ALASKA WORKERS' COMPENSATION BOARD

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

LAZLO TOENNIS, Employee, Claimant, v. CROWLEY HOLDINGS, INC., Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202128481 AWCB Decision No. 25-0002 Filed with AWCB Anchorage, Alaska on January 16, 2025

Lazlo Toennis's August 30, 2024 petition for reconsideration, and Crowley Holdings, Inc.'s and Old Republic Insurance Company's September 4, 2024 petition for an order requiring mediation, were heard in Anchorage, Alaska on November 13, 2024, a date selected on September 12, 2024. A September 12, 2024 stipulation gave rise to this hearing. Attorney Adam Franklin appeared and represented Lazlo Toennis (Employee). Attorney Rebecca Holdiman Miller appeared and represented Crowley Holdings, Inc. and Old Republic Insurance Company (Employer). A prior decision, *Lazlo Toennis v. Crowley Holdings, Inc.,* AWCB Decision No. 24-0036 (June 24, 2024) (*Toennis I*), denied Employee's petition to strike the September 28, 2022, employer medical evaluation (EME) report of Dustin Logan, Ph.D., concluding that Employer had not excessively changed physicians and had not unlawfully interfered with Employee's selection of a treating physician. The hearing's sole witness was Employee's former wife, Chrystal Toennis, who

testified on Employee's behalf. The record closed at the hearing's conclusion on November 13, 2024.

ISSUES

Employee contends Employer failed to file an August 12, 2022, EME report of Gregory Zoltani, M.D., on a medical summary, so that report was not considered by the panel in *Toennis I* when it decided whether Employer had excessively changed physicians. He also contends that Employer's failure to file this report adversely impacts the credibility of its former adjuster, whom he contends unlawfully interfered with his choice of a treating physician. As in *Toennis I*, Employee contends that Dr. Logan's EME report should be excluded from consideration because Employer unlawfully interfered with his choice of a treating physician, and because Employer excessively changed physicians.

Employer contends the absence of Dr. Zoltani's EME report has no impact on the issue of whether Dr. Logan's EME report should be stricken from the record. It contends that the failure to consider that report in *Toennis I* was "harmless error" because it does not affect Employee's benefits, does not affect the issue of whether Employer interfered with Employee's choice of a physician, and does not change *Toennis I*'s conclusion that Employer did not excessively change physicians. Employer contends this decision should affirm the conclusions in *Toennis I*.

1) **Given Dr. Zoltani's EME report, should *Toennis I* be reconsidered?**

Employer contends Employee has become "fixated" on issues involving defense counsel and his own attorneys rather than attempting to resolve or advance his claim. As examples, it contends Employee has alleged that his attorney and defense counsel colluded to try to get him to settle his case; has alleged that his former attorneys, Employer's former adjuster, a former treating physician and defense counsel colluded against him to settle his case; and continues to allege unethical conduct by defense counsel and Employer's former adjuster. Employer contends a knowledgeable mediator is needed to evaluate both parties' positions and give each party an objective perspective they may otherwise be lacking. It contends mediation may re-focus the parties on issues relevant to resolving Employee's claim. Employer contends that ordering mediation will not harm

Employee's claim and attending mediation does not adversely affect his right to a hearing on the merits of his claim.

Employee contends mediation is only valuable if both parties come to it in good faith but the issue of Employer's former adjuster unlawfully interfering with his choice of a treating physician has become a roadblock to case progress. He contends this case has not been litigated for six or seven years, like other cases where mediation has been ordered, and contends that participating in mediation would be against his will, so he opposes mediation.

2) Should mediation be ordered?

FINDINGS OF FACT

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

1) Employees' preexisting medical history includes chronic pain and a multitude of other chronic conditions. (*Toennis I*).

