ALASKA WORKERS' COMPENSATION BOARD

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

BRIAN FOUTS, Employee, Claimant, v. ARCTIC SLOPE REGIONAL CORP., Employer and Insurer, Defendant.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201903390 AWCB Decision No. 22-0010 Filed with AWCB Fairbanks, Alaska on February 7, 2022

Employee's June 4, June 23, and November 4, 2021 Petitions for Protective Order were heard on October 7 and December 2, 2021 in Fairbanks, Alaska, dates selected on July 14 and November 18, 2021. A stipulated request at prehearing gave rise to this hearing. Attorney Patricia Huna appeared and represented Brian Fouts (Employee). Attorney Timothy McKeever appeared and represented Arctic Slope Regional Corp. (Employer). Employee testified. The record closed at the hearing's conclusion on December 2, 2021.

ISSUES

Employee contends that portions or the entirety of reports from employer medical evaluator (EME) R. David Bauer, M.D. from June 2, 2020 forward should be stricken; he asserts the reports contain information unrelated to his work injury, benefits claimed, or medical disputes listed on the SIME form. Employee additionally contends the reports are hearsay, prejudicial, contain sensitive information, and should be excluded from the record.

Employer contends there is no provision under the Act to support striking an EME physician's report, either in whole or in part. Even if there were, Employer contends the reports are relevant, Employee did not timely object to Bauer's reports or request cross-examination when served on medical summaries, and the June 2, 2020 report was relied upon by Employee in his petitions for an SIME and the SIME form, stipulated to and signed by both parties.

1) **Will Dr. Bauer's EME reports be stricken in whole or in part?**

Employee contends that Dr. Bauer inappropriately relied on irrelevant records, was biased, and as Employer's paid expert would attribute any pain complaint to prior trauma.

Employer contends Dr. Bauer provided multiple opinions, and Employee's petition, if granted, would effectively prevent Dr. Bauer from offering any evidence and thus deny Employer its statutory right to an EME. It additionally contends Employee has provided no evidence to support the contention that Dr. Bauer always attributes pain complaints to prior trauma.

2) **Will Dr. Bauer be prevented from testifying or providing future opinions?**

Employee contends an EME report from Lee Doppelt, Ph.D. is not related to his work injury. He contends medical records regarding psychological evaluation are not related to Employee's claimed medical conditions and all references to them should be stricken.

Employer contends Dr. Doppelt's report is related to the work injury, being the result of an EME discussing Employee's medical history, work-related complaints, and treatment. It further contends Employee has waived his right to object to Dr. Doppelt's report by filing it, and by failing to object to it or seek cross-examination in a timely manner. Employer contends Dr. Doppelt's report should not be stricken from the record.

3) **Will Dr. Doppelt's report be stricken from the record?**

Employee objected to the procedural process leading to the hearing, and contended Division correspondence stating his petitions for protective orders would be heard at a prehearing conference restricted his right to due process by requiring him to hire a court reporter to record his

prehearing conference "testimony." He later contended the designee's determination at prehearing that a full board hearing should occur provided Employer with an unfair advantage.

Employer did not brief or argue procedural process issues. This decision presumes it is in opposition to Employee's contention.

4) Was the procedural process used to address Employee's petitions correct?

FINDINGS OF FACT

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

1) On October 14, 2009, Employee was evaluated by Michael Gevaert, M.D. regarding an occupational injury. Chart notes included he had

> . . . significant and debilitating pain four months after the occupational injury. His pain is not responding to extensive physical therapy, chiropractic treatment, pain management, and two epidural steroid injections followed by a facet injection. . . . I am a little bit at a loss in terms of what I can offer [and] . . . am requesting a second opinion . . . .

(Gevaert record, October 14, 2009). On November 11, 2009, Dr. Gevaert noted Employee's pain was not responding to appropriate intervention. Findings included

> . . . [f]actors in his psychosocial environment (such as high levels of support or secondary gain) offset the emotional distress that might otherwise be expected and may reinforce symptomatic complaints. Psychological treatment for somatic preoccupation and any exaggerated perception of disability should be considered. [Employee] exhibits high somatic complaints, extremely high functional complaints and moderately high anxiety. . . . I recommend an evaluation . . . .

Employee's objective neurologic examination and imaging did not correlate with subjective complaints of debilitating pain leading to sudden weakness and frequent falls. Symptom magnification was suspected. Referral to a pain center out of state was not recommended. Testing was scheduled to "identify cognitive and emotional trends" with a recommendation to consider "referral to Dr. Michael Rose, an experienced psychologist with special interest in chronic pain management." (Gevaert records, November 11, 2009).

2) On December 17, 2009, Employee underwent a pain management evaluation with Hassan Ali Moinzadeh, M.D., Ph.D. The evaluation was "extraordinarily unusually medically complex" and included medical review, face-to-face time with Employee, and discussion with the nurse case

manager. Impression included chronic pain syndrome; a multi-disciplinary, in-patient program was recommended. "Psychological overlay on top of his chronic pain syndrome maybe (sic) adversely affecting his pain perception, but will hopefully be addressed in the course of the multi-disciplinary approach . . . ." (Moinzadeh evaluation, December 17, 2009). Pain interpretive report results suggested a severe somatization disorder. Employee's treatment plan included increasing his "knowledge and awareness of the psychological, emotional, and behavioral consequences on chronic pain." (Rehab Practice Management record, December 18, 2009).

3) On February 10, 2010, Employee's permanent partial impairment (PPI) rating report referenced a November 11, 2009 evaluation where "significant discrepancy" was noted between Employee's clinical presentation and benign magnetic resonance imaging (MRI) and electromyography (EMG) findings. "Clinical examination was significant for altered pain perception and symptom magnification, which is not the same as malingering." Employee had been "referred to Long Beach Pain Center for an inpatient evaluation and treatment," was discharged, "but remained with significant functional limitations not completely explained by objective diagnostic data." "He presents with psychological . . . issues as documented at the pain center in Long Beach, which in my opinion are not work-related." (Gevaert PPI report, February 24, 2010).

4) On or about February 27, 2019, Employee contends he had a work injury while working for Employer. (First Report of Injury, March 12, 2019).

5) On July 15, 2019, Employee was seen for a post-operative evaluation by Trucker Drury, M.D. He was 13 weeks post-surgical repair of a ruptured tendon which had healed uneventfully. Employee reported continued, worsening, persistent nerve-like pain. He had seen Dr. McNally, a chronic pain specialist, who felt he needed a neurosurgical referral to Louis Kralick, M.D. (Drury record, July 15, 2019).

6) Employee underwent an EME by Dr. Bauer, an orthopedic surgeon, on multiple occasions. (Agency file). Initial EME reports opined the work injury was the cause of Employee's disability and need for treatment, although Employee had "exaggerated symptoms and findings greater than one would expect" based on the injuries. (Bauer EME report, August 8, 2019).

7) On September 16, 2019, Employee underwent a C5-7 discectomy and fusion with Dr. Kralick of Anchorage Neurosurgical Associates. (Operative Report, September 16, 2019).

8) On October 14, 2019, EME examinations were confirmed for Employee with Gary Olbrich, M.D. (addiction medicine), Dr. Doppelt (neuropsychologist), and Dr. Bauer. (OMAC scheduling

email, October 14, 2019). No petition for protective order was filed by Employee relating to these exams. (Agency file).

9) On October 29, 2019, Employee was evaluated by Jessica Johnson, ANP regarding ongoing pain complaints. History taken included "[s]evere pain in the cervical region post discectomy and fusion . . . [h]ands [and] feet bilaterally are 'burning, muscles spasms and freaking out.'" Employee had stopped narcotics and muscle relaxants. (Johnson record, October 29, 2019).

10) On October 31, 2019, Employee underwent an EME with Dr. Olbrich, who reviewed medical records beginning on October 22, 2013, met individually with Employee, and conducted pain management and addictive disease evaluations. Dr. Olbrich opined there was no significant objective evidence to diagnose "Complex Regional Pain Syndrome, type 1 of RUE." Impressions included "[a]pparent exaggeration of reported severity of pain symptoms, probably secondary to psychosocial issues that are currently undetermined." Dr. Olbrich opined the work injury or the surgeries and other treatments for it had damaged Employee's nervous system. Treatment recommendations included participation in a "top rate residential multispecialty rehabilitation program for at least 4 weeks" which should provide medications and other pain management modalities to address neurogenic pain. "He will need a thorough psychiatric evaluation to determine the role his past psychological development and current psychological trauma plays in his unrelenting perception of severe pain and/or disability." Dr. Olbrich opined "psychosocial factors play a very large role in the reports of the intensity of his pain and his alleged disability." (Olbrich EME report, October 31, 2019).

11) On November 5, 2019, Employee was examined by ANP Johnson to discuss increased pain. He stated he had what felt like "ice picks in his eyes . . . his arms [were] electric and sharp . . . these pulse and shock, he also note[d] numbness in his legs and toes." Pain level was stated to be 9 out of 10 at the time of the exam, with an average pain level of 7+ out of 10. Employee was compliant with his pain contract. He had tried a number of medications that were ineffective, including antiepileptics, muscle relaxers, and opioids. Heat and ice helped. Employee was prescribed Oxycodone, Baclofen, and Lamictal. (Johnson record, November 5, 2019).

12) On November 14, 2019, Employer controverted specific benefits (specified medications) based on Dr. Olbrich's EME report. (Controversion Notice, November 14, 2019).

13) On December 3, 2019, Employee underwent a psychological EME with Dr. Doppelt. The first page of Dr. Doppelt's report indicated he was a licensed psychologist, with "Medical and

Consulting Psychology" and "Clinical Neuropsychology" noted. The examination was "for evaluation only, not for care, treatment or consultation and, therefore, no doctor/patient relationship is created, exists, or would result from this evaluation." Dr. Doppelt reviewed a variety of medical records beginning in October 2013 and summarized them in his report. Employee's treatment for the work injury was discussed, including pain management. Some of Employee's prior medical history and diagnoses in his records were noted by Dr. Doppelt as not reported by Employee during the evaluation. Employee's education, life, work history and mental health history were discussed. Employee revealed he had been subjected to traumatic events while a minor and a summary of these events was included in Dr. Doppelt's report. Dr. Doppelt opined Employee was "open, honest, and forthcoming" during the evaluation and did not find suggestion of under- or over-reporting symptoms. He conducted a variety of screening tests and noted Employee "reported multiple somatic complaints including head pain and a number of vague neurological complaints. Individuals with similar profiles are often preoccupied with physical health concerns and tend to be prone to developing physical symptoms in response to stress." Dr. Doppelt found an "extremely high level of somatization," provided a diagnosis, and noted Employee had some pre-existing personality traits contributing to his presentation. He was unable to comment on whether Employee's prior severe TBI was causing any residual cognitive symptoms as he had not conducted a neuropsychological evaluation. Dr. Doppelt opined the mechanism of the work injury was not the major causal factor but rather it was Employee's perception that the treatments have made him worse; he was not adjusting to the possibility that he might not fully recover, which created some anxiety, though not at a clinical level to qualify for its own diagnosis. Except for the high somatization score, Dr. Doppelt found there was no evidence of symptom magnification or secondary gain, and found Employee medically stationary from a psychological viewpoint. (Doppelt report, December 3, 2019).

