ALASKA WORKERS' COMPENSATION BOARD

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

LAZLO TOENNIS, Employee, Claimant, v. CROWLEY HOLDINGS, INC., Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202128481 AWCB Decision No. 24-0036 Filed with AWCB Anchorage, Alaska on June 24, 2024

Lazlo Toennis's November 6, 2023, petition to strike the September 28, 2022, employer medical evaluation (EME) of Dustin Logan, Ph.D., was heard in Anchorage, Alaska on May 23, 2024, a date selected on April 17, 2024. A February 22, 2024 stipulation gave rise to this hearing. Attorney Adam Franklin appeared and represented Lazlo Toennis (Employee). Attorney Rebecca Holdiman Miller appeared and represented Crowley Holdings, Inc. and Old Republic Insurance Company (Employer). Witnesses included Employee, who testified on his own behalf, and Molly Friess, Employer's former adjuster, who testified on Employer's behalf. The record closed at the hearing's conclusion on May 23, 2024.

ISSUES

In addition to Employee's September 28, 2023 petition, the designee added the issue of whether Employer made an excessive change of physician as a hearing issue.

Employee contends Employer excessively changed physicians so Dr. Logan's September 28, 2022 report should be stricken pursuant to regulation.

Employer contends Dr. Logan's September 28, 2022 report should not be stricken because its first two medical evaluators were a panel, authorized by regulation, and the only reason the panel members' reports were not dated within five days of one another as required by the regulation was because Employee failed to appear for the second evaluation, so it then requested the second evaluator perform an evaluation based on Employee's medical records instead.

1) **Should Dr. Logan's September 28, 2022 report be stricken because Employer excessively changed physicians?**

Employee contends he scheduled an appointment to see Dr. Logan as his physician, then Employer caused Dr. Logan to cancel his appointment and had Dr. Logan perform an EME on its behalf instead. He contends Dr. Logan's September 28, 2022 report should be stricken because Employer's actions amount to unlawful interference with his selection of a treating physician. In response to Employer's contention that he consented to the change of appointments, Employee contends he was not represented an attorney, has a traumatic brain injury (TBI), and could not have been expected to understand the difference between his appointment to see Dr. Logan as a patient and his appointment to see Dr. Logan for an EME.

Employer contends Dr. Logan's September 28, 2022 report should not be stricken because Employee consented to changing the appointment and because Employee did not timely object to the change afterwards.

2) **Should Dr. Logan's September 28, 2022 report be stricken because Employer unlawfully interfered with Employee's selection of a treating physician?**

FINDINGS OF FACT

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

1) Employee's preexisting medical history includes chronic pain and a multitude of other chronic conditions. (Jared Kirkham, M.D., report, July 25, 2022).

2) On November 11, 2021, Employee was driving a semitruck with double tank trailers, and when he slowed to 10 miles per hour at a railroad crossing, a car going about 50 miles per hour rear-ended his truck. He was thrown forward and backwards and felt pain in his neck, both shoulders and upper and lower back. (First Report of Injury (FROI), November 19, 2021).

3) On November 13, 2021, Employee sought treatment at the Emergency Department (ED). He reported wearing his seatbelt at the time of the collision and denied head injury or loss of consciousness. Employee complained of right shoulder pain with numbness running down his right arm and intermittent headache. On physical exam, Employee's head was noted to be atraumatic and there were no neurological deficits on exam. (ED report, November 13, 2021). Computed Tomography (CT) scans of the head and cervical spine were negative for any acute findings. X-rays of the right shoulder showed mild degenerative changes. (Radiology reports, November 13, 2021).

4) Following the accident, Employee treated with Kymberli Brock, F.N.P., his primary care provider; Peter Osterbauer, M.D., a neurologist, for headaches; Curtis Mina, M.D., an orthopedic surgeon, for neck pain; and Tucker Drury, M.D., an orthopedic surgeon, for right shoulder pain. (Employee).