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

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

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

in psychotherapy and behavioral therapy with numerous providers, including Janet Bogard, LCSW; Richard Kurtz, LMFT, and Cindy Jones, NPRN-Psych. (Lonser operative report, April 29, 2022; Bogard progress notes, May 16, 2022; Kurtz progress notes, June 23, 2022; Jones progress notes, September 8, 2022).

5) On November 8, 2022, Employee was evaluated for visual disturbances by Jeff Keene, O.D. (Keene chart notes, November 8, 2022).

6) On November 22, 2021, Dr. Osterbauer noted, prior to the work accident, Employee was asymptomatic, and since the day after the accident, Employee had persistent headaches, disequilibrium, intermittent visual blurring, cognitive difficulty, mild irritability, mild balance difficulty, neck pain, and right shoulder pain. He opined Employee's "overall clinical picture" was consistent with post-concussion syndrome. (Osterbauer chart notes, November 22, 2021).

7) On December 8, 2021, Employee presented to Dr. Drury for a right shoulder MRI follow-up. Dr. Drury opined Employee was "having significant pathology" caused by the motor vehicle accident. (Drury chart notes, December 8, 2021).

8) On December 14, 2021, Dr. Mina opined that Employee had sustained a whiplash injury in both the cervical and lumbar spine. (Mina chart notes, December 14, 2021).

9) On December 15, 2021, Jeremiah Robinson, PA-C, opined Employee had sustained a calcaneal fibular sprain from the motor vehicle accident. (Robinson chart notes, December 15, 2021).

10) On March 15, 2022, Dr. Mina opined Employee had sustained a "clear hyperextension injury" to his cervical spine. (Mina chart notes, March 15, 2022).

11) On May 3, 2022, Dr. Osterbauer assessed Employee with multiple sequelae of concussion with brief alteration in consciousness from the motor vehicle accident. (Osterbauer chart notes, May 3, 2022).

12) On July 13, 2022, Dr. Bauer, an orthopedic surgeon, performed an EME. Employee's current complaints included headaches, nausea, dizziness, blurred vision, vertigo, ringing in the ears, memory loss, confusion, brain fog, anxiety, bursts of anger, depression, night sweats, leg tremors, and shaking hands. Employee stated his pain is aggravated by "almost anything," and is relieved by "nothing." Dr. Bauer diagnosed, 1) Subjective pain complaints without objective findings; 2) History of chronic pain dating back multiple years prior to the accident in question; 3) No evidence of nerve compression or other condition that would explain numbness in the upper and lower extremities; 4) Bilateral degenerative changes in the shoulders, with labral pathology

not caused by or aggravated by the incident in question; 5) Neurologic diagnosis to be deferred to the appropriate examiner; and 6) Symptom exaggeration. He concluded Employee's widespread, subjective pain complaints were out of proportion to the magnitude of the trauma sustained in the November 11, 2021 motor vehicle accident and the duration of time since that accident, and opined Employee sustained, at most, a cervical sprain/strain because of the accident. Dr. Bauer also thought Employee's medical treatment had been excessive and not related to the November 11, 2021 accident. (Bauer report, July 13, 2022).

13) On July 25, 2022, Jared Kirkham, M.D., a physiatrist, performed a records review EME. (*Toennis I*). He thought Employee's multiple, widespread, diffuse, chronic pain complaints did not have a clear musculoskeletal or neurological etiology based on essentially normal physical examinations and normal imaging studies with at most age-related changes. Dr. Kirkham opined Employee's chronic pain complaints were not substantially caused by November 11, 2021 accident but were instead multifactorial in etiology, including Employee's history of chronic pain, age, genetics, personality factors, obesity, deconditioning, and especially psychosocial factors, including adverse childhood experiences, anxiety, depression, worry, hopelessness, and suicidal ideation. He concluded parts of Employee's medical treatment were reasonable and necessary, but his overall course of care had been excessive and protracted. (Kirkham report, July 25, 2022).