14) On January 23, 2020, Employee was assessed by Erik Kussro, D.O. Employee's right upper limb electrodiagnostic study was normal. Dr. Kussro noted two concerns, a possible rotator cuff disorder and "limb hypersensitivity and apparent allodynia raise concern for the possibility of a complex regional pain syndrome . . . ." (CRPS). Employee's left lower limb electrodiagnostic study was normal; Dr. Kussro was unsure of the etiology of Employee's left leg symptoms. Employee was referred for a right shoulder MRI without contrast and a three-phase bone scan to

evaluate for reflex sympathetic dystrophy (RSD) "RSD/CRPS" of the right upper limb. (Kussro assessment, January 23, 2020).

15) On January 30, 2020, Employee's right shoulder MRI revealed mild osteoarthritis, severe tendinopathy and "1 cm full-thickness tear of the . . . tendon insertion with severe . . . degeneration of the remainder of the . . . tendons, a complex superior labral tear, and moderate shoulder joint effusion." (Reed MRI report, January 30, 2020).

16) On February 13, 2020, Employee was examined by Gregory Schumacher, M.D. Employee's arm was noted to randomly "jerk or twitch as if presenting with some sort of tic . . . ." After considering Employee's "situation, his presentation, his mood and demeanor and his thoughts on the matter during the visit," Dr. Schumacher was "almost certain that surgical treatment . . . would lead to complications and potentially more misery . . . he has a lot more work to do to settle down the remainder of the symptoms before . . . treating this shoulder surgically." Physical therapy, behavior modification, and over-the-counter medications were recommended. (Schumacher record, February 13, 2020).

17) On February 18, 2020, Employee underwent a brain MRI without contrast. Results were a stable brain MRI with focal encephalomalacia consistent with prior trauma, and no significant change in "scattered cerebral white matter hyperintensities also consistent with sequela of remote brain insult such as prior trauma, old ischemic changes, or early microangiopathy." (Winn MRI report, February 18, 2020).

18) On February 18, 2020, Employee was hospitalized for a pain crisis. He had been sent to the emergency room from radiology. Extreme sensitivity to touch was noted. An organic etiology for Employee's pain could not be identified. Employee reported pain over his chest, ribs, and abdomen like he had been beaten; shooting pain in his upper extremities exacerbated by movement of arms or hands; bilateral lower extremity pain exacerbated by "any form of intentional movement." Examination showed no pain on muscle palpation, no pain on examiner's moving of legs, no arm pain until full extension when Employee pulled away and "started to jerk his arms as though he was having spasms . . . ." Anesthesia "felt [Employee's] symptoms were consistent with succinylcholine and they should wear off over the coming days . . . ." Susan Dillon, M.D. "[d]iscussed psych likely contributing to overall severity of pain/issues." (Providence Alaska Medical Center records, February 18-21, 2020).

19) On February 24, 2020, Employee followed up with Dr. Dillon following an allergic reaction to anesthesia. "He states it was an adverse reaction not an allergic reaction, this is what he believes caused his extreme pain reaction . . . [h]e states this is workmans comp." Employee stated he "has a labrum tear . . . as well as a tendon tear . . . [and] the surgeon states he needs surgery but . . . the twitching will undo it. He has been given a referral through Magellan to speak with a mental health provider but has not set that up yet." (Dillon record, February 24, 2020).

20) On February 26, 2020, Sophia Walsh PA-C of Anchorage Neurosurgical Associates provided a referral for a neuropsychological evaluation to "evaluate for conversion disorder." (Walsh referral, February 26, 2020).

21) On March 19, 2020, Kacie Tempel PA-C of Anchorage Neurosurgical Associates noted Employee's recovery had been complicated by debilitating neck pain and neurological complaints including stroke-like symptoms which had been "thoroughly worked up without significant abnormalities." Employee might need rotator cuff surgery and was "awaiting a neuropsychiatric evaluation to rule out underlying factors that may be contributing to his symptoms." He reported neck pain, shocking sensations and muscle spasms in his right arm, and a band-like headache. Employee noted he was "unable to perform water therapy due to the pain associated with the water against his skin." PA-C Tempel thought "the neuropsychiatric evaluation [wa]s necessary to evaluate for any underling (sic) depression or conversion disorder that is exacerbating his symptoms." (Tempel record, March 19, 2020).

22) On March 26, 2020, Employee was evaluated at Mat-Su Health services regarding medication refills and left ankle swelling. Employee's health questionnaire indicated severe depression; a severe generalized anxiety disorder was noted. (Schranz record, March 26, 2020).

23) On March 27, 2020, Employee was evaluated at Alaska Neurology Center by Lorn Scott Miller, M.D.. The exam was limited due to severe right shoulder pain. Diagnoses included: chronic right shoulder pain, post-traumatic right shoulder osteoarthritis, right shoulder tendinopathy, labral tear of right shoulder, CRPS type 1 affecting right shoulder, muscle tightness, cervical radiculopathy, dysarthria, dysphagia, multiple hemosiderin deposits in brain, history of traumatic head injury, and low blink rate. Employee was concerned he had possibly suffered a stroke during neck fusion surgery in September 2019. The MRI did not reveal "any evidence of a major stroke, but there is (sic) hemosiderin deposits to suggest a prior head injury (most recent was 4/31/01). [He] is advised that he is going to have progressive cognitive decline and worsening

speech as a result of his prior brain injuries and ongoing aging." Employee had "multiple orthopedic issues in the right shoulder . . . that may mimic neuropathic pain. It has been well documented that myogenic and sclerogenic pain mimics radiculopathy. He needs to rehabilitate the right shoulder before surgery or it will become worse." "After his shoulder improves in range of motion and rehabilitation, I will see the patient back for a more comprehensive neurologic exam to determine his neurological status and plan strategies for improvement and or management." (Miller record, March 27, 2020).

24) On April 1, 2020, Employee had a telemedicine appointment with John Hinman, M.D. in follow up for a stellate ganglion block on March 24, 2020, that provided zero pain reduction. Current medications included Trazodone, Celecoxib, Diazepam, Duloxetine, Diclofenac (topical), Baclofen, Gabapentin, Cymbalta, Oxycodone, and Celebrex. Diagnoses included postoperative pain from spinal surgery and right shoulder pain. A possible future brachial plexus block was recommended, and referral to James Alex, M.D. was provided regarding right shoulder pain and possible tears. Employee was considering stem cell regenerative therapy. (Hinman record, April 1, 2020).

25) On April 16, 2020, Employer controverted specific benefits related to a hypopharyngeal lesion. (Controversion Notice, April 15, 2020).

26) On April 20, 2020, Employee presented to Greg Wilkinson, PA-C with chronic neck pain, asserting "his medications are making him be in more pain" and he would like to get off of his medications. Oxycodone was listed as currently effective. Chart notes indicated "[i]t is believed that patient may have hyperalgesia. He has requested to decrease his medications." (Wilkinson record, April 20, 2020).

27) On May 1, 2020, Employee was examined by Luke Liu, M.D. on referral from PA-C Tempel for a second opinion regarding right upper extremity pain. Dr. Liu diagnosed cervical radiculitis, neck pain, CRPS type 1 of right upper extremity, pain in right arm, cervicogenic headache, and failed back surgical syndrome. (Liu record, May 1, 2020).

28) On May 5, 2020, Employee underwent a telehealth encounter with PA-C Tempel. He reported "doing 'way better' since his last visit. . . . He reports waking up one morning with these improvement[s] because Jesus fixed his problems. He had visions that he needed to stop living in pain and move on with his life . . . ." Employee was reported to have had a neuropsychiatric

evaluation years ago but had not received a new one due to COVID. (Tempel record, May 5, 2020).

29) On May 14, 2020, Employee presented to Mat-Su Health Services for a physical exam. History included Employee was "[n]o longer needing his cane and has FROM of his arm. He was healed after visions of giving the issue to God. He is in the process of getting off all of his pain meds." (Dillon record, May 14, 2020).

30) On May 15, 2020, physical therapy records indicated Employee "stated they have psychological testing scheduled in the near future for their workers comp." (Gunderson record, May 20, 2020).

31) On June 2, 2020, Employee underwent an EME with Dr. Bauer, who reviewed and summarized Employee's medical records and imaging. Records summarized by Dr. Bauer included records relating to chronic pain treatment, Dr. Olbrich's EME, which recommended a multidisciplinary treatment plan, and an EME report by Dr. Doppelt identified as a "neuropsychology" evaluation. Dr. Bauer's summary of the Dr. Doppelt's report included details of childhood trauma. Historic records reviewed and summarized included a January 21, 2008 record from Michael Senta, M.D. indicating a "very large supratentorial effect to his discomfort." Other historic records were summarized by Dr. Bauer to have included chronic pain, symptoms that did not respond to "extensive" therapy, no objective finding on examination, and "objective neurologic examination and imaging do not correlate well with the examinee's subjective complaints and debilitation . . . pain . . . [and] [b]ecause of the discrepancy," symptom magnification was suspected, which could be explained by expectations, cultural differences, prior experiences, and secondary gain. A 2009 psychological evaluation by Michael Rose, Ph.D. was reviewed, also including details of childhood trauma; pain and other disorders were noted to have been diagnosed. A 2011 neuropsychological evaluation by Paul Craig, Ph.D. was summarized, which noted a personality change due to prior severe traumatic brain injury (TBI). Employee's current complaints were listed as still having pain in the same areas as the last EME, though the shocks of pain were not as severe. It was noted Employee had undergone surgical biceps repair and cervical surgery under this claim. Dr. Bauer's report regarding the orthopedic examination included in part:

> [Employee] is very pleasant, and appears to be in no acute distress. He is very jovial, and laughs several times during the examination. His demeanor is not consistent with severe pain.
>
> [He] ambulates normally . . . there is no limping listing, ataxia, or spasticity.
>
> Cervical range of motion is tested with the examinee sitting. . . . Placing my hand on the top of his head increased his neck and right arm pain, a nonphysiologic finding.
>
> Objectively, there was no spasm, the muscles were soft and supple and there was no evidence of rigidity. There was severe withdrawal and tenderness about the right arm. Even very light touch caused flinching and withdrawal. There are, however, no temperature or trophic changes, no atrophy, and no signs of complex regional pain syndrome.
>
> . . . .

