ALASKA WORKERS' COMPENSATION BOARD

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

JOLENE M. CLARK, Employee, Claimant, v. KENAITZE INDIAN TRIBE, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202216636 AWCB Decision No. 23-0051 Filed with AWCB Anchorage, Alaska on September 12, 2023

Jolene M. Clark's (Employee) April 24, 2023 claim for a second independent medical evaluation (SIME) was heard on August 22, 2023, in Anchorage, Alaska, a date selected on July 11, 2023. A June 12, 2023 hearing request gave rise to this hearing. Attorney Robert Bredesen appeared by Zoom, and represented Employee, who also appeared by Zoom. Attorney Vicki Paddock appeared by Zoom and represented Kenaitze Indian Tribe and Alaska National Insurance (Employer). There were no witnesses. The record closed at the hearing's conclusion on August 22, 2023.

ISSUE

Employee contends there is a significant medical dispute between her treating physicians and Employer's medical evaluator regarding causation, compensability and treatment. She contends Employer's medical evaluator's opinion fails to rebut the presumption because he ignored objective evidence in the medical record of an aggravation of symptoms. Employee also contends

there is a gap in the medical record as Employer's controversion cut off further investigation into the nature and severity of the work injury and a post-work injury magnetic resonance imaging (MRI) was never obtained. She requested the medical opinions be analyzed for sufficiency, similar to an analysis for summary judgment. Employee requests an order granting her request for a SIME with an orthopedic foot specialist.

Employer contends there is no significant medical dispute because Employee's physician's opinion is based upon an inaccurate injury history. It contends there is no gap in medical evidence. Employer contends there is sufficient medical evidence in the record and an SIME physician opinion is not necessary. It requests an order denying Employee's request for an SIME.

Should an SIME be ordered?

FINDINGS OF FACT

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

1) On September 12, 2022, Employee reported her left ankle gave out when she was going down the stairs and she fell against the wall. She was able to hobble to the living room but has been unable to bear weight since. Employee wrapped her ankle to keep it from swelling. No bruising or swelling was seen. Left foot and ankle x-rays demonstrated no fracture or dislocation. She was provided a lace-up ankle brace and crutches and advised to rest for a week before increasing weight bearing. (Robert B. Mitchell, D.O., chart note, September 12, 2022; X-ray report, September 12, 2022).

2) On September 15, 2022, Dr. Mitchell stated Employee "should not bear weight on her left ankle for 1 week, with progression of activities as symptoms allow." (Mitchell letter, September 15, 2022).

3) On September 20, 2022, Dr. Mitchell excused Employee from working from September 19 to September 23, 2022. (Mitchell Excuse from Work, School, or Physical Activity, September 20, 2022).

4) On September 22, 2022, left foot and ankle MRI revealed a grade 1-2 sprain of the anterior talofibular ligament; grade 1 sprain of the calcaneal fibular ligament; grade 2 deltoid ligamentous complex sprain; acute to subacute nondisplaced fractures of the base of the second and third

metatarsals, medial cuneiform and possibly to the base of the first metatarsal; grade 1 Lisfranc ligament sprain; and bone contusion of the middle cuneiform, cuboid and base of the fourth metatarsal. (MRI reports, September 22, 2022).

5) On September 22, 2022, Employee said she had stepped off of a step, slipped and fractured her left foot and her physician referred her for an MRI, which she had a day prior. She used a scooter to get around and needed to obtain a better foot brace for better support. Katherine Sterner, A.N.P., referred Employee to orthopedics and recommended she follow up with the emergency department for pain meds. (Sterner Walk-In Clinic Provider Note, September 22, 2022).

6) On September 24, 2022, Employee followed up with Erin Carrick, PA-C, for left foot and ankle pain. She used ibuprofen and Tylenol, icing and elevation but the pain was still too much. Employee had an ankle brace and scooter, which she "like[d] better than crutches." She had some left foot swelling and "resolving ecchymosis at MT heads." PA-C Carrick prescribed acetaminophen-hydrocodone. (Carrick Primary Care Provider Note, September 24, 2022).

7) On September 27, 2022, Employee's left foot ecchymosis improved and swelling was intermittent. No ecchymosis or edema was visible upon examination. She was released to work from home for the next four weeks while her pain improved. Employee was directed to follow up in six to eight weeks. (Denya Koehler, PA, Orthopedic Consult note and Work/School Release, September 27, 2022).