14) On August 12, 2022, Gregory Zoltani, M.D., a neurologist, performed an EME. He diagnosed, 1) Cervicodorsal strain, historically related to the accident as the substantial cause; 2) Lumbodorsal strain, historically related to the accident as the substantial cause; 3) Possible head contusion, though a concussion was doubtful; 4) Ongoing muscle contraction headaches, likely on a psychophysiological basis and unrelated to the accident; and 5) Right Shoulder condition deferred to a specialist in the area. Dr. Zoltani did not think Employee had any residual neurologic condition from the accident, though he may possibly be showing symptoms of posttraumatic stress disorder (PTSD), however that was outside his area of expertise. In response to Employer's question regarding the substantial cause of Employee's "neurological/psychiatric complaints," Dr. Zoltani deferred to a psychiatry consultant regarding PTSD. (Zoltani report, August 12, 2022).

15) On September 28, 2022, Dustin Logan, Ph.D., a neuropsychologist, performed a EME. While reviewing Employee's medical records, Dr. Logan noted Employee does not meet the criteria for a PTSD diagnosis, which requires 'exposure to actual or threatened death, serious injury, or sexual violence.' He wrote, "given the nature of [Employee's] injuries and the

circumstances around his MVA, most reasonable individuals would agree that no such exposure occurred." During testing, Dr. Logan thought Employee's performance on performance validity measures indicated invalid responding and response bias. Employee's scores on one measure were at "chance" performance, indicating he may have intentionally answered incorrectly, and his psychological and personality testing was also determined to be invalid due to excessive reporting of infrequent responses, particularly in the areas of cognition and somatic symptoms. Dr. Logan was unable to provide a diagnosis due to invalid cognitive profiles and psychological symptom overreporting. He also found Employee overreported cognitive and somatic symptoms at a level inconsistent with his claimed injury. Noting that Employee did not report hitting his head at the time of impact, and that a concussion diagnosis requires a loss of consciousness, posttraumatic amnesia or an alteration of consciousness, Dr. Logan saw no evidence from Employee's medical records of a head injury or concussion injury. Instead, he thought Employee's reported symptoms were attributable to multiple psychosocial factors, deconditioning, longstanding chronic pain, emotional distress, including anxiety and depression, suicidal ideation, chronic medical conditions, secondary gain, and iatrogenic misattribution of symptoms to a perceived concussion. (Logan report, September 28, 2022).

16) On November 1, 2022, Employee began behavioral therapy treatment with Herbert Schwanger, Ph.D. (Schwanger progress notes, November 1, 2022).

17) On November 2, 2022, Dr. Osterbauer wrote a "To Whom It May Concern" letter in which he expressed his disagreement with Dr. Logan's EME report and opined Employee sustained a coup-contrecoup injury from the motor vehicle accident that resulted in a concussion. (Osterbauer letter, November 2, 2022).

18) On November 9, 2022, A.N.P. Brock wrote a "To Whom It May Concern" letter in which she expressed her disagreement with Dr. Logan's EME report and opined that Employee has a traumatic brain injury (TBI) directly related to the work injury. (Brock letter, November 9, 2022).

19) On February 3, 2023, A.N.P. Brock saw Employee for a follow-up evaluation. Assessments that she opined were related to the motor vehicle accident included: neurological issues, including TBI with confusion, blurred vision, headaches, and hearing changes; a "plethora" of musculoskeletal issues, including low back pain, thoracic back pain, chest wall pain, right ankle pain, and back muscle spasms; and mental health issues, including, anger, anxiety, chronic

traumatic encephalopathy (CTE) symptoms, depression, suicidal thoughts, and night terrors. (Brock chart notes, February 3, 2023).

20) On May 18, 2023, Employee's former attorney petitioned for a second independent medical evaluation (SIME) and filed a completed SIME form, setting forth medical disputes over causation, compensability, treatment, degree of impairment, functional capacity, and medical stability. The form was not signed by either Employee's or Employer's attorneys. The proposed medical specialists were an orthopedic surgeon, a neuropsychologist/psychologist, and a neurologist. (SIME Form, undated).

