30.095(k) and discovery was not complete. (Opposition to Request for SIME, November 6, 2019).

21) On January 22, 2020, Employer's attorney mailed PA-C Williams a letter seeking answers to several questions, along with Dr. Kirkham's two EME reports. The letter stated:

> The questions ask you to express an opinion as to whether [Employee's] employment activities are "the substantial cause" in bringing about a need for medical treatment or disability. "The substantial cause" is the most important or material cause in causing the need for treatment.

> Disability or need for treatment that arises as a result of a work-related injury is also considered work-related even if the connection is not direct, such as a work-related injury causing a condition that leads to the development of other medical problems, so long as work remains "the substantial cause" of the related medical condition.
> . . . .
>
> An injury can cause, aggravate or combine with a preexisting condition to make it worse. An injury may also cause an increase in symptoms of a preexisting condition without aggravating the underlying condition itself. Only if the work activities or injury are "the substantial cause", will they be deemed the legal cause of the condition, the increase in symptoms of a preexisting condition, or the aggravation of a preexisting condition.

When asked to list all diagnoses he believed to apply to Employee's right knee, PA-C Williams answered right knee sprain, right knee pain, right knee osteoarthritis and right knee meniscal tear. PA-C Williams was asked to state which of the causes he believed to be "the substantial cause" of Employee's need for treatment or disability and to explain his conclusion and he wrote:

> [Employee's] cardinal injury happened on 27 Jan 2019 and I saw him on 1 Feb 2019. He was placed on a conservative treatment plan and a 2/6 week follow up scheduled. On 15 Feb 2019 the [Employee] followed up and requested a fit for duty to return to work. He slipped and fell at his house the next week - which may have further injured the knee. However, the cardinal injury that he was being treated for at the time was work related.

Next, PA-C Williams was asked to explain the basis and rationale for his opinion if he concluded that work was the substantial cause of Employee's ongoing right knee conditions/need for treatment. He stated, "Yes though [Employee] had requested a fit for duty to go back to work - I was still following him for the original injury and had not completely cleared him." When PA-C Williams was asked to explain his release to modified work on February 1, 2019, he answered:

> Metlakatla does not have advanced imaging available without [a] referral. As [Employee's] physical exam was rather benign - I restricted his work activity (climbing/high impact activity) and started conservative treatment. This did not mean [Employee] had no internal derangement of the knee - only that his symptoms were mild and his exam at the time did not reflect acute injury.

The letter asked PA-C Williams to recall the February 15, 2019 visit where he filled out a fit to return to duty form, he stated, "[Employee] returned to me on 15 Feb 2019 and requested a fit for duty returning him to work. He stated and demonstrated that he had a non-antalgic gait. I was under the impression that he needed to get back to full duty or his job may have been in jeopardy." PA-C Williams was asked to review PA-C Kitchen's February 22, 2019 report and indicate whether he thought the work injury or the fall which occurred at Employee's home on February 22, 2019 was the substantial cause of his need for right knee treatment. He stated, "I think [Employee] injured the knee on 27 Jan 2019 at work. I think the second injury exacerbated his symptoms and initial injury. I suspect he had some mild internal derangement of the [right] knee made worse by the fall at home. The second injury happened before his 6 week scheduled follow up." PA-C Williams was asked to review Dr. Kirkham's EME reports and asked whether he agreed or disagreed with the revised opinion and to explain why. He answered:

> I agree with Dr. Kirkham and the report. I will say that if [Employee] had not requested the fit for duty and was still displaying acute [symptoms] at his follow up[,] he would have been referred to [physical therapy]. After 28 years in the military I have seen patients with significant asymptomatic meniscal tears and every patient is different. I base most of my treatment plans off the [patient's] symptoms. In this case, the second fall significantly worsened the original injury and symptoms - which facilitated my decision to refer him to advanced imaging and evaluation from an orthopedic surgeon. (Employer letter, January, 22, 2020; Williams, undated response).

22) On January 22, 2020, Employer's attorney mailed a letter to Dr. Becker with similar questions along with Dr. Kirkham's EME reports and Dr. Becker responded. When asked to list all Employee's right knee diagnoses, Dr. Becker answered medial meniscal tear and mild osteoarthritis with grade 3 chondromalacia patella and medial femoral condyle. He addressed "the substantial cause" of Employee's need for treatment or disability:

> I initially attributed the meniscal tear to the work injury of Jan 27, 2019. At that time, I did not have records regarding his fall at home on Feb 22, 2019, and [Employee] did not volunteer this information. As I have not seen the records [regarding] the fall at home, I cannot definitively determine the "substantial cause."

Dr. Becker was asked to review Dr. Kirkham's EME reports and asked whether he agreed or disagreed with the revised opinion and to explain why. He answered, "The revised opinions seem very reasonable to me. Again, I have not personally seen the additional records on which they are based." (Employer letter, January, 22, 2020; Williams, undated response).

23) On April 27, 2020, Michael J. Patterson appeared on behalf of Employee. (Substitution of Counsel, April 27, 2020).

24) On July 20, 2020, Employee's attorney mailed PA-C Williams a letter stating:

> [Employee] worked as a seaman for the Alaska Marine Highway System. On 1/27/2019, while working a regular shift, he slipped and fell on deck, twisting his knee awkwardly and hyperextending his knee. Although an MRI was not taken immediately of his knee, it is [Employee's] contention that the tear that showed up on the MRI occurred as a result of his 1/29/2019 work injury and it was aggravated when he slipped on his steps a month later.
>
> As you know, [a]fter the injury, he was seen at your clinic. You provided conservative treatment and the clinic referred him to, and he was seen by Dr. Steven Beck, on July 18, 2019. Dr. Becker ordered an MRI for [Employee], and after review of the MRI, Dr. Becker diagnosed a medial meniscus tear and the need for right knee arthroscopy with partial medial meniscectomy, which he performed on [Employee] on July 23, 2019.
>
> In Dr. Kirkham's original 5/24/2019 [EME] report, he opined that the work injury was the substantial cause of [Employee's] symptoms and need for treatment, which presumably would have covered [Employee's] subsequent surgery. However, on or about August 27, 2019, after [Employee's] MRI and partial medial meniscectomy, Dr. Kirkham inexplicably revised his opinion and stated that a slip on [Employee's] stairs 4 weeks after the work injury was the substantial cause of [Employee's] symptoms and need for treatment. . . and the work injury was no longer the substantial cause. We believe that he did not use the proper definition in reaching his decision.
>
> The purpose of this letter is to obtain your opinion on the "substantial cause" of the injury, symptoms and need for treatment resulting therefrom. In simple terms, if [Employee] is determined to have developed symptoms and need for treatment as a result of the 01/29/2019 work injury and its sequela, which necessitated the medical treatment received, including the partial medial meniscectomy, it will be a compensable claim and he would be entitled payment of lost wages while recovering from the injury and treatment, as well as his medical bills relating to the injury.
>
> As you can see from the definition below, even if you believe that [Employee's] meniscal tear occurred when he slipped on his stairs at home on 2/2/2019, if