Dr. Bauer's diagnoses included "[a]dverse childhood events, which significantly color his pain perception, reported injury, and unrelated to this claim" and "[s]ymptom exaggeration." Recommendations and discussion noted Employee

> is a gentleman with a long and complicated history. The medical records received for this evaluation are much more complete . . . and this extended review has disclosed important facts that were not available . . . [h]e has a history of adverse childhood experiences . . . . These . . . experiences are very important, as they certainly predict failure of response to treatment and ongoing chronic pain. The medical records also indicate multiple episodes where [Employee] has had subjective pain complaints that could not be explained on an objective basis . . . . Had this history been known . . . prior to the initial [EME], I would have suspected the adverse childhood experiences or other psychodynamic cause of his ongoing pain and would have been very hesitant at recommending further treatment at that time. At the current time the medical records <u>do not</u> indicate a clear etiology for his ongoing pain. . . .

(Bauer report, June 2, 2020) (emphasis in original).

32) None of the 2008 Senta, 2009 Rose, or 2011 Craig reports summarized in the Bauer report were filed on medical summary. (Agency file).

33) On June 9, 2020, Employer controverted specific benefits including left upper extremity, low back, right shoulder treatment and related benefits, CRPS, and reemployment benefits, based on the June 2, 2020 EME opinion of Dr. Bauer. (Controversion Notice, June 9, 2020).

34) On June 18, 2020, PA-C Tempel evaluated Employee and noted "The working diagnosis . . . is CRPS and he . . . may need surgery, and is awaiting a neuropsychiatric evaluation to rule out underlying factors that may be contributing to his symptoms." Medical history included "his recovery has been complicated by debilitating . . . pain with radiation . . . with shocking sensations . . . [and] reduced strength due to pain. He has other neurologic complaints . . . which have been worked up without significant abnormalities." (Kempel record, June 18, 2020).

35) On June 25, 2020, Dr. Bauer issued an addendum to his June 2, 2020 report. "In [his] medical opinion, there [was] no objective pathology that remain[ed] . . . that would explain his ongoing subjective pain complaint. His examination on June 2, 2020 was markedly nonphysiologic . . . [t]he objective examination is normal. There are no conditions that would restrict or limit [Employee]." Dr. Bauer opined Employee was medically stable regarding his cervical spine and right biceps on March 27, 2020 when he was evaluated at Alaska Neurology center. Dr. Bauer provided a five percent PPI rating. (Bauer addendum, June 25, 2020).

36) On June 26, 2020, Employer controverted specific benefits including those related to the cervical spine and right biceps, PPI of the right biceps, and TTD after March 27, 2020, based on the June 25, 2020 EME report of Dr. Bauer. (Controversion Notice, June 26, 2020).

37) On July 11, 2020, Employee underwent a neurological EME with J. Gregory Zoltani, M.D. Dr. Zoltani reviewed medical records, and summarized a December 2009 pain management program report that indicated "psychological overlay on top of chronic pain syndrome." Employee was examined in person and no changes of skin texture or color were noted in the upper extremities, nails were symmetric and normal, and no swelling or temperature changes were noted. Dr. Zoltani found "He has a great deal of pain behavior. With light palpation, barely touching the skin . . . he indicates that this causes him pain . . . [t]he strength of palpation is barely touching the skin in most areas . . . [t]his is totally nonphysiologic." Diagnoses included "[c]hronic opioid usage, which may actually be causing a hyperalgesic response as a long-term side effect . . . ." Dr. Zoltani opined that the work injury was not the substantial cause of the ongoing subjective complaints, and found no evidence of CRPS. (Zoltani report, July 11, 2020).

38) On July 20, 2020, Employee's legal counsel filed an Entry of Appearance. (Entry of Appearance, July 20, 2020).

39) On July 20, 2020, Employee filed a claim for benefits, including temporary total disability (TTD), permanent partial impairment (PPI), medical and transportation costs, attorney's fees, and reemployment benefits. (Workers' Compensation Claim, July 20, 2020).

40) On July 23, 2020, Employee was examined by Dr. Miller, who diagnosed multiple conditions including chronic right shoulder pain, CRPS type 1, and status post cervical spinal fusion. Dr. Miller's record included "CRPS is not a psychosomatic condition; there are subtle trophic changes that are characteristic of CRPS. . . ." Cymbalta was prescribed. Employee's PHQ9 depression scale score indicated severe depression. Subtle signs of trophic changes were present in his right hand; his neck was "still painful and he continue[d] to have band-like headaches." (Miller record, July 23, 2020).

41) On July 30, 2020, Employee was re-evaluated by PA-C Tempel. His recovery from cervical surgery had been

> . . . complicated by debilitating neck pain with radiation into his right arm with shocking sensations . . . which reduced strength due to pain. He has had other neurologic complaints, including stroke like symptoms as well as left foot numbness, which have been thoroughly worked up without significant abnormalities. This includes repeat cervical spine imaging, lumbar MRI, EMG/NCV studies, right shoulder MRI, triple phase bone scan of his right arm, and a brain MRI with and without contrast. The working diagnosis of his neck pain is CRPS . . . and [he] is awaiting a neuropsychiatric evaluation to rule out underlying factors that may be contributing to his symptoms.

He was "evaluated at Alaska Neurology Center and . . .[t]here was evidence of a prior TBI which could be responsible for neurocognitive decline." Dr. Kralick saw Employee and had previously reviewed the most recent EME. "We do not agree with the [EME] conclusions as [Employee] continues to exhibit symptoms related to CRPS and right shoulder pathology which now seem to be the limiting factor . . . ." (Tempel record, July 30, 2020). Employee was released to part-time, light duty work, with a 25-pound lifting restriction. (Tempel work release, July 30, 2020).

42) On August 5, 2020, Employee requested a second independent medical evaluation (SIME) based on a medical dispute between Employee's physicians Dr. Schumacher, Dr. Miller, and PA-C Tempel, and EME Dr. Bauer; the disputes included causation, compensability, treatment, and medical stability. (Petition for SIME and SIME form, August 5, 2020).

43) On August 12, 2020, Employee filed a petition for a protective order for a July 31, 2020 medical release requested by Employer, restricting *ex parte* communication with treating

physicians, and limiting information only "relative to the employee's injury." (Petition for Protective Order, August 12, 2020). No response to the petition appears in the record, and no affidavit of readiness for hearing (ARH) or prehearing summary was found addressing this petition. (Agency file). No other petition for protective order for a medical release appears in the record. (Agency file).

44) On or about August 19, 2020, Employer filed a medical records summary of approximately 638 pages on a USB drive. (Email from Lindsey Martin to the Division, August 19, 2020). This drive was later unable to be located but the medical summary and records were received by Employee's legal counsel at the time of filing. (Prehearing Conference Summary, September 10, 2021). The August 19, 2020 medical records summary included the November 11, 2009 Gevaert record, the December 17, 2019 Moinzadeh report, the February 24, 2010 Gevaert record, the October 31, 2019 Olbrich EME report, the February 13, 2020 Schumacher evaluation, the February 2020 Providence Hospital records, the February 24, 2020 Dillon record, the February 26, 2020 Walsh referrals, the May 5, 2020 Gunderson record, the June 2 and 25, 2020 Bauer EME reports, and the July 11, 2020 Zoltani EME report. (Agency file).

45) On August 5, 2020, Dr. Kralick answered written questions from Employee's attorney, and opined the work-related injury or its treatment was the substantial cause of Employee's CRPS. Dr. Kralick said it was unknown whether Employee's rotator cuff and SLAP tear were substantially caused by the work injury; review of the orthopedic evaluation was suggested. He diagnosed Employee's right forearm and bicep pain as "[r]esidual symptoms related to CRPS" and said the work-related injury or its treatment was the substantial cause of that pain. Dr. Kralick could not provide a diagnosis relating to Employee's low back and lower extremity issues ("imaging work-up was inconclusive of any structural lesion"); he did not find that the low back and lower extremities issues would have been substantially caused by the work-related injury or its treatment. (Kralick response, September 15, 2020).

46) On October 9, 2020, Employee followed up with Dr. Miller at Alaska Neurology Center. He had not had any change in right shoulder pain, and was "concerned about his brain injury and right sided numbness following his brain injury. When he becomes distracted . . . then he has trouble focusing and he has been injuring himself severely." There was not much color or temperature change from side to side on extremities, but there was underlying edema in fingers, hands, and forearms. There were subtle signs of trophic change in the right hand. Diagnoses

included chronic right shoulder pain, post-traumatic right shoulder osteoarthritis, and right shoulder tendinopathy. Employee was medically stable. (Miller record, October 9, 2020).

47) On October 29, 2020, Employee attended a telemedicine appointment with PA-C Tempel and reported feeling he had "plateaued in his recovery." (Tempel record, October 29, 2020).

48) On December 18, 2020, Employee again petitioned for an SIME, stating it was "both an amended petition and a new petition." (Petition for SIME, December 18, 2020). The SIME form attached to the petition noted discrepancies between EME Dr. Bauer and Employee's Drs. Schumacher, Miller, Kralick, and PA-C Temple on issues including causation, compensability, treatment, functional capacity, and medical stability. Dr. Bauer's June 2, 2020 report was listed on the SIME form and attached to the SIME Petition. (SIME Form; Petition; December 18, 2020).

49) On January 28, 2021, PA-C Tempel provided Employee with a work release indicating that he would be disabled from work from January 28, 2021 to "TBD" and noting he was "currently unable to work until shoulder re-evaluated or disability has been established." (Tempel work release, January 28, 2021).

50) On April 9, 2021, Employee underwent a neurological examination with Dr. Miller for follow up regarding headaches, right arm and shoulder pain, right hand paresthesia, neck pain and cervical radiculopathy, and concerns regarding a stroke during cervical disc fusion surgery on September 16, 2019. Chart notes provided Employee planned

> to have a disability appointment 4/15/21 and he has a hard time accepting that he is going to be disabled. He has been on disability two times for head injuries and returned to work both times . . . He has been compliant. . . he weened (sic) himself off [opioids] the last time he was prescribed them.

Chronic right upper extremity, shoulder, and neck pain were noted as a result of a work injury. Examination of extremities indicated "[a]lthough not much color or temperature change from side to side, there is underlying edema in fingers hands and forearm. There is (sic) very subtle signs of trophic change in that right hand; although not distinct and obvious, they are present. . . ." Employee flinched during the examination and was apprehensive of having his shoulder palpated. "He tolerated palpation of the AC joint with hidden grimace. He has pain of the right corpral (sic) brachial muscle lifting the shoulder." Employee was found to be at medical stability, and Dr. Miller did not anticipate improvement. Employee would "need physical therapy to losen (sic) shoulder . . ." Employee was noted to take Cymbalta to treat depression and "reduce central

sensitization and suffering from neuromuscular pain." Diclofenac and Oxycodone were noted to have been discontinued. (Miller record, April 1, 2021).

