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 ON RECONSIDERATION AWCB Case No. 201912676 AWCB Decision No. 24-0045 Filed with AWCB Anchorage, Alaska on August 15, 2024

Vend, Inc.'s (Employer) July 15, 2024 petition for reconsideration or modification of *Phillips v. Vend, Inc*., AWCB Dec. No. 24-0038 (June 28, 2024) (*Phillips I*) was heard on the written record on August 6, 2024, in Anchorage, Alaska, a date selected on July 17, 2024. The July 15, 2024 petition gave rise to this hearing. Attorney David Graham represents Zachary Phillips (Employee). Attorney Michelle Meshke represents Employer. The record closed on August 6, 2024.

Stating that international travel for Employee's second independent medical evaluation (SIME) was never raised as an issue for the *Phillips I* hearing, Employer contended *Phillips I*'s order requiring it to pay SIME travel costs from Peru to the United States (US) denied its right to due process and must be reconsidered on that basis. *Phillips v. Vend, Inc*., AWCB Dec. No. 24-0041 (July 17, 2024) (*Phillips II*) granted Employer's timely petition to reconsider *Phillips I*, solely to

allow both parties to brief the travel issue fully. Employee did not file a timely petition to reconsider any part of *Phillips I*. He subsequently timely filed a petition to reconsider *Phillips II*, which is not addressed in this decision.

ISSUE

Employer contends Employee's "address of record" is in Palmer, Alaska, according to the change of address form he filed; he has never had "an address of record" in Peru. It cites Employee's April 24, 2023 deposition, where he testified that his residential address was in Alaska, and he had resided there for about a year and lived with his parents. Employee had a valid driver's license in Alaska. His wife was a Peru resident but as of April 24, 2023, he had only lived with her for six or seven months and at the moment of his deposition they were not "living together." Employee flew from Peru to Alaska in part to attend his deposition. He was undecided if he would remain in Peru, has no medical providers there, did not plan on working in Peru, does not drive there, his visa does not allow him to work in Peru and he had no plans to become a Peruvian citizen. Thus, Employer contends it need not pay international SIME travel expenses.

Employee contends travel is an integral part of an SIME, and was raised at length at the SIME hearing. He contends his deposition testimony and hearing brief, as well as his testimony at hearing, raised and addressed "prejudice from unpaid travel costs for a SIME." Employee contends this put Employer on notice that SIME travel costs were raised and an issue at the *Phillips I* hearing. Moreover, Employee contends that by granting Employer's petition before his time to answer expired, *Phillips v. Vend, Inc*., AWCB Dec. No. 24-0041 (July 17, 2024) (*Phillips II*) violated his due process rights to be heard on Employer's petition. Thus, in his July 25, 2024 answer to Employer's petition, he also sought reconsideration of *Phillips II*.

Does Employer have to pay for international travel for Employee to attend 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 April 24, 2023, Employee testified by deposition taken in Anchorage, Alaska. As of that date: Employee's "residential address" was "**** [number redacted for privacy] East Reich Court, Palmer, Alaska," where he had lived for approximately one year with his parents. He had a valid Alaska driver's license. Employee was married to his wife Jessica, who lives in Peru; they got married in Girdwood, Alaska in summer 2022. Employee and his wife were not at that moment living together only because, "As of this weekend I just flew back up from Peru." Employee explained that he was not working because, he was "helping [his] wife adjust to some stuff at home. [He is] being a house husband." He further explained he had been living in Peru with his wife since October 2022. Employee came back to Alaska in April 2023, (1) because his visa was expired, and (2) to attend his deposition. He was returning to Peru on April 24, 2023, where he would continue to be a "house husband." Employee and his wife had no plans at that time about where they would reside. He saw his Anchorage physician for his work injury while on this deposition trip; he had no medical provider in Peru. A typical day for Employee in Peru included waking up and cooking his wife breakfast, then scrolling on the Internet until it was time for her lunch, which he also made. At dinner time, Employee prepared the meal. Thereafter, the two either gamed together on the computer or watched television. Employee's visa did not provide for him working in Peru. As of April 24, 2023, Employee had no plans to come back to Anchorage. He and his wife may "decide to stay in Peru," and were considering a particular neighborhood where his wife had family. Employee did not drive at all in Peru; he had a vehicle in Palmer, which he kept at his parents' home. (Deposition of Zachary Phillips, April 24, 2023).

3) On December 29, 2023, Employer petitioned to continue a previously scheduled hearing on Employee's claim. Relevant to the instant matter, Employer in its associated brief and attachments stated Employee had failed to appear for a scheduled employer's medical evaluation (EME) because he had tested positive for COVID-19, "in Peru where he has been residing" and was denied travel to the EME. (Memorandum in Support of Petition to Dismiss [sic]; Affidavit of Counsel, Michelle M. Meschke, December 29, 2023).

4) On February 16, 2024, Employer petitioned for an SIME. (Petition, February 16, 2024).

5) On April 17, 2024, the parties attended a prehearing conference where the designee scheduled a June 16, 2024 hearing on Employer's "02/16/2024 petition for an SIME." The SIME petition was the only issue set for hearing. (Prehearing Conference Summary, April 17, 2024).

6) On March 20, 2024, Employee signed, filed and served on Employer an address change form, effective March 19, 2024. His new "address for service," is the same given at his deposition. The Division of Workers' Compensation (Division) form Employee completed states:

> Pursuant to 8 AAC 45.060(f), immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address. (State of Alaska Division of Workers' Compensation Change of Address form, March 19, 2024).

7) On June 5, 2024, Employer in its hearing brief stated Employee missed an EME because he had tested "positive for COVID when attempting to travel from Peru to the IME." The brief further stated, "Per his deposition, the employee moved to Peru in October 2022, where he has been living as a 'house husband.'" (Employer's Hearing Brief in Support of Petition for Second Independent Medical Evaluation, June 5, 2024).

8) On June 12, 2024, the parties attended a hearing on Employer's SIME petition. Employee attended by Zoom from Peru, "where [he is] currently living," and testified briefly. He said he had paid for travel to an EME out of his own pocket. Employee said he could not afford to pay for travel for another examination this year and had saved his money for a year so he could go back to his physician for another medial branch block (MBB) in August 2024. Employee was concerned about missing the MBB and having to start his MBB trial, which he described as a test for a possible radiofrequency ablation procedure, over. He was also concerned that his medical treatment was being delayed improperly. (Record).

