ALASKA WORKERS' COMPENSATION BOARD

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

ZACHARY PHILLIPS, Employee, Respondent, v. VEND, INC., Employer, and UMIALIK INSURANCE CO., Insurer, Petitioners.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201912676 AWCB Decision No. 24-0038 Filed with AWCB Anchorage, Alaska on June 28, 2024

Vend, Inc.'s (Employer) February 16, 2024 petition for a second independent medical evaluation (SIME) was heard on June 12, 2024, in Anchorage, Alaska, a date selected on April 17, 2024. A March 19, 2024 hearing request gave rise to this hearing. Attorney David Graham appeared by Zoom and represented Zachary Phillips (Employee), who appeared by Zoom from Peru, South America, and testified. Attorney Michelle Meshke appeared and represented Employer and its insurer. As preliminary matters, Employer objected to Employee's testimony as irrelevant; an oral order overruled the objection in part and allowed Employee to testify about alleged prejudice associated with him attending an SIME. Employee objected to the panel considering reports from employer medical evaluator (EME) Jared Kirkham, MD, because Employee filed requests for cross-examination and Employer had not produced Dr. Kirkham for questioning. The record closed at the hearing's conclusion on June 12, 2024. This decision examines the oral order, Employee's *Smallwood* objection issue, and decides the petition on its merits.

ISSUES

As a preliminary matter, Employer objected to Employee testifying at this SIME hearing. It contended his testimony was irrelevant.

Employee contended his testimony was relevant because he needed to explain his injury in more detail to show that Dr. Kirkham did not understand the full extent of his injuries. He also wanted to explain alleged prejudice Employee may suffer if he is ordered to attend an SIME. An oral order granted the objection in part, but allowed Employee's limited testimony.

1) Was the oral order allowing, but limiting, Employee's testimony correct?

For his preliminary matter, Employee objected to the panel considering Dr. Kirkham's opinions because Employee had "*Smallwooded*" his reports. Since Employer had not produced him for cross-examination, Employee initially contended the panel could not consider his reports. He later implied Dr. Kirkham's report could be used to decide the SIME issue, but the panel had to decide the case's merits first, to determine if any medical dispute is "significant."

Employer contended it did not need to produce Dr. Kirkham for cross-examination on the SIME issue. It relied on case law stating the *Smallwood* doctrine does not apply to SIMEs.

2) Shall the panel consider *Smallwooded* EME reports on the SIME issue?

Employer contends there are medical disputes between Employee's attending physicians, and its EME Dr. Kirkham. It contends Employee's objections to the SIME are without merit.

Employee raised numerous objections. These included SIME request timeliness, policy considerations, substantial prejudice to him, and contested "significance," among other things.

3) Shall the panel order an SIME?

FINDINGS OF FACT

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

1) On July 25, 2019, while working for Employer, Employee was "climbing into the back of a truck and the overhead door came down on his head." The injury report cites "neck, back," and "shoulder" injuries. (First Report of Injury, September 16, 2019).

2) On January 3, 2020, James Schwartz, MD, saw Employee for an EME. Several pages of Dr. Swartz's EME report is found in the agency file. However, the pages containing his opinions is not found in Employee's file. (Agency file; observations).

3) On August 21, 2020, Dr. Kirkham saw Employee for an EME. He reviewed Employee's medical records and examined him. Dr. Kirkham noted Employee had been receiving chiropractic and massage therapy visits through July 10, 2020. He was currently receiving chiropractic care once per week and receiving trigger point injections, but was not sure if these were helpful. Employee said he had "blackout episodes," "memory loss" and would forget "entire conversations." Minimal lifting caused neck pain. (Kirkham report, August 21, 2020).

4) Dr. Kirkham diagnosed a cervical "sprain/strain" injury substantially caused by the work injury, but resolved with no objective evidence of any physical damage; a head contusion also caused by the work injury, and resolved with no evidence of a serious head injury or concussion; chronic neck pain not substantially caused by the work injury; multiple cognitive symptoms including blackout episodes, sleeping difficulty, concentration problems, memory loss and word-finding issues, with no objective findings and a normal neurological examination, not substantially caused by the injury but caused by noninjury factors "including psychosocial factors"; hip pain, unrelated to the work injury; history of depression and bipolar disorder, unrelated; and chronic pain syndrome. Dr. Kirkham characterized Employee's work injury as "minor" as evidenced by no objective head trauma or bruising four days after the injury and a normal physical examination. In his opinion, "very small amounts" of movement on digital motion radiographs were "within normal limits." Dr. Kirkham opined that the work injury had "completely resolved." Any residual chronic neck pain or cognitive symptoms were not substantially caused by the work injury, and are found in "otherwise healthy individuals." Even assuming Employee had a mild concussion, Dr. Kirkham said according to the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (*Guides*), any related symptoms would have resolved within days to weeks, leaving Employee with no impairment. Thus, Dr. Kirkham reasoned that any post-concussive-like-symptoms were related to noninjury factors including "psychosocial factors" and not substantially caused by the work injury. (Kirkham report, August 21, 2020).

5) Dr. Kirkham opined that Employee needed no further diagnostic studies or tests for his work injury. Likewise, Employee needed no further medical treatment for the cervical sprain/strain injury and head contusion that Dr. Kirkham opined were substantially caused by the work injury. To treat Employee's other, non-work-related symptoms, Dr. Kirkham recommended a multidisciplinary pain management program like the Rehabilitation Institute of Washington. In his opinion, Employee became medically stable on October 25, 2019, with no permanent partial impairment under the AMA *Guides*. Since a physical therapy report documented that Employee could lift 100 pounds from floor to waist, Dr. Kirkham opined Employee could return to his at-injury job. (Kirkham report, August 21, 2020).