8) On September 28, 2022, Employee was tentatively released to return to work on October 25, 2022, for her left foot and ankle injury. She was to weight bear as tolerated wearing a heel-strike boot and progress as pain allowed. (Orthopedic Clinic Medical Report of Duty Status, September 28, 2022).

9) On October 14, 2022, x-rays of Employee's left foot were compared to x-rays of her right foot and revealed symmetric appearance of the Lisfranc interval of the left compared to the right, possible minimal lateral step-off between the base of the first metatarsal and medial cuneiform in her left foot and nondisplaced fractures of the base of the first through third metatarsals and medial cuneiform in her left foot. (X-ray report, October 14, 2022). An x-ray of her left tibia-fibula showed a proximal fibular fracture. (X-ray report, October 14, 2022). Chad Ferguson, M.D., noted minimal left foot and ankle swelling, recommended no surgical treatment and prescribed a CAM boot for walking, anti-inflammatories and vitamin-D. Employee was to follow up in six to

eight weeks for x-rays. Dr. Ferguson anticipated she would not require any additional intervention. (Ferguson Orthopedic Clinic Note, October 14, 2022).

10) On October 21, 2022, Employee was released to return to work on October 25, 2022. (Orthopedic Service Medical Report of Duty Status, October 21, 2022).

11) On November 8, 2022, Employee injured her left foot and ankle while working when she was in the restroom stall standing up from the toilet and her left foot slipped, "twisting" her left foot and ankle. (FROI, November 8, 2022).

12) On November 8, 2022, Employee reported a twisting injury occurred two months after the initial fibular fracture and intermittent pain. She was at work and twisted her ankle while in the bathroom. Rachelle Blanc, D.O., noted "minimal pedal edema, no erythema or redness" in Employee's left foot. A left tibia and fibular x-ray showed a healed proximal fibular fracture and a left foot x-ray showed bone demineralization but no acute abnormalities. She prescribed ibuprofen, recommended Employee continue wearing the boot and using crutches and "conservative care such as RICE therapy," and released her to restricted work, no lifting over five pounds and no pushing or pulling. (Blanc Progress Note and Return to Work Authorization, November 8, 2022; X-ray Reports, November 8, 2022).

13) On November 9, 2022, Employee reported severe pain throughout the day and trouble tolerating ibuprofen as it upset her stomach. She tried Tylenol but it provided only minimal relief. Dr. Blanc recommended Employee go to the emergency room for faster evaluation by orthopedics due to reported severity of pain, but Employee declined to go. She referred Employee to orthopedic and for an MRI and prescribed hydrocodone-acetaminophen for severe pain. Dr. Blanc recommended Employee continue wearing the boot and using crutches and use "conservative care such as RICE therapy." (Blanc Progress Note, November 9, 2022).

14) On November 10, 2022, Dr. Blanc stated:

> [Employee] is under the care of our clinic and was evaluated 11/8/22. it[sic] is my recommendation that she has limitations in the following activities until she is evaluated by orthopedics:
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> - Bending over (less 10% of time)
> - Twisting of the lower body (0% of the time)
> - Lifting more than 5 lbs while sitting (less than 20% of the time)
> - Carrying anything more than 2 lbs (100% of the time)

> She should be able to sit and stand as needed which will be determined by her pain level. Accommodations should be made to allow her to elevate her left foot for at least 80% of the day. (Blanc letter, November 10, 2022).

15) On November 11, 2022, Dr. Blanc released Employee to restricted work duty from November 11, 2022 through November 23, 2022. (Blanc Return to Work Authorization, November 11, 2022).

16) On November 14, 2022, Dr. Blanc noted Employee's left foot had "trace pedal edema, no erythema or redness." Employee said she had been using "Norco 5-3 25" twice a day but sometimes needed it three times per day. Her pain was still pretty severe with movement but she denied walking on it. Dr. Blanc refilled Employee's prescription for hydrocodone-acetaminophen. She recommended Employee keep her appointment with orthopedics the next day but again reemphasized Employee go to the emergency room for further guidance due to her reported pain. (Blanc Progress Notes, November 14, 2022).

17) On November 17, 2022, left foot x-rays showed "[r]emote appearing, partially healed fractures" of the proximal aspects of the second and third metatarsal shafts and generalized degenerative changes and osteopenia. (X-ray reports, November 17, 2022). Left ankle x-rays showed generalized degenerative changes "without a cause of ankle pain." (X-ray report, November 17, 2022).