9) At hearing, Employer asked Employee what his current "address of record for the Board" was; he gave an address in Peru. As for his "address of record" in his Division file, which listed a Palmer, Alaska address, Employee said he tried to update that address recently, but did not say to what address he wanted to change. Employee said he has a mailing address in Palmer, Alaska, and receives a digital scan of his mail sent to that address. Mail in Lima, Peru is unreliable in Employee's view. He has been receiving mail from the Division at his "**** [number redacted for privacy] E. Reich Ct., Palmer, Alaska 99645" address. Employee did not have an estimation

as to how long he would be in Peru. However, he was hoping to attend college in Michigan in mid-August to get a master's degree in accounting and thereafter practicing accounting in the US "at some point." Currently, he had been living in Peru for about two years. At no time did Employee suggest he had "proximity" concerns about coming to the US from Peru for an SIME. His concerns were purely SIME travel costs that he believed he had to pay, and treatment or case delay. Likewise, Employer did not make a "proximity" argument. (Record).

10) Employer's hearing arguments did not object to or discuss its legal obligation to pay SIME travel expenses for the SIME it wanted. It mentioned in its closing argument that the Workers' Compensation Act's (Act) focus on reasonable Employer costs was contrary to Employee's testimony where he suggested it would be prohibitively expensive for him to pay to fly back and forth from Peru to the US. Employer was otherwise silent on this international SIME travel issue. (Record; inferences from the above).

11) On June 28, 2024, *Phillips I* denied Employer's February 16, 2024 SIME petition as untimely, but ordered an SIME on its own motion. It found Employee currently resides in Lima, Peru. *Phillips I* found only that he feared delay and having to pay for some or all of his SIME travel, given his past experience paying for travel to an EME. It found Employee needed money he had saved up to return to the US for his next MBB injection, scheduled in August 2024. He was also concerned that if he missed his next MBB, Employee would have to start the diagnostic injection process over. Employee testified that he planned to attend school in Michigan in August 2024, and implied he would return to the US for that purpose. In his closing argument, Employee argued against an SIME, citing expense, delay, extended travel and related costs, significance of the medical dispute compared to the issues in the claim, and the panel's familiarity with the disputed subject matter. However, he raised these arguments in context of his overall contention that the panel had to "essentially" hold a merits hearing to address these issues before ordering an SIME on its own motion. (*Phillips I*).

12) *Phillips I* allayed Employee's SIME travel cost concerns stating "because the examination is paid, per statute, by the employer," there would be no expenses to him for travel to an SIME in the US. In an effort to minimize time and costs to both parties, it also added that if his SIME appointment could be coordinated with his return to the US to obtain his next MBB or to attend college in August 2024, Employee "could receive a free trip to America from Peru. . . ." *Phillips*

I stated, "Employer is the party requesting the SIME, signaling that it does not object to paying for one notwithstanding Employee's location in Peru." (*Phillips I*).

13) Employer's SIME hearing brief revealed that it knew prior to the *Phillips I* hearing that Employee was residing in Peru in October 2022, April 21, 2023 and June 5, 2024, and was traveling back and forth for medical evaluations and treatment. (Inferences from the above).

14) On June 28, 2024, the Division served *Phillips I* on all parties by certified mail. (Agency file: Judicial, Prehearings and Hearings, D&O Issued and Served tabs, June 28, 2024).

15) Fifteen days from June 28, 2024, plus three additional days added to account for service by mail, was July 16, 2024. (Observations).

16) On July 11, 2024, Employer sent Employee a letter directing him to see EME Michael Villaneuva, MD, neuropsychologist, on August 24, 2024, at 8:00 AM, at 1577 C Street, Suite 100, Anchorage, AK 99501. (Letter, July 11, 2024).

17) On July 15, 2024, one day before its time ran out to petition, Employer timely petitioned for reconsideration of *Phillips I* on the SIME travel issue. (Petition, July 15, 2024).

18) In its attached briefing, Employer contended that an April 2024 prehearing conference summary identified Employer's February 16, 2024 petition for an SIME as "the only issue to be addressed at the hearing." It contended costs, "including the reasonableness of international travel while the employee is on an extended vacation internationally, while maintaining his residence in Alaska, was not an issue for hearing." Employer objected to *Phillips I*'s finding that by requesting an SIME, knowing Employee lived in Peru, signaled its acceptance of the legal requirement to pay all related expenses if *Phillips I* ordered an SIME. It further contended Employee's "address of record" is in Palmer, Alaska, according to his March 20, 2024 address-change form. Employer stated Employee has never had a Peru address, and at his deposition testified he resided with his parents in Palmer and had a valid Alaska driver's license. However, Employer's brief also conceded that it knew from Employee's deposition that he had lived in Peru for at least six months as of April 24, 2023. Employer said it had never paid any travel expenses for Employee to come from Peru and he had not requested any. It noted that he paid his own travel expenses to attend his deposition and his 2024 EME, and to get medical treatment in Anchorage. Employer stated the panel should not have presumed Employer did not object to paying for Employee's international travel to attend an SIME. For the first time, Employer contended Employee's choice to live "temporarily internationally" should not "cause the

Employer to bear excessive costs." Employer said the unresolved issue the panel should determine on reconsideration its whether Employer is required to pay for international travel to attend an SIME. It contended "Employee's travel costs from Peru to the US are "excessive and unreasonable." Employer said, "At the very least, Employee should be required to pay for his travel to an entry point in the United States, and Employer may pay for Employee's travel from there to the location of the SIME" in the US. (Memorandum in Support of Employer's Petition for Reconsideration, July 15, 2024).

19) To further support its position on reconsideration, Employer cited *Thoeni*, which says an employer does not have to select an EME physician "most convenient" for an employee, but the employee's convenience cannot be completely discounted. In other words, Employer for the first time raised a "proximity" argument. Employer cited Board SIME regulations, which require the Board to consider "the proximity of the physician to the employee's geographic location." Employer acknowledged that the Act requires it to pay all SIME costs. However, it added that the law is "unclear whether the employer's duty to provide travel is absolute or whether there exists limitations on the reasonableness of an employee's travel." Employer cited AS 23.30.001(1), which suggests "reasonable cost" limitations on Employer, and contended this should apply to SIME travel expenses. Since it contended Employee is on a "voluntary extended international vacation," Employer stated it is "manifestly unreasonable" to require it to pay travel expenses for Employee's SIME, at least from Peru to the US, and presumably back to Peru. Employer focused on Employee's "address of record" in his agency file as determinative. Although it seeks "reconsideration," Employer also contended *Phillips I* made "numerous mistakes of fact." (Memorandum in Support of Employer's Petition for Reconsideration, July 15, 2024).