6) On September 17, 2020, Larry Levine, MD, Employee's attending physician saw him in follow-up for "postconcussion syndrome," "whiplash injury to neck," "low back pain," and "hypermobility syndrome." Dr. Levine's report references Employee's July 25, 2019 work injury. He noted medial branch blocks (MBBs) "would be a reasonable consideration given all else not working thus far." Chiropractic care and physical therapy provided some relief. Dr. Levine administered a trigger point injection and referred Employee back to his chiropractor for continued care. It cannot be determined from the record when Employer first received this report. (Levine report, September 17, 2020; observations).

7) On September 21, 2020, Employer denied Employee's right to all benefits based on Dr. Kirkham's August 21, 2020 report. The adjuster attached Dr. Kirkham's report to the denial notice and served the notice and the report on Employee by mail. This is the only copy of Dr. Kirkham's August 21, 2020 report the panel could locate in Employee's agency file. (Controversion Notice, September 21, 2020; observations).

8) On September 21, 2020, Employer presumably stopped paying all benefits for Employee's work injury. Because there was no medical summary filed in this case until January 6, 2022 (see below), it cannot be determined when Employer first received any medical opinions from Employee's attending physicians that differed from Dr. Kirkham's opinions expressed in his August 21, 2020 report. (Observations, and inferences drawn from the above).

9) By September 21, 2020, at the latest, Employer was aware of Dr. Kirkham's opinions. (Inferences drawn from the above).

10) On October 27, 2020, attending physician Bryan Matthisen, DC, saw Employee for follow-up chiropractic care for his work injury. He stated Employee was not medically stable, his injury

would result in permanent impairment, and he needed ongoing care including palliative relief for his neck. (Matthisen report, October 27, 2020).

11) On December 6, 2021, Employee claimed temporary total and partial disability benefits, medical benefits and related transportation expenses, a penalty for late-paid compensation and interest. (Claim for Workers' Compensation Benefits, December 6, 2021).

12) On January 6, 2022, Employer filed and served the first medical summary in this case. Listed thereon was EME Dr. Kirkham's August 21, 2020 report. However, his report is not found attached to the medical summary in the agency file. Drs. Levine's September 17, 2020, and Matthisen October 27, 2020 reports were attached. Dr. Kirkham's August 21, 2020 report was attached to Employer's September 21, 2020 Controversion Notice. Therefore, by no later than January 6, 2022, Employer had Drs. Kirkham's August 21, 2020, Levine's September 17, 2020, and Matthisen's October 27, 2020 reports. These reports showed medical disputes between EME Dr. Kirkham versus attending physicians Drs. Levine and Matthisen. (Controversion Notice, September 21, 2020; Medical Summary, January 6, 2022; observations).

13) Employer did not petition for an SIME within 60 days of January 6, 2022. (Agency file).

14) On April 21, 2023, Alfred Lonser, MD, examined Employee for chronic neck and low-back pain, "postconcussion syndrome," and "whiplash injury to neck." Employee's history included anxiety, depression and headaches. Dr. Lonser diagnosed low-back pain, a whiplash injury to Employee's neck, cervical facet joint cervicalgia, a herniated nucleus pulposus in the cervical region and chronic pain. Employee said the analgesic regimen he was on had "been providing significant pain reduction and increased his "mobility and function." (Lonser report, April 21, 2023). In conjunction with this visit, Dr. Lonser also completed a questionnaire:

> (1) Taking into account all relevant information known to you, what are all possible causes of [Employee's] need for the medical treatment you have ordered?
>
> Answer: Box truck door striking pts [patient's] head.
>
> (2) To a reasonable medical probability, which of these possible causes is the most likely or most important, that is to say "the substantial cause," of [Employee's] need for the medical treatment he has received? Please fully explain the reasons for your answer.
>
> Answer: The box truck door is most likely the cause of his ongoing pain.

> (3) Are the results of the medial branch blocks [MBBs] received in August 2021 relevant to the determination of the cause of [Employee's] ongoing symptoms? If so, explain how and why.
>
> Answer: Yes. The 100% relief of symptoms shows that the facet joints are responsible for his pain.
>
> (4) Are the results of the medial branch blocks he received in August 2021, relevant to the treatment of [Employee's] symptoms in the future? If so, explain how and why.
>
> Answer: Yes. The amount of relief he received helps predict outcome of treatment.
>
> (5) What is your current prognosis as to [Employee's] need for medical treatment in the future as a result of his work injury of 7/25/19?
>
> Answer: He will likely need ongoing care for his neck pain.
>
> (6) What do you anticipate will be the likely frequency and duration of any future treatments?
>
> Answer: National average response to treatment is 7 months. Will likely need treatment every 6-12 months.
>
> (7) Do you anticipate that the further treatment you recommend will provide [Employee] with significant improvement to the symptoms he currently suffers as a result of his work injury of 7/25/19?
>
> Answer: Yes. Based on his response to the test he should benefit greatly from therapy. (Lonser questionnaire responses, April 21, 2023).

15) On September 20, 2023, Employee "*Smallwooded*" Dr. Kirkham's August 21, 2020 report, so he could cross-examine Dr. Kirkham about his recollections, knowledge, perceptions, actions and opinions. (Request for Cross-Examination, September 20, 2023).

16) On January 30, 2024, Dr. Kirkham saw Employee again for a follow-up EME. After reviewing additional records and examining him, Dr. Kirkham said:

> On August 21, 2020, I saw [Employee] for an Independent Medical Evaluation. I diagnosed a very mild cervical sprain/strain injury that completely resolved with no permanent impairment and no need for any physical restrictions.