> [Employee's] "slipping" on his stairs was *aggravated by* or *combined with his work injury* or his work injury accelerated the damage he received when he slipped on his stairs, than the work injury is the substantial cause for the need for treatments on his knee.
>
> With that in mind, would you please respond to the following questions, based on the definition below:
>
> When identifying "*the substantial cause*," please be aware that our Supreme Court has issued a recent opinion examining preexisting conditions and "*triggering event*" for guidance in determining if the work injury is "the substantial cause" for the need for medical care or disability. They ruled that the statutes allow "*aggravation, acceleration or combination with a pre-existing condition*" to be "the substantial cause." They also concluded that the legislature did not intend to require that the substantial cause be the primary cause or even 51% or greater cause of the disability or need for treatment. The Supreme Court stated that the question to answer regarding substantial cause is what is the most important material cause related to the benefit sought, which is this cause is the cause of the need for his previous conservative therapy and labrum repair that you performed.
>
> In your opinion, was the work injury and its sequela the substantial cause of the need for [Employee's] treatments on his knee [e.g. physical therapy, steroid injections and eventual partial medial meniscectomy)?

PA-C Williams responded to Employee's letter and checked "Yes" and after "Comments" wrote, "Initial injury occurred [at] the work site and I had not cleared him from further treatment when he slipped on his porch - arguably second to ongoing knee pain/symptoms." (Employee letter, July 20, 2020; Williams response, undated).

25) On September 15, 2020, Employee requested a SIME with an orthopedist contending there was a dispute between PA-C Williams' undated response to his July 20, 2020 letter and Dr. Kirkham's August 27, 2019 addendum EME report on causation and compensability. He attached both medical records. (Petition, September 15, 2020; SIME Form, September 15, 2020).

26) On September 15, 2020, Employee filed and served PA-C Williams undated response to his July 20, 2020 letter on a medical summary form. (Medical Summary, September 15, 2020).

27) On October 5, 2020, Employer opposed Employee's petition for an SIME, contending PA-C Williams did not meet the "attending physician" requirements under AS 23.30.395(3)(D): Dr. Becker was Employee's attending physician and he opined the EME opinion was reasonable;

PA-C Williams' response to Employee's July 20, 2020 letter was hearsay and could not be relied upon because it was not a medical record, business record or other form of evidence to which a hearsay exception applied; and PA-C William's response was not reliable enough to form the basis for an SIME dispute because it contained "a large amount of undue framing, legal critique, and argument concerning legal standards" prompting PA-C Williams to answer the work was the substantial cause of the injury. (Opposition to Petition for SIME, October 5, 2020).

28) On July 29, 2021, Employee requested a hearing on his September 15, 2020 petition. (Affidavit of Readiness for Hearing, July 29, 2021).

29) On August 25, 2021, the board designee scheduled the October 19, 2021 hearing. The parties agreed on the issues for hearing and included Employee's request for an SIME, an extension of the AS 23.30.110(c) deadline and attorney's fees and costs. (Prehearing Conference Summary, August 25, 2021).

30) On October 10, 2021, David Grashin appeared on behalf of Employee. (Substitution of Counsel, October 10, 2021).

31) On October 12, 2021, Employee filed a brief contending *Dehut v. Alaska*, AWCB Decision No. 15-0115 (September 15, 2015) and *Gillion v. The Northwest International et al*, AWCAC Decision No. 253 (August 28, 2020) should be relied upon to award attorney fees and costs. (Employee's Hearing Brief, October 12, 2021).

32) On October 13, 2021, Employer filed a hearing brief that did not cite *Adamson v. University of Alaska*, 819 P.2d 886, 888 (Alaska 1991) and *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 170 (Alaska 1996). (Employer Hearing Brief, October 13, 2021).

33) On October 15, 2021, Employee's attorney filed an affidavit of attorney's fees and cost documenting 24.7 hours of work from July 28, 2021 through October 14, 2021 on Employee's September 15, 2020 petition for an SIME. He billed $360 per hour for a total of $8,892 (24.7 x 360) in attorney's fees and $47.80 in costs. (Affidavit of Attorney's fees and Cost, October 15, 2021).

34) On October 19, 2021, Employee provided PA-C Williams' active collaborative plan agreement license number 129312 which issued on December 28, 2017, became effective on December 11, 2018, and expires on December 31, 2022. It listed Robert Gibson as the supervising physician. (Submittal of Employee's Exhibit 7, October 19, 2021; Department of

Commerce, Community, and Economic Development, Corporations, Business & Professional Licenses, License Details).

35) At hearing on October 19, 2021, Employee testified PA-C Williams referred him to Dr. Becker. He could not remember if PA-C Williams provided paperwork, the referral could have been provided by a phone call. (Employee).

36) At hearing on October 19, 2021, Employer contended *Adamson* and *Carter* precluded an award of fees and costs. It relied upon *Albert Peacock v. Municipality of Anchorage*, 1995 WL 18703847 (Alaska 1995), *Eugene M. Foster v. TNT Painting & Contracting, Inc.*, AWCB Decision No. 04-0273 (November 18, 2004) and *George S. Stackhouse v. C.G.G. Veritas Services Holding, Inc.*, AWCB Decision No. 08-0178 (October 1, 2018) to contend Employee must provide evidence a PA's opinion was reviewed and adopted by a supervisory licensed medical doctor or doctor of osteopathy. Employer contended the language in AS 23.30.145(b) "medical and related benefits" is defined under AS 23.30.395(26) and does not include an SIME. (Employer arguments).