20) On July 15, 2024, Employer served its petition for reconsideration and memorandum on Employee's attorney by email. (Petition; Memorandum in Support of Employer's Petition for Reconsideration, July 15, 2024).

21) By close of business on July 16, 2024, the last day for a party to petition for reconsideration of *Phillips I*, Employee had not petitioned the panel for reconsideration. (Agency file).

22) On July 17, 2024, *Phillips v. Vend, Inc*., AWCB Dec. No. 24-0041 (July 17, 2024) (*Phillips II*) granted Employer's petition solely to allow for additional briefing. It also ordered

the parties to file simultaneous written-record hearing briefs by no later than August 5, 2024, addressing Employer's obligation to pay for international SIME travel. *Phillips II* set a written-record hearing for August 6, 2024, and specifically stated, explaining its order:

> Employer served its reconsideration petition on Employee via e-mail on July 15, 2024. Employee has 20 days to answer Employer's petition, or until August 5, 2024. 8 AAC 45.050(c)(2); 8 AAC 45.063(a). However, the panel's power to order reconsideration expires 30 days from *Phillips I*'s issuance date, or on July 29, 2024. AS 44.62.540; 8 AAC 45.063(a). *Therefore, given the short timeframe* and *to best ascertain the parties' rights*, Employer's petition for reconsideration will be granted *to allow additional briefing*. AS 23.30.135.
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> ORDER
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> 1) Employer's July 15, 2024 petition for reconsideration *is granted, for additional briefing*.
> 2) The parties are ordered to file simultaneous written record hearing briefs no later than August 5, 2024 *addressing Employer's obligation to pay for international SIME travel*.
> 3) On August 6, 2024, the panel will review the parties' written record hearing briefs and decide the issue on its merits (emphasis added). (*Phillips II*).

23) On July 19, 2024, the parties attended a prehearing conference, which was to schedule SIME deadlines pursuant to *Phillips I*. However, the Board's designee recorded:

> Since [*Phillips I*], the ER filed a petition for reconsideration on the D&O 24-0038 regarding international travel. The designee asked the EE during this prehearing when he was planning on coming into the US and noted that he had a couple of personal reasons to travel to the US, for an injection and the other to start school in Michigan, the EE stated that he has a scheduled IME on 8/22/24 and will only be here possibly before and/or after that date for at least one week and will try to coordinate his injections. The EE noted that he read the D&O as saying that the SIME would be scheduled end of August. The ER noted that the EE had mentioned that he would be coming to Michigan for school in August and confirmed that the SIME has not been scheduled yet. The EE had no other plans to come. He stated that his school in Michigan is online and does not need to come in person most of the time. The EE noted that the SIME can be in any region and does not have to be near Michigan. The ER was willing to set SIME deadlines, however, the EE preferred to discuss deadlines after the coming decision that is set on a written record for 8/6/24 since briefs are also due by 8/5/24.

The designee scheduled a follow-up prehearing conference for August 15, 2024. (Prehearing Conference Summary, July 19, 2024).

24) On July 25, 2024, Employee answered Employer's July 15, 2024 petition for reconsideration, and also asked for the panel to reconsider *Phillips II*. He stated:

> Employee . . . through his attorney . . . and pursuant to Alaska Admin. Code 3 §48.090(e) [footnote below], submits his opposition to the July 15, 2024 petition for reconsideration of the order for a second independent medical examination (SIME) in this claim, [*Phillips I*]. Pursuant to AS 44.62.540 and 8 AAC 45.050, Employee also petitions for reconsideration of [*Phillips II*].
> . . . .
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> [1] This regulation gives a party 10 days to respond to a petition for reconsideration, so that both the petition and any opposition are before the agency prior to the 30-day deadline to act. *See*, *Alaska Pub. Utils. Comm'n v. Chugach Electric Ass'n*, 580 P.2d 687.

He cited his deposition and his *Phillips I* hearing testimony where he explained how requiring him to pay for SIME travel expenses, like he did for his EME, would prejudice him because he has limited funds. Employee contended this put Employer on notice that SIME travel costs were an issue for the *Phillips I* hearing. He stated Employer's "hearing strategy does not create a due process claim." Employee further contended Employer had notice and an opportunity to be heard on the SIME travel issue. He stated reconsidering "just travel costs" is "unfair." In his view, if travel cost "allocation" is reconsidered, the SIME should also be reconsidered. Moreover, he contended "not allowing" Employee's response to Employer's reconsideration petition before ordering reconsideration in *Phillips II* "denied" him due process. Employee continued:

> The prior notice and the oral ruling allowing testimony as to prejudice if there were to be out-of-pocket costs to Employee for international travel if a SIME were to be ordered clearly put the issue of whether the Employer would have to pay for Employee to travel internationally to attend a SIME before the Board at the June 12, 2024, hearing.

Since he contended the issue was raised at the *Phillips I* hearing, and Employer failed to make an argument at that hearing regarding travel expenses, it failed to "preserve the issue." He stated Employer may have made a tactical decision to not address international travel for the SIME. But Employee contended a party cannot later argue "due process" if it chose not to address an

issue that was raised but not "specifically listed as an issue for hearing." He stated AS 23.30.001(2) requires cases be decided on their merits with all parties afforded due process and an opportunity to be heard. This implies in his view that "parties must actively engage with all issues raised during the proceedings to preserve their right to due process claims." (Employee's Opposition to Employer's Motion for Reconsideration and Petition for Reconsideration of the July 17, 2024 D&O Granting Reconsideration, July 25, 2024).

25) In its August 5, 2024 hearing brief, Employer reiterated contentions from its July 25, 2024 petition and memorandum. Employer stated, "Employee's travel costs from Peru to the United States are excessive and unreasonable." It emphasized Employee's "address of record" in Alaska and suggested he has been on a "extended international vacation." Employer relied on *Thoeni* and equated its finding that the legislature intended "some consideration" of an employee's ease in attending an EME. It contended this panel should similarly find "the legislature intended some consideration of Employer's costs in [an injured worker] attending a SIME." Employer also cited 8 AAC 45.092(e), which gives guidance to the Board's designee when "selecting the physician" for an SIME. Included is "(6) the proximity of the physician to the employee's geographic location." (Employer's Hearing Brief Regarding SIME International Travel, August 5, 2024).

26) Employer noted AS 23.30.095(k) states the SIME costs "shall be paid by the employer." However, it further contended that under AS 23.30.001(1), the Act must be interpreted to ensure "a reasonable cost to the employers." In Employer's view, *Thoeni* set a "reasonable" limit on travel costs for an SIME. It also cited 8 AAC 45.084(c), which addresses transportation for medical treatment, and requires Employee to use "the most reasonable and efficient means of transportation under the circumstances." If Employer demonstrated at a hearing that Employee did not use the most reasonable and efficient transportation method, "the board may direct the employer to pay the more reasonable rate rather than the actual rate." (Employer's Hearing Brief Regarding SIME International Travel, August 5, 2024).