On this second visit, Dr. Kirkham diagnosed (1) a mild cervical sprain/strain injury, substantially caused by the July 25, 2019 event, resolved; (2) no objective evidence of a head injury or

concussion from the work injury; (3) no evidence of post-concussive syndrome; (4) chronic neck pain with uncertain causation but "unlikely" related to the work injury; (5) no objective evidence of a low-back injury from the work incident; (6) no objective evidence of a hip injury from the work event; (7) profound psychosocial influence on Employee's degree of pain and disability; (8) a history of anxiety, depression, bipolar disorder, insomnia, headaches, right parascapular pain, low-back pain and multiple cognitive complaints, all predating the work injury. He opined Employee had a normal physical examination, his injury resolved within three weeks post-injury, and he required no "significant long-term treatment such as medial branch blocks or radiofrequency ablation." Dr. Kirkham stated the substantial cause of any recommended treatment "is psychosocial factors rather than any residual structural injury from the work event of July 25, 2019." While there was no post-injury intervening injuries, he opined there were "profound intervening psychosocial factors" causing Employee's ongoing pain and any need for treatment and associated disability. Dr. Kirkham charted "no further treatment is indicated for the process of recovery." He recommended 8 to 12 sessions of cognitive behavioral therapy (CBT) to ameliorate the psychosocial factors, but this is in his view "completely unrelated" to the work injury. Dr. Kirkham suspected "a significant secondary gain component" to symptoms, and therefore doubted that even CBT would improve his situation. In his opinion, Employee genetically inherited his psychiatric profile and personality traits. Dr. Kirkham added:

> He has apparently reported 100% relief for four months from right-sided C4, C5, and C6 medial branch blocks. I am skeptical that a repeat trial of medial branch blocks would yield the same level of benefit, but it may be reasonable to trial repeat medial branch blocks to confirm this. If he does indeed obtain excellent relief from medial branch blocks, then he may be a candidate for radiofrequency ablation.
>
> Ultimately, however, it remains my opinion that his pain symptoms are out of proportion to objective findings and unlikely to be caused in major part by facet-related pain. Even if the repeat medial branch blocks were effective, the need for subsequent medial branch blocks and radiofrequency ablation would not be the injury of July 25, 2019, as there is no evidence of significant structural injury to the cervical spine from the very mild force of injury.

He did not recommend a repeat neuropsychological evaluation because Employee already had one. Dr. Kirkham opined that Employee had a zero percent permanent partial impairment rating. Employee has no physical restrictions on his activities. (Kirkham report, January 30, 2024).

17) Dr. Kirkham stated his January 30, 2024 examination strengthened his earlier opinions. (Kirkham report, January 30, 2024).

18) Dr. Kirkham's August 21, 2020 and January 30, 2024 EME opinions are very similar. (Observations; inferences drawn from above).

19) On February 7, 2024, Employer filed and served Dr. Kirkham's January 30, 2024 EME report. (Medical Summary, February 7, 2024).

20) On February 16, 2024, Employer for the first time petitioned for an SIME. (Petition, February 16, 2024, agency file).

21) On March 28, 2024, Employee "*Smallwooded*" Dr. Kirkham's August 21, 2020 report again, and his January 30, 2024 report, and requested cross-examination. (Request for Cross-Examination, March 28, 2024).

22) On April 17, 2024, the parties appeared at a prehearing conference where the designee set a hearing for June 12, 2024. The only issue listed for hearing was, "[Employer's] 02/16/2024 Petition for SIME." The designee listed Employee's claims, apparently amended from his original filing: They included temporary total and partial disability benefits, medical benefits and related transportation costs, a penalty, interest and an unfair or frivolous controversion finding. (Prehearing Conference Summary, April 17, 2024).

23) On June 5, 2024, Employer contended the "sole issue" for hearing is whether a medical dispute exists between Employee's attending physician and its EME. It said the panel is not to determine which medical report is more persuasive when considering whether to order an SIME. Employer cited *Bah* and contended that a medical dispute exists between Employee's attending physician Dr. Lonser and its EME Dr. Kirkham. Specifically, it cites the disagreement as to causation of Employee's continuing symptoms. Dr. Lonser said they are caused from the box truck door hitting Employee in the head, while Dr. Kirkham says that injury is fully resolved, and "psychosocial factors" are the substantial cause of any enduring symptoms or need for treatment. Employer contends this is a "significant dispute" because the physicians disagree on causation, and resolving that disagreement determines whether Employee is entitled to additional benefits. Therefore, it contends an SIME will assist the panel in resolving this important dispute. Employer further contends the panel can consider Dr. Kirkham's reports notwithstanding the *Smallwood* objections. Employer says it will produce Dr. Kirkham for cross-examination on or before a merits hearing as required by law. It contends any additional discovery Employee might seek is not

relevant to the SIME issue, and would contradict his affidavit stating he was fully prepared and ready to go to hearing on his claim. For these reasons, Employer contends its petition for an SIME should be granted. (Employer's Hearing Brief in Support of Petition for Second Independent Medical Evaluation, June 5, 2024).

24) On June 5, 2024, Employee filed and served his witness list for the June 12, 2024 hearing. He was the only witness listed and reserved his right to testify about the following:

> (1) His perception and estimation of the forces involved in his injury, his perception of pain and other symptoms that began immediately after his injury, and the extent to which his pain and symptoms have persisted.
> (2) His course of treatment, how his treatment was affected by the Employer's controversions, and the results obtained from his treatment.
> (3) The basis of his agreement to continue the previously set hearing on the merits, and the Employer's breach of that agreement at the mediation he attended.
> (4) That prejudice would result to him if a[n] SIME is ordered.
> (5) Or any other matter relevant to the issues presented about which he has personal knowledge. (Employee's Witness List for Hearing, June 5, 2024).