21) On June 12, 2023, Employee's former attorney filed an affidavit of readiness for hearing (ARH) on his May 18, 2023 petition for an SIME. (ARH, June 12, 2023).

22) On July 12, 2023, a September 6, 2023 hearing was scheduled on Employee's May 18, 2023 SIME petition. (Prehearing Conference Summary, July 12, 2023).

23) On August 21, 2023, the parties agreed to cancel the September 6, 2023 hearing on Employee's May 18, 2023 SIME petition because they were working on scheduling a mediation. They planned on requesting another prehearing conference to set SIME deadlines if mediation failed. (Prehearing Conference Summary, August 21, 2023).

24) Mediation dates were set then subsequently cancelled. (Incident Claims and Expense Reporting System (ICERS) event entries, October 24, 2023; October 26, 2023). Afterwards, the parties never requested a prehearing conference to set SIME deadlines. (Observations).

25) On November 6, 2023, Employee filed a petition to strike Dr. Logan's EME report on the basis Employer had unlawfully interfered with his choice of a treating physician. (Petition, November 6, 2023).

26) On April 17, 2024, a designee added Employer's potential excessive change of physicians as a hearing issue. (Prehearing Conference Summary, April 17, 2024).

27) On June 24, 2024, *Toennis I* denied Employee's petition to strike Dr. Logan's EME report, concluding that Employer had not excessively changed physicians and had not unlawfully interfered with Employee's selection of a treating physician. (*Id*.).

28) On July 22, 2024, Employee filed his petition for review with the Alaska Workers' Compensation Appeal Commission (Commission), contending that Employer's former adjuster, Employer's attorney, his former attorneys and one his treating physicians were colluding against him to settle his case. He also contended that Employer's former adjuster, and perhaps Employer's

attorney, had committed several "crimes" against him by "covering up" information. (Petition for Review, July 22, 2024).

29) Employee contends, following *Toennis I*, he realized that he had been evaluated by an employer physician whose report was not part of the evidentiary record. He contends he contacted Employer's attorney, who provided him with the report. (Employee's hearing brief, November 7, 2024; record).

30) On August 8, 2024, Employee filed Dr. Zoltani's EME report on a medical summary. (Medical Summary, August 8, 2024).

31) On August 14, 2024, at Employee's request, the Commission dismissed Employee's petition for review and returned jurisdiction of his case to the Board. (Order Dismissing Petition for Review, August 14, 2024).

32) On September 3, 2024, Employee filed his instant petition and explained that he interpreted the Commission's remand order as "an invitation for the Board to reconsider" *Toennis I*. (Petition, September 3, 2024).

33) On September 4, 2024, Employer filed its instant petition seeking a mediation order. (Petition, September 4, 2024).

34) On September 10, 2024, Employee answered Employer's September 4, 2024 petition seeking a mediation order. He opposed mediation because mediation requires the parties to compromise and he was not inclined to compromise or settle his benefits for less than full value, because his claim is not ripe for mediation since the parties are litigating the "vexacious and intentional misconduct" of Employer's former adjuster, and because he has already been through a mediation that was not successful. (Answer, September 10, 2024).

35) At a September 12, 2024 prehearing conference, Employee's September 3, 2024 petition seeking reconsideration and Employer's September 4, 2024 petition for an order requiring mediation were set for hearing on November 13, 2024. (Prehearing Conference Summary, September 12, 2024).

36) On November 13, 2024, Chrystal Toennis testified she has been helping Employee make appointments, get to appointments, and with every aspect of his case because of his brain injury. After Employee's doctor referred him to Dr. Logan, Dr. Logan would not talk to them. They called Employer's former adjuster to see if the appointment with Dr. Logan was going to be covered, but the adjuster became hesitant to talk, and Employee never talked with the adjuster again afterwards.