5) On November 22, 2021, Dr. Osterbauer diagnosed Employee with post-concussion syndrome. (Osterbauer chart notes, November 22, 2021).

6) On April 11, 2022, FNP Brock referred Employee to Dustin Logan, PhD., for a neuropsychological evaluation. (Referral, April 11, 2022). That same day, Employee's ex-wife, Crystal, scheduled an October 27, 2022 appointment with Dr. Logan for Employee's evaluation. (Melinda Logan email, April 11, 2023). Crystal stated that the appointment was "urgent," and Employee needed to "get in earlier." Dr. Logan's office put Employee on the wait list. Crystal asked whether Dr. Logan would also consider the appointment "urgent" and if he could "get [Employee] in earlier." (Contact Note for Crystal, April 11, 2022). Dr. Logan's office notified Employer's adjuster of the October 27, 2022 appointment and informed her that Employee was on Dr. Logan's wait list. The adjuster authorized the evaluation on October 27, 2022, and asked to be notified if Employee's appointment changed. (Contact Note for Molly, April 11, 2022).

7) On April 19, 2022, Crystal called Dr. Logan's office to "make sure" it had received Employee's paperwork. (Contact Note for Crystal, April 19, 2022).

8) On April 19, 2022, Dr. Logan's office manager sent Employee an additional form to complete for his appointment. (Melinda Logan email, April 19, 2022).

9) On April 22, 2022, after speaking with Employee, Employer's adjuster noted Employee was scheduled for a neuropsychological evaluation in October 2022 with Dr. Logan. (Friess notes, April 22, 2022).

10) On May 10, 2022, Employer's adjuster scheduled a panel EME with R. David Bauer, M.D. and Dr. Kirkham. The evaluations were to occur on July 13, 2022, and July 15, 2022, respectively. (McCain affidavit, May 10, 2024).

11) On July 13, 2022, Dr. Bauer, an orthopedic surgeon, performed an EME. Employee completed a symptom diagram for the evaluation that indicated sharp, aching pain across his head in a circumferential fashion, including both temporal and occipital regions; pins and needles pain and sharp aching pain that begins at his neck and radiates down his back, as well as burning in his midback, lower back and buttock; burning, numbness and aching over the left shoulder, with numbness along the radial aspect of the left arm; numbness and paresthesia in the right leg from the hip area down the lateral aspect of the leg from the knee to the foot, as well as pain in both hips. His current complaints included headaches, nausea, dizziness, blurred vision, vertigo, ringing in the ears, memory loss, confusion, brain fog, anxiety, bursts of anger, depression, night sweats, leg tremors and shaking hands. Employee stated his pain is aggravated by "almost anything," and is relieved by "nothing." Following his physical examination of Employee, Dr. Bauer thought Employee's widespread, subjective pain complaints were out of proportion to the magnitude of the trauma sustained in the November 11, 2021 motor vehicle accident and the duration of time since that accident. He concluded Employee sustained, at most, a cervical sprain/strain because of the accident and thought Employee's medical treatment had been excessive and not related to the November 11, 2021 accident. (Bauer report, July 13, 2022).

12) On July 15, 2022, Employee, who was scheduled to appear for an EME with Dr. Kirkham, did not appear for the evaluation. (Kirkham report, July 25, 2022; McCain affidavit, May 10, 2024).

13) The record does not explicitly show why Employee did not attend the EME with Dr. Kirkham. (Observations). However, Employee's absence was likely the result of a scheduled court appearance on July 15, 2022 arising from an incident where Employee fired three or four shots from a firearm while he thought some people were stealing a trailer from him. (Progress

Note, July 14, 2022; Logan report, September 28, 2022; Employee dep., April 3, 2024 at 151-157; inferences drawn therefrom). He was charged with assault in the third degree and misconduct involving a weapon. Employee testified that the criminal charges against him were subsequently dismissed. (Employee dep., April 3, 2024 at 156).