25) On June 5, 2024, in his hearing brief Employee raised several objections to Employer's SIME petition: (1) Timeliness: He said the SIME request was untimely because it was not made within 60 days of the date Employer had medical records showing a dispute. He said Dr. Lonser created a medical dispute on April 21, 2023, when he answered a questionnaire, but Employer did not request an SIME within 60 days even though it already had Dr. Kirkham's first EME report. Employee contended Employer waived its right to an SIME. Moreover, he said the time to request an SIME was not reset by a second happening of the same event -- Dr. Kirkham's second EME report. Nevertheless, citing *Bremont*, he conceded that a party's waiver of its right to request an SIME does not prevent the panel from ordering one on its own motion. He stated, "Board precedent holds a late request doesn't bar the board from ordering an SIME, but policy calls for caution." (2) Policy considerations: Employee stated ordering an SIME would contradict the legislative policy in AS 23.30.001(1) to ensure quick, efficient, fair and predictable benefits delivered to him. Furthermore, he said an SIME would be an unreasonable cost to Employer. (3) Substantial prejudice: He asserted an SIME would cause substantial prejudice by further delaying his treatment and imposing upon him significant, unreimbursed expenses. (4) Multiple medical specialties: Employee asserted that if the panel orders an SIME, it should include a psychiatrist, anesthesiologist, pain management specialist, orthopedic specialist, and an epidemiologist. (5) No

significant medical dispute: He stated there is no "significant" dispute between his attending physicians and the EME to justify an SIME. Employee said the panel must "weigh" competing medical opinions against each other before ordering an SIME. He criticized Dr. Kirkham's opinions, said he misunderstood the facts, and contended his opinions were without scientific basis. Since in Employee's view, no reasonable person would accept Dr. Kirkham's opinions, they cannot rebut the presumption, there can be no "significant medical dispute," and an SIME will not likely assist the panel in resolving the claim. (Employee's Hearing Brief for SIME Hearing, June 5, 2024).

26) Employee's address in the Division's database is in Sitka, Alaska. Employee's hearing brief did not state that he lives in Lima, Peru, and the panel was unaware he did until he testified at hearing. Though he cited AS 23.30.110(g) in his brief, he did not contend that "proximity" from his current residence in Peru, to an SIME, was a concern for him. (Agency file; Employee's Hearing Brief for SIME Hearing, June 5, 2024).

27) At hearing on June 12, 2024, Employee wanted to testify in accordance with his June 5, 2024 witness list. Employer objected, stating Employee's testimony on other issues was not relevant to an SIME hearing. An oral order declined to allow him to testify about anything other than the alleged prejudice to him if the panel ordered an SIME, finding his other testimony irrelevant. However, Employee was allowed to make an offer of proof on the other issues. (Record).

28) Employee testified that he paid for part of the 2024 EME appointment from his own pocket. Since he lives in Peru, Employee said if he had to pay for part of another medical evaluation from his own pocket in the same year, he would not be able to use those funds to obtain the treatment he needs to address his work injury, which would result in additional treatment delays. He said he needs to use his money to treat his work injury that Employer controverted, which has caused to this point at least a one-year delay. His doctor said he needs an additional MBB injection for which he has saved up for a year and expects to receive in August 2024. Employee also pointed to the timing between MBB injections and stated if he misses the next one, he will have to start over with what is a "testing procedure" for later radiofrequency ablation treatment. In his view, an SIME will thwart his ability to obtain that injection or would interfere with its timing. He said he must have two consecutive injections, six months apart to fulfill the test. (Record)

29) Under cross-examination Employee said he would "attempt to" come to Alaska for the hearing he has requested. He stated his address of record is in Lima, Peru, and not in Palmer,

Alaska, as stated in the agency records, but said he had tried to update his address recently. Employee agreed that there could be a delay if he came to Alaska for the hearing and the Board stayed the hearing and ordered an SIME. Someone on his behalf receives all his mail at his Alaska address and he, in Peru, obtains photographs of all documents sent to his Palmer address. Employee confirmed that he has been receiving the Division's mail sent to his record address. He is uncertain how long he will remain in Peru, but he has been there two years. He plans on going to college in Michigan to get his master's degree in accounting, beginning in late August 2024, to practice accounting in the United States. (Record).

30) In its closing argument, Employer reiterated its hearing brief contentions and responded to the new arguments Employee raised at hearing. (Record).

31) In his closing argument, Employee reemphasized his hearing brief contentions, and admitted there was a medical dispute in this case. Employee added additional contentions, numbered here sequentially with those in his brief for clarity: (6) Issue set for hearing: Employee contended the only issue set for hearing was Employer's request for an SIME, not the panel's potential to order one on its own motion. Thus, he said the panel may not consider an SIME on its own motion unless it denies Employer's requests, and convenes a new hearing on that issue. When asked how his argument on Employer's SIME request would be different had the prehearing conference designee pointed out that the panel might consider ordering an SIME on its own motion, Employee's counsel evaded the question. However, Employee contended that he did not have sufficient due process notice that the panel might consider ordering an SIME on its own motion. Employee contended that "typically" a panel would not order an SIME on its own motion until after, or perhaps during, a merits hearing because the panel would first have to determine at that hearing that the disputes were "significant." He contended that most disputes in this case are "factual," not medical. Lastly, Employee contended *Geister* requires the panel to consider seven factors before ordering an SIME. Presumably referring to page 7 in *Geister*, last paragraph, these include: The SIME expense; delay; extended travel and related costs; significance of the medical dispute compared to the issues and the claim; and the panel's familiarity with the disputed subject matter. He contended these considerations require "essentially" a merits hearing prior to ordering an SIME. (Record).

32) Medical care is expensive. (Experience; observations).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (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. . . .

The Board may base its decision not only on direct testimony and other tangible evidence, but also on its "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. . . .

> (k) In the event of a medical dispute regarding . . . 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 Alaska Workers' Compensation Appeals Commission in *Bah v. Trident Seafoods Corp.,* AWCAC Dec. No. 073 (February 27, 2008) addressed the Board's authority to order an SIME. *Bah* stated in *dicta*, that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition. *Bah* said when deciding whether to order an SIME, the Board considers three 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? *Id*.