37) At hearing on October 19, 2021, Employee contended *Adamson* and *Carter* did not preclude an award of fees and costs because those cases involved collateral issues and the injured worker was not successful on the merits of claims. He contended an SIME is not a collateral issue. (Employee arguments).

38) At hearing on October 19, 2021, Employee requested the hearing record remain open to file a supplemental fee affidavit. (Employee).

39) The record remained open for Employee to file a supplemental fee affidavit and Employer to file a response. (Record).

40) On October 21, 2021, Employee's attorney filed an affidavit of attorney's fees and costs documenting 12.0 hours of work from October 15, 2021 through October 19, 2021 on Employee's September 15, 2020 petition for an SIME. He billed $360 per hour for a total of $4,320 (12 x $360) in attorney's fees. (Affidavit of Attorney's fees and Cost, October 15, 2021).

41) On October 22, 2021, Employer opposed Employee's attorney's fees and costs contending he is not entitled an award of fees for an interlocutory proceeding accruing only a "strategic benefit," to Employee. It contends *Adamson* and *Sulkosky* preclude an award of fees and costs. Employer had no additional objection to Employee's fee affidavits. (Employer Opposition to Attorney Fees, October 22, 2021).

42) On October 29, 2021, Employee responded to Employer's October 22, 2021 opposition, contending *Adamson* and *Sulkosky* do not support Employer's contention that he is not entitled to attorney fees and costs. He contended *Dehut*, *Gillion*, *Guerrissi v. State of Alaska*, AWCB Decision No. 18-0013 (March 16, 2020), *Stepanoff v. Bristol Bay*, AWCB Decision No. 09-0041 (February 26, 2009) and *Nelson v. State of Alaska*, AWCB Decision No. 21-0092 (September 27, 2021) should be relied upon instead to award attorney fees and costs. (Employee's Brief Response to Employer's Opposition to Attorney's Fees, October 29, 2021). Employee attached an affidavit of attorney's fees and costs documenting 3.2 hours of work from October 26, 2021 to the present to respond to Employer's October 22, 2021 opposition. He billed $360 per hour for a total of $1,152 (3.2 x $360) in attorney's fees and requested award of the additional fees. (Attorney's 2nd Supplemental Fees Affidavit, October 29, 2021).

43) On November 3, 2021, Employer opposed consideration of Employee's October 29, 2021 brief contending no new arguments were raised in Employer's opposition. It requested Employee's attorney fees and costs in his October 29, 2021 second supplemental fee affidavit be denied. Alternatively, Employer requested the opportunity to respond to Employee's October 29, 2021 brief. (Opposition to Employee's Additional Arguments and Fees, November 3, 2021).

44) There are 731 days in two years; and 684 days lapsed from September 13, 2019 through July 28, 2021. (Observation).

45) Employer did not request cross-examination of PA-C Williams. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter.
> . . . .
>
> (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.
> . . . .
>
> (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 [SIME] 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 23.30.110. Procedure on claims.** . . .

> (c) . . . . 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.
> . . . .
>
> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.
> . . . .

AS 23.30.110(c) requires an employee, once a claim has been filed and controverted by the employer, to prosecute the employee's claim in a timely manner. *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995). Generally, failure to request a hearing within this time limitation requires a claim be dismissed. *See generally, Bailey v. Texas Instruments, Inc.*, 111 P.3d 321 (Alaska 2005). AS 23.30.110(c) is similar to a statute of limitations in that such defenses are "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-913 (Alaska 1996); *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 198 (Alaska 2008).

Substantial compliance with AS 23.30.110(c) is sufficient to toll its time bar, and the board has discretion to extend the deadline for good cause, absent significant prejudice to the other party. *Kim* at 196. The board has power to excuse failure to file a timely request for hearing when the evidence supports application of equitable relief, such as when the parties are participating in the SIME process. *See, e.g., Kim*, 197 P.3d at 197; *Tonoian v. Pinkerton Sec*, AWCAC Decision No. 029 at 11 (January 30, 2007); *Snow v. Tyler Rental, Inc.*, AWCB Decision No. 11-0015 (February 16, 2011). However, in *Alaska Mechanical v. Harkness*, AWCAC Decision No. 176 (February 12, 2013), the Commission held a stipulation for an SIME was not enough; the parties must follow through on the stipulation to toll the running of the two-year time period. A claimant bears the burden of establishing with substantial evidence a legal excuse from the AS 23.30.110(c) statutory deadline. *Providence Health System v. Hessel*, AWCAC Decision No. 131 at 8 (March 24, 2010).

The board has generally held the SIME process tolls the AS 23.30.110(c) deadline for the period the parties are actively in the SIME process. In *Aune v. Eastwood, Inc.*, AWCB Decision No. 01-0259 (December 19, 2009), the board began tolling the two-year time period in AS 23.30.110(c) when the parties stipulated to an SIME and the board designee ordered an SIME in a prehearing conference, all of which occurred prior to the two-year time period in AS 23.30.110(c).

In *Turpin v. Alaska General Seafoods*, AWCB Decision No. 09-0054 (March 18, 2009), the board began tolling the two-year period when the *pro se* claimant filed a claim requesting an SIME. It noted the claimant believed she was participating in the SIME process by agreeing to sign releases and give a deposition. *Id*. at 22-23. Turpin also found the division did not adequately inform the claimant of the two-year period in light of her pending SIME request and the employer was not prejudiced by any action of the employee. *Id*.

McKitrick v. Municipality of Anchorage, AWCB Decision No. 10-0081 (May 4, 2010), tolled the AS 23.30.110(c) time period when the employer petitioned for and the board designee ordered the SIME in a prehearing conference. The AS 23.30.110(c) deadline was tolled until the SIME process was completed including any discovery or deposition requested from the SIME physician after the report. *McKitrick* noted it would be illogical to require the employee to file an ARH on his claims' merits while awaiting an SIME examination, report, deposition, or other discovery related to the SIME. *Id*. at 22.