14) On July 25, 2022, Employer confirmed it wanted Dr. Kirkham to evaluate Employee based on his medical record instead of an in-person evaluation. (McCain affidavit, May 10, 2024). After reviewing Employee's medical records, Dr. Kirkham opined Employee's chronic pain complaints were not substantially caused by November 11, 2021 accident but were instead multifactorial in etiology, including Employee's history of chronic pain, age, genetics, personality factors, obesity, deconditioning and especially psychosocial factors, including adverse childhood experiences, anxiety, depression, worry, hopelessness and suicidal ideation. He further concluded parts of Employee's medical treatment were reasonable and necessary, but his overall course of care had been protracted and excessive. (Kirkham report, July 25, 2022).

15) At the conclusion of Dr. Kirkham's report, he wrote: "Please note that the above opinions are based upon the records available to me as of 07/28/22." (*Id*.).

16) On August 21, 2022, Employer controverted all benefits based on Dr. Bauer's July 13, 2022 and Dr. Kirkham's July 25, 2022 reports and served Employee with a copy of the controversion notice. (Controversion Notice, August 21, 2022).

17) On August 30, 2022, an agent for Employer requested available dates when Dr. Logan could evaluate Employee for an EME. (Colman email, August 30, 2022). Dr. Logan's office contacted Employer's adjuster to "find out if there has been a change in the need for a clinical evaluation vs [EME]." Employer's adjuster stated an EME was needed "as soon as possible." Differences between an EME and a clinical evaluation were discussed, and Dr. Logan's office offered September 7th or September 28th as possible dates for an EME. (Contact Note for Molly, August 30, 2022). The September 28, 2022 date was confirmed. (Colman email, August 30, 2022).

18) On September 13, 2022, Dr. Logan's office called Employee to confirm he would attend the EME with Dr. Logan. (Contact Note for Employee, September 13, 2022; Kirkham letter, May 13, 2024). Employee requested Dr. Logan's office send him a confirmation email, which it did. (Contact Note for Employee, September 13, 2022).

19) Dr. Logan's September 13, 2022 contact note did not record any objections by Employee to the evaluation being conducted as an EME. (Observations).

20) On September 20, 2022, Employer amended its August 21, 2022 controversion based on Dr. Bauer's July 13, 2022 and Dr. Kirkham's July 25, 2022 reports and served Employee with a copy of the controversion notice. (Controversion Notice, September 20, 2022).

21) On September 28, 2022, Employee was provided with written and verbal explanations of the purpose of Dr. Logan's EME, including use of the information obtained, limits to confidentiality and the voluntary nature of visit. Employee gave his verbal and written consent to the EME before it commenced. (Acknowledgments form, September 28, 2022; Logan report, September 28, 2022; Logan letter, May 13, 2024). During the evaluation, Employee described undergoing counselling for depression and anxiety, having poor cognition, and struggling with short term memory. He reported impulsive spending behavior, and being overly anxious, easily angered and depressed. Employee was having constant thoughts of killing himself, and was hearing voices, including a woman's voice that whispers and could be vulgar. He was seeing shadows that others do not see, and reported sleep disruption, ongoing daily headaches and chronic pain. During testing, Dr. Logan thought Employee's performance on performance validity measures indicated invalid responding and response bias. Employee's scores on one measure were at "chance" performance, indicating he may have intentionally answered incorrectly, and his psychological and personality testing was also determined to be invalid due to excessive reporting of infrequent responses, particularly in the areas of cognition and somatic symptoms. Dr. Logan was unable to provide a diagnosis due to invalid cognitive profiles and psychological symptom overreporting. He also found Employee overreported cognitive and somatic symptoms at a level inconsistent with his claimed injury. Noting that Employee did not report hitting his head at the time of impact, and that a concussion diagnosis requires a loss of consciousness, posttraumatic amnesia or an alteration of consciousness, Dr. Logan saw no evidence from Employee's medical records of a head injury or concussion injury. Instead, he thought Employee's reported symptoms were attributable to multiple psychosocial factors, deconditioning, longstanding chronic pain, emotional distress, including anxiety and depression, suicidal ideation, chronic medical conditions, secondary gain, and iatrogenic misattribution of symptoms to a perceived concussion. (Logan report, September 28, 2022).

