ALASKA WORKERS' COMPENSATION BOARD

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

ROBERT S. NATHAN,	)	
	)	INTERLOCUTORY
Employee,	)	DECISION AND ORDER
Claimant,	)	ON RECONSIDERATION
	)	
v.	)	AWCB Case No. 201903478
	)	
STATE OF ALASKA,	)	AWCB Decision No. 21-0121
	)	
Self-Insured Employer,	)	Filed with AWCB Juneau, Alaska
Defendant	)	on December 22, 2021
	)	

State of Alaska's (Employer) December 6, 2021 petition for reconsideration was heard on the written record on December 21, 2021, a date selected on December 16, 2021. Attorney Henry Tashjian appeared and represented Employer. Attorney David Grashin appeared and represented Robert S. Nathan (Employee). The record closed on December 21, 2021.

ISSUE

Employer requests reconsideration of *Robert S. Nathan v. State of Alaska*, AWCB Decision No. 21-0108 (November 22, 2021) (*Nathan I*). It contends *Nathan I* legally erred when it held PA-C Cody Williams' undated response to Employee's July 20, 2020 letter was a medical record. Employer contends the response is hearsay and cannot be considered. It contends it is irrelevant for hearsay purposes that Employer failed to request cross-examination of PA-C Williams. Employer contends *Nathan I* erred when it awarded Employee attorney fees for time spent pursuing his September 15, 2020 petition seeking a second independent medical evaluation (SIME) and associated costs. It requests an order granting its petition.

Employee's position is unknown; it is assumed he opposes the request for reconsideration.

Should *Nathan I* be reconsidered?

FINDINGS OF FACT

All factual findings and conclusions from *Nathan I* are incorporated here by reference. A preponderance of the evidences establishes the following facts and factual conclusions:

1) On August 27, 2019, Jared Kirkham, M.D., reviewed medical records dated February 1, 15, and 22, March 8 and 12, 2019. 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, Employee's 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. (*Nathan I*).

2) 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 cause he believed to be "the substantial cause" of Employee's need for treatment or disability and to explain his conclusion. 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).

3) On January 22, 2020, Employer's attorney mailed a letter to Steven Becker, M.D., with similar questions along with Dr. Kirkham's EME reports and Dr. Becker responded. (*Id*.).

4) 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 Becker, 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." (*Id*.)

5) 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. (*Id*.).

6) On October 5, 2020, Employer opposed Employee's petition for an SIME, contending among things, 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. (*Id*.).

7) On November 22, 2021, *Nathan I* granted Employee's September 15, 2020 petition for an SIME. It held PA-C Williams' undated response to Employee's July 20, 2020 letter was a medical record and could be relied upon to establish a medical dispute between his attending physician and Employer's physician. *Nathan I* concluded 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. It ordered the following:

a) An SIME will be scheduled with an orthopedist.

b) 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.

c) Employer shall pay $13,212 in attorney fees and $47.80 in costs. (*Id*.).

8) On December 6, 2021, Employer requested reconsideration of *Nathan I*. (Petition, December 6, 2021).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of this 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…
> ….
>
> (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 44.62.540. Reconsideration.** (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.
>
> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence

"The appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a)." *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). A petition for reconsideration has a 15-day time limit for the request, and power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied." *Id.* at 743 n. 36. The Board must give due consideration to any argument or evidence presented with a petition for reconsideration, but is not required to give conclusive weight to new evidence and has power to consider the new evidence against the backdrop of evidence presented at prior hearings. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 957 (July 30, 1982).

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).

In *Geister v. Kid's Corps, Inc.*, AWCAC Decision No. 45 (June 6, 2007), Geister challenged the exclusion of Dr. Dramov's opinions and the denial of her SIME request. Dr. Dramov's opinions were excluded as hearsay because Geister did not provide the employer an opportunity to cross-examine Dr. Dramov. The Commission concluded:

> While the Court's decisions in *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000), and *Loncar v. Gray*, 28 P.3d 928 (Alaska 2001), hold "medical records kept by hospitals and doctors" are business records [a hearsay exception], this holding is qualified by *Liimatta v. Vest*, 45 P.2d 310 (Alaska 2002), and *Municipality of Anchorage v. Devon*, 124 P.3d 424 (Alaska 2005); letters written by a physician to a party or party representative to express an expert medical opinion on an issue before the tribunal are not admissible as business records unless the requisite foundation is established. The letters were written to the patient's attorney and to the workers' compensation insurer to express opinions on the core issue before the board. We conclude the board did not abuse its discretion in excluding Dr. Dramov's letters. *Id.* at 16-17 (full citations to cases added).

The Commission remanded the SIME denial noting Dr. Dramov's opinions should have been considered in determining if a significant medical dispute existed. It further noted Dr. Dramov's opinions were not hearsay because they were not offered to persuade the board "of the truth of their substance; the opinions are offered solely to establish a difference of medical or scientific expert opinion exists." *Id.* at 9.

ANALYSIS

Should *Nathan I* be reconsidered?

Employer contends it is irrelevant that it did not request cross-examination of PA-C Williams. Employer's contention is correct; however, that does not provide a basis to exclude PA-C Williams' responses from consideration to determine if a medical dispute exists. *Geister*. Medical opinions fall squarely within the business records exception to the hearsay rule. *Dobos.* Either it is within PA-C Williams' regular practice to express an expert medical opinion on an issue before a tribunal upon a legal representative's request and his response to Employee's letter is not hearsay or it is not, and it is hearsay. *Liimatta*. If is not his regular practice to do so, PA-C Williams' responses to Employer's attorney's letter should also be excluded as hearsay. Employer's failure to request cross-examination deprived Employee of the opportunity to question PA-C Williams about whether it is in his regular practice to respond to such letters, as Employer is clearly contending it is not. As *Nathan I* concluded, it would be unfair not to include PA-C Williams' opinion prepared at Employee's direction as a medical record while including PA-C Williams' responses to Employer's January 22, 2020 letter, which were prepared at Employer's direction. AS 23.30.001(1); (4); *Rogers & Babler*. Therefore, PA-C Williams' response to Employee's attorney's letter was a medical record and could be relied upon to establish a medical dispute between his attending physician and Employer's physician.

Additionally, when determining if a significant medical dispute exists to order an SIME, a determination regarding which of two competing opinions is more persuasive is not made; only evidence of a medical dispute is considered, not the substance and truth of either opinion. *Geister*. When an opinion letter is not offered to persuade that the opinion's substance is true, but solely to establish a medical dispute, opinion letters should be considered. *Id.* Therefore, PA-C Williams' response to Employee's attorney's letter is relevant and can be considered to determine whether there is a dispute between his attending physician and Employer's physician. No legal error occurred and Employer's petition will be denied. *Easley*.

The record shows *Nathan I* applied established law, persuasive argument and precedent in finding Employee is entitled to attorney fees for time spent pursuing his September 15, 2020 petition seeking an SIME and associated costs. *Nathan I* properly ordered Employer to pay Employee's attorney fees and costs. Employer's December 6, 2021 petition presented no new

argument or evidence warranting reconsideration. *Whaley*. Therefore, no legal error occurred and Employer's petition will be denied. *Easley*.

CONCLUSION OF LAW

Nathan I should not be considered.

ORDER

1) Employer's December 6, 2021 petition is denied.

Dated in Juneau, Alaska on December 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 on Reconsideration 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 December 22, 2021.

/s/
Dani Byers, WC Officer II