Snow v. Tyler Rental Inc., AWCB Decision No. 11-0015 (February 16, 2011), held signing the SIME form, which occurred the same day the parties stipulated to an SIME at a prehearing conference, tolled the AS 23.30.110(c) time period until the SIME report was received. The signed SIME form gave notice the parties needed to request more time to prepare for hearing. *Id*. at 16.

In *Harkness*, the Commission refused to toll the AS 23.30.110(c) deadline when the "quantum of evidence" did not support the board's finding the parties had stipulated to an SIME. It noted

even if it had accepted the board's finding of a stipulation at a prehearing conference, the fact the parties never filed an SIME form or followed through with the SIME process demonstrated the parties were not actively in the SIME process and tolling was not appropriate. *Harkness* at 21-23.

In *Narcisse v. Trident Seafoods Corp.*, AWCAC Decision No. 242 (January 11, 2018), the SIME process began and ended prior to the AS 23.30.110(c) two-year deadline from the employer's after-claim controversion. *Narcisse* began tolling the AS 23.30.110(c) time period on the date of the prehearing conference when the parties further discussed the SIME and the employee's attorney promised to file SIME questions, medical binders, and an SIME form. It ended the tolled period on the date of the SIME examination and added that tolled time period to the original AS 23.30.110(c) deadline. *Id*. at 21. *Narcisse* noted the two-year time period is tolled when some action by the employee shows a need for additional time before requesting a hearing, and a request for an SIME is a demonstration that additional time is needed before a hearing is held. *Id*. at 22. If an SIME is completed prior to the expiration of the two-year deadline, an employee has only the remainder of the AS 23.30.110(c) time period to request a hearing. *Id*. (citation omitted).

The Commission also found the best demarcation for tolling the .110(c) deadline is when parties stipulate to an SIME at a prehearing conference and the stipulation is memorialized in the prehearing conference summary. *Roberge v. ASRC Construction Holding Company*, AWCAC Dec. No 269 (Sept. 24, 2019), at 17. The Commission found the AS 23.30.110(c) deadline should be tolled until the SIME report is completed and received. *Id*. at 18.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties . . . .
>
> **AS 23.30.145. Attorney fees.** . . .

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Adamson* a settlement was reached and read into the record about half-way through a hearing on the merits, but the employee later refused to sign the written settlement document. The employer's petition requesting the oral settlement terms be reduced to an order was denied, and instead the hearing picked up where it had left off, no additional evidence beyond that which the parties would have presented at the first hearing was permitted. The employee's claim was denied in its entirety, including an award of attorney's fees for the employee's "success" in obtaining an opportunity to finish the continued hearing. The Alaska Supreme Court held the language of AS 23.30.145(b) "makes it clear" that to be awarded attorney fees and costs, "the employee must be successful on the claim itself, not on a collateral issue. . . . The word 'proceedings' also indicates that the Board should look at who ultimately is successful on the claim, as opposed to who prevails at each proceeding." *Id.* at 895.

Citing *Adamson, Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184, 1193 (Alaska 1993) held the employee was not entitled to fees for his whole claim, because he lost on most issues; he was, however, entitled to full reasonable fees for those matters (TTD benefits, penalty and interest) on which he prevailed. Also citing *Adamson, Sulkosky* held an employee who partially prevailed on an interlocutory discovery dispute but lost on the merits of his case was not entitled to an attorney fees award.

Interlocutory decisions declining to award interim attorney fees related to the determination of attending physician status cited *Adamson*, *Childs* and *Cortay v. Silver Bay Logging,* 787 P.2d 103, 108 (Alaska 1990. Both *Brewster v. Davison & Davison,* AWCB Decision No. 95-0218 (August 24, 1995) and *Coffin v. Alaska Airlines,* AWCB Decision No. 95-0214 (August 21, 1995) stated:

> The question of who is the attending physician is a collateral issue which had to be resolved on the way to deciding the employee's ultimate claim of compensability. Consequently, we conclude under *Adamson* that a fee award must be denied at this time. Should the employee ultimately prevail on [her/his] claim, the attorney's time may be considered in determining a reasonable and fully compensatory fee award.

Though AS 23.30.145(b) states attorney fees will be awarded where "an employer ... otherwise resists ... related benefits," the statute does not limit the "related benefits" to those that benefit the employee. The Commission has awarded attorney fees on a dispute concerning an SIME petition. *Gillion*. Both Gillion and the employer had agreed an SIME was necessary, but did not agree on the SIME form. The dispute had to be resolved before the SIME could go forward. The Board eventually decided two separate forms were the equivalent of a single form, but incorrectly decided Gillion was not entitled to attorney fees as he did not prevail on getting his requested language included on the form. The Commission found Gillion did prevail when the Board ordered the SIME process to move forward, which could not have taken place without Gillion seeking a Board decision. Therefore it found Gillion should be awarded attorney fees for the work in obtaining the ordered SIME. *Id*. at 11.

The Board has awarded attorney fees in cases where an employer unsuccessfully resisted an SIME.
See, e.g., Stepanoff. Fees are also awarded when an employee is successful in requests for review of reemployment benefit eligibility cases because the preservation of reemployment benefits over the employer's resistance, is a benefit. *See Carroll v. City of Fort Yukon*, Dec. 12-0176 (October 8, 2012); and *Bruketta v. Encore Mechanical, Inc*., Dec. 19-0096 (September 23, 2019).

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
>
> . . . .
>
> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;

> . . . .
>
> (26) "medical and related benefits" includes but is not limited to physicians' fees, nurses' charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required which arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available;
>
> (32) "physician" includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists;
> . . . .