51) On April 13, 2021, Employee was evaluated regarding neck and right arm pain by PA-C Tempel. Chart notes indicated Employee reported doing generally well, with continued neck pain at "5/10." He had been "undergoing acupuncture, 'desensitization,' and physical therapy in Canada which provide[d] temporary benefit." Continued use of heat and ice were recommended for symptom management, as well as home physical therapy exercises. (Tempel record, April 13, 2021).

52) On May 3, 2021, the parties filed a stipulation to proceed with an SIME. (Stipulation to Cancel Hearing and to Proceed with SIME, May 3, 2021). They concurrently filed an SIME form signed by both attorneys, which confirmed medical disputes between Employee's physicians Schumacher, Kralick, Miller, PA-C Temple, and EME physicians Bauer and Zoltani. Dr. Bauer's June 2, 2020 report was referenced regarding causation, compensability, and treatment disputes; his June 25, 2020 report was referenced regarding treatment, degree of impairment, functional capacity, and medical stability disputes. (SIME Form, May 3, 2021).

53) On June 3, 2021, Employee filed a "Petition for Protective Order," stating Employer had submitted records unrelated to Employee's injury. Employee requested portions of Dr. Bauer's June 2, 2020 report be stricken relating to 2008 treatment for a hernia, 2009 psychological evaluation, 2011 neuropsychological evaluation, and the "Diagnoses" and "Recommendations" sections of the Dr. Bauer's report that referred to data in the 2009 and 2011 evaluations. Passages were requested to be stricken from pages 26, 27, 33, 34, and 41 of Dr. Bauer's June 2, 2020 report. (Petition for Protective Order, June 3, 2021).

54) On June 23, 2021, Employee filed a second "Petition for Protective Order" requesting Dr. Bauer's June 2, 2020 report and "any future testimony and opinions of Dr. Bauer be stricken from the record" and not provided to the Board or the SIME physician. Employee contended he was "not disputing the propriety of the releases" "[a]t this time," but contended Dr. Bauer summarized a December 3, 2019 "neuropsychological" EME and records from Employee's prior workers' compensation injuries, including limited psychological records, "in his own words" and then based his conclusions on these reports. Employee contended "[w]hat is happening is once an [EME] hears of childhood trauma . . . the employer's paid expert will attribute any pain complaint to that

trauma." He contended his trauma treatment records should be private. (Petition for Protective Order, June 23, 2021).

55) On July 14, 2021, Employee's June 4 and June 23, 2021 Petitions for Protective Order were set for hearing on October 7, 2021. (Prehearing Conference Summary, July 14, 2021).

56) On August 2, 2021, the parties were notified that the petitions would be determined at a September 10, 2021 prehearing pursuant to AS 23.30.108. That correspondence noted the Alaska Workers' Compensation Act did not provide a mechanism to take testimony at a prehearing and therefore

> . . . [a]ny testimony you wish the designee to consider in making a determination on the petitions for protective order should be taken by deposition with all transcripts filed prior to prehearing. In the event that either party files for a review of the designee's ruling, board review is limited to the written record under AS 23.30.108(c).

(Tilly correspondence, August 2, 2021).

57) On August 12, 2021, Employer's attorney wrote to the hearing officer, contending that the "petitions for protective order" were effectively motions to exclude evidence and should be heard by the full board. He noted that sensitive information was involved and the parties had requested a prehearing to work out a process to best protect Employee's privacy. Employee's attorney, the adjuster, and the workers' compensation officer who had conducted the initial prehearings were copied. (McKeever correspondence, August 12, 2021).

58) The hearing officer was out of the office from August 13 to August 23, 2021. (Observations).

59) On September 3, 2021, Employee filed a "Petition for Protective Order Excluding Any Opinion of David Bauer M.D. Made After June 2, 2020," requesting that Dr. Bauer's June 2, 2020 report "and any future testimony and opinions" from Dr. Bauer be stricken from the record. Employee also requested "the description and use of medical reports that do not relate to the case, including psychological records, records regarding a hernia, and records on childhood trauma" be stricken from Dr. Bauer's report. Employee objected to the August 2, 2021 order restricting his testimony to deposition "limiting his rights to a fair hearing and also his due process rights." (Petition for Protective Order Excluding Any Opinion of David Bauer M.D. Made After June 2, 2020, September 3, 2021). Employee contended "[n]owhere did his treating physicians suggest he seek treatment for a psychological condition." Employee argued Dr. Bauer's summaries of

prior records in his report were hearsay, and if "provided to the SIME physician . . . would be relied upon by the SIME physician. That in itself would be a violation of the Workers' Compensation rules on hearsay." Employee contended his psychiatric records "should be made confidential and irrelevant," because the United States Supreme Court recognized the importance of the psychotherapist-patient privilege, and the Alaska Supreme Court has also recognized the importance of confidentiality of counseling records. Employee contended his right to a fair hearing and due process was restricted by costs he would incur to testify by deposition, and that the board should allow the testimony of Employee "or at least his affidavit" into the record. (*Id.*). Dr. Doppelt's December 3, 2019, EME report was attached to the September 3, 2021 petition and filed with the board. (*Id*.) Employee said an "examination of Dr. Bauer's summary of Dr. Doppelt's report and Dr. Doppelt's report itself will indicate just how unreliable Dr. Bauer's hearsay is" and provided three paragraphs, or approximately 25 lines, examining Dr. Doppelt's report including his diagnoses, final conclusion, lack of emphasis on childhood trauma relating to Employee's condition, and at least one alternative cause of Employee's diagnosis. (*Id*. at 10-11). The petition further speculated on Employer's reasoning in failing to file Dr. Doppelt's EME report, and noted

> . . . [i]t would be very easy to limit the disclosure of the . . . trauma in Dr. Doppelt's report and still include it in the record, because [he] does not rely on the trauma to make his evaluation. However, even if that is done, [Employee] does not want that report in the record because his psychological state is not an issue and therefore, a psychological report should not be part of the record.

(*Id*. at 13). Nowhere in the September 3, 2021 filing did Employee contend the filing of Dr. Doppelt's report was for the limited purpose of deciding the June 4 and 23, 2020 petitions for protective order. (*Id*.).

60) On September 10, 2021, the board's designee determined the June 3 and 23, 2020 petitions should be heard before a panel at hearing as previously set on October 7, 2021, and the titles of those petitions would be updated in ICERs to "reflect their substance as petitions to strike/exclude evidence." Employee said his September 3, 2021 filing titled "Petition for Protective Order" was his brief for determining the substance of the petitions anticipated to be resolved at a prehearing conference. Employee said he was not seeking to limit neuropsychological information, only psychological information. Employer contended the SIME physician should receive all the evidence and could advise whether it was relevant. The designee was unable to locate a large medical summary Employer's attorney said was filed by mail on August 19, 2020; Employee

confirmed he had received that summary. Discussion was had regarding whether any records to be relied on a hearing needed to be filed under seal. (Prehearing Conference Summary, September 10, 2021). A copy of the August 19, 2020 medical summary was re-filed by Employer on September 15, 2021, on a USB "flash" drive. (Agency file).

61) On September 30, 2021, Employee filed his hearing brief, contending Dr. Bauer's June 2, 2020 EME report and all future testimony from him should be excluded "as his opinion has been tainted by the exposure to [certain] medical reports . . . " Employee contended this report would not be allowed into the record by statute. The brief referenced psychotherapist-patient privilege and counseling records confidentiality but aside from noting the privilege, provided almost no substantive argument or analysis other than "psychiatric records should be made confidential and irrelevant." Employee contended by determining at prehearing that the issues raised should be decided at a full board hearing, the designee removed the "simultaneous briefing practice" and therefore gave Employer an unfair advantage. (Employee's Brief Regarding Dr. Bauer's Report and Any Statements Made after June 2, 2020, September 30, 2021).

62) On September 30, 2021, Employer filed its hearing brief, and contended Dr. Bauer's June 2, 2020 EME report was provided to Employee no later than August 5, 2020, when it was referenced in an SIME petition. Employer contended the summaries objected to by Employee in Dr. Bauer's report were not a significant portion of the report (i.e., 10 typed lines relating to childhood trauma in a 10-page report), with "the vast majority of the June 2, 2020 [EME] report address[ing] the medical complaints which [Employee] claims were due to his work injury." Employer contended the EME report also contained a short summary of Dr. Doppelt's mention of childhood trauma and a "6-line summary of the same subject in a report by Michael Rose PhD. (sic)." Employer contended the summarized records were mentioned in connection with Dr. Bauer's opinion that the childhood trauma was "very important as these experiences certainly predict failure of response to treatments and ongoing chronic pain." It further contended Employee provided no legal authority allowing the Board to rewrite an EME or other medical records before sending it to the SIME physician. Employer said there was "no suggestion that the records concerning the 2008 hernia surgery are related to the 2019 work injury," however the solution was not to revise the EME report, but rather disregard those records "until someone makes a connection with the work injury. If the SIME doctors also find that episode to be insignificant they will likely not mention

it or say it is not related." Regarding the childhood trauma references Employee seeks to redact from Dr. Bauer's report, Employer contended

> Dr. Bauer does think those experiences 'are very important' to the current claim as they certainly predict failure of response to treatment and ongoing chronic pain. This is a claimant who has a long history of slow prolonged recoveries from this and prior injuries. His treating providers . . . have wondered whether there is a psychological aspect to his complaints. Bauer believes there is. For the Board to delete the brief mentions from the [EME] report would exceed its authority and result in possibly important medical evidence not being considered by the SIME doctors. It is certainly possible that the . . . doctors will disagree with Dr. Bauer and the Board may have to address this issue after a full hearing on the merits. But doing so then, when it has a fully developed medical and evidentiary record will allow the Board to make a more informed decision.

Employer contended while the "brief mentions of the childhood trauma in the Bauer report could be an intrusion of [Employee's] privacy," Employee had relied upon the report he now seeks to strike and "attached it to pleadings including his requests for a SIME, in his petitions for a protective order, and in his briefs related to the same." Employer contended the statute gives it the right to have an EME and requires a claimant to submit to an EME if requested; it further contended "[n]othing in the statute or regulations allows the Board to prevent an [EME] physician from testifying" and to do so would deprive Employer of its statutory rights. (Employer's Hearing Brief for October 7, 2021 hearing, September 30, 2021).