Thoeni v. Consumer Electronic Services, 151 P.3d 1249, 1254-55 (Alaska 2007) said referring to a long trip for an EME under AS 23.30.095(e):

> The board erred when it found Thoeni's refusal to attend the Utah examination to be unexcused. The board acknowledged that a physician could have been found in Florida. Even though, as the board states, the employer does not have to select the examining physician to be the "most convenient" for the employee, this does not mean that the employee's convenience should be completely discounted. The statute

> provides that the employer may request examinations "at reasonable times" (footnote omitted). Although the statute does not make any comment on where the examination takes place, its requirement of a "reasonable time" indicates that the legislature intended some consideration of the employee's ease in attending the examination. Furthermore, the board's regulations on selection of physicians for a second independent medical evaluation -- when the board, rather than the employer, makes the selection -- explicitly direct that "the proximity of the physician to the employee's geographic location" be taken into account (footnote omitted). . . . Requiring Thoeni to travel 2,500 miles from her home was manifestly unreasonable. . . .

Geister v. Kid's Corps, Inc., AWCAC Dec. No. 045 (June 6, 2007) involved a Board decision denying a requested SIME. On appeal, *Geister* set forth reasons why a panel might not order an SIME:

> Based on the commission's experience of the workers' compensation system, there are reasons why a board panel may exercise its discretion not to grant a request for an SIME, even when there is a medical dispute. After weighing the expense of the evaluation, delay, need for extended travel and associated costs, significance of the medical dispute to the material and contested issues in the claim, quantity of medical evidence already in the record, likelihood of new and useful information, and the board panel's familiarity with the subject area of the dispute (footnote omitted), the board may decide that it is "more doubtful" that an SIME would assist the board in reaching a decision on the material and contested issues before it and therefore it will not grant a request for an SIME. *Id*. at 7.
> . . . .
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> . . . If the board *weighed* and chose to rely on Dr. Klassen over Dr. Dramov in deciding a dispute did not exist, instead of merely comparing competing opinions to identify conflicts, or if the board did not consider Dr. Dramov's letters because they were the subject of an unsatisfied request for cross-examination, then we believe the board erred. It is enough that the parties present evidence of a medical dispute to request an SIME. The board is not asked to decide which physician's opinion is more persuasive when deciding if there is a qualifying conflict in opinions -- it will only do that when deciding the merits of the claim. The parties are not offering competing opinions to persuade the board of the truth of their substance; the opinions are offered solely to establish that a difference of medical or scientific expert opinion exists. Therefore, the documents containing the opinions are not hearsay evidence (footnote omitted; emphasis in original). *Id*. at 9.

Betts v. Greenling Enterprises, LLC, AWCAC Appeal No. 22-013, Order on Petition for Review (November 30, 2022), addressed an employee's petition for review from a Board order granting an employer's request for an SIME. The Board had found a medical dispute, "especially as to the kind and nature of proposed medical treatment." *Id*. at 9. Addressing the employee's argument, *Betts* said

"even if the EMEs' opinions did not rebut the presumption of compensability, there remained a substantial and significant question as to future medical treatment." *Id*. *Betts* explained:

> Ms. Betts' position that the EMEs do not rebut the presumption of compensability is a legal issue to be addressed by the Board at a hearing on the merits. The procedure is that the Board, at that time, will decide if Ms. Betts raised the presumption, then whether Greenling rebutted it and, if so, then Ms. Betts must prove her claim by a preponderance of the evidence. However, a hearing on the issue of whether to order an SIME is not a hearing on the merits and the issue of sufficiency and credibility of the EME reports is not addressed. Among the concerns addressed by the Board at the hearing on the SIME is whether an SIME will be of assistance to the Board in resolving the issues of the claim at a hearing on the merits. The Board has a right to order an SIME to assist it in understanding the medical issues involved in the claim and this right is independent of the issue of the presumption of compensability. . . .
> . . . .
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> This right to require an SIME arises prior to a hearing on the merits. The presumption analysis is not relevant where the Board is making a determination as to whether an SIME would assist it. . . .
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> The Board's ordering of the SIME does not impair a legal right of Ms. Betts, because the Board has its own right to order an SIME. The Board is entitled to have a full understanding of the medical issues it is deciding, as are the parties to the claim.
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> Furthermore, there is no unnecessary expense for Ms. Betts because the examination is paid, per statute, by the employer. While there is delay in the Board holding a hearing on the merits, it is better for the delay to occur prior to that hearing than to occur part-way through such a hearing. If the Board were to find it necessary to halt the proceedings in order to exercise its right to order an SIME to help this decision-making process, the cost of the parties would be substantially greater. That is, at hearing the parties usually have one or more medical experts lined up to testify. If the Board stays the hearing to conduct an SIME, there is greater expense due to the need for the experts to be called again to testify after the SIME.
> . . . .
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> . . . Ms. Betts contends that the EME reports do not rebut the presumption of compensability and, therefore, should not be a basis for ordering an SIME. However, the issue of the presumption of compensability comes into play at hearing on the merits. To decide this issue when deciding whether to order an SIME deprives the parties of a full and fair hearing because not all evidence will be heard or considered at the preliminary hearing on the issue of the SIME. The question Ms. Betts raises as to whether the EME reports are sufficient to rebut the presumption of compensability is an important question, but it is a question for the board at a hearing on the merits of her claim. . . .
> . . . .

> In fact, Ms. Betts asked the Board to depart from its accepted and usual course of proceedings by asking it to address the presumption of compensability at a preliminary stage in the proceedings. . . .
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> . . . A dispute is required, not that the dispute rebuts the presumption nor is substantial evidence to support a controversion, but that there is a dispute. . . .
> . . . .
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> At a hearing on the merits, the Board may ultimately agree with one or the other of the doctors, but at the point of ordering an SIME the question is whether there is a dispute, not which doctor's opinions are credible or sufficient. *Id*. at 11-14.