22) Dr. Logan's September 28, 2022 report did not record any objections by Employee to the evaluation being conducted as an EME. (Observations).

23) At the time of Dr. Logan's evaluation, Employee was not represented by an attorney. (Employee; observations).

24) On March 6, 2023, Employee sought benefits arising from a coup contrecoup closed head injury, post-concussive syndrome, headaches, cognitive deficit, mood disorder, vision disturbance, right shoulder, neck and back. (Claim for Workers' Compensation Benefits, March 6, 2023).

25) On November 6, 2023, Employee filed his instant petition to strike Dr. Logan's September 28, 2022 EME report because Employer unlawfully interfered with his selection of a treating physician. (Petition, November 6, 2023).

26) On December 11, 2023, Dr. Osterbauer opined Employee's imaging studies are consistent with a history of TBI and he was considering referring Employee to an out-of-state facility specializing in post-TBI treatment. (Osterbauer chart notes, December 11, 2023).

27) On April 3, 2024, Employee testified he has memory problems that have gotten worse since the November 11, 2021 accident. (Employee dep., April 3, 2024, at 145). He also testified his primary care provider, Ms. Brock, made his appointment with Dr. Logan. (*Id*. at 159). Employee could not recall having a conversation with Employer's adjuster about him wanting to have the appointment with Dr. Logan sooner than October. (*Id*. at 164, 165). He also answered many other questions at his deposition by stating "I don't know," "I can't remember," and "I can't recall." (Employee dep., March 13, 2024; continued April 3, 2024).

28) At an April 17, 2024 prehearing conference, because the dates of Dr. Bauer's and Dr. Kirkham's reports were more than five days apart, the designee added the issue of whether Employer made an excessive change of physician as a hearing issue. (Experience; Prehearing Conference Summary, April 17, 2024).

29) On May 10, 2024, a representative for Employer's third-party EME vendor averred Dr. Kirkham's report was dated July 25, 2022 because that date was the date Employer's adjuster confirmed her request that Dr. Kirkham perform an evaluation based on Employee's medical records. She also declared, "The [EME] was originally set as a panel evaluation but for [Employee's] failure to appear, the reports would have been dated within 5 days of each other." (McCain affidavit, May 10, 2022).

30) On May 13, 2024, Dr. Logan authored a letter stating that one of his conditions for changing Employee's appointment from a clinical evaluation to an EME was that Employee agreed to the change. (Logan letter, May 13, 2024). Dr. Logan's May 13, 2024 letter did not record any

objections by Employee to the evaluation being conducted as an EME. (Observations). Instead, it states Employee was aware the evaluation was being conducted as an EME and that Employee provided both verbal and written consent to complete the EME. (Logan letter, May 13, 2024).

31) On May 23, 2024, Employee testified about the providers with whom he had treated since the injury. His ex-wife, Crystal, helped him look for a neuropsychiatrist to perform an evaluation and she found Dr. Logan. He made the appointment with Dr. Logan. Employer's adjuster did not help him find Dr. Logan. Employee contacted Employer's adjuster to confirm the appointment would be paid for and the adjuster approved of Employee using Dr. Logan for the evaluation. These events occurred in early to mid-April. His appointment with Dr. Logan was in October, which was the first available appointment. He asked to be put on a cancellation list because six months is a long time to wait for medical testing and he had seen multiple doctors trying to figure out what was causing his symptoms. Employee learned that Employer was going to have Dr. Logan perform an EME from a certified letter. He also received a letter stating, if he failed to show up for the appointment, he would be fined $3,300 and they would "kick me off of workman's comp." At that time, he did not have legal counsel to tell him if he should or should not attend the EME. Employee required the insurance company to pay for his transportation to the EME because that was how mad he was that "they took my doctor from me." He did not discuss changing the appointments with Employer's adjuster. Employee "definitely" would not have agreed to the change. He did not know what was "legal" and what was "not legal." Employee was very unhappy, very agitated and dissatisfied with the changed appointment. He expressed his frustration about the changed appointment to Dr. Logan and "everybody." (Employee).