In *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007), the Court heard an injured worker's objection to her employer sending her to a psychologist for an EME. *Thoeni* stated:

> Alaska Statute 23.30.095(e) provides that "the employee shall . . . submit to an examination by a *physician or surgeon* . . . authorized to practice medicine under the laws of the jurisdiction in which the examination occurs." (Emphasis added). Thoeni argues that the plain language of this section indicates that only an M.D. may conduct an EIME. Plain language is only the starting point of the statutory inquiry, however. We interpret Alaska statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." (Footnote omitted). We have held that "unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage." (Footnote omitted).
>
> [Former] Alaska Statute 23.30.395(31) [now renumbered §395(32)] states that "'physician' includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists." Because the legislature chose to use the word "includes" rather than more exclusive terms, we interpret the definition as a nonexclusive list. (Footnote omitted). Accordingly, the term "physician" should be read to include psychologists such as Dr. Barth. This interpretation is consistent with the legislature's intent that "AS 23.30 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." (Footnote omitted). Mental health specialists such as psychologists are in the best position to ensure effective treatment of mental injuries such as those suffered by Thoeni. Her claim involves a mental injury, so it is reasonable that a doctor skilled in healing mental illness -- whether a Ph.D., Psy.D. or M.D. -- would be qualified to conduct the inquiry into her mental health. We have consistently credited the testimony of psychologists

> in worker's compensation cases and are of the firm belief that continuing to do so is the proper course. (Footnote omitted).

Carter v. Anchorage Daily News, AWCB Decision No. 13-0050 (May 10, 2013), found under *Thoeni* "attending physician" in AS 23.30.095(k) must be interpreted to include qualified medical experts other than those listed in AS 23.30.395(3) and Employee's audiologist's opinion was considered in determining a dispute between employee's physician and employer's EME physician. *Carter* reasoned even if an audiologist is not an "attending physician," another medical doctor agreed with the audiologist's letter diagnosing the employee with work-place-induced bilateral hearing loss. Thus Carter concluded there was a dispute between medical doctors concerning causation.

In *Peacock*, the Court affirmed the finding the injured worker failed to prove his claim by a preponderance of the evidence. It found "the Board was not required to concluded the PA's testimony outweighed [Employer's] evidence that the [work injury] did not cause [Employee's] cervical problems" because (1) the PA opinion assumed the injured worker developed neck pain immediately following the work injury when the injured worker testified it did not begin until the following year, (2) the PA did not review any medical records before arriving at his opinion and (3) the PA did not consult with any physicians in arriving at his opinion, although physician's assistants are required to work under supervising physicians.

Foster held the RBA-designee abused her discretion when she found the employee eligible for reemployment benefits because the supervising medical physician did not approve of the PA's opinion regarding the employee's permanent physical capacities.

In *Stackhouse*, the parties disputed the employee's entitlement to reemployment benefits. Initially, the reemployment benefit designee issued a letter stating she could not determine eligibility because a PA rather than a physician made predictions. The employee relied upon a PA opinion, which was reviewed by a medical physician at the same practice. Subsequently, the reemployment benefit administrator (RBA) designee found the employee eligible for reemployment benefits as she decided a PA could make the required predictions. The employer appealed and argued the RBA-designee abused her discretion by relying upon the PA opinion.

Relying upon *Thoeni*, *Stackhouse* found a physician assistant working under the supervision of a medical doctor is a physician for purposes of AS 23.30.041.

David Dunham v. All American Oilfield, LLC, AWCB Decision No. 20-0100 (November 3, 2020), held a physical therapist, with a Ph.D., cannot be relied upon to diagnose the cause of the employee's left hip problems to establish a dispute between his attending physician and the employer's physician when there was no corroborating opinion from a medical provider qualified as an attending physician under AS 23.30.395(3). *Dunham* distinguished the case from *Thoeni* and *Carter* after reviewing the Alaska statutory definition of physical therapist which specifically excluded diagnosis of disease, the Alaska statutory definition of psychologist which specifically included diagnosis of psychological problems and emotion and mental disorders and the statutory definition of the practice of audiology which did not specifically exclude the diagnosis of disease.

> **8 AAC 45.052. Medical summary.**
> . . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.
> . . . .
>
> > (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.
> > . . . .

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 45.060. Service.** . . .
>
> (b) . . . If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.
> . . . .
>
> **8 AAC 45.082. Medical Treatment.**
> . . . .
>
> (b) A physician may be changed as follows:
> . . . .
>
> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; 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;
> . . . .
>
> (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. . . .

8 AAC 45.090. Additional examination.

. . . .

(b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section.

. . . .

(g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section,

(1) the employer will pay the physician's fee, if any, for the missed examination; and

(2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds

(A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or

(B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

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

. . . .

(g) If there exists a medical dispute under AS 23.30.095(k),

. . . .

(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;

> (A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and
>
> (B) copies of the medical records reflecting the dispute; or
>
> (3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if
>
> (A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or
>
> (B) the board on its own motion determines an evaluation is necessary.
>
> (h) If the board requires an evaluation under AS 23.30.095(k), the board may direct
>
> (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. . . .
>
> (i) The report of the physician who is serving as a second independent medical examiner must be done not later than 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. The board will presume the evaluation ended after the injured worker was examined. If the evaluation ended at a later date, the physician must state in the report the date the evaluation was done. An examiner's report must be received by the board not later than 21 days after the evaluation ended. If an examiner's report is not timely received by the board, a party may file a petition asking that another physician be selected to serve as a second independent medical examiner. The board or its designee may, select another physician to serve as a second independent medical examiner, and will make the selection in accordance with this section. . . .

Tobar v. Remington Holdings, LP, 447 P.3d 747 (Alaska 2019) held the Act authorizes the board to order an SIME when requested under AS 23.30.095(k) and AS 23.30.110(g) and 8 AAC 45.092(g) allows it to order one on its own motion. *Tobar* cited with approval from the Commission's *Bah* decision, which said the board can order an SIME "when there is a significant gap in the medical or scientific evidence" and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue.

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).

> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. . . .

> **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 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. . . .

AS 08.64.170. License to practice medicine, podiatry, or osteopathy. (a) A person may not practice medicine, podiatry, or osteopathy in the state unless the person is licensed under this chapter, except that

> (1) a physician assistant may examine, diagnose, or treat persons under the supervision, control, and responsibility of either a physician licensed under this chapter or a physician exempted from licensing under AS 08.64.370;
> . . . .