18) On November 17, 2022, Employee complained of left foot and ankle pain "for approximately 2 months." Danny Romman, D.P.M., noted:

> Patient presents with a complex history, with a timeline that changed multiple times during the interview.
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> Patient states that on 09/11/2022, the patient was descending a flight of stairs at work, when she suffered a rotational type injury to the left lower extremity, she had immediate pain, bruising and swelling, and pain on weightbearing to the left foot and ankle.
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> 24 hours later, the patient presented to the local ANMC outpatient clinic where X-rays and MRIs were obtained, confirming the presence of fractures of the bases first second and third metatarsals left foot, as well as a high fibular fracture of the left ankle. MRI revealed a sprain of Lisfranc's articulation, but no frank tear, no instability. X-rays of the right foot confirmed a similar anatomical presentation.
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> Since then, patient was referred to ANMC where's she followed with a foot and ankle orthopedic surgeon, who reviewed her imaging and suggested that she

> ambulate with a fracture boot. He wanted to treat her conservatively, so as to decide whether she needs to go to surgery after a conservative path. Patient understood this, but wanted to follow with somebody locally, as it is difficult for her to travel to Anchorage.
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> Patient is very emotional during the interview. . . .

Upon examination, Dr. Romman found "mild pain on palpation to the midfoot left foot as well as the anterior lateral synovial recess of the left ankle." He found Employee was difficult to evaluate as she was very emotional throughout the interview "with guarding." Dr. Romman said Employee likely had a left foot sprain of the Lisfranc's articulation, "with what the patient describes as a high ankle fracture, x-ray is reassuring, as the left foot seems similar anatomically to the right foot, and the left ankle mortise was intact." He recommended continued conservative measures, including weightbearing while utilizing the fracture boot at all times, and to return in one month for x-ray and reevaluation. Dr. Romman stated her left foot metatarsal fractures appeared to be "healing nicely, without any change in alignment." He advised her to return to non-weightbearing status and return to the clinic if she experienced increased pain. (Romman chart note, November 17, 2022).

19) On December 21, 2022, Dr. Romman saw Employee via telehealth one month after her last appointment; he included the same injury description from the November 17, 2022 chart note. She complained of continuing left foot pain on the top of her foot, as well as both sides of her left ankle; her pain level was about "2-3/10" and very achy. Employee did not walk with the fracture boot; she found it "cumbersome." She said she could not "stand up for very long and must ice daily. The ice does help. She often feels as though she must reposition the foot. She reports some color changes, and when asked if it is sensitive to temperature such as a warm shower, she says yes. She denies unusual hair growth." Dr. Romman diagnosed left foot pain, left Lisfranc's sprain and foot fracture history and suspected possible complex regional pain syndrome type 1 of her left lower extremity. He recommended conservative measures, including weightbearing while utilizing the fracture boot at all times, and to return to the clinic in one month for x-rays and reevaluation. Dr. Romman said, "I suspect this is normal healing, and noncompliance with the fracture boot. That being said, [chronic regional pain syndrome] CRPS must be ruled out." He referred Employee to pain management for further workup and recommended she continue to wear the boot and ice her left foot and ankle. (Romman medical chart, December 21, 2022).

20) On January 9, 2023, Employee reported she had received a rotational injury descending a flight of stairs at home and was diagnosed with fractures in her left foot at the bases of the first, second and third metatarsals and a left ankle high fibular fracture. She wore an "uncomfortable orthopedic boot" and twisted her left leg again in November. On December 22, 2022, Employee started wearing another boot but continued to experience left foot pain and noticed her left leg turned red. She used Tylenol and ibuprofen. At this visit, Solomon Michael Pearce, D.O., a pain management specialist, noted she had "allodynia to LT/Temp" but no edema. He diagnosed central pain syndrome, lower left leg pain, foot fracture history and back pain. Dr. Pearce said Employee "played a very passive role in her healing process. Mentally she is struggling significantly and feels she has fallen through the cracks." He referred Employee to behavioral medicine for instruction on coping strategies, breathing relaxation training, stress management and pain management techniques, and to occupational therapy and physical therapy. Dr. Pearce stated if Employee continued to have symptoms after the recommended treatment, a sympathetic nerve block could be considered but "at this time it does not appear to be CRPS, but rather lack of use with significant psychological stressors which seem to be limiting her progress." He advised her to follow up with podiatry to be tapered off her ankle and walking boot bracing. (Pearce progress note, January 9, 2023).