63) At hearing, Employee contended he had not put his mental health at issue in this case, none of his treating physicians had suggested the need for a psychological examination, and reports by EME Drs. Bauer and Doppelt did not put his psychological condition at issue. Employee contended the EME reports were hearsay and did not contain indicia of reliability. He further contended Dr. Bauer's report was slanted, prejudicial to Employee, and Dr. Bauer's future testimony had been tainted by review of irrelevant records. Employee contended Employer did not want Dr. Doppelt's report to be included in the record because it was favorable to him, and Dr. Doppelt's report is a psychological record. Employee urged the panel to "read Dr. Doppelt's report" and noted Dr. Bauer did not include Dr. Doppelt's conclusions in his EME. Employee was concerned the SIME might ask to see the original reports that Dr. Bauer summarized, perpetuating the issue; conversely, Employee contended the SIME physician should read the records and not rely on Dr. Bauer's summary. He contended Employer's adjuster gave irrelevant records to Dr.

Bauer, or "cherrypicked" the records provided. Employee contended there were "various reasons" no objection had been made previously without stating those reasons, and nothing in the Act discusses when a request to strike irrelevant records could be made. (Employee's hearing argument, October 7, 2021).

64) Employer contended Dr. Bauer's report was relevant, and striking evidence was highly unusual unless completely irrelevant or highly prejudicial. It contended the supplemental authority Employee filed noted psychiatric records and psychiatric history are part of a neuropsychological evaluation. Employer contended medical reports are not hearsay, and it was not hearsay for a physician to rely on prior medical reports. It contended striking Dr. Bauer's report or precluding his testimony would taint any new EME, should the Employer obtain one, because the opportunity to examine Employee early in the case would be lost. Employer contended relevancy of Dr. Bauer's report was evident based on Employee's reliance on it in seeking an SIME. Employer contended there was no mechanism under the Act to prevent Employer's EME from testifying, and it was a fundamental rule if an Employee complained of an injury, normal privacy rules do not apply regarding the claim itself and medical records are not privileged (though they remain confidential and are not open to the public). (Employer's hearing argument, October 7, 2021).

Employee testified at hearing substantially as follows:

65) He was injured at work in 2019 when he yanked hard on a wrench, the bolt broke loose, and he fell into a "genset" behind him. He sought medical treatment and was assigned a nurse case manager (NCM). His understanding was the NCM was working for his best interest to make sure his appointments were handled correctly; she was a RN and would provide him information and advice about his medical care. The NCM went to most of his appointments with him and asked questions and spoke to his doctors about the treatment provided. He was unsure of the NCM's relationship with the Employer's insurer. He did not recall discussions with the NCM about what information she was getting and who she was sharing it with; he thought she was sharing it with the adjuster, Katie Weimer. (Employee).

66) Employee could not recall the first time he spoke with the NCM, he thought she showed up at an appointment with Dr. Kralick with her paperwork. He did not read the papers; the NCM told him what they said, that she was an RN, was there in his best interest, and would answer questions and explain medical terminology. (*Id*.).

67) He initially had surgery on his arm with Dr. Drury, then later saw Dr. Kralick. After the surgery with Dr. Drury, he did not get better. He complained to Dr. Drury he had the same pain after surgery and a nerve block on his arm. They thought he needed to see a nerve specialist, so they sent him to Dr. McNally, who ordered an MRI of his neck which showed problems. He was then referred to Dr. Kralick. (*Id*.).

68) Employee underwent neck fusion surgery with Dr. Kralick, a neurosurgeon. In February of 2020, a neuropsych evaluation was brought up in an appointment with Dr. Kralick; Employee was still having pain and was undergoing tests. Tracy (the NCM) said she used to be an RN and it was common for psych to be part of it; she suggested a psychological or neuropsychological exam. Employee did not know if the NCM pursued a neuropsych evaluation with Dr. Kralick; he never underwent a neuropsych evaluation for his injury. He knew one had been scheduled with Dr. Craig, he thought as an IME, but he did not know why it did not occur. He received notices it had been rescheduled, then cancelled. He did not recall ever receiving treatment from Dr. Craig. (*Id*.).

69) Employee had seen PA-C Tempel in Dr. Kralick's office about a month before the October 2021 hearing. He did not remember if she had been suggesting neuropsych consultations. Employee had appointments scheduled with Dr. Miller on October 25, 2021 and Dr. Kralick on November 16, 2021. He understood Employer paid Dr. Kralick; he was not undergoing any other treatment. (*Id.).*

70) He was not currently taking opioids or narcotics, as he did not want to get addicted to them. He voluntarily stopped taking them and had weaned himself off of them. (*Id.*).

71) Employee was not claiming a psychological condition regarding his work injury. He was never referred for psychological evaluation or treatment. He would feel sad if he had been victimized as a child and then people judged his actions or blamed prior abuse for current problems, like he was being revictimized. He was sad a lot because the work injury had changed his whole life, and he could not do things he'd done for his work life like be a mechanic or operate heavy equipment; it had ruined his financial stability. (*Id*.).

72) Employee had resolved his childhood trauma. He was not ashamed of what happened, and he did not care if that information was made public. (*Id.).*

73) Employee remembered seeing Dr. Bauer in June 2020; he had seen Dr. Bauer before. He understood the purpose of the EME was to see if Dr. Bauer agreed with the need for surgery on his right shoulder. He knew Dr. Bauer was the EME physician for the insurance company. He

saw the June 2, 2020 report less than a week later. It showed up in his email; he thought it came from the adjuster, attached to a controversion. He read the report and did not agree with it or its conclusions. Employee believed most of the report was "lies and falsities." Shortly after that he found an attorney to represent him. (*Id*.).

74) Employee saw Dr. Doppelt after his injury, but did not know why he was seeing him. Employee had no expectations regarding the kind of exam he would receive. He saw the report six weeks or so after the examination. When he read it, he did not see how it had any bearing on his injuries, or why he went there. (*Id*.).

75) He had a prior traumatic brain injury. He had stroke-like symptoms after his neck surgery in September 2019. He reported the symptoms to Dr. Kralick's office, and they recommended he see Dr. Miller and ordered a brain MRI. (*Id.*).

76) Employee is married. His wife lives in Canada; he often spends time with her there. There are no specific times he generally travels to Canada, and he does not have specific plans to return at this time. (*Id*.).

77) Employee has ongoing pain from his injury. He thinks he needs to have someone find out what is wrong and fix it. He still has numbness and tingling in both arms, his fingers are numb, his neck still hurts, he still has headaches, and still has the same pain in his bicep he had in the first place. He never had any of it before he yanked on that wrench. (*Id*.).

78) On November 4, 2021, Employee filed another petition for a protective order, requesting that "the employer's Medical Summary and the SIME records submission be stricken from the record . . . " asserting the medical record attached to the summary and for submission with the SIME was not related to Employee's injury. No medical summary date or particular medical record was identified. (Petition for Protective Order, November 4, 2021).

79) On November 9, 2021, the hearing officer sent correspondence to the parties advising of the unclear nature of the November 4th petition filing, and that the hearing record would reopen to allow for clarification of the items requested to be stricken, Employer's response to the petition, and any additional briefing, evidence, or arguments the panel might require. (Tilly correspondence to Huna and McKeever, November 9, 2021).

80) On November 9, 2021, Employee filed an errata to his November 4, 2021 petition for protective order, adding the date of the applicable submissions by Employer as October 25, 2021. (Employee's Petition for Protective Order Errata, November 9, 2021).

81) Medical records attached to the October 25, 2021 medical summary consist of five pages dated April 15, 2021, from Larry Levine, M.D. (Medical Summary, October 25, 2021). The October 25, 2021 supplemental SIME medical records filing included Dr. Doppelt's December 3, 2019 EME report in addition to Dr. Levine's April 15, 2021 records. (Supplemental SIME Medical Records, October 25, 2021).

82) On November 12, 2021, Employee's counsel wrote to the hearing officer, requesting the Board make a determination on the October 7, 2021 hearing. She contended "reopening the record and allowing the [E]mployer to respond to the . . . petition, and then require an affidavit of readiness for hearing, and then schedule a hearing . . . would cause tremendous undo (sic) delay . . ." The letter was copied to Employer's counsel. (Huna correspondence, November 12, 2021).

83) On November 16, 2021, at a prehearing conference Employee withdrew his objection to Dr. Levine's medical report as filed on a medical summary and in SIME records on October 25, 2021. Employee objected to the inclusion of Dr. Doppelt's EME report on a medical summary and in SIME records; Employee contended he had previously filed that report for the limited purpose of determining the June 2021 petitions for protective order. The designee noted that as the subject of the November 4 petition was a psychological evaluation as referenced in the October 7, 2021 hearing, it would be more efficient to schedule a written record hearing and accept additional briefing to issue a single decision addressing all three of Employee's petitions for protective order. The parties were to notify the designee whether they could agree on a written record hearing date and briefing deadline. (Prehearing Conference Summary, November 16, 2021). On November 19, 2021, an update was provided to the November 16, 2021 prehearing conference summary, noting that a written record hearing had been scheduled for Thursday December 2, 2021, on Employee's November 4, 2021 petition; each party would be provided 20 minutes for oral argument. (Prehearing Conference Summary Update, November 19, 2021).

84) On November 24, 2021, Employer answered the November 4, 2021 petition for protective order and November 8, 2021 errata and asserted neither the petition nor errata specified the relief sought. Based on the November 16, 2021 prehearing and the filing of the errata, Employer contended its understanding that the request for protective order applied only to Dr. Doppelt's report. Employer contended Dr. Doppelt's EME report was clearly related to the work injury, and Employee's petition for a protective order should be denied. (Answer to November 4, 2021 Petition for Protective Order and November 8, 2021, Errata).

85) On December 2, 2020, Employee contended the information he disclosed to Dr. Doppelt and the resultant EME Report were not related to his claim, and were therefore privileged. He contended Employer's actions "systematically exploited" him as the victim of childhood trauma, and obtained mental health records that it provided to the EME physician but not to him. Employee contended the NCM was aggressive and tried to get his doctor to make neuropsych an issue in an *ex parte* communication. He contended as the case progressed he began to feel revictimized and wanted any mention of childhood trauma removed from the record. Employee contended Employer was retaliating against him by bringing Dr. Doppelt's report into the case, and Employer should be stopped from sending employees to EMEs and making it part of the record because of "some mention" of a work-related condition. Employee contended the questions asked of Dr. Doppelt in the EME implied that he was claiming a mental health injury. He contended it is "clear" Employer was trying to "smear" him and the Board should have "no part in it." (Employee argument, December 2, 2020). Employee had contended he was "claiming injury to his right shoulder, right arm, neck, cervical radiculopathy, headaches, and arm paresthesia." (Employee's Brief on Petition to Strike/Protective Order, November 29, 2021).