Bremont v. K & L Distributors, Inc., AWCB Dec. No. 98-0319 (December 22, 1998) held that the Board always has discretion to order an SIME even in a case where one or both parties waive their right to request one.

> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
>
> (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. . . .
>
> **8 AAC 45.065. Prehearings.** . . .
>
> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .
>
> **8 AAC 45.070. Hearings.** . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.
>
> **8 AAC 45.092. Second independent medical evaluation.** . . .
>
> (g) If there exists a medical dispute under AS 23.30.095(k),
>
> (1) the parties may file a

(A) completed second independent medical form, . . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

8 AAC 45.112. Witness list. . . . If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider

(1) the testimony of a party. . . .

8 AAC 45.120. Evidence. . . .

(e) . . . Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

8 AAC 45.900. Definitions. (a) In this chapter
. . . .

(11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976);

ANALYSIS

1) Was the oral order allowing, but limiting, Employee's testimony correct?

Employer objected to Employee's testimony at the SIME hearing, and contended it was irrelevant. Employee contended Dr. Kirkham did not understand his injury and his testimony would enlighten the panel as to the facts, and would show that an SIME would prejudice him. An oral order granted Employer's objection in part and denied it in part. The panel declined to allow Employee to testify on points (1) through (3) and (5) in his witness list because this proposed testimony was irrelevant. An SIME hearing is not a merits hearing and consequently, Employee's proposed testimony about his injury, treatment, a previous continuance and "any other matter" was not relevant to considerations for ordering an SIME. *Geister*. The questions for an SIME hearing include: Is

there a medical dispute between an attending physician and an EME, is the dispute significant, and will an SIME assist the fact-finders in resolving the case? *Bah*. The panel allowed him to testify about "prejudice" that may result "if a SIME is ordered." *Thoeni*. A party always has the right to testify at hearing, so long as the party has something "relevant" to say. 8 AAC 45.112(1); 8 AAC 45.120(e). Citing *Thoeni*, which addressed the timeliness for an EME but also referenced SIME "proximity" regulations, the panel decided Employee's testimony could be relevant to ordering an SIME. In fact, while he did not argue "proximity," Employee testified how an SIME could allegedly cause him prejudice or hardship, which the panel considered, below. Thus, the order allowing him to testify about alleged prejudice, and disallowing other testimony, was correct.

2) Shall the panel consider "*Smallwooded*" EME reports for an SIME?

Employee objected to the panel using Dr. Kirkham's reports as a basis for ordering an SIME, because he had previously "*Smallwooded*" them and Employee had not presented Dr. Kirkham for cross-examination. 8 AAC 45.900(11). He reasoned that since the reports were not admissible evidence at a hearing, the panel could not rely on them to order an SIME. This same issue has already been decided. *Geister* said the issue for an SIME hearing is whether a medical dispute exists, if it is significant, and will an SIME assist the factfinders in deciding the case. It specifically stated that if a panel decided an SIME dispute in favor of one party over the other because medical records upon which the disputes were based "were the subject of an unsatisfied request for cross-examination," the panel would err. Moreover, the records are not hearsay, because they are not offered at an SIME hearing to prove the opinions asserted in the records. Thus, this panel will consider Dr. Kirkham's EME reports, solely for this SIME issue, in accordance with *Geister*.

3) Shall the panel order an SIME?

A) Timeliness.

Employee contends Employer's SIME petition was untimely and Employer waived its right to request an SIME. AAC 45.092(g)(1)(A), (2). He also concedes that a panel may order an SIME on its own motion even where parties waived their rights to ask for one by making an untimely request. *Bremont*. On both points, Employee is correct. Although it is difficult to determine when Employer first received medical records showing medical disputes, some facts are clear: On

August 21, 2020, Dr. Kirkham said Employee needed no further diagnostic studies, tests or medical treatment for the cervical sprain/strain injury and head contusion that Dr. Kirkham opined were the only treatments substantially caused by the work injury. In his opinion, Employee became medically stable on October 25, 2019, with no permanent partial impairment under the *Guides*. Dr. Kirkham opined that Employee could return to his at-injury job.

By contrast, on September 17, 2020, Employee's attending physician Dr. Levine saw him for "postconcussion syndrome," "whiplash injury to neck," and "low back pain," from Employee's July 25, 2019 work injury. He stated MBBs "would be a reasonable consideration." Dr. Levine administered a trigger point injection and referred Employee back to his chiropractor for continued care. On October 27, 2020, attending physician Dr. Matthisen saw Employee for follow-up chiropractic care for his work injury. He stated Employee was not medically stable, his injury would result in permanent impairment (suggesting he may not be able to return to his at-injury job), and Employee needed ongoing care including palliative relief for his neck.

Employer filed the above-referenced records either on its September 21, 2020 Controversion Notice (Dr. Kirkham's report) or on its January 6, 2022 Medical Summary (the other reports). Therefore, by no later than January 6, 2022, Employer had Drs. Kirkham's August 21, 2020, Levine's September 17, 2020, and Matthisen's October 27, 2020 reports. These reports showed medical disputes between EME Dr. Kirkham and attending physicians Drs. Levine and Matthisen. Employer did not petition for an SIME within 60 days of January 6, 2022. Thus, Employer waived its right to request an SIME under §095(k). 8 AAC 45.092(g)(1)(A), (2). Employer presented no legal authority to suggest that obtaining a second, similar EME report somehow "reset" its right to request an SIME, when it should have sought one previously. Its petition will be denied.