21) On February 17, 2023, Employee began physical therapy and was tearful through the session. She reported that since the initial injury, her pain at rest has improved but it remained at 3/10 up to 9/10, and standing on her left leg increased the pain. Employee wore a lace up ankle brace all day prescribed by primary care physician Stuart Marcotte and has been using crutches for mobility. She found the two walking boots provided by orthopedics intolerable and worried they made the injury worse. When Employee's foot was painful, she iced and elevated it and occasionally took over-the-counter medication; she had been massaging her foot based upon Dr. Pearce's advice which was somewhat helpful at improving pain. She arrived at the session wearing the lace up ankle brace under her walking boot and using crutches. Employee's left ankle was slightly edematous but not enough to cause dysfunction. She was too sensitive and emotionally labile to attempt extensive therapy so was started on "gentle AROM exercise." (Benjamin M. Chimenti, DPT, Progress Note, January 17, 2023).

22) On March 11, 2023, Todd Fellars, MD, examined Employee for an employer's medical evaluation (EME) and concluded:

> The claimant has complex injury to her mid foot involving her second and third metatarsals that are associated likely with her osteoporosis. This was documented to have occurred at home when she twisted her foot going downstairs. She then had a subsequent injury on November 8, 2022. However, there was no objective worsening of her injuries identified after her September 11, 2022 industrial injury. She had been receiving treatment for this and had already had nondisplaced fractures at the base of her second and third metatarsals and the small medial cuneiform fractures as well as a midfoot injury, including the Lisfranc ligament sprain.
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> Objectively, these conditions were not worsened. She reported increased pain because she put weight on her foot, but there was no interval displacement. Therefore, although she reports subjective pain, her healing at this time is still consistent with her September 12[sic], 2022 injury that occurred at home and there is truly no worsening of her condition or aggravating of her symptoms that can be attributed to her reported incident on November 8, 2022.
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> Given this, the claimant would be continuing to heal from her left foot injury that occurred at home and it is not work related. This is a very significant injury and will take at least a year to heal. The work incident did not cause any prolonged healing time or create any need for further treatment that they existed prior to this event as all of her conditions are pre-existing her reported work incident of November 8, 2022. Certainly, she will have pain for a period of time after the incident because she had not been walking yet on her foot, but it did not cause any material or objective worsening of her overall condition as a report of her reported incident from November 8, 2022. Given this, the claimant will be medically stable and will not have a ratable impairment associated with her work injury as the entire impairment pre-existed the reported November 8, 2022, work injury.

Dr. Fellars stated the medical treatment had been reasonable and necessary for the process of recovery from her injury at home and her need for treatment is not the result of the work injury but is the result of her injury at home. He said:

> She is a candidate for behavioral medicine counseling, physical therapy, pain management, and a CAM boot, all as a result of her work injury. I am not certain that a sympathetic block is indicated, as she has no evidence of CRPS and that is the only indication for a sympathetic block in this case. Therefore, overall, the November 8, 2022 work injury is not the substantial cause of the need for any treatment. She's continued to follow in normal post injury course as a result of her September 2022 injury at home. She truly does not have evidence of a work injury that has caused the disability or need for treatment.

He did not recommend evaluations by any other medical specialists except the behavioral medicine counseling through her private insurance. Dr. Fellars opined Employee has the physical capacity

to return to her position as an accreditation and policy manager as it is a sedentary position. No restriction was a result of her work injury, as she was only restricted based on her pain and objectively there was no worsening of her condition and her condition preexisted the work injury. Employee "tweaked" her foot but shortly after the work injury, her pain followed the predicted post-injury course for her September 2022 injury at home that would have occurred whether or not the work injury had occurred. She sustained no impairment as a result of the work injury. (Fellars EME report, March 11, 2023).

23) On April 24, 2023, Employee requested an SIME. She also sought temporary total disability (TTD), temporary partial disability (TPD) and permanent partial impairment (PPI) benefits, medical and transportation costs, penalty for late-paid compensation and interest as she "Twisted foot/ankle/body in the handicap restroom which no handicap railing installed after recent renovations of the 215 Fidalgo building owned by the Kenai Native Association." (Claim for Workers' Compensation Benefits, April 24, 2023).

24) On March 20, 2023, x-rays of Employee's right foot showed degenerative changes, including an accessory ossicle. (X-ray report, March 20, 2023).