27) Employer opined that if Employee demanded reimbursement, it would not be ordered to pay medical travel costs from Peru to Anchorage, where his physician is located. In conclusion, notwithstanding the above, Employer again suggested a compromise: "[Employee] should be required to pay for his own travel from an international location to a reasonable entry point in the United States, and the Employer will pick up the cost of travel from a reasonable location in the

United States to the SIME appointment." (Employer's Hearing Brief Regarding SIME International Travel, August 5, 2024).

28) In his August 5, 2024 extra-length hearing brief, most of which is cited here only to preserve his record, Employee raised numerous issues and arguments not relevant to Employer's reconsideration petition: First, Employee suggested he could argue on reconsideration, issues not raised in Employer's petition. Employee apparently contended that because he opposed Employer's petition within 10 days that this somehow resulted in him also petitioning for reconsideration in response to Employer's petition. Indeed, he said, "But [Employee] filed a timely response to the petition for reconsideration. . . ." and suggested the issues on reconsideration "must be broader" than the international travel issue as stated in *Phillips II*. (Employee's Opposition to Employer's Motion for Reconsideration and Petition for Reconsideration of the July 17, 2024 D&O Granting Reconsideration, July 25, 2024; Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

29) Second, he stated for the first time that *Phillips I* should have applied the first two steps of the presumption analysis in determining if a medical dispute existed. He walked back his *Phillips I* argument where Employee suggested the panel should "essentially" hold a full hearing before deciding if a medical dispute existed to warrant an SIME, before ordering one. Employee now contended the panel "misstated" his issue, and a full hearing was not what he sought. (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

30) Third, Employee said *Phillips I* did not follow applicable law when it relied upon hearsay medical evidence to support an SIME in light of an unsatisfied *Smallwood* objection. (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

31) Fourth, he stated *Phillips I* misconstrued *Geister*. (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

32) Fifth, Employee contended *Phillips I* did not follow Board regulations and caused him unfair prejudice "including precluding him from fully addressing the legal and factual issues." It is not clear what regulations Employee referred to here, but he contended *Phillips I* had no authority to order an SIME on its own motion after denying Employer's petition. Employee suggested Employer duped him by seeking mediation and immediately thereafter requesting an SIME. (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

33) Sixth, on the merits of Employer's reconsideration petition, Employee said Employer must be required to pay the cost of international travel to attend the SIME, or the SIME order should be rescinded. He further stated the international travel issue was raised in his opposition to Employer's petition for an SIME, in his hearing brief and at hearing. Thus, he contended *Phillips I* did not violate Employer's right to due process. Employee cited and relied on AS 23.30.095(k), which requires Employer to pay the cost of an SIME examination and report. He said that if Employer objected to paying for travel costs for the SIME, it should have either objected to the SIME or raised that issue at the *Phillips I* hearing. Employee contended Employer made a strategic decision not to argue travel costs at hearing because it feared the panel would not order the SIME Employer requested, if Employee had to pay travel costs from his own pocket. (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

34) Seventh, Employee also stated *Phillips I* erred as a matter of law by relying on a hearsay EME report to find the medical dispute. He said *Phillips I* should have employed "well-established evidence rules" in determining if the EME report lacked "internal indicia of reliability," before relying upon it to find a dispute. Employee stated an SIME process is no exception to these rules, and the Board must weigh evidence before ordering an SIME. (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

35) Eighth, Employee next said he negotiated and mediated this case in good faith, thereby delaying his right to a merits hearing. He suggested Employer took "unfair advantage" of a hearing continuance for mediation and then belatedly requested an SIME where a dispute had existed since at least January 6, 2022. Employee disagreed that an SIME based on Employer's petition or on the panel's own motion are the same. He suggested that at no time prior to *Phillips I* did Employer mention the need for an EME in any other specialty than already accomplished. Now, Employer has a neuropsychological EME scheduled for Employee on August 22, 2024. In his view, "This is further evidence of the prejudice [Employee] has suffered as a result of the use of these improper procedures." (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

36) Lastly, Employee said had *Phillips I* been a hearing on the merits, the panel would have been required to address the statutory presumption. And had it made the factual findings it made in *Phillips I*, it would have been required by law to have granted Employee's claims. He stated *Phillips I* gave "no adequate explanation" for its alleged failure to follow regulations for hearing

disputed issues. Employee noted that even Employer claimed, "prejudice from the procedures utilized," although he also argued that *Phillips I* was correct on the issue to which Employer objected. He cited *Deal* as support for his contention that once *Phillips I* denied Employer's petition for an SIME as untimely, that should have been "the end of the decision." By ordering an SIME on its own motion, *Phillips I* failed to follow its own regulations and provide adequate notice to satisfy Employee's due process, in his view. He implied that *Phillips I* in an effort to assist Employer's case, "pointed out for the employer" certain facts derived from the medical evidence. Employee suggested this triggered Employer's request for a new SIME, set for August 22, 2024, with a neuropsychologist. In summary, he contended the above deprived Employee of his present right to receive his claimed benefits. He concluded "it would be most appropriate to deny an order for a SIME." (Employee's Memorandum on Reconsideration of *Phillips I*, August 5, 2024).

37) The panel could find no evidence in the agency file regarding airline travel costs between Lima, Peru and anywhere else, and has no personal experience. (Agency file; experience).

38) Effective August 5, 2024, Employee changed his service address to, "*** W. Diamond Blvd., Suite *** #**** [redacted for privacy] Anchorage, AK 99515. He had contracted with a service to receive, store and scan his US mail to him. (Email, August 5, 2024).

39) Lima, Peru, on a different continent, is more than 100 road miles away from any SIME physician on the Board's SIME list. (Observations).

40) This panel is unaware of any injured worker taking an international vacation while his or her workers' compensation claim was pending. (Observations; experience).

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. . . .
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

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**. . . .
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> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. . . .