Employee is fixated on how Employer took his doctor away from him and now he cannot get out of the house. She is not aware of any communications involving changing the appointment with Dr. Logan to an EME. Ms. Toennis thinks mediation might be helpful, but it would be against Employee's will. (Chrystal Toennis).

37) Employee's entitlement to temporary total disability (TTD), permanent partial impairment (PPI), and medical benefits, as well as transportation costs and interest are controverted. (Controversion Notice, March 24, 2023).

PRINCIPLES OF LAW

> **AS 23.30.001**. **Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted . . . to ensure . . . the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> (h) . . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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

> **AS 23.30.095. Medical treatments, services, and examinations**.
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> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice . . . furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. . . .

> (i) Interference by a person with the selection by an injured employee of an authorized physician to treat the employee, or the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee, is a misdemeanor.
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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. . . .

Under the Alaska Workers' Compensation Act (Act), both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette v. Arctic Lights Electric, Inc.,* AWCB Dec. No. 05-0135 (May 19, 2005). Nothing in the Act or controlling law precludes a non-specific referral. *Kessler v. Federal Express Corp.*, AWCB Dec. No. 15-0159 (December 11, 2025). An EME's referral to a specialist, without naming a particular physician, does not violate AS 23.30.095(e). *Kollman v. ASRC Energy Services*, AWCB Dec. No. 15-0004 (January 7, 2015).

> **AS 23.30.110. Procedure on Claims.** (a) . . . the board may hear and determine all questions in respect to the claim.
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> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.
> . . . .

Considering the broad procedural discretion granted in AS 23.30.135(a) and AS 23.30.155(h), wide discretion exists under AS 23.30.095(k) and AS 23.30.110(g) to consider any evidence available when deciding to order an SIME to "properly protect the rights of all parties."

The Commission in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g).

Regarding AS 23.30.095(k), the Commission referred to its decision in *Smith v. Anchorage School District,* AWCAC Decision No. 050 (January 25, 2007) at 8, in which it confirmed:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the board in resolving the dispute. *Bah* at 4.

The Commission outlined the Board's authority to order an SIME under AS 23.30.110(g), as follows:

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

Id. at 5. Accordingly, an SIME pursuant to AS 23.30.095(k) may be ordered when there is a medical dispute, or under AS 23.30.110(g) when there is a significant gap in the medical evidence or a lack of understanding of the medical evidence.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **AS 23.30.155. Payment of Compensation.**
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> (h) The board may upon its own initiative at any time . . . where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended . . . make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties. . . .

> **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 with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . .
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> **8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
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> (9) the possibility of settlement or using a settlement conference to resolve the dispute;
> . . . .
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> (b) The designee will, in the designee's discretion, conduct prehearings or settlement conferences without the presence of board members.
> . . . .

The issue of Board-ordered mediation was first addressed in *Lindeke v. Anchorage Grace Christian School*, AWCB Decision No. 11-0400 (April 18, 2011). *Lindeke* noted there was no specific statutory or regulatory provision requiring the parties to submit to mediation, but the Act contained broad authority for resolving disputes. The Act requires process and procedure to be as "summary and simple as possible," and is to be interpreted to ensure the "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to employers. That goal and the intent had not been met in *Lindeke* as the case had languished and "gone nowhere" for over six years. *Lindeke* noted that mediation is relatively quick, usually taking only one business day, very efficient because it normally resolves the entire case with very little Division resources, and fair because both parties must agree to a mediated settlement. Also, costs to the employer for a mediated settlement are likely to be significantly less than continued litigation. Consequentially, *Lindeke* ordered the parties to mediate, but advised they were not required, or forced, to resolve that case through mediation.