32) On May 23, 2024, Employer's former adjuster, Molly Friess, testified she was the adjuster for Employee's case until she left her former employer. Employee was referred for a neuropsychological evaluation and she learned the first available "regular" appointment with Dr. Logan was in October 2022. She did some research, "thinking outside the box," and she told Employee he could be seen much sooner if he was seen for an EME. Ms. Friess learned Employee could be seen sooner if the appointment was an EME by calling Dr. Logan's office. "So that's what we did" because Employee was referred for the evaluation and he wanted to know what was going on with him physically and with his head. She does not recall if she communicated with Employee by phone or email about rescheduling the evaluation with Dr. Logan. Employee wanted to see Dr. Logan as soon as possible so the evaluation was done as an EME and Employee could

be seen sooner. As an adjuster, Ms. Friess knows she cannot direct medical care in Employee's case and can schedule an appointment for Employee only at his request. Dr. Logan was the only appointment she scheduled for Employee because EMEs are scheduled by the adjusters and not the injured workers. It was an "unusual situation" involving an evaluation for which Employee was referred and he wanted to pursue. She had never done this before because she has never had a multi-month delay for a doctor to do an evaluation. Employee did not object to the evaluation being done as an EME; "he wanted the appointment." Employee did not object afterwards until the time Ms. Friess left her former employer. If Employee had objected, she would have cancelled the appointment immediately to avoid a no-show fee. When asked about making notes in the adjuster's file, Ms. Friess stated the reason she left her former employer was because she wanted to work for an employer where she could do her best work. She acknowledged she was not doing her best work at the time she was adjusting Employee's case and everything in Employee's case should have been documented better. Ms. Friess does not know whether all her contacts with Employee were noted in the adjuster's file because she no longer has access to the file. Scheduling the appointment with Dr. Logan as an EME was something she and Employee agreed to. She did not explain to Employee the differences between an appointment with a doctor as a treating physician and an appointment with a doctor as an EME physician. This was an unusual situation because the doctor to which Employee was referred also does EMEs and most EME physicians are from out-of-state. She was trying to help Employee by scheduling the evaluation with Dr. Logan. (Friess).

33) Ms. Friess is familiar with the statutory guidelines for EMEs under the Act and she spontaneously and correctly recited them when asked. (Observations, record).

34) At hearing, Employer contended the evidence in the record shows Employee consented to the change in appointments; it does not show a lack of consent by Employee. (Record).

PRINCIPLES OF LAW

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 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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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.
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> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires . . . . The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
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> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon 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. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . .
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> (i) Interference by a person with the selection by an injured employee of an authorized physician to treat the employee, or the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee, is a misdemeanor.

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette v. Arctic Lights Electric, Inc.,* AWCB Dec. No. 05-0135 (May 19, 2005). One of the purposes of the "one change of physician" rule is to curb potential abuses, especially "doctor shopping." *Bloom v. Tekton, Inc*., 5 P.3d 235, 237 (Alaska 2000).

In *Seybert v. Cominco Alaska Exploration*, 182 P.2d 1079 (Alaska 2008) the Alaska Supreme Court held the board correctly determined that, because the Act creates an adversarial system, and because the parties' interests were in conflict, there was no basis for a fiduciary relationship between the injured worker and the workers' compensation insurer. While regulation imposes some duties on a workers' compensation insurer towards a claimant, it does not impose the duties of loyalty and disavowal of self-interest that are the hallmarks of a fiduciary's role. *Id*. at 1090.