86) On December 2, 2020, Employer contended workers' compensation had a few fundamental elements, including Employer's right to EMEs to independently investigate causation and treatment. It contended Employee was effectively asking the right to an EME be declined in this case, and evidence of other possible causes be ignored before the board had an opportunity to weigh the evidence. Employer contended the board's interest would not be served by excluding records prior to SIME review, and the Employee had previously testified he did not care if records regarding his trauma were filed in this case. (Employer argument, December 2, 2020).

87) No documents were requested to be filed under seal by either party. (Agency file).

88) No requests for cross-examination were filed by Employee regarding the June 2 or 23, 2020 Bauer EME Report, or the December 3, 2019 Doppelt EME report. (Agency file).

PRINCIPLES OF LAW

The Constitution of the State of Alaska. . . .

Art I, § 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

. . . .

The hearing panel does not have authority to consider constitutional issues in most instances. *Burke v. Raven Elec., Inc.,* 420 P.3d 1196 (Alaska 2018). The core of procedural due process includes notice to individuals whose interests in life, liberty, or property are adversely affected by governmental action. *Crutchfield v. State*, 627 P.2d 196 (Alaska 1980). For a hearing to meet the standard for due process, it must have been fair, appropriate, and adequate, and the participants must have had an opportunity to protect their rights and make a showing by evidence. *Fenner v. Bassett*, 412 P.2d 318 (Alaska 1966).

> **AS 23.30.001. Legislative Intent.** It is the intent of the legislature that . . .
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> . . .
>
> (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, medical findings 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 23.30.010. Coverage.** (a) Except as provided . . . compensation or benefits are payable . . . for disability or . . . the need for medical of an employee if the disability or . . . need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or . . . need for medical treatment . . . . .
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> **AS 23.30.095. Medical treatments, services, and examinations**. . . .

> (e) The employee shall after an injury, at reasonable times during the continuance of the disability . . . submit to an examination by a physician . . . of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . Facts relative to the injury or claim communicated to or otherwise learned by a physician . . . who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in . . . hearings . . . or an action to recover damages from an employer who is subject to the compensation provisions of this chapter . . .
> . . . .
>
> (h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division . . . reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.
> . . . .
>
> **AS 23.30.107. Release of information.** (a) Upon written request, an employee shall provide written authority to the employer . . . to obtain medical and rehabilitation information relative to an employee's injury. The request must include notice of the employee's right to file a petition for protective order . . . . This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.
>
> (b) Medical or rehabilitation records . . . in the employee's file maintained by the division . . . are not public records subject to public inspection and copying . . . .

Employers must have the ability to investigate workers' compensation claims to verify information presented, properly administer claims, litigate disputed claims, and deter fraud. *Granus v. Fell*, AWCB Dec. No. 99-0016 (January 20, 1999); *Cooper v. Boatel*, Inc., AWCB Dec. No. 87-0108 (May 4, 1987). Under AS 23.30.107(a), an employee must release all information "relative" to the injury. Evidence is "relative" where the information is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus*. "Calculated" to admissible evidence means more than a mere possibility, but not necessarily a probability, that the information sought will lead to admissible evidence. *Teel v. Thornton General Contracting*, AWCB Dec. No. 09-0091 (May 12, 2009).

All causes that may be relevant must be considered to determine the substantial cause of an employee's continued need for treatment and disability. *Morrison v. Alaska Interstate Constr.,* 440 P.3d 224 (Alaska 2019). Pre-existing conditions which a work injury aggravates, accelerates, or combines with to cause the need for medical treatment or a current disability may constitute a compensable injury. *Id*. at 234, 238-39.

"The Board's record should be open to all evidence 'relative' to a claim; that is, all evidence relevant or necessary to the resolution of the claim. This evidence is then winnowed in the adversarial process of cross-examination and weighing in a hearing . . . ." *Cornelison v. Rappe Excavating, Inc*., AWCB Dec. No. 15-0139 (October 20, 2015) (further citation omitted); *Guys with Tools v. Thurston*, AWCAC Dec. No. 062 (November 8, 2007) ("The exclusion of evidence . . . does not serve the interest of the board in obtaining the best and most thorough record on which to base its decision . . . ."). The Act allows an employer to access employees' mental health records when relevant to the claim, even if the employee has not made a claim relating to a mental health condition. *Leigh v. Alaska Children's Servs.,* 467 P.3d 222 (Alaska 2020).

Alaska recognizes "a common law privilege, belonging to the patient, which protects communications made to psychotherapists in the course of treatment." *Allred v. State*, 554 P.2d 411, 418 (Alaska 1976). "Psychotherapy" means "treatment of the mind," commonly referring to the "use of psychological means to modify mental and emotional disorders of a serious, disabling nature. " *Id*. It implies treatment by medical personnel, or treatment by clinical psychologists to employ psychological methods of treating emotional and personality disturbances. *Id*. at 418-19. "Counseling" generally means non-medical psychological care, not primarily aimed at uncovering deep psychological processes but enabling a client to effectively use current resources. Counseling includes vocational, educational, employee, rehabilitation, marriage, and personal guidance. *Id*. at 419. Statements made by a patient to a psychiatrist or psychotherapist outside of a therapeutic relationship are excluded from the privilege. *Id.* at 420. The test to determine privilege is twofold: First, was the communication made to a psychiatrist or licensed psychologist? If yes, was the communication made in the course of psychotherapeutic treatment (including examinations or diagnostic interview which might reasonably lead to psychotherapeutic treatment)? Both parts must be answered affirmatively for the privilege to apply. *Id.* at 421.

Doctor-patient privilege is waived where a claimant initiates an action for bodily injury; waiver applies to "all information concerning the health and medical history" relevant to matters the claimant put at issue, including but not limited to matters based on a historical or causal connection. *Trans-World Invest. v. Drobny,* 554 P.2d 1148, 1151 (Alaska 1976), *abrogated on other grounds by Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018); *Mathis v. Hilderbrand*, 416 P.2d 9 (Alaska 1966); AS 23.30.095(e), (h). *Also see*, Alaska R. Civ. P. 35 (no privilege for court-ordered examination).

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**. . . .
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the . . . designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. . . . If a discovery dispute comes before the board for review of a determination by the . . . designee, the board may not consider any evidence or argument that was not presented to the . . . designee, but shall determine the issue solely on the basis of the written record. . . .
>
> (d) If the employee files a petition seeking a protective order to recover medical and rehabilitation information that has been provided but is not related to the employee's injury, and the board or the board's designee grants the protective order, the board or the designee . . . shall direct the division, the board, the commission, and the parties to return to the employee, as soon as practicable . . . all medical and rehabilitation information, including copies, in their possession that is unrelated to the employee's injury . . . .
>
> **AS 23.30.135. Procedure before the board.** (a) In making . . . an 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 by this chapter. The board make make its . . . inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> (b) All testimony given during a hearing before the board shall be recorded, but need not be transcribed unless further review is initiated. Hearings before the board shall be open to the public.

The board has broad statutory authority in conducting its hearings. *DeRosario v. Chenega Lodging*, AWCB Dec. No. 10-0123 (July 16, 2010).

8 AAC 45.052. Medical summary. (a) A medical summary . . . listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

(b) The party receiving a medical summary and claim or petition shall file with the board an amended summary . . . within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. In addition, the party shall serve the amended medical summary form, together with copies of the reports, upon all parties.

(c) Except as provided . . . a party filing an affidavit of readiness for hearing must attach an updated medical summary . . . if any new medical reports have been obtained since the last medical summary was filed.

(1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medica report listed . . . a request for cross-examination must be filed . . . and served . . . within 10 days after service of the affidavit of readiness for hearing.

. . . .

(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed . . . and be served upon all parties.

. . . .

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

. . . .

8 AAC 45.065. Prehearings. (a) . . . Even if a claim, petition, or request for prehearing has not been filed the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues;

. . . .

> (6) the relevance of information requested under AS 23.30.107(a) and AS 23.30.108;
> . . . .
>
> (15) other matters that may aid in the disposition of the case.
>
> **8 AAC 45.120. Evidence**. (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, at its discretion, examine witnesses and will allow all parties present an opportunity to do so. Except as provided in this subsection and 8 AAC 45.112, a party who wants to present a witness's testimony by deposition must file a transcript of the deposition with the board . . .
> . . . .
>
> (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 . . . . 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. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded . . . .
>
> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon . . . in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified . . . does not apply to medical reports filed in accordance with 8 AAC 45.052 [which] . . . must be made in accordance with 8 AAC 45.052.
> . . . .

The Alaska workers' compensation system favors the production of medical evidence in the form of written reports. *Wise v. Wolverine Supply, Inc*., AWCB Dec. No. 20-0095 (October 13, 2020).

"Psychological" is defined as "relating to psychology [or] . . . relating to the mind and its processes." STEDMAN'S MEDICAL DICTIONARY, 28th Ed., at 1596. "Psychology" is defined as "[t]he profession, scholarly discipline, and science concerned with the behavior of humans and animals, and related mental and physiologic processes." *Id.* "Neuropsychological" is defined as "pertaining to neuropsychology"; neuropsychology is "[a] specialty of psychology and behavior, including the use of psychological tests and assessment techniques to diagnose specific cognitive and behavioral deficits and to prescribe rehabilitation strategies for their remediation." STEDMAN's

at 1314. Neuropsychology has also been identified as "a specialty field that joins the medical fields of neurology, psychology and psychiatry. [It] involves determining how well the brain is working when it is disrupted by a brain injury or psychological disorder. A neuropsychological assessment is a comprehensive test of a wide range of mental functions including behavior." Cleveland Clinic, "Neuropsychological Testing and Assessment," (October 15, 2020), *https://my.clevelandclinic.org/health/diagnostics/4893-neuropsychological-testing-and-assessment.* Neuropsychological examination includes a personal interview, review of the examinee's medical and psychological history, and education. *Id.* A variety of tests may be given; the examinee may also complete questionnaires about mood and psychological symptoms. *Id.*

"Psychosocial" is defined as: [i]nvolving both psychological and social aspects; e.g., age, education, martial and related aspects of a person's history." STEDMAN'S at 1598. The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Fifth ed. 2013) (DSM-5) provides for separate notation of psychosocial and contextual factors apart from diagnoses. DSM-5 at 16, 848-53. Such factors include but are not limited to lack of adequate food or safe drinking water, malingering, nonadherence to medical treatment, abuse, neglect, violence, and other counseling. *Id.* at 848-53. The DSM-5 additionally contains a section on "Somatic Symptom and Related Disorders, including "Conversion Disorder," "Somatic Symptom Disorder," and "Psychological Factors Affecting Other Medical Conditions." *Id*. at xx-xxi, 309-327.