Board-ordered mediation was again addressed in *Ellison v. Fairbanks Gold Mining Co.*, AWCB Decision No. 13-0026 (March 15, 2013), which noted that regulations granted authority to a designee

to exercise discretion in conducting settlement conferences and resolving disputes. In *Ellison*, the employee refused to discuss case resolution until an SIME was performed for a hernia, even after the employer offered to accept the hernia as a compensable injury. Then, after an SIME was performed, the employee still refused to consider an agreed upon resolution to the case. Noting that employers were equally entitled to a reasonable cost resolution as employees were to medical and indemnity benefits, and since the case had been ongoing for over seven years, *Ellison* ordered the parties to participate in mediation.

Board-ordered mediation was also addressed in *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 14-0140 (October 20, 2014). In *Freelong*, the case had been ongoing for over six years, and there had been four Board decisions, including a decision on the merits that was on appeal to the Appeals Commission. Noting that significantly more litigation would be required before a final decision was reached by the Board or the Commission, the parties were ordered to attempt mediation.

McCormick v. Northern Air Cargo, Inc., AWCB Decision No. 15-0122 (September 24, 2015) ordered mediation because it "may well result in a quicker, more efficient resolution with little if any further delay." Mediation was also ordered in *Roach v. Manor Management of Alaska, Inc.*, AWCB Decision No. 23-0045 (August 17, 2023).

> **8 AAC 45.082. Medical treatment.**
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> (b) A physician may be changed as follows:
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> (3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records . . . .
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> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose . . . .

> **8 AAC 45.092. Second independent medical evaluation.**
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> (h) In an evaluation under AS 23.30.095(k), the board or the board's designee will identify the medical disputes at issue and prepare and submit questions addressing the medical disputes to the medical examiners selected under this section. . . .
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> (j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. . . .
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> **AS 08.86.130. Licensing requirements.** (a) The board shall issue a psychologist license to a person who
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> (1) holds an earned doctorate degree, from an academic institution whose program of graduate study for a doctorate degree in psychology meets the criteria established by the board by regulation, in
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> (A) clinical psychology;
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> (B) counseling psychology; or
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> (C) education in a field of specialization considered equivalent by the board
> . . . .

ANALYSIS

1) Given Dr. Zoltani's EME report, should *Toennis I* be reconsidered?

As in *Toennis I*, Employee again seeks to exclude Dr. Logan's EME report from consideration on the basis Employer's former adjuster unlawfully interfered with his choice of a treating physician. He contends that Employer's failure to file Dr. Zoltani's EME report adversely impacts the credibility of its former adjuster and contends that *Toennis I*'s reliance on her testimony that he consented to being evaluated by Dr. Logan as an EME should be reconsidered. However, Employee is reminded that *Toennis I*'s conclusion that Employer did not unlawfully interfere with his choice of a treating physician was not based on the testimony of Employer's former adjuster alone. It was also based on his own testimony, the conduct of his former wife, Dr. Logan's numerous records, and the severity of his reported symptoms. The conclusion in *Toennis I* on this issue is supported by substantial evidence and the issue of whether Employer unlawfully interfered with Employee's choice of a treating physician will not be reconsidered. AS 44.62.540.

Employee also contends that the addition of Dr. Zoltani's EME report to the evidentiary record means that Employer excessively changed physicians so Dr. Logan's EME report should now be excluded from consideration on that basis as well. Employee was first evaluated by Drs. Bauer and Kirkham. As found in *Toennis I*, Drs. Bauer and Kirkham were a panel and not a change of physician. In his report, Dr. Bauer deferred neurologic diagnosis to the appropriate examiner. Employer then had Employee evaluated by Dr. Zoltani, a neurologist. Next, Dr. Zoltani opined that Employee did not have any residual neurologic condition from the accident, but he questioned whether Employee was exhibiting symptoms of PTSD, and he deferred that diagnosis to a psychologist. Employer then had Employee evaluated by Dr. Logan, a neuropsychologist. Here, the referral chain is intact so there was not an excessive change of physicians. *Colette*; *Kessler*; *Kollman*.