As Employee stated, the panel has discretion to order an SIME on its own motion in appropriate circumstances. *Bremont*. Therefore, this decision will consider Employee's objections and evaluate the relative merits of ordering an SIME based on the facts and applicable law.

B) Policy considerations.

Employee's brief contends that an SIME would defeat the legislature's intended public policy for quick, efficient, fair and predictable delivery of benefits to him, if he is entitled to them, at a reasonable cost to Employer. AS 23.30.001(1). He contends an SIME will take too long and delay his right to receive necessary medical care. In his hearing testimony, Employee objected to the SIME because (1) He previously had to pay out-of-pocket expenses related to an EME; (2) He is living in Peru and if he were required to pay to travel for another medical examination in the same year from his own pocket, he would not be able to use those funds to get the medical care he needs for his work injury; (3) He needs his case decided quickly so he can obtain necessary medical care; and (4) An SIME may interrupt his next MBB, and interfere with timing for that diagnostic and therapeutic injection.

Employee raised other concerns including: (5) An SIME is an unreasonable cost to Employer; (6) A full merits hearing must occur before the panel can determine if a medical dispute is "significant" enough to warrant ordering an SIME. He bases this contention on his argument that Dr. Kirkham's opinion lacks reliability and must be weighed against his attending physicians' opinions to determine if any disputes are "significant." Employee disagrees with the panel's notion of "significant" dispute. Lastly, Employee contends; (7) The panel cannot order an SIME on its own motion, because only Employer's petition for an SIME was raised as an issue for hearing, not the panel's ability to order one. He contends the panel should deny Employer's petition and reschedule a hearing before the panel considers ordering an SIME on its own motion.

As to objection (1), as *Betts* pointed out, "because the examination is paid, per statute, by the employer," there would be no expenses to Employee for an SIME. As for contention (2), although it is true that Employee resides in Peru, he testified that he plans on coming to America to attend college in Michigan in late August 2024. It would not be unreasonable to have him attend an SIME when he arrives in August. *Thoeni*. Moreover, since he would come at Employer's expense, Employee could receive a free trip to America from Peru for his MBB injection, college, or both. Neither in his brief, nor hearing testimony, nor arguments did Employee contend it was unreasonable to send him to the States from Peru for an SIME because he had "proximity" concerns. Employee cited AS 23.30.110(g) in his brief but did not discuss it, at all. *Thoeni*.

Regarding objection (3), Employee agreed that if this decision did not order an SIME, there could be a significant delay later if, at a hearing, a panel decides it needs an SIME and stays the hearing until one is obtained. *Betts* said any delay in holding a hearing on the merits created by an SIME is better to occur prior to that hearing than part-way through it. Otherwise, the delays would be even longer. If the panel halted a hearing to exercise its right to order an SIME to help its decision-making, the parties' costs would be substantially greater, because parties usually have medical experts prepared to testify. If the panel stayed a hearing to conduct an SIME, there would be greater expense because experts would have to be prepared and called again to testify after the SIME. *Betts*. Moreover, as to contention (4), in addition to his college plans, Employee has plans for a scheduled MBB injection. His SIME may be scheduled to coincide with his travel for that injection.

As for Employee's concern (5), Employer is the party requesting the SIME, signaling that it does not object to paying for one notwithstanding Employee's location in Peru. Moreover, as noted above, Employee never raised a "proximity" concern. *Thoeni*. Furthermore, since Employee testified he was planning to come to America for his next injection and to attend college, it is not an unreasonable distance or expense for Employer to pay his way here for an SIME that Employer requested.

Regarding Employee's contention (6), requiring a full-merits-hearing before the panel considers the "significance" factor for an SIME, *Geister* resolved this issue. If the factfinders in an SIME hearing "*weighed* the competing reports, letters and testimony against each other (emphasis in original)," as Employee contends should happen, *Geister* says that panel "erred." For an SIME hearing, "It is enough that the parties present evidence of a medical dispute to request an SIME." Employee apparently relies on the last paragraph on page 7 in *Geister*. There, *Geister* listed numerous reasons why a panel "may exercise its discretion not to grant" an SIME. Nowhere in that list does *Geister* suggest the panel "weigh" the competing medical opinions in deciding whether to order an SIME. In fact, to the extent Employee relies on this paragraph, he takes it out of context and construes it contrary to the above-referenced quotes found on *Geister* page 9, which state exactly the opposite.

Additionally, Employee's suggested procedure departs from the "accepted and usual course of proceedings" by asking the factfinders "to address the presumption of compensability at a preliminary stage in the proceedings." *Betts*. At the June 12, 2024 hearing, the panel was "not asked to decide

which physician's opinion is more persuasive when deciding if there is a qualifying conflict in opinions -- it will only do that when deciding the merits of the claim." Thus, Employee's reliance on case law rejecting medical opinions that are "not reliable" is misplaced, as those cases are referring to merits hearings where evidence is weighed. Moreover, the parties are not offering competing opinions to persuade the factfinders "of the truth of their substance." The opinions are offered "solely to establish that a difference of medical . . . opinion exists. Therefore, the documents containing the opinions are not hearsay evidence." *Geister*. Further, Employee's concept of what it means to have a "significant" dispute runs contrary to the panel's "accepted and usual" notion of "significant," which ordinarily considers the cost and extent of benefits at stake given the claims and medical disputes. *Betts* recognized this, stating the factfinders in that case correctly found a "significant" medical dispute "especially as to the kind and nature of proposed medical treatment."

Lastly, in objection (7) Employee suggests that the only issue set for hearing was "[Employer's] 02/16/2024 petition for SIME." Therefore, if the panel wants to consider ordering an SIME on its own motion, it must deny Employer's petitions for the reasons Employee suggested, and notice and hold another hearing on what he contends is essentially a new issue not previously raised. Employee presumably relies on 8 AAC 45.065(c) and 8 AAC 45.070(g) for support. Those regulations guide the issues for hearing, and normally a panel will not hear additional issues unless they were properly raised or agreed-upon at hearing. This helps avoid "trial by ambush." This decision already accepted Employee's timeliness argument, and denied Employer's petition.