> A number of factors may contribute to somatic symptom and related disorders. These include genetic and biological vulnerability (e.g., increased sensitivity to pain), early traumatic experiences (e.g., violence, abuse, deprivation), and learning (e.g., attention obtained from illness, lack of reinforcement of nonsomatic expressions of distress), as well as cultural/societal norms that devalue and stigmatize psychological suffering as compared with physical suffering. . . . Variations in symptom presentation are likely the result of the interaction of multiple factors within cultural contexts that affect how individuals identify and classify bodily sensations, perceive illness, and seek medical attention for them. Thus, somatic presentations can be viewed as expressions of personal suffering inserted in a cultural and social context.

Id. at 310. One diagnostic criteria for "conversion disorder" is clinical findings showing "evidence of incompatibility between the symptom and recognized neurological or medical conditions . . . ." *Id.* at 318. Associated features can support a diagnosis of conversion disorder, such as a history

of multiple similar somatic symptoms and onset associated with stress or trauma (either psychological or physical). *Id.* "Somatic symptom disorder" has diagnostic criteria including "[o]ne or more somatic symptoms that are distressing or result in significant disruption of daily life." *Id.* at 311. Sometimes only one severe symptom, most commonly pain, is present; symptoms may or may not be associated with another medical condition. *Id.* Diagnostic criteria under the DSM-5 for "psychological factors affecting other medical conditions" are

> A. A medical symptom or condition (other than a mental disorder) is present.
>
> B. Psychological or behavioral factors adversely affect the medical condition in one of the following ways:
>
> 1. The factors have influenced the course of the medical condition as shown by a close temporal association between the psychological factors and the development or exacerbation of, or delayed recovery from, the medical condition.
>
> 2. The factors interfere with the treatment of the medical condition (e.g., poor adherence).
>
> 3. The factors constitute additional well-established health risks for the individual.
>
> 4. The factors influence the underlying pathophysiology, precipitating or exacerbating symptoms or necessitating medical attention.
>
> C. The psychological and behavioral factors . . . are not better explained by another mental disorder . . . . *Id.* at 322.

The "essential feature" is the "presence of one or more clinically significant psychological or behavioral factors that adversely affect a medical condition by increasing the risk for suffering . . . or disability . . . ." *Id.* Disability conviction is "a belief that because of chronic pain, one is unable to meet occupational, domestic, family, and social responsibilities, and to engage in avocational and recreational activities." *Leigh*, 467 P.3d 222 n.1 (further citation omitted)

"Evidence of a plaintiff's preexisting mental disability is admissible when it is relevant to a claim for future loss of earning capacity." *Liimatta v. Vest*, 45 P.3d 310 (Alaska 2002). Prior psychology records were found relevant and ordered released in a workers' compensation claim involving respiratory problems where a pulmonary specialist reported that a component of the employee's

problem was anxiety and the employee was evaluated by a clinical psychologist. The psychologist testified that prior psychological records related to anxiety would be relevant. *Anderson v. University of Alaska Southeast*, AWCB Dec. No. 96-0082 (February 28, 1996). The employee's concerns about his former wife's privacy relating to information contained in his prior psychological counseling records were addressed: "when the records in question contain information not elsewhere available, we believe privacy must give way to [Employer]'s right to thoroughly investigate Employee's claim." *Id.* at 5. The panel requested that the adjuster exercise discretion in the use of the records and "take appropriate action to protect the privacy of Employee and his former wife . . . ." *Id.*

> **Alaska R. Evid. 703. Basis of Opinion Testimony by Experts.** The facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.
>
> **Alaska R. Evid. 801. Definitions**. . . . (c) **Hearsay**. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
> . . . .
>
> **Alaska R. Evid. 803. Hearsay Exceptions - Availability of Declarant Immaterial.** . . . (6) **Business Records**. A memorandum, report, 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 keep [it], all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
> . . . .

It is generally accepted that failure to timely object to offered evidence waives the objection. *Williams v. Abood*, 53 P.3d 134 (Alaska 2002). At least one board decision has found no time limit on an employee's right to file for a protective order. *Guerrissi v. State*, AWCB Dec. No. 20-0109 at 14 (December 4, 2020). Nothing in the Act allows the board to dictate what medical records an employer sends to its medical evaluator. *Cornelison*.

ANALYSIS

1) Will Dr. Bauer's EME reports stricken in whole or in part?

Employee contends specific portions of Dr. Bauer's June 2, 20202 EME summarizing prior medical records should be stricken from the EME report and the agency file report. Alternatively, he contends Dr. Bauer's EME reports beginning June 2, 2020 should be stricken in their entirety.

A. Should portions of Dr. Bauer's June 2, 2020 EME report be stricken?

Employee claims his work-related injury, for which he has received medical care, includes his right shoulder, right arm, and neck, and cervical radiculopathy, headaches, and arm paresthesia. His medical records noted prior issues of pain unresponsive to extensive physical therapy, high somatic complaints, severe somatization disorder, psychosocial factors that might reinforce somatic complaints, exaggerated perception of disability, anxiety, and chronic pain syndrome with possible psychological overlay. Records of Employee's treating physicians for his current industrial injury include concerns of hypersensitivity, allodynia, chronic neck pain, chronic right shoulder pain, chronic right upper extremity pain, CPRS, "psych likely contributing to overall severity of pain/issues," the need to evaluate for conversion disorder or underlying factors contributing to his symptoms, and generalized anxiety disorder. Despite multiple surgeries, imaging, and ongoing treatment, Employee continues to have pain, the source of which has not been identified by any of a host of treating or EME physicians. Employee testified at hearing that he still had ongoing pain, and he wanted have someone figure out what was wrong and "fix it."

Employers must have the ability to investigate workers' compensation claims, *Granus*; *Cooper;* and Employer has a statutory right to an EME. AS. 23.30.095(e). Employer's EME is presumed to be reasonable. *Id.* Alaska Workers' compensation cases are driven by medical evidence; written reports are favored. *Wise.*

Employee objects to portions of Dr. Bauer's June 2, 2020 EME report. The majority of the report sections Employee requests be stricken contain summaries of psychological records he contends

are subject to psychotherapist-patient privilege. Employee specifically objects to Dr. Bauer's included summaries of Dr. Doppelt's psychological EME as well as a 2009 psychological evaluation and a 2011 neuropsychological evaluation.

Patients have a privilege generally protecting communications made to psychotherapists or psychiatrists in the course of treatment. *Allred*. Statements made outside of a therapeutic relationship are not covered by the privilege. *Id*. Dr. Doppelt is a psychologist who conducted a psychological EME for Employer; the EME report on its face stated that the examination was for evaluation only, not for treatment, and no doctor or patient relationship was created or existed. EME examinations and reports in Alaska workers' compensation cases are not privileged by statute. AS 23.30.095(e). The summary of Dr. Doppelt's EME report and examination are not subject to psychotherapist-patient privilege and will not be stricken.

The 2009 psychological evaluation by Dr. Rose and the 2011 neuropsychological evaluation by Dr. Craig, as summarized in the Dr. Bauer's EME report(s) are not identified as being EME examinations or reports. If they are records of EME examinations, they would not be subject to psychotherapist-patient privilege as detailed above. If they are not EME evaluations, privilege would still be waived by Employee's claim for a work-related injury, assuming the records concern medical history relevant to the matters Employee has put in issue. *Trans-World*; *Mathis*; AS 23.30.095(e). Employer may access Employee's mental health records when relevant to the workers' compensation claim, even if Employee has not made a mental health claim. *Leigh*. Relevant evidence is that which is reasonably calculated to lead to facts having "any tendency" to make an issue in a case more or less likely. *Granus.* There must be more than a mere possibility that the information will lead to admissible evidence. *Teel.*

Employee contends all of the psychological records summarized in Dr. Bauer's report are irrelevant as he has not put his mental health into issue, has not claimed a mental injury, and none of his treating providers have suggested he seek treatment for a psychological condition. However, in determining the cause of disability or need for medical treatment, the different possible causes of the disability or need for treatment must be evaluated. AS 23.30.010(a); *Morrison*. The record should be open to receive all relevant information, which is then reviewed in the adversarial

process and weighed at hearing. *Cornelison*; *Guys with Tools*. Exclusion of evidence does not serve the interest of obtaining the best and most thorough record to base a decision upon. *Guys with Tools*.

Evidence regarding Employee's pre-existing mental disability, if any, is relevant to a claim for loss of earning capacity. *Liimatta*. Employee's July 20, 2020 claim includes a request for TTD and reemployment benefits. His prior and current medical records filed on medical summary are replete with concerns that psychological or psychosocial factors including his perceptions of pain and disability have affected his recovery from orthopedic injuries. The 2009 Dr. Rose and 2011 Dr. Craig evaluations are relevant to Employee's workers' compensation claim; thus, any privilege is waived. *Trans-World*; *Mathis*; AS 23.30.095(e). Additionally, Employee clarified he is seeking only to withhold psychological information, not neuropsychological information; thus negating the argument that the 2011 Dr. Craig evaluation was irrelevant. The neuropsychological reports Employee has clarified he does not wish to exclude from the record by definition include psychological information. STEDMAN'S; *Cleveland Clinic*. The 2009 psychological evaluation summary and the 2011 neuropsychological evaluation summary are relevant and should not be stricken.

Employee also contends portions of Dr. Bauer's report summarizing 2008 records regarding a hernia are irrelevant and should be stricken. While a physical hernia condition may not be relevant to Employee's current claim, information contained in the records regarding Employee's perception of pain and disability, or excessive subjective symptoms over objective examination, would be relevant. As this information reasonably may lead to admissible evidence, it will not be stricken. *Granus*; *Teel*; *Cornelison*.

Nothing contained in the Act provides authority for the fact-finders to rewrite any portion of an EME report; Employee has not provided any legal precedent demonstrating this authority. If the requested portions of the June 2, 2020 report had been found to be privileged or irrelevant, the fact-finders would still be without the authority to provide the relief Employee requests.

B. Should Dr. Bauer's EME reports beginning June 2, 2020, be stricken in their entirety?

Employee contends Dr. Bauer's June 2, 2020 report in its entirety is irrelevant, has been tainted by the review of irrelevant records, and it and all subsequent reports should be stricken. Dr. Bauer's June 2, 2020 report is relevant on its face; he performed multiple orthopedic EMEs and made related reports in a case where Employee asserts multiple orthopedic injuries. Employer has a statutory right to the EME. AS 23.30.095(e).