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

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

> **AS 23.30.155. Payment of compensation.** . . .
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> (h) The board may upon its own initiative at any time in a case in which . . . where right to compensation is controverted, or where payments of compensation have been . . . suspended . . . take the further action which it considers will properly protect the rights of all parties.
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> **8 AAC 45.082. Medical treatment.** . . .
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> (b) A physician may be changed as follows:
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> (3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records; to constitute a panel, for purposes of this paragraph, the panel must complete its examination, but not necessarily the report, no later than five days after the first physician sees the employee; if more than five days pass between the time the first and last physicians see the employee, the physicians do not constitute a panel, but rather a change of physicians;

> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose . . . .
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> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

(1) Should Dr. Logan's September 28, 2022 report be stricken because Employer excessively changed physicians?

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette*. An employer's choice for a medical evaluation is made by having a physician or panel of physicians evaluate the employee or the employee's medical records. 8 AAC 45.082(b)(3). To constitute a panel, the panel must complete its evaluation, but not necessarily the report, no later than five days after the first physician sees the employee. *Id*. If more than five days pass between the time the first and last physicians see an employee, the physicians do not constitute a panel, but rather a change of physician. *Id*. If an employee or an employer makes an unlawful change of physician, the reports, opinions, or testimony of the physician will not be considered in any form, in any proceeding, or for any purpose. 8 AAC 45.082(c).

Employer contends Drs. Bauer and Kirkham were an EME panel, so Dr. Logan's evaluation was not the product of an excessive change of physician. Dr. Bauer evaluated Employee on July 13, 2022. Dr. Kirkham's evaluated Employee's medical records after he failed to attend the in-person evaluation scheduled for July 15, 2022. His report is dated July 25, 2022 because, according to Employer's third-party EME vendor, that was the date Employer's adjuster confirmed her request that Dr. Kirkham perform an evaluation based on Employee's medical records. However, the conclusion of Dr. Kirkham's report indicates he evaluated Employee's medical records on July 28, 2022, which is well past the five days provided in regulation for a panel EME.

Considering a court appearance related to Employee's alleged criminal misconduct likely caused the delay in Dr. Kirkham issuing his report, it would be illogical and obviously unjust to punitively strike Dr. Logan's report because Employee failed to present himself to Dr. Kirkham for an in-person evaluation on the appointed date, as he was required to do. AS 23.30.001(4); 8 AAC 45.195. Neither would it serve as a deterrent to "doctor shopping," the statute's purpose, since Employer's adjuster had originally scheduled Drs. Bauer's and Kirkham's evaluations to occur a mere two days apart as a permissible panel under the regulation. 8 AAC 45.082(b)(3). It is thought that this is precisely the type of circumstance where a waiver of procedure should be applied. Therefore, the procedural requirement that panel evaluations must be concluded within five days will be waived, and Dr. Logan's September 28, 2022 report will not be stricken on the basis Employer excessively changed physicians. AS 23.30.155(h); 8 AAC 45.195.

(2) Should Dr. Logan's September 28, 2022 report be stricken because Employer unlawfully interfered with Employee's selection of a treating physician?

The Act prohibits a person from interfering with an employee's selection of a treating physician. AS 23.30.095(i). On April 11, 2022, Employee's primary care provider, Ms. Brock, referred him to Dr. Logan for a neuropsychological evaluation. His appointment with Dr. Logan was originally scheduled to occur on October 27, 2022; however, on September 28, 2022, Dr. Logan performed a neuropsychological EME. Employee contends Employer unlawfully interfered with his selection of a treating physician by having Dr. Logan's office cancel his appointment and perform an EME instead. Employer contends Employee consented to changing the appointment with Dr. Logan because he wanted to be seen sooner than his own scheduled appointment. Employee contends he did not discuss changing the appointment with Employer's adjuster and he "definitely" would not have agreed to the change.