12 AAC 40.410. Collaborative relationship and plan. (a) A licensed physician assistant may not practice without at least one collaborative relationship established under this chapter. The collaborative relationship must be documented by a collaborative plan on a form provided by the board and must include

> (1) the name, license number, and specialty, if any, for the primary supervising physician and at least one alternate collaborating physician;

12 AAC 40.430. Performance and assessment of practice. (a) A person may perform medical diagnosis and treatment as a physician assistant only if licensed by the board and only within the scope of practice of the collaborating physician.

(b) A periodic method of assessment of the quality of practice must be established by the collaborating physician. In this subsection, "periodic method of assessment" means evaluation of medical care and clinic management.

. . . .

(e) Assessments must include annual direct personal contact between the physician assistant and the primary or alternate collaborating physician, at either the physician or physician assistant's work site. The collaborating physician shall document the evaluation on a form provided by the department.

(f) Except as provided in (h) of this section, collaborative plans in effect for less than two years must include at least one direct personal contact visit with the primary or alternate collaborating physician per calendar quarter for at least four hours duration.

(g) Except as provided in (h) of this section, collaborative plans in effect for two years or more must include at least two direct personal contact visits with the

> primary or alternate collaborating physician per year. Each visit must be of at least four hours duration and must be at least four months apart.
>
> (h) Physician assistants who practice under a collaborative plan for a continuous period of less than three months of each year must have at least one direct personal contact visit with the primary or alternate collaborating physician annually.
>
> (i) Collaborative plans, regardless of duration, must include at least monthly telephone, radio, electronic, or direct personal contact between the physician assistant and the primary or alternate collaborating physician. Monthly contact must be documented.
>
> (j) Contacts, whether direct personal contact or contact by telephone, radio, or other electronic means, must include reviews of patient care and review of health care records.
>
> (k) The primary collaborating physician shall maintain records of performance assessments. The board may audit those records.
>
> (l) The primary collaborating physician shall maintain on file the completed records of assessment form for at least seven years after the date of the evaluation.
>
> (m) If an alternate collaborating physician performs the evaluation, copies of the record of assessment must be provided to the primary collaborating physician for retention in the primary collaborating physician's records.
>
> **AS 44.62.460. Evidence rules**. . . .
> . . . .
>
> (e) Unless a different standard of proof is stated in applicable law, the
>
> (1) petitioner has the burden of proof by a preponderance of the evidence. . . .

AS 44.62.460(e)(1) "applies to hearings before the Workers' Compensation Board." *DeNuptis v. UNOCAL Corp*., 63 P.3d 272, 276 (Alaska 2003). If an employer asserts an affirmative defense to a claim, it has the burden to prove its defense. *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501 (Alaska 1973). A reply to an affirmative defense, also known as an "avoidance," will "entitle the plaintiff to, in effect, prove an affirmative defense to an affirmative defense." *Reno, M.D. v. Adventist Health Systems/Sun Belt, Inc*., 516 So. 2d 63, 64 (Fla. App. 1987). An "avoidance" is "characterized as an affirmative defense." *University of Alaska v. Simpson Building Supply Co*., 530 P.2d

1317, 1323 (Alaska 1975). One bearing the burden of proof must induce a belief in the factfinders' minds "that the asserted facts are probably true." *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

ANALYSIS

1) Should Employee's second brief and second supplemental fee affidavit be considered?

Employer objected to Employee's October 29, 2021 brief and second supplemental fee affidavit but had no further objection to his fee and cost affidavits. Employee's second supplemental fee affidavit billed an additional 3.2 hours for time spent responding to Employer's October 22, 2021 response to his first supplemental fee affidavit. The record closed after receiving Employee's first supplemental fee affidavit and Employer's response. Legal memorandum filed after the hearing record close cannot be considered unless the panel reopens the record after finding the record incomplete. 8 AAC 45.120(m). The record was reopened to deliberate on whether Employee's October 29, 2021 brief and second supplemental fee affidavit should be considered. It was not reopened because the record was incomplete. Employer's October 22, 2021 response presented the same arguments it made at hearing. Employee was provided the opportunity to give legal argument, call witnesses and introduce exhibits at hearing on the issue. His October 29, 2021 brief provided the same arguments he made at hearing. Thus, the record was complete. Therefore, Employee's October 29, 2021 brief and second supplemental fee affidavit cannot be considered. *Id.*

2) Should an SIME be ordered?

If a significant medical dispute exists between Employee's attending physician and the EME physician and an SIME would assist to resolve the dispute, a party's SIME petition may be granted or one may be ordered on the board's own motion. AS 23.30.095(k); 8 AAC 45.092(g)(2); and (3)(B); *Bah*; *Smith*. In the absence of a medical dispute, an SIME may be ordered if there is a significant gap in the medical or scientific evidence or a lack of understanding of that evidence and independent medical examiner's opinion will assist to resolve the issues before it. AS 23.30.110(g); *Bah*.

Employer contends PA-C Williams' opinion cannot be relied upon to establish a dispute between Employee's attending physician and Employer's physician for several reasons. First, Employer contended PA-C Williams' is not a physician under the Act and relied upon *Dunham*. AS 23.30.395(3)(D), (32). However, the Alaska statutory definition of a PA specifically provides PAs the authority to "examine, diagnose, or treat persons under the supervision, control, and responsibility" of a physician licensed physician. AS 08.64.170(a)(1). Therefore, the Act includes a PA as a physician. AS 23.30.395(3)(D), (32); *Thoeni*; *Carter*; *Dunham*.

Second, Employer contends PA-C Williams' opinion cannot be relied upon to establish a dispute between Employee's attending physician and Employer's physician because Employee failed to provide a written statement or testimony proving PA-C Williams' opinion was reviewed and adopted by his supervisory physician. AS 23.30.395(3)(D) includes a licensed PA as an "attending physician" if "acting under supervision of a licensed medical doctor or doctor of osteopathy." Employer relied upon *Peacock*, *Foster* and *Stackhouse* to contend Employee must provide evidence PA's Williams' opinion was reviewed and adopted by his supervisory licensed physician. Employee contended PA-Williams is licensed by the Alaska State Medical Board, which regulates the supervision of PAs by licensed physicians, and Employer has provided no evidence PA-C Williams was not properly licensed or supervised.