25) On March 20, 2023, Employee reported bilateral foot pain, including a rotational injury of her left lower extremity while descending stairs at work. She had not been wearing her CAM boot but her pain was improving. Employee's left midfoot and right first metatarsophalangeal joints had no edema. Kristina Lacy, D.P.M., diagnosed right foot pain, hallux limitus, left foot pain, history of foot fracture and Lisfranc's sprain. She released Employee to restricted duty work until further evaluation, reducing her work hours to four hours per day, five days per week. (Lacy Progress Notes and Return to Work Authorization, March 20, 2023).

26) On March 24, 2023, left foot x-rays showed no acute fracture or dislocation, diffuse osteopenia, healed fracture deformities involving the base of the second and third metatarsals and generalized degenerative changes. (X-ray report, March 24, 2023).

27) On April 16, 2023, Dr. Lacy responded to a letter from the claims adjuster asking her to review Dr. Fellars' March 11, 2023 EME report and indicate whether she did nor did not concur with the findings and treatment recommendations. She made no indication and stated, "Unfortunately I was not involved in Ms. Clark's care prior to 3/20/23. The podiatrist Dr. Romman saw Ms. Clark prior to this, he moved out of the state. Ms. Clark's improving and I requested that she follow up but she has not." (Lacy response, April 16, 2023).

28) On May 12, 2023, Employer opposed an SIME, contending Employee failed to identify "the issues where there is a dispute between her attending physician and the IME and the Board should not order an SIME." It controverted TTD, TPD and PPI benefits and medical and transportation costs, penalty, and interest based upon Dr. Fellars' EME report. (Controversion Notice, May 12, 2023; Answer, May 12, 2023).

29) On May 12, 2023, Dr. Fellars issued the following addendum to his EME report:

> Her left midfoot injury is a result of her fall at home prior to her reported work incident, but not as a result of her work incident. Also, I don't feel a sympathetic block is indicated. She is a candidate for behavioral medicine counseling, physical therapy, pain management, and a CAM boot, all as a result of her work injury, that would need to be directed by a competent mental health specialist. I am not a mental health specialist and would defer to them regarding this matter. From an orthopedic standpoint, no further treatment is indicated as she does not have an injury that was substantially caused by her reported work injury, the November 8, 2022 work injury is not the substantial cause of the need for any treatment. She is continuing to follow a normal post-injury course as a result of her September 2022 injury at home. She truly does not have evidence of a work injury that has caused the disability or need for treatment. TO[sic] be clear, it is my medical opinion that no further intervention is required from an orthopedic standpoint. . . . (Fellars addendum, May 23, 2023).

30) On June 8, 2023, Employer controverted TTD, TPD and PPI benefits and medical and transportation costs, penalty, and interest based upon Dr. Fellars' EME reports, and an SIME for Employee's failure to identify medical disputes. (Controversion Notice, June 8, 2023).

31) On June 26, 2023, Employee amended her claim to add a request to find an unfair or frivolous controvert and attorney fees and costs for "repetitive work activities, and a specific incident, which injured employee's foot/ankle." (Claim for Workers' Compensation Benefits, June 26, 2023).

32) On July 12, 2023, Employer controverted TTD, TPD, and PPI benefits, medical and transportation costs, penalty, and interest based upon Dr. Fellars' EME reports. (Controversion Notice, May 12, 2023; Answer, May 12, 2023).

33) On July 3, 2023, Employee contended there were disputes between Drs. Romman and Fellars in their December 21, 2022 and March 11, 2023 medical records regarding compensability, causation and medical treatment and sought non-SIME issues for medical stability, degree of impairment and functional capacity. She requested the SIME physician be an orthopedic foot

specialist. Dr. Romman's December 21, 2022 medical record and Dr. Fellars' March 11, 2023 EME report were attached to the form. (SIME form, July 3, 2023).

34) On July 12, 2023, Employer controverted TTD, TPD and PPI benefits and medical and transportation costs, penalty, interest, a finding of unfair or frivolous controvert and attorney fees and costs based upon Dr. Fellars' EME report, and an SIME for Employee's failure to identify medical disputes. (Controversion Notice, July 12, 2023; Answer, July 12, 2023).