Employee contends Dr. Bauer's June 2, 2020 report is hearsay based upon hearsay, and should be stricken. Neither Dr. Bauer's report, nor any of the medical records summarized, are hearsay, Evid. R. 801, as they fall squarely into the hearsay exception for medical records. Evid. R. 803 (6). Even if the report were hearsay, any relevant evidence may be admissible if it is the sort on which responsible persons are accustomed to rely in the conduct of serious affairs, and hearsay evidence may be used in workers' compensation cases to supplement or explain any direct evidence. 8 AAC 45.120(e). Experts may base an opinion on facts or data perceived or known to the expert at or before hearing, if of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences. Evid. R. 703(a). Written medical evidence is preferred. *Wise*. Nothing contained in the Act provides fact-finders with authority to dictate what medical records an employer sends to its EME evaluator. *Cornelison*.

Employee contends Dr. Bauer is biased and would attribute any pain complaint to prior trauma, Employer has systematically exploited Employee as a childhood trauma victim, and all of Dr. Bauer's reports should be stricken beginning June 2, 2020. No evidence has been provided that Dr. Bauer was biased against Employee or would "attribute any pain complaint to prior trauma." No evidence has been provided that Employer has exploited Employee as a childhood trauma victim; inclusion of relevant medical evidence in a workers' compensation case does not violate Employee's rights or otherwise exploit his past. The fact-finders have no interest in receiving or reviewing unrelated medical records; for those records containing sensitive information, particularly pertaining to events occurring when Employee was a minor, the panel may still review the evidence as necessary and reveal sensitive information to the extent necessary in issuing its decisions.

Once a claim has been filed, all parties must file and serve all of the medical records and reports in their possession with the Division and serve them on any adverse party. 8 AAC 45.052 (a), (b), (d). Records filed with the Division are not open to public inspection; AS 23.30.107(b); however, Employer has the right to send medical records to an EME or SIME physician. Once a claim is filed, it is governed by the Act, and other statutes regarding confidentiality do not apply to workers' compensation claims. *Leigh*. Alaska workers' compensation hearings are open to the public, AS 23.30.135(b), and the hearing panel files a written decision and order in each case it decides. AS 23.30.110(c).

In *Leigh*, the parties disputed the discoverability of the employee's mental health records. She had a complicated recovery from an ankle injury; she had preexisting conditions "not directly associated with her work injury" including anxiety. After Employee's physical complaints continued after a second surgery, the employer's EME doctor thought she was medically stable but had "disability conviction" and "multiple psycho-social factors" with subjective complaints in excess of objective findings. The employee was undergoing continued counseling relating to childhood trauma. Eventually her attending physician for the work injury diagnosed chronic pain, post-traumatic arthritis, neuralgia, and (CRPS); chart notes correlated Employee's pain levels and stress from events in her life. He wrote "while chronic pain in general, and CRPS definitely contains significant psychosocial components, to declare that her condition is due to pre-existing psychiatric issues is . . . ridiculous." *Id*. at 224. The SIME physician found the employee had some criteria for CRPS. The employer sought a release for Employee's mental health records, which was denied by the designee; on review, a board panel found that "[w]hile Employee's mental health records may not be admissible at hearing because they may . . . turn out to be . . . irrelevant, this possibility does not prevent Employer from discovering them during litigation" and ordered the records released. *Leigh v. Alaska Children*'s *Services,* AWCB Dec. No. 18-0074 (July 26, 2018).

On initial appeal, the Alaska Supreme Court noted that discovery rules are construed broadly, and that in civil cases as well as workers' compensation claims, "preexisting medical conditions can be relevant to a case even if the specific medical condition is not directly put at issue." *Leigh*, 467 P.3d at 229. "The current causation standard . . . requires the Board to consider the relative

contribution of different causes to determine whether a claim is compensable. An employer has a right to develop defenses and discover information relevant to different possible causal factors in response to a worker's written claim . . . even if [Employee] did not directly make a claim for medical care or disability for a mental health condition, the medical records contain numerous references to the impact of her mental health conditions on treatment and possible disability related to her pain complaints." *Id*. Treatment and pain complaints were part of the employee's claim for medical treatment and disability; the mental health records were correctly determined to be potentially relevant to a defense. *Id*. at 230. The court declined to set out an "explicit rule" to follow in limiting access to mental health records; the Board has discretion on discovery issues and can limit access to an employee's mental health records. On remand, the Board was directed to scrutinize the information sought for overbreadth, particularly relating to timeframe, and to consider restrictions on re-release of the information. *Id.* at 231.

Accordingly, Dr. Bauer's reports are relevant to the specific injuries asserted by Employee, including the pain associated with those injuries and its treatment. His reports will be examined in the context of the evidence as a whole as presented at a hearing on the merits of a claim or petitions if they are scheduled for hearing; the evidence will then be reviewed during the adversarial process and the weight to be accorded the reports will be determined at that time. *Cornelison.* Striking one or more of Dr. Bauer's reports would deprive Employer of its right to an EME, and would particularly prejudice Employer by eliminating the possibility of having an EME examination of Employee close in time to the initial injury, and follow-up examinations over the course of his treatment and recovery. AS 23.30.095(e).

2) **Will Dr. Bauer be prevented from testifying or providing future opinions**?

Employee contended Dr. Bauer is biased against him, and his opinion and future testimony had been tainted by the review of privileged or irrelevant medical records. Employee suggested that he had been re-victimized by inclusion of summaries of psychological records in the EME report where Dr. Bauer opined that adverse childhood events colored Employee's pain perception and could "predict failure of response to treatment and ongoing chronic pain."

No evidence has been presented that Dr. Bauer is biased against the Employee. The relevancy and privilege of the summarized records has been addressed earlier in this decision. Dr. Bauer's testimony and opinions are relevant to Employee's workers' compensation claim. Employer is entitled to its EME. AS 23.30.095(e). The appropriate course for Employee to pursue whether EME Bauer was biased or any inappropriate basis for his opinion prior to hearing was by timely filing a request for cross-examination. 8 AAC 45.052(c); 8 AAC 45.120(f). Dr. Bauer will not be prevented from testifying or providing future opinions.

3) Will Dr. Doppelt's report be stricken from the record?

Employee initially requested the panel review Dr. Doppelt's EME report as part of the original hearing on Dr. Bauer's report and compare the actual Doppelt report to the summary contained in Dr. Bauer's report. He later contended he had filed Dr. Doppelt's report for the limited purpose of determining the June 2021 petitions. Employee contended at hearing that the information disclosed by Employee to Dr. Doppelt relating to childhood events was not related to the workers' compensation claim and was privileged. He contended he was feeling re-victimized and wanted all references to childhood trauma removed from the record; conversely, Employee testified that he had resolved his childhood trauma and did not care if the information became public.

There is nothing within the Act that provides for filing a medical report for a limited purpose; the Act provides that any document in the agency file 20 or more days before hearing may be relied on in reaching a decision, absent a request for cross-examination. 8 AAC 45.120(f); 8 AAC 45.052. No request for cross-examination was filed relating to Dr. Doppelt's report.

Employer is entitled to its EME report, AS 23.30.095(e), so long as it relates to Employee's workers' compensation claim. Employee testified to ongoing, unresolved pain arising from a work-related injury. Multiple medical providers have noted that an objective cause of his pain and related complaints (i.e., arm twitching) has not been found. Multiple medical providers have raised concerns whether psychosocial, psychological, or neuropsychological factors may be affecting his pain perception and recovery. Information provided to Dr. Doppelt in the course of his examination of Employee included childhood trauma which may contribute to somatic symptom disorder, conversion disorder, and psychological factors affecting other medical conditions, *DSM-*

5; these are all concerns raised by one or more medical providers during the course of Employee's treatment and recovery. The information received by Dr. Doppelt from Employee is relevant to his workers' compensation claim. *Granus*.

For information shared with a psychotherapist to be privileged, it must be a communication made in the course of treatment. *Allred*. Statements made to a psychotherapist outside of a therapeutic relationship are not privileged. *Id.* While Dr. Doppelt is a licensed psychotherapist, Employee was not being seen in a therapeutic setting. The EME report notes Employee was advised at the time of examination that no doctor-patient relationship was being created or would result from the examination. The information contained in Dr. Doppelt's EME is not privileged; even if it were, privilege is waived where Employee initiates a claim and the information at issue is relevant to the matters put at issue. *Trans-World*; *Mathis*. Dr. Doppelt's EME report will not be stricken.

4) Was the procedural process used to address Employee's petitions correct?

Employee has raised the issue of whether the procedure used violated his due process rights. ALASKA CONST. ART. I, § 7. At the heart of due process is Employee's right to notice and the opportunity to be heard. *Fenner; Crutchfield*. This decision does not have authority to consider constitutional issues in most instances. *Burke*. The Act provides that workers' compensation hearings shall be fair and impartial to all parties and each party shall be afforded due process and an opportunity to be heard. AS 23.30.001(4).

Formal rules of procedure and evidence do not apply in workers' compensation cases, unless specifically set out in the Act. AS 23.30.135(a). "The board may make its . . . inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . ." *Id*. It has broad statutory authority in conducting its hearings. *DeRosario*.

Employee filed multiple petitions for protective orders, generally determined by the designee at a prehearing conference. *Rogers & Babler*; AS 23.30.108(d); 8 AAC 45.065. The designee notified the parties that the petitions would be heard at a prehearing conference, and as there was no provision in the Act for taking testimony at a prehearing conference, any testimony would need to occur via deposition. At the prehearing conference, after reviewing the file (including Employee's

objection to restricting Employee's testimony to deposition) and following discussion with the parties, the designee notified the parties that the June, 2021 petitions would be determined at hearing. Employee had filed a document entitled a "petition" prior to the prehearing conference; at the prehearing conference, he contended that petition was actually his brief for the issue. Employee later contended his due process rights had been violated by the loss of simultaneous briefing practice, giving Employer an unfair advantage.

Workers' compensation cases are to be decided on their merits. AS 23.30.001(2). The Act grants broad statutory discretion in the conduct of its hearings. AS 23.30.135; *DeRosario*. Employee was provided with notice regarding the hearing, an opportunity to appear and testify, and for his evidence and arguments to be fully heard and considered. The procedural process provided prior to hearing was appropriate and allowed by the Act.

CONCLUSIONS OF LAW

1) Dr. Bauer's EME reports will not be stricken in whole or in part.
2) Dr. Bauer will not be prevented from testifying or providing future opinions.
3) Dr. Doppelt's report will not be stricken from the record.
4) The procedural process used to address Employee's petitions was correct.

ORDER

1) Employee's June 4, June 23, and November 4, 2021 Petitions for protective order are denied.

Dated in Fairbanks, Alaska on February 7, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Cassandra Tilly, Designated Chair

/s/
Sarah Lefebvre, 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 Brian Fouts, employee / claimant v. Arctic Slope Regional Corp., self-insured employer / defendant; Case No. 201903390; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on February 7, 2022.

/s/
Ronald C. Heselton, Office Assistant II