The Act does not define "acting under supervision." However, the Alaska State Medical Board regulates PAs in Alaska and requires PAs practicing medicine to be "under the supervision, control, and responsibility" of at least one primary supervisory licensed physician under a collaborative relationship. AS 08.64.170(a)(1); 12 AAC 40.410. The Alaska State Medical Board requires the collaborative agreement to include at least monthly telephone, radio, electronic, or direct personal contact between the PA and the licensed physician and two days each quarter of direct and personal contact for reviewing the PA's performance, knowledge, skills, patient care and health records. 12 AAC 40.430. The Alaska State Medical Board does not require "adoption" of the PA's opinion, nor does AS 23.30.395(3)(D). AS 23.30.395(3)(D) simply requires the PA to be acting under supervision of a licensed medical doctor or doctor of osteopathy - it does not require written or testimonial evidence the supervisory physician

reviewed the record containing PAs opinion. To rely on PA-C Williams' opinion Employee is not required to provide written or testimonial evidence his supervisory physician reviewed and adopted his opinion.

Employer raised an affirmative defense inclusion of PA-C Williams' opinions regarding the substantial cause of the need for Employee's right knee medical treatment. AS 44.62.460(e)(1); *Gonzales*. Employee provided evidence PA-C Williams maintains an active licensed collaborative plan agreement and Dr. Gibson as his supervising physician. *Reno, M.D.* Employer failed to provide any evidence to the contrary. *Saxton*. PA-C Williams response to Employee's July 20, 2020 letter can be relied upon to establish a medical dispute between his attending physician and Employer's physician. AS 23.30.095(k).

Third, Employer contends PA-C Williams' opinion cannot be relied upon to establish a dispute between Employee's attending physician and Employer's physician because Employee excessively changed physicians when he obtained PA-C Williams' opinion. An employee is permitted to select an attending physician and designates one by obtaining an opinion. AS 23.30.095(a); 8 AAC 45.082(b)(2). An employee may get referrals from his attending physician to specialists; and the referrals do not count as changes of an employee's attending physician choice. AS 23.30.095(a).

PA-C Williams first treated Employee for his work injury and became his "attending physician." AS 23.30.395(3)(D); 8 AAC 45.082(b)(2). On March 8 and 12, 2019, PA-C Williams directed Employee to obtain "plain films" by a radiologist. Dr. Schneider, a radiologist took Employee's right knee x-rays on March 12, 2019. This was a valid referral to a specialist. AS 23.30.095(a); *Rogers & Babler*. On March 12, 2019, PA-C Williams also directed Employee to follow up with "orthopedics." On April 4, 2019, Dr. Becker, an orthopedic surgeon, began providing Employee treatment. This was also a valid referral to a specialist. *Id*. Therefore, Employee provided evidence he did not excessively change physicians when he sought PA-C Williams opinion on July 20, 2020. PA-C Williams' response to Employee's July 20, 2020 letter can be relied upon to establish a medical dispute between his attending physician and Employer's physician.

Finally, under the faulty assertion PA-C Williams is not an attending physician, Employer contends PA-C Williams' opinion cannot be relied upon to establish a dispute as it is hearsay and does not fit under a hearsay exception and was "too unreliable to support an SIME." Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. 8 AAC 45.120(e); *Dobos*. However, PA-C Williams opinion was provided in response to Employee's letter asking questions on disputed issues. This record lacks the trustworthiness normally associated with an ordinary medical record. Thus, it would be inadmissible as a business record under Alaska Rule of Evidence 803(6) unless the requisite foundation is established showing it is the physician's regular practice to prepare and send such letters. *Liimatta*. Employee filed and served PA-C Williams opinion on September 15, 2020, and filed and served an ARH on July 29, 2021. Employer had the right to cross-examine PA-C Williams but Employer did not file and serve a *Smallwood* objection. *Schoen*; 8 AAC 45.052(c)(2); 8 AAC 45.900(11).

"All medical records, including medical providers' depositions regarding the employee in the party's possession" except records obtained by unlawful changes in physicians are sent to the SIME physician. 8 AAC 45.082(c); 8 AAC 45.092(h)(1). *Wilson* held "medical records" under 8 AAC 45.092(h) include reports from physicians, prepared at the employer's direction under AS 23.30.095(e). It would be unfair not to include PA-C Williams' opinions prepared at Employee's direction as medical records while including Dr. Kirkham's EME reports and Dr. Becker's and PA-C Williams responses to Employer's January 22, 2020 letter which were prepared at Employer's direction. AS 23.30.001(1); (4). Therefore, PA-C Williams' opinion is a medical record which may be relied upon to establish an SIME dispute.

PA-C Williams' undated response to Employee's July 20, 2020 letter opined the work injury was the substantial cause of Employee's need for right knee medical treatment as the February 22, 2019 fall at home occurred "arguably second to ongoing knee pain/symptoms" from the work injury. His undated response to Employer's January 22, 2020 letter said, "I suspect he had some mild internal derangement of the [right] knee made worse by the fall at home." Dr. Kirkham opined the February 22, 2019 fall at home was the substantial cause of Employee's right knee medial meniscus tear and the tear is the substantial cause of Employee's need for treatment in the

August 27, 2019 addendum EME report. In other words, Dr. Kirkham opined the fall at home was an intervening non-work-related injury and was the substantial cause of Employee's need for medical treatment. Thus, a medical dispute exists on causation and compensability between Employee's attending physician and the EME physician. *Bah*.

Employee seeks disability and medical benefits, which are significant benefits if found compensable. The dispute between the physicians is significant because Employee's entitlement to disability and medical benefits depends on disputes regarding causation and compensability. An SIME with an orthopedist will assist in best ascertaining the parties' rights and to resolve the parties' disputes. *Bah*; AS 23.30.135(a); *Rogers & Babler*. An SIME with an orthopedist will be ordered.

3) Should the deadline to file a hearing request be extended?