In *Thoeni v. Consumer Electronics Services*, 151 P.3d 1249 (Alaska 2007), the employer required an injured worker to attend an EME in Utah. The worker refused to travel from Miami, where she had moved, to Utah for the EME. The employer controverted her benefits on this ground. The Board found a "rational basis" existed for the controversion and found the worker's failure to attend the Utah medical examination was "unexcused." It also held she forfeited her benefits from the missed examination until she saw an EME. The employee appealed. Reversing, the Alaska Supreme Court addressed the statute authorizing EME and stated:

> 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.' 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. . . . Requiring Thoeni to travel 2500 miles from her home was manifestly unreasonable. The board's decision that Thoeni's refusal was unreasonable is not supported by substantial evidence. . . . *Id.*

Olafson v. State of Alaska, Dep't of Transportation & Public Facilities, AWCAC Dec. No. 061 at 6, n. 75-76 (October 25, 2007) referring to an SIME reiterated that, "The cost of an examination and medical report shall be paid by the employer." Citing *Thoeni*, it added,

"However, when choosing the physician, the board's designee must take into account the 'proximity of the physician to the employee's geographic location.' 8 AAC 45.092(e)(6)."

> **AS 23.30.130. Modification of awards.** (a) Upon . . . the application of any party in interest on the ground of a change in conditions, . . . or because of a mistake in its determination of a fact, the board may, before one year after . . . after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case. . . . To be considered by the agency, a petition for reconsideration must be filed . . . within 15 days after delivery or mailing of the decision. The power to order reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .

State of Alaska v. O'Neill Investigations, Inc., 609 P.2d 528 (Alaska 1980) held, "Failure to argue a point constitutes an abandonment of it." *Richards v. University of Alaska*, 370 P.3d 603, 614 (Alaska 2016) rejected a party's contention in an administrative appeal, in reference to "bare allegations," stating "argument is not evidence."

Baker-Withrow v. Crawford & Co., AWCB Dec. No. 00-0036 (March 6, 2000) applied 8 AAC 45.084 to out-of-pocket transportation costs associated with her husband's accompaniment to her SIME examination, and stated, "Our regulation at 8 AAC 45.084 provides that medical-related travel expenses are to be reimbursed to employees."

Wollman v. Earthmovers of Fairbanks, Inc., AWCB Dec. No 00-0150 (July 20, 2000) stated,

> We find the employee incurred $213.00 in unreimbursed lodging costs associated with his travel to the Seattle SIME examination. Our regulation at 8 AAC 45.084 provides for reimbursement of travel expenses, provided they are incurred in the most reasonable and efficient means possible. . . .

Broderick v. Summit Lake Lodge, AWCB Dec. No. 00-0112 (June 12, 2000) stated in an effort to reduce the cost of a two-physician SIME panel, "We find that we may consider the economical [sic] impact of an SIME on employers and insurers." However, this decision was based on the second SIME physician historically charging several times more than the average SIME cost.

An issue in *Brennan v. Flowline of Alaska*, AWCB Dec. No. 03-0043 (February 21, 2003) was "whether the employee must travel to the US for an EIME." The employee was injured in Alaska while working and thereafter "moved from Alaska back to his home in Ireland." A dispute arose over the employee's "ability to travel" given his physical limitations:

> The employer also argued Dr. Marble's medical record review indicated the employee can travel. It offered to fly the employee first class to Salt Lake City, Utah for his EIME examination. It argued it has a right under AS 23.30.095(e) to an in-person examination of the employee by the same EIME physicians it previously used. It additionally argued the medical disputes between the treating and EIME physicians necessitated an in-person SIME. *Id*. at 9.

Without commenting on the transportation cost issue, presumably because it did not arise, *Brennan* decided it was not reasonable to require the employee to fly to the US for an EME "when he [was] medically restricted from extensive travel." *Id*. at 10. As for the SIME, *Brennan* declined to order one finding the employee had an extensively developed medical file and a previous SIME. Without discussing cost or logistical issues involved, the Board retained jurisdiction over the SIME issue suggesting it may order one "in the British Isles, or by means of a record review. . . ." *Id*. at 11. It also ordered that the employer "may arrange a medical examination of the employee in the British Isles, or a written record review." *Id*. at 13.

McKitrick v. Municipality of Anchorage, AWCB Dec. No. 08-0148 (August 21, 2008) said in a case where an SIME report was stricken from the record, "We find AS 23.30.095(k) provides for payment for an SIME only by an employer."

In *Betts v. Greenling Enterprises, LLC*, AWCB Dec. No. 23-0019 (April 4, 2023) the claimant objected to an SIME because it would require her to travel at "a great personal inconvenience and cost." The employee in *Betts* had previously testified that she did not receive necessary treatment from her physician because it required out-of-pocket costs for travel from her home that she could not afford. *Betts* addressed that objection by stating, "Employer is required to arrange and pay for Employee's transportation, room and board for the SIME. 8 AAC 45.090(b)."

> **8 AAC 45.050. Pleadings.** . . .

(c) For answers to claims and petitions under this subsection,
. . . .

(2) an answer to a petition must be filed not later than 20 days after the date of service of the petition and served upon all parties;

8 AAC 45.060. Service. . . .

(f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.
. . . .

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

8 AAC 45.090. Additional examination. . . .

(d) Regardless of the date of an employee's injury, the employer must . . .

(2) arrange, at least 10 days in advance of the examination date, for the employee's transportation expenses to the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, at no cost to the employee if the employee must travel more than 100 road miles for the examination or, if the employee cannot travel on a government-maintained road to attend the examination, arrange for the transportation expenses by the most reasonable means of transportation; and
(3) arrange, at least 10 days in advance of the examination date, for the employee's room and board at no cost to the employee if the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, requires the employee to be away from home overnight. . . .

8 AAC 45.092. Second independent medical evaluation. . . .

> (e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095(k), the board or its designee may select a physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as a second independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:
> . . . .
>
> (6) the proximity of the physician to the employee's geographic location.

Title 3 of the Alaska Administrative Code applies only to actions under the Department of Commerce, Community and Economic Development, including the Regulatory Commission of Alaska (RCA). 3 AAC 01.010 - 3 AAC 48.105. Regulation 3 AAC 48.090 applies only to practice and procedures in actions before the RCA. 3 AAC 48.010. Former regulation 3 AAC 48.090(e) was repealed on June 29, 1984. See 3 AAC 48.090(e). However, current 3 AAC 48.105, which also applies only to RCA hearings, states:

> **3 AAC 48.105. Petitions for reconsideration**. Within 15 days after an order of the commission is served, a party may file a petition for reconsideration of that order setting out specifically the grounds upon which the petitioner believes the order is unreasonable, erroneous, unlawful, or otherwise defective. The petitioner may also submit a proposed order designed to cure the alleged defects of the commission's order. A party opposing a petition for reconsideration has 10 days after the date on which the petition is filed with the commission to respond. The commission's power to order reconsideration expires 30 days after the date on which the petition for reconsideration is filed with the commission. If the commission takes no action on a petition for reconsideration within the time allowed for ordering reconsideration, the petition is automatically denied. The commission may order reconsideration in writing of all or part of the record in a proceeding together with any additional evidence and argument which may be permitted either in writing or orally. The mere filing of a petition for reconsideration does not excuse the petitioning party from compliance with a decision or order of the commission.