Outside Employee's own testimony, no evidence in the record supports his position that he did not consent to the changed appointment, and even his testimony is concerning. AS 23.30.122. He testified he has memory problems that have gotten worse since the November 11, 2021 accident, and he frequently answered many questions at his deposition by stating "I don't know," "I can't remember," and "I can't recall." *Id*. Employee alternately testified that Ms. Brock made his appointment with Dr. Logan, and he made his appointment with Dr. Logan, but Dr. Logan's business

records indicate Employee's ex-wife made the appointment. *Id*. Employee testified that his ex-wife found Dr. Logan to perform a neuropsychological evaluation, but Ms. Brock's chart notes indicate she referred Employee directly to Dr. Logan, so there was no need for Employee's ex-wife to "find" him. At his deposition, Employee testified he could not recall having a conversation with Employer's adjuster about him wanting to have the appointment with Dr. Logan sooner than October but, at hearing, he testified he did not discuss changing the appointment with Employer's adjuster at all. Although Employee testified that he expressed his frustration about the changed appointment with Dr. Logan and "everyone," his purported protestations are not documented in Dr. Logan's September 13, 2022 contact note, his September 28, 2002 report, his May 13, 2024 letter, or anywhere else in the record until he filed the instant petition 13 months later. *Id*.

Employee's contentions that he was not represented an attorney, has a TBI, and could not have been expected to understand the difference between his appointment to see Dr. Logan as a patient and his appointment to see Dr. Logan for an EME are not persuasive either. AS 23.30.122. Employee was being aided by his ex-wife at the time, had already been evaluated by Dr. Bauer for an EME, and two controversion notices, based on Drs. Bauer's and Kirkham's EMEs, had already been served on him by the time of Dr. Logan's evaluation that would have further alerted him to the purpose of an EME. Neither is the fact that Employer's adjuster did not explain to Employee the difference between seeing Dr. Logan as a patient and seeing him as an EME consequential because the Act created an adversarial system and Employer's adjuster did not owe Employee a fiduciary duty to have done so. *Seybert*.

On the other hand, considerable evidence in the record supports Employer's position that Employee consented to the change in appointments because he wanted to be seen sooner than his own appointment. AS 23.30.122. This evidence includes Employee's ex-wife's statements to Dr. Logan's office on April 11, 2022, when she repeatedly characterized the appointment as "urgent", and she repeatedly requested an earlier appointment date. *Rogers & Babler*. She also contacted Dr. Logan's office on the same day Ms. Brock made the referral; and followed-up with Dr. Logan's office a week later to "make sure" it had received Employee's paperwork, which both connote a sense of urgency. *Id*. On August 31, 2022, Employer's adjuster told Dr. Logan's office that the EME was needed "as soon as possible" even though it already had evidence sufficient to controvert Employee's benefits in

the forms of Drs. Bauer's and Kirkham's reports. *Id.* Moreover, Employee testified he asked to be put on Dr. Logan's cancellation list because six months is a long time to wait for medical testing and he had seen multiple doctors trying to figure out what was causing his symptoms. *Id*. Additionally, Employee's reported symptoms were numerous and severe, and anyone experiencing them would consider the appointment urgent and want to be seen as soon as possible. *Id*. Finally, the September 28, 2022 acknowledgment form, Dr. Logan's September 28, 2022 report, and his May 13, 2024 letter, all document Employee's consent to the EME evaluation.

At hearing, Employer contended the evidence in the record shows Employee consented to the change in appointments; it does not show a lack of consent by Employee. It was correct. Employee's November 6, 2023 petition to strike Dr. Logan's September 28, 2022 report will be denied.

CONCLUSIONS OF LAW

1) Dr. Logan's September 28, 2022 report should not be stricken because Employer excessively changes physicians.
2) Dr. Logan's September 28, 2022 report should not be stricken because Employer unlawfully interfered with Employee's selection of a treating physician.

ORDER

Employee's November 6, 2023 petition is denied

Dated in Anchorage, Alaska on June 24, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, 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 Lazlo Toeniss, employee / claimant v. Crowly Holdings, Inc., employer; Old Republic Insurance Compnay, insurer / defendants; Case No. 202128481; 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 June 24, 2024.

/s/ Rochelle Comer
Office Assistant II