35) On August 14, 2023, Employee testified at deposition she was injured at work on November 8, 2022, when her foot slipped while going to stand up in the handicapped bathroom stall. (Employee deposition at 37). All of her weight went on her broken left foot as she twisted and rebalanced so she would not fall. (*Id*. at 37-38). Their building was being remodeled and there were no handrails so there was nothing to grab onto. (*Id*. at 38). Employee was wearing a "kick boot" that had five or six Velcro straps on her left foot. (*Id*. at 39). She had broken her foot on September 11, 2022 at home while going downstairs and she stepped wrong on her foot. (*Id*. at 40-41). Employee saw Dr. Mitchell for her fall at home and he sent her to get x-rays and gave her a lace-up ankle brace, which she was wearing when she fell, and crutches. (*Id*. at 41-42). Prior to the work injury, she was walking very short distances on her boot. (*Id*. at 76). After her work injury, Employee could not bear weight on her foot. (*Id*.). She still does not like to stand for very long; she needs to elevate and it hurts. (*Id*. at 76-77). Employee elevated before the work injury but elevated and iced more after the work injury. (*Id*. at 77). After the work injury, her left foot became swollen and discolored and she had to have a chair in her shower. (*Id*.). The discoloration is finally starting to recede and its beginning to look like her right foot now. (*Id*. at 78).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .
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> . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered

The Board may base its decision not only on direct testimony and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.095. Medical treatments, services, and examinations.** . . .
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> (k) In the event of a medical dispute regarding determinations of causation, medical stability . . . degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . . .
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> **AS 23.30.110. Procedure on Claims.** . . .
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> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. . . .

Regulation 8 AAC 45.090(b) provides for orders requiring an employer to pay for an employee's examination pursuant to AS 23.30.095(k) or §110(g). Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Dec. No. 97-0165 (July 23, 1997), at 3; *see also Harvey v. Cook Inlet Pipe Line Co*., AWCB Dec. No. 98-0076 (March 26, 1998). Under §135(a) and §155(h), wide discretion exists under §110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in claims, to best "protect the rights of the parties."

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.,* AWCAC Dec. No. 073 (February 27, 2008) addressed the Board's authority to order an SIME under §095(k) and §110(g). With regard to §095(k), the Commission referred to its decision in *Smith v. Anchorage School District,* AWCAC Dec. No. 050 (January 25, 2007), at

8, in which it confirmed, "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer."

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the Board in resolving the dispute. *Bah* at 4. The Commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties. *Id.* at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the Board, and the SIME is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id*. When deciding whether to order an SIME, the Board typically considers the following criteria, though the statute does not require it:

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

Deal at 3.

Accordingly, an SIME pursuant to §095(k) may be ordered when there is a medical dispute, or under §110(g) when there is a significant gap in the medical or scientific evidence. Further, the Commission held an SIME may be ordered when, because of a lack of understanding of the medical evidence, the parties' rights cannot be ascertained. It stated:

> Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board. *Bah* at 8.

The decision to order an SIME rests in the discretion of the Board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Dec. No. 06-0301, at 6 (October 25, 2007). Although a party has a right to request an SIME, a party does not have a right to an SIME if the Board decides one is not necessary for the Board's purposes. *Id*. at 8. An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the Board to assist it by providing disinterested information. *Id*. at 15.

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

ANALYSIS

Should an SIME be ordered?

An SIME may be ordered if there is a significant medical dispute between Employee's attending physician and the EME. AS 23.30.095(k); *Bah*. Drs. Blanc, Romman, Pearce and Lacy treated Employee's left lower extremity after the November 8, 2022 work injury. Dr. Blanc's medical reports noted Employee's previous left foot fracture caused by an injury at home on stairs, and pain, and included a description of the twisting work injury; she prescribed acetaminophen-hydrocodone, referred Employee to orthopedics and for an MRI and released her to restricted work. However, Dr. Blanc did not indicate whether the recommendations, prescription and work restrictions were related to the work injury or the previous injury at home.

Dr. Romman's medical reports stated Employee presented with a "complex history" and "a timeline that changed multiple times" and that she injured her left lower extremity at work on September 11, 2022, when she suffered a rotational injury while descending stairs and described the medical treatment Employee underwent after her previous injury at home, including the MRIs and x-rays that diagnosed her fractures. He recommended an assessment for CRPS and referred Employee to pain management.

Dr. Pearce's medical reports included a description of Employee's injury at home and her work injury and stated, "lack of use with significant psychological stressors seemed to limit" Employee's recovery progress and he referred her to behavioral medicine, occupational and physical therapy and podiatry but ruled out CRPS. He did not indicate whether the recommended treatment was related to the injury at home or the work injury.