Alaska Pub. Utils. Comm'n v. Chugach Electric Ass'n, Inc., 580 P.2d 687, 690 (Alaska 1978) addressed a dispute between two utility companies over service area boundaries. *Alaska Pub. Utils. Comm'n* cited former 3 AAC 48.090(e) to note that since the Commission took no action on one party's reconsideration petition it was automatically denied. The Court did not further discuss former 3 AAC 48.090(e), which at the time stated, "A party opposing a petition for reconsideration shall have 10 days in which to respond."

ANALYSIS

Does Employer have to pay for international travel for Employee to attend an SIME?

Employer's July 15, 2024 petition for reconsideration contends that *Phillips I* erred by requiring it to pay for Employee's "travel internationally to attend" an SIME. It bases this contention on the following: Employee's "address of record" is in Palmer, Alaska, according to the March 19, 2024 change of address form he filed. Employee has never had "an address of record" in Peru. Moreover, it relies heavily on Employee's April 24, 2023 deposition, where he testified that his residential address was in Alaska, and he had resided there for about one year. He lived with his parents. Employee had a valid driver's license in Alaska. His wife was a Peru resident but as of April 24, 2023, Employee had only lived with her for six or seven months and at the moment of his deposition they were not "living together." He flew from Peru to Alaska in part to attend his deposition. Employee was undecided whether he would remain in Peru, has no medical providers there, did not plan on working in Peru, does not drive there, his visa does not allow him to work in Peru and he had no plans to become a Peruvian citizen.

Employer further states it had not paid any travel for Employee from Peru to Alaska and he has never requested any. It notes Employee "paid for his own travel to attend his deposition in 2023," and Employer did not pay for Employee's travel from Peru to Alaska when he attended an EME in 2024. Employer contends Employee has merely been on an "extended international vacation" while his claim is pending and maintains "his address of residence in Alaska." It states Employee's choice to live "temporarily internationally" should not cause it to bear excessive costs. Consequently, Employer contends, "Employee's travel costs from Peru to the United States are excessive and unreasonable" and it should not have to pay them for his SIME.

While contending it has no legal obligation to pay for Employee's travel expenses to the SIME that it requested, Employer suggests an alternative resolution: Employee should pay for his travel to "an entry point" in the US, "and Employer can pay for Employee's travel from there to the location of the SIME" in the US. It cites *Thoeni* and 8 AAC 45.092(e)(6) as support for this position. Employer concedes that while AS 23.30.095(k) requires it to pay SIME costs, it

contends that duty "should not be absolute or unreasonable." To support that contention, Employer relies on AS 23.30.001(1), which requires the Act to be interpreted to result in "a reasonable cost" to employers, and on 8 AAC 45.084(c), which requires Employee to use the "most reasonable and efficient means of transportation under the circumstances." It contends Employee has maintained his "permanent residence in Alaska, and his address of record is in Alaska." Therefore, since it surmises it would not be ordered to pay for medical travel costs under 8 AAC 45.084(c) for Employee's travel from Peru to Anchorage and back for medical treatment, it likewise does not have to pay SIME transportation expenses either.

Employer said it was unable to find a case where an employer was required to pay international travel for an SIME when the worker was on a "voluntary extended international vacation." Lastly, Employer states if it has to pay for international travel, employers in other cases would be subject to providing workers a "free trip" to the US "from anywhere in the world they chose to travel to on an extended basis." That, it contends, would be "manifestly unreasonable."

A) Employee has not petitioned for reconsideration of Phillips I.

Employee, by contrast, reiterates numerous points he raised at the *Phillips I* hearing. Notably, he cites an RCA regulation that was repealed in 1984, and a case that relied on the repealed regulation. 3 AAC 48.090(e); *Alaska Public Utilities Comm*. Although the repealed regulation was restated in 3 AAC 48.190 for use only in hearings before the RCA, it is unclear why Employee believes Alaska Admin. Code Title 3, or a related case, applies to a workers' compensation hearing. The repealed regulation upon which he relies, the related case, and the current regulation gives parties to RCA proceedings 10 days to oppose a reconsideration petition, which presumably provides the RCA five days to issue a decision before the 30-day deadline for the RCA to act expires pursuant to AS 44.62.540(a). But Title 3 does not apply to workers' compensation cases, and there is no comparable regulation in Title 8. Rather, 8 AAC 45.050(c)(2) applies and gives an opposing party "not later than 20 days after the date of service of the petition" to file and serve an answer.

It appears Employee cites the Title 3 references as a "back-door" route to justify his effort to raise issues in response to Employer's petition for reconsideration that he failed to raise by filing

his own petition for reconsideration timely. Under AS 44.62.540(a), considering the Division's service by mail, each party had 18 days to petition the agency to reconsider *Phillips I*. Employer did so timely; Employee did not. He cited no relevant statute or regulation that allows a non-petitioning party to "cross-petition" for different relief outside the 15-day statutory window (18 days here because the Division served the decision by mail). While the panel could decide broader issues in addressing Employer's petition, it sees no reason to do so here and will limit this decision to Employer's July 15, 2024 reconsideration petition on international travel for an SIME, and Employee's relevant response to that issue only.

B) Employer waived or abandoned its objection to paying for international SIME travel.

Employee contends the international travel issue arose in his deposition, hearing brief and at the *Phillips I* hearing. He contends Employer knew Employee was living in Peru when it requested an SIME. Employee implies without actually stating, that Employer by not addressing the issue at the *Phillips I* hearing waived or abandoned its right to do so and should not be allowed to raise it now. He suggests Employer made a tactical or strategic decision not to argue travel costs at the *Phillips I* hearing fearing the SIME order may not have been issued.

Employer contends the issue of paying for Employee to travel internationally to attend an SIME was not an issue for hearing, and *Phillips I* ruling on it violated its due process rights. But the issue was raised in Employer's petition for an SIME. By statute and regulation, Employer's duty to pay for the SIME and travel to and from it was always at issue. It was more so after Employee testified that, other than delaying his case, he objected to an SIME only because he could not afford to pay for the travel to attend it. AS 23.30.095(k); 8 AAC 45.090(d)(2), (3). *Phillips II* remedied any due process issue by allowing both parties an opportunity to brief Employer's petition.