The panel will not follow Employee's suggested procedural process to consider ordering an SIME on its own motion. His proposed procedure violates the fundamental premise in the Act that requires that it be construed to ensure "quick, efficient, fair, and predictable delivery" of benefits to Employee if he is entitled to them, at "a reasonable cost" to Employer. AS 23.30.001(1). Employee's process is anything but quick, efficient, fair and predictable or a reasonable cost to Employer. Whether the panel orders an SIME based on Employer's petition, or on its own motion, the facts and legal considerations for ordering an SIME are exactly the same. Employee clearly had notice that the panel could consider ordering an SIME on its own motion. As he stated in his hearing brief, "Board precedent holds a late request doesn't bar the board from ordering an SIME, but policy calls for caution." Employee was on notice that the panel may consider ordering an

SIME on its own motion. There is no due process violation given these facts, and this decision considered all his cautionary concerns. The panel will now apply the three *Bah* factors.

(1) There are medical disputes between Employee's physicians and an EME.

There are clearly medical disputes between Drs. Kirkham vis-à-vis Drs. Levine, Matthisen and Lonser. Dr. Kirkham twice stated Employee had a minor injury and has fully recovered from nothing more than a cervical sprain or strain. In his view, Employee needs no further diagnostics or treatment, is medically stable, is released to full-duty work and has no permanent impairment. He attributes Employee's continued symptoms to preexisting and non-work-related psychosocial issues. By contrast, just after Dr. Kirkham's report, Dr. Levine provided a trigger point injection and referred Employee back to his chiropractor for treatment; and Dr. Matthisen provided that care. On April 21, 2023, Dr. Lonser stated the work injury is still the substantial cause of Employee's need for medical care and treatment including MBB's and possibly an additional surgical procedure. He opined Employee will likely need continuing care every six to 12 months. These opinions raise disputes as to "causation," "medical stability," "degree of impairment," "functional capacity" and the "amount and efficacy of the continuance of or necessity of treatment." AS 23.30.095(k).

(2) The medical disputes are significant.

Employer's physician suggests Employee's continuing symptoms are related to non-work-related psychosocial issues. He does not address whether the work injury aggravated, accelerated or combined with these preexisting issues to cause the need for care or disability. Employee claims disability and medical benefits, now approaching five years post-injury. The panel takes official notice that medical treatment is expensive. *Rogers & Babler*. Employee's physicians suggest he may have permanent impairment, and may not be able to return to his at-injury job. These claims may result in considerable benefits if Employee prevails, making the disputes "significant."

(3) An SIME will assist the factfinders in resolving this case.

While familiar with most orthopedic injuries, the panel is not as familiar with psychosocial issues and how a work-related injury could aggravate, accelerate or combine with psychosocial factors and cause symptoms and the need for medical treatment or disability. Therefore, an SIME panel

including either a physiatrist or an orthopedic surgeon, and a neuropsychologist, would greatly assist the panel in understanding these relatively complex issues and resolving this case. Therefore, this panel will order a two-physician SIME on its own motion.

The parties will be directed to attend a prehearing conference as soon as possible for the designee to issue a calendaring order for the SIME process. The physicians shall be selected from the Division's SIME physician lists, unless an appropriate expert is not available from the list, in which case the designee will follow the normal procedure for choosing the necessary experts. The designee writing questions for the SIME panel shall include questions addressing whether the work injury aggravated, accelerated or combined with any preexisting "psychosocial" conditions to cause a need for medical treatment or disability (including for his physical symptoms, and for any aggravated, accelerated or combined-with preexisting psychosocial conditions) and whether the work injury continues to be the substantial cause of Employee's need for treatment and disability, if any. The designee shall also include any other appropriate questions addressing "causation," "medical stability," "degree of impairment," "functional capacity" and the "amount and efficacy of the continuance of or necessity of treatment."

CONCLUSIONS OF LAW

1) The oral order allowing, but limiting, Employee's testimony was correct.
2) The panel shall consider *Smallwooded* EME reports on the SIME issue.
3) The panel shall order an SIME.

ORDER

1) Employer's February 16, 2024 petition for an SIME is denied.
2) The Division shall notice a prehearing conference at the earliest possible opportunity.
3) The panel on its own motion orders a two-physician SIME, including a neuropsychologist and either an orthopedic surgeon or a physiatrist.
4) The physicians shall be selected from the Division's SIME physician lists, unless an appropriate expert is not available from the list, in which case the designee will follow the normal procedure for choosing the necessary experts.

5) The designee writing questions for the SIME panel shall include questions addressing whether the work injury aggravated, accelerated or combined with any preexisting "psychosocial" conditions to cause a need for medical treatment or disability (including for his physical symptoms, and for any aggravated, accelerated or combined-with preexisting psychosocial conditions).

6) The designee's questions shall include whether the work injury continues to be the substantial cause of Employee's need for treatment or disability for any physical, mental or "psychosocial" condition.

7) The designee shall also include the Division's normal questions addressing "causation," "medical stability," "degree of impairment," "functional capacity" and the "amount and efficacy of the continuance of or necessity of treatment."

8) To the extent possible, the designee shall attempt to arrange for the SIME to occur in mid- to late-August and as close as possible to Michigan.

Dated in Anchorage, Alaska on June 28, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz Member

/s/
Bronson Frye, 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 Zachary Phillips, employee / respondent v. Vend, Inc., employer; Umialik Insurance Co., insurer / petitioners; Case No. 201912676; 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 28, 2024.

/s/
Rochelle Comer, Office Assistant II