Employee filed a claim on July 30, 2019, and Employer controverted Employee's claim on September 13 2019 and served the notice upon Employee by first-class mail on September 13, 2019. The deadline for Employee to request a hearing on his claim is Thursday, September 16, 2021 (September 13, 2019 + 2 years = Monday, September 13, 2021 + 3 days = Thursday, September 16, 2021). AS 23.30.110(c); 8 AAC 45.060(b). At the August 25, 2021 prehearing conference, the parties agreed on the issues for hearing and included Employee's request for an extension of the AS 23.30.110(c) deadline. While the October 19, 2021 hearing was scheduled on August 25, 2021, prior to Employee's deadline to request a hearing, this decision will issue after the deadline. It would be illogical to require Employee to file an ARH on the merits of his claims while awaiting a decision on his petition seeking an SIME. Additionally, this decision will order an SIME and the SIME process cannot occur prior to the deadline, nor could an SIME report be received prior to the deadline. Therefore, there is good cause to toll or extend the AS 23.30.110(c) two-year deadline. *Kim*; *Tipton*.

The board has generally held the SIME process tolls the AS 23.30.110(c) deadline for the period the parties are actively in the SIME process. *Aune*. Employee contended tolling should begin when he filed his petition seeking an SIME on September 15, 2020. Employer contended

Employee failed to pursue petition requesting an SIME for a long period without reason. Employee contends the COVID pandemic and Bulletin 20-02 prevented him from vigorously pursuing the SIME. However, he did not describe how or why the pandemic or Bulletin delayed a hearing on his SIME petition. Unlike *Turpin*, Employee has been represented by an attorney during his September 15, 2020 petition's pendency. Consequently, it is not reasonable to toll the deadline from the September 15, 2020 petition because the parties were not actively in the SIME process during the entire time. *Rogers & Babler*. Unlike *Snow*, *Harkness*, *Roberge*, and *Narcisse*, Employer opposed an SIME and the parties did not stipulate to an SIME so it does not make sense to toll at the August 25, 2021 prehearing conference. *McKitrick* tolled the two-year period in AS 23.30.110(c) when the employer petitioned for an SIME and the board designee ordered the SIME in a prehearing conference. This decision will order an SIME; however it will issue after the Thursday, September 16, 2021 deadline. As stated before, it is illogical to toll the two-year period after the deadline so an earlier reasonable date must be determined. Employee's attorney's affidavit of fees and costs documented time spent pursuing the September 15, 2020 petition for an SIME and he first documented work hours on July 28, 2021, the day before he requested a hearing on the petition. Therefore, it is reasonable to begin tolling the time period in AS 23.30.110(c) on July 28, 2021. *Kim*; *Rogers & Babler*.

The AS 23.30.110(c) time period should be tolled until the SIME report is completed and received. *Roberge*; 8 AAC 45.092(i). The specific date the SIME report will be completed and received is unknown at this time. However, an employee has only the remainder of the two-year period under AS 23.30.110(c) to request a hearing. *Narcisse*. There are 731 days in two years; and 684 days lapsed from September 13, 2019 through July 28, 2021. Employee has 50 days remaining of the two-year period under AS 23.30.110(c) (2 years = 731 days; 731 days – 684 days = 47 days + 3 days = 50 days). AS 23.30.110(c); 8 AAC 45.060(a). Therefore, he has 50 days after the SIME report is completed and received to request a hearing. *Narcisse*; *Rogers & Babler*. An order will issue extending the two-year period under AS 23.30.110(c) until 50 days after the SIME report is completed and served upon the parties to request a hearing.

4) Is Employee entitled to attorney's fees and costs?

Employee request attorney fees for time spent pursuing his September 15, 2020 petition seeking an SIME and associated costs. AS 23.30.145(b). An attorney fees award is permitted when an employee has successfully prosecuted a claim or obtained a benefit. *Id*. Employer contends Employee is not entitled to attorney fees and cost because an SIME is neither a medical and related benefit as defined under AS 23.30.396(26) nor compensation. It also contends *Adamson* and *Sulkosky* preclude an award of fees and costs. AS 23.30.396(26) states "medical and related benefits includes but is not limited to physicians' fees. . . ." An SIME involves physician's fees for medical records review and examination to obtain a medical opinion from a board physician and Employer is required to pay for the SIME cost. 8 AAC 45.090(b). This case is distinguished from *Adamson* and *Sulkosky* which both involved collateral issues requiring the employee to pay for costs relating to the preparation and presentation of those issues and an employee is only reimbursed costs and paid attorney fees for time spent on those issues if he prevailed at hearing on his claim. An employee cannot be ordered to pay for the SIME costs, even if he loses on claims's mertis unless he fails to attend the SIME without good cause. 8 AAC 45.090(b), (g). Furthermore, attorney fees in cases where an employer unsuccessfully resisted an SIME are routinely awarded. *Stepanoff*; *Gillion*. The SIME would not have gone forward in this case had Employee not filed a petition and sought an order as Employer strongly resisted an SIME. *Gillion*; *Carroll*; *Bruketta*; *Childs*. Therefore, Employee is entitled to attorney fees for time spent pursuing his September 15, 2020 petition seeking an SIME and associated costs because he was successful on his petition.

Employee's initial fee affidavit and first supplemental fee affidavits billed $13,212 in attorney fees ($4,320 + $8,892) and $47.80 in costs. An order awarding $13,212 in attorney fees and $47.80 in costs will issue.

CONCLUSIONS OF LAW

1) Employee's second brief and second supplemental fee affidavits should not be considered.
2) An SIME should be ordered.
3) The deadline to file a hearing request should be extended.
4) Employee is entitled to attorney fees and cost.

ORDER

1) Employee's September 15, 2020 petition is granted.
2) An SIME will be scheduled with an orthopedist.
3) The deadline under AS 23.30.110(c) is tolled on July 28, 2021, and extended for 50 days from the date the SIME report is completed and served upon the parties. Employee has 50 days after the SIME report is completed and served to request a hearing.
4) Employer shall pay $13,212 in attorney fees and $47.80 in costs.

Dated in Juneau, Alaska on November 22, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Christina Gilbert, Member

/s/
Bradley Austin, 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 Robert S. Nathan, employee/claimant v. State of Alaska, self-insured employer/defendant; Case No. 201903478; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on November 22, 2021.

/s/
Dani Byers, WC Officer II