Incidentally, Dr. Bauer's and Dr. Zoltani's use of the word "defer" instead "refer" is not consequential since the import remains the same. They were suggesting that Employee be evaluated by someone with the proper expertise. Hence, they made referrals. Similarly, neither is it thought that the differences between a psychiatrist and a neuropsychiatrist are significant enough to disqualify Dr. Logan as a referred physician since, in the first instance, a neuropsychologist is a psychologist. *See* AS 08.86.130 (State of Alaska only licenses psychologists, not neuropsychologists, child psychologists, etc.). Moreover, Employee's former attorney desired an evaluation by a "neuropsychologist/psychologist" when he completed the proposed SIME form, which indicates he did not see a significant difference between to two either. Nevertheless, even if the differences between a neuropsychologist and a psychologist were great enough such that Dr. Logan should be considered outside Dr. Zoltani's referral, and a change of physician, that change would be Employer's first, which is not excessive. AS 23.30.095(e). Thus, reconsideration will also be denied on the basis that Employer excessively changed physicians.

2) Should mediation be ordered?

The Act is to be interpreted to ensure the quick, efficient, fair and predictable delivery of medical and indemnity benefits to Employee, if in fact he is entitled to them, at a reasonable cost to Employer. AS 23.30.001(1). Process and procedure shall also be as summary and simple as

possible. AS 23.30.005(h). These legislative mandates are not being met in this case. Even though this case has not yet been litigated for six or seven years like other cases where mediation has been ordered, the litigation thus far has been far from focused, as reflected by Employee's stubbornness while trying to re-litigate the unlawful interference issue. Here, Employee appears more interested in seeking retribution against Employer's *former* adjuster than he does in engaging in litigation that would *advance* his case, such as pursuing an SIME. Additionally, as Employer points out, in Employee's recent petition for review to the Commission, he contended that Employer's former adjuster, his former attorneys, one of his former physicians, and Employer's attorney, were colluding against him to settle his case. He also contended that Employer's former adjuster, and perhaps Employer's attorney, had committed several "crimes" against him by "covering up" information. Even though Employee is represented by a competent attorney, he nevertheless remains, as both Employer and Employee's former wife describe it, "fixated" on peripheral issues. This is precisely a situation where the objective perspective of a knowledgeable and skilled mediator may prove beneficial by re-focusing Employee's attention on facts relevant to his potential entitlement to benefits. *Ellison*.

An SIME will likely assist the mediator in evaluating the parties' relative positions in this case. *Rogers & Babler*. One may be ordered on the Board's own initiative at any time where the right to compensation is controverted, as Employee's benefits are here. AS 23.30.155(h). Even if the parties are not successful in mediating this matter to a conclusion, an SIME will assist the fact finders at any hearing on the merits of Employee's claim. *Id*. Other criteria for an SIME have been met as well. *Bah*. The wide-ranging constellation of symptoms that Employee attributes to the work injury are confounding and an SIME will facilitate the fact finders' understanding of the medical evidence. AS 23.30.110(g). Additionally, medical disputes between Employee's and Employer's physicians are also plentiful. AS 23.30.095(k). Many are apparent in this decision's factual findings, and they are further detailed on Employee's May 18, 2023 SIME form, which sets forth disputes over causation, compensability, treatment, degree of impairment, functional capacity, and medical stability.

These disputes are significant. *Bah*. Employee has not worked in over three years. If his lengthy disability is the result of his work injury, Employee could be entitled to significant TTD benefits

and interest. Conversely, if Employee's disability is not caused by the work accident, Employer is not liable for TTD benefits or interest. Similarly, the date Employee became medically stable from any effect of the work accident is important for purposes of disability payments. Likewise, if Employee has a ratable permanent impairment because of the work injury he could be entitled to significant PPI benefits. The question of whether an injured worker needs additional medical treatment to address the effects of a work-related injury is always a significant factor, as medical care to enable an injured worker to recover and return to work is one of the Act's most valuable benefits. Conversely, a finding that Employee is not entitled to medical treatment would be a