It is undisputed Employer knew Employee was physically in Peru at all relevant times, and had been there for over a year-and-a-half. Its counsel signed an affidavit and filed a brief supporting a continuance request, attesting in both that Employee had been denied travel to an EME because he contracted COVID-19, "in Peru where he currently *resides*" (emphasis added). In its hearing brief for *Phillips I*, Employer stated, "Per his deposition, the employee *moved* to Peru in October

2022, *where he has been living* as a 'house husband'" (emphasis added). Employer knew he had traveled to and from Peru at his own expense for his deposition, an EME and to see his Anchorage doctor. It knew at the *Phillips I* hearing that he was physically present in Peru.

Inexplicably, even after Employee testified at the *Phillips I* hearing that an SIME would prejudice him because he could not afford to pay for travel from Peru to an SIME and back, Employer was silent on the travel issue. Perhaps Employer believed that because, for reasons not clear and not at issue here, Employee had paid his own travel expenses from Peru to attend his deposition and an EME, he was somehow legally required to also pay for his SIME travel. Perhaps Employee believed that too. The reasons for these possible presumptions is unknown. Regardless of Employer's motivation or presumptions, it failed to object in its briefing or arguments at the *Phillips I* hearing to complying with the statutory mandate that it pay for Employee's SIME travel. Employer contends *Phillips I* was not justified in assuming it did not object to paying for international SIME travel; it is mistaken. Unless a party raises an objection to an obvious legal requirement, the panel has no reason to suspect it wants a new "international exception" to SIME laws. Thus, Employer waived or abandoned its objection by not raising it before or at the *Phillips I* hearing, and it will not be considered on reconsideration. *O'Neill Investigations, Inc*.

C) Alternately, Employer's objection to paying for international SIME travel is without legal support.

Alternately, even if Employer had not waived or abandoned its objection to paying for Employee's international SIME travel by failing to assert it, Employer's legal arguments lack merit. The designated chair, like Employer, could find no case directly on point. The chair reviewed over 600 decisions dating back to 1986 and found little that was helpful. This is a case of first impression, and Employer's waived and abandoned arguments also fail on their merits:

(1) The Alaska Legislature created a "bright-line" rule in SIME cases stating, "The cost of an examination and medical report shall be paid by the employer." AS 23.30.095(k). No exceptions were stated or implied. This rule avoids placing the burden on an injured worker, who may have been disabled and without earnings for months or years, to pay for an examination ordered to assist the fact-finders in resolving disputed medical issues. This is

especially true where, as here, Employer is the party who initially requested the SIME and brought the medical dispute to the fact-finders' attention. To require Employee to pay his own way to and from the SIME, given this statute's purpose, makes no logical sense. *Broderick* considered the economic impact on an employer in an SIME. However, *Broderick* eliminated a two-physician SIME panel in favor of a single SIME physician because the second SIME panel member routinely charged multiples of a typical physician's charges to perform an SIME. *Broderick* is not helpful here.

(2) Similarly, the Division through its rule-making process to clarify any possible ambiguities in the statute, adopted "bright-line" 8 AAC 45.090(d)(2), (3) and stated, "the employer must" "arrange, at least 10 days in advance of the examination date," for Employee's "transportation expenses to the examination under . . . AS 23.30.095(k) . . . at no cost to the employee if the employee must travel more than 100 road miles for the examination." If necessary, Employer must also arrange for Employee's "room and board at no cost" to him if the examination requires him "to be away from home overnight." Obviously, Lima, Peru, is more than 100 road miles away from any SIME physician on the Division's list. *Rogers & Babler*.

(3) Employer's characterization of Employee's "residence" is misleading and not supported by the evidence as a whole. Employee has been living in Peru since at least October 2022. Employer's selected citations from Employee's deposition incorrectly imply that Employee has little connection with Peru. It suggests he is simply on an extended "international vacation." Employer omits portions from his deposition testimony where he further explained that he has been living in Peru with his wife since October 2022. As of his April 24, 2023 deposition, Employee said he was returning to Peru that evening, where he planned to resume being a "house husband." It is misleading for Employer to imply that Employee and his wife were somehow separated and not living "together." Employee's testimony later clarified he meant at that moment in time they were not together simply because she was in Peru, and he had flown to Alaska from Peru days earlier for his deposition. In context, Employer clearly understood this. The only reason he was in Alaska was to renew his visa and attend his Employer-mandated deposition.

Employer's other reasons for suggesting Employee was on an extended vacation in Peru are likewise immaterial and not persuasive. It cited no legal requirement suggesting a person living

in Peru must obtain citizenship, a driver's license or a job. By contrast, Employee discussed his family possibly moving to an area in Lima where his wife had relatives. In its counsel's affidavit and its hearing brief, Employer acknowledged Employee had "been *living* as a 'house husband" and contracted COVID-19 in "Peru where he has been *residing*" (emphasis added). Employer petitioned for an SIME knowing he was living in Peru with his wife. It is misleading for Employer to say Employee has never had an "address of record" in Peru. He has a residence address in Peru and gave it during the hearing; that is where he physically lives and has lived for nearly two years. However, because in his experience receiving mail in Peru is unreliable, he uses his Alaska addresses for his "service address." The bottom line is, Employee lives with his wife in Peru and has lived there since October 2022. He is not on an extended vacation.

(4) Neither the statute nor the applicable regulations suggest that Employer only has to pay SIME travel from Employee's "address of record" or "service" address. AS 23.30.095(k) simply states Employer must pay the SIME costs. Similarly, 8 AAC 45.090(d)(2), (3) state Employer must arrange for SIME travel "at no cost" to Employee without regard to where he is living at the time. On March 20, 2024, Employee filed a Division "Change of Address" form. The Division's form expressly states Employee was changing his "address for service," not the address where he physically lives. The form and regulation upon which it is based are procedural and designed to prevent a party from changing its "service address" without advising the Division or opposing party, and then complaining documents were not received. 8 AAC 45.060(f). Employer cited no statute, regulation or case law suggesting Employee has to live at his "address for service" to justify it paying statutorily mandated SIME expenses. While typically an injured worker will physically reside at his "address for service," many do not; including those who have post office boxes. On August 5, 2024, Employee changed his "service address" again to a contract service in Anchorage that will scan and send his mail to him in Peru; this change does not affect this analysis.