Dr. Lacy's medical reports included the same injury description as Dr. Romman's reports, diagnosed a new medical condition for Employee's right foot pain and recommended work restrictions but did not indicate they were related to her new right foot or her left foot, including whether it was for the injury at home or at work. She also refused to provide an opinion in her April 16, 2023 response when asked to review Dr Fellars' EME report. None of Employee's treating physicians addressed whether their recommended medical treatment or work restrictions were related to the prior injury at home, the work injury or her right foot symptoms.

Dr. Fellars attributed Employee's need for left lower extremity medical treatment and disability to her injury at home, and not to the work injury. He found no work-related impairment and opined Employee could return to her job and any work restrictions were due to her injury at home. Dr. Fellars concluded the medical treatment had been reasonable and necessary for the process of recovery from the injury at home and Employee was medically stable. He stated Employee's healing was consistent with the injury at home because the work injury did not cause any prolonged healing time or create any need for further treatment that did not exist prior to it. While he acknowledged Employee experienced pain for a time after the work injury because she had not been walking on it yet, Dr. Fellars concluded there was no worsening of her condition or aggravation of symptoms attributable to the work injury. He ruled out CRPS and did not recommend an MRI. Dr. Fellars recommended Employee obtain behavioral medicine counseling through her "private insurance" and opined Employee "is a candidate for behavioral medicine counseling, physical therapy, pain management, and a CAM boot, all as a result of her work injury, that would need to be directed by a competent mental health specialist." Therefore, upon careful review, the medical records from Employee's treating physicians do not create a significant medical dispute with Dr. Fellars' opinions adequate to justify an SIME regarding compensability, causation or medical treatment. AS 23.30.095(k); *Bah*.

A gap in the medical records could give rise to the need for an SIME. AS 23.30.110(g); *Bah*. A gap is significant if it is one which would prevent the factfinders from ascertaining the rights of the parties in the dispute. *Bah*. The lack of a medical opinion from Employee's treating physicians regarding whether Employee's need for medical treatment or disability was related to the work injury or the injury at home is not a gap in medical evidence which would prevent the factfinders form ascertaining the rights of the parties in the dispute, because there is contrary medical evidence. An SIME is not a discovery tool for parties to obtain a medical opinion. *Olafson*. Dr. Romman's muddled description of the work injury, the lack of medical opinion from Employee's treating physicians and the lack of a post-injury MRI does not create a gap which justifies an SIME because an SIME is not a discovery tool. AS 23.30.110(g); *Bah*; *Olafson*. Employee may obtain a medical opinion regarding causation, compensability and medical treatment and its relationship to her work injury by requesting additional examinations or reports. Dr. Romman's account of the work injury in his report would go towards the weight accorded his reports at a merits hearing. This decision will not issue an advisory opinion on whether Dr. Romman's reports, or any other evidence, establishes the preliminary link in the presumption of compensability analysis.

The defect Employee asserted in Dr. Fellars' EME report regarding his lack of consideration of objective evidence showing an aggravation of symptoms is not grounds for finding a medical dispute justifying an SIME because an SIME is not a discovery tool. *Olafson*. Such an asserted defect would go to the weight accorded Dr. Fellars' reports at hearing. AS 23.30.135(a); *Bah*. This decision will not issue an advisory opinion on whether Dr. Fellars' reports rebut the presumption of compensability. There is no gap in the medical evidence to prevent the rights of the parties from being ascertained. AS 23.30.001; AS 23.30.110(g); AS 23.30.135(a); *Bah*.

Another physician's opinion is not necessary in determining whether the work injury is the substantial cause of Employee's need for medical treatment and disability and whether additional medical care will be reasonable or necessary. AS 23.30.001 AS 23.30.095(k); AS 23.30.135(a); *Bah*. An SIME will not assist the factfinders in this case and it will not be ordered. AS 23.30.001; AS 23.30.095(k); AS 23.30.110(g); AS 23.30.135(a); *Bah*.

CONCLUSION OF LAW

An SIME should not be ordered.

ORDER

Employee's April 24, 2023 claim for an SIME is denied.

Dated in Anchorage, Alaska on September 11, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Marc Stemp, 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 Jolene M. Clark, employee / claimant v. Kenaitze Indian Tribe, employer;

Alaska National Insurance, insurer / defendants; Case No. 202216636; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 12, 2023.

/s/
Rachel Story, Office Assistant I