(5) Employer's reliance on *Thoeni* is misplaced. In *Thoeni*, the injured worker objected for health reasons to traveling cross-country for an EME; she had "proximity" issues. The instant decision assumes *Thoeni*, applicable to an EME, also applies to an SIME. *Olafson*. The injured worker in *Thoeni* objected because she had physical difficulties sitting on an airplane and navigating through airports. Here, there is no evidence Employee has any physical inability to travel on an airplane from Peru to the US. He has done so several times over the past years to

see his Anchorage physician, attend an EME and go to his deposition. Other than delay, Employee emphasized that his only objection to an SIME was that he paid from his own pocket to come to his EME in 2024, and if he were required to pay for SIME travel, he would be unable to afford it. Employee offered no "proximity" objection to traveling from Peru to an SIME. If he had, it would be difficult for him to justify his objection since he travels from Peru to Anchorage to see his attending physician when necessary. Employer did not raise "proximity" objections either, until *Phillips I* applied the law and stated it had to pay for SIME travel.

(6) The fact Employee, for whatever reason, paid for his travel to his deposition and an EME, and also paid to travel to see his treating doctor in Anchorage is irrelevant.

(7) Employer's "international travel" concept is not "predictable," and is contrary to the Act's expressed intent. AS 23.30.001(1). Were Employer's view adopted, an injured worker who returned to his or her home in, or moved to, Vancouver, British Columbia, or Tijuana, Mexico, would have to pay their own way to and from an SIME since the trip involved "international travel." This highlights the Alaska Legislature's and Division's "bright-line" rules requiring Employer to pay for the SIME at no cost to Employee.

(8) Employer's position also raises possible equal protection issues, noted but not decided here. An injured worker who was hurt in Alaska but moved or returned home somewhere in the US, including Hawaii, would get free travel to and from an SIME. A different injured worker, injured at the exact time and place as the first worker, who moved or returned home to a place across international boundaries would have to pay for SIME travel. This makes no sense.

(9) Employer contends travel costs from Peru to the US are "excessive and unreasonable." However, the panel found no evidence in Employee's agency file of these allegedly excessive and unreasonable costs. Argument is not evidence. *Richards*. The panel has no experience or knowledge of travel costs from Peru to the US. *Rogers & Babler*.

(10) Employer apparently took umbrage at *Phillips I*'s attempt to accommodate both parties by coordinating Employee's expected return to Alaska for his second MBB and his attendance at college in Michigan in August 2024, and his "free" SIME trip paid for by Employer. That trip conceivably could have been one-way and less expensive had Employee remained in the US to attend college. But as a practical matter, every worker who attends an SIME gets a "free trip" somewhere at his or her employer's expense. AS 23.30.095(k); 8 AAC 45.090(d)(2), (3).

(11) Employer cites 8 AAC 45.084(c), which addresses transportation for medical care generally. Some agency decisions have applied this section to SIME travel. *Baker-Withrow*; *Wollman*. However, the regulation refers to Employee using the "most reasonable and efficient *means* of transportation under the circumstances" to travel to medical appointments -- not international travel (emphasis added). Employer's reliance on 8 AAC 45.084(c) is misplaced.

(12) Employer cited 8 AAC 45.092(e)(6), which refers to "proximity" issues for a worker traveling to an SIME. The designee scheduling the SIME will consider Employee's location in Peru when she selects the appropriate physician for Employee's SIME. When the SIME is ready to schedule, she will also consider where he resides at that time, if his location changes.

(13) Employer cites the "reasonable cost" factor from AS 23.30.001(1) to suggest that paying for travel from Peru to the US is inherently "unreasonable." Again, there is no evidence presented addressing these costs or explaining what guidelines should inform this panel as to what are or are not "reasonable" travel costs. *Richards*. The closest case the panel chair could find from over 600 reviewed decisions, was *Brennan*. In *Brennan*, the injured worker left Alaska and returned to his home in Ireland. He objected to traveling to the US for an EME, not because it was too far to go, but because he had travel limitations. Interestingly, the employer in *Brennan* not only did not object to paying travel expenses for the injured worker to see the same EME physician he had seen before, that employer offered to pay "first-class" fare for the employee's trip. *Brennan* cuts against Employer's position. The main problem with Employer's argument is that it misconstrues Employee's situation as a "voluntary extended international vacation," when it is not.

(14) Employer raises the "slippery slope" theory and suggests that if it were required to pay international travel for Employee, employers in future cases would be required to pay international travel expenses from anywhere in the world that an injured worker decided to go temporarily while awaiting an SIME. However, neither Employer nor the designated chair, who reviewed over 600 cases since 1986, could find any instance in which this fear has come to fruition. In a similar situation in *Brennan*, the employer agreed to pay first-class airfare to account for the injured worker's comfort in returning to the US for an EME. Apparently, given the absence of case law on this issue, disabled injured workers do not take expensive international vacations while their claims are pending. *Rogers & Babler*.

Employee relies on AS 23.30.095(k), which requires Employer to pay the "cost of an examination and medical report" arising under that section. He contends case law consistently supports the statutory requirement that Employer must pay for the cost of an SIME so that the "financial burden does not fall on the employee." The law is clear: only Employer must pay for all costs associated with Employee's SIME. AS 23.30.095(k); 8 AAC 45.090(d); *Olafson*; *McKitrick*; *Betts*.

D) Phillips I did not make any factual errors.

Notwithstanding it filed a "reconsideration" petition, Employer also contends *Phillips I* made "numerous factual errors," which suggests it also seeks "modification." AS 23.30.130. The only alleged factual error the panel can discern from Employer's briefing is its suggestion that *Phillips I* erred by "presuming" Employer did not object to paying for Employee's international SIME travel. As mentioned above, *Phillips I* did not err in this regard because Employer never objected until after the hearing was over. Employer requested the SIME, and if it objected to any part of the SIME process, it could have and should have raised it at the *Phillips I* hearing.

Given the above, Employer's July 15, 2024 petition for reconsideration, and to the extent it seeks modification, will be denied, on its merits. AS 23.30.001(2); AS 23.30.130(a); AS 44.62.540.

CONCLUSION OF LAW

Employer has to pay for international travel for Employee to attend an SIME.

ORDER

1) Employer's July 15, 2024 petition for reconsideration and modification is denied.
2) Employer is directed to pay for Employee's international travel and any other SIME-related costs in accordance with the Act and applicable administrative regulations.
3) If Employee relocates to the US while his case is pending, he is directed to promptly advise his attorney, Employer's attorney and the Division with a current address where he is living.
4) An SIME scheduling prehearing conference will be scheduled promptly.

Dated in Anchorage, Alaska on August 15, 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 / claimant v. Vend, Inc., employer; Umialik Insurance Co., insurer / defendants; 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 August 15, 2024.

/s/
Pamela Hardy, Workers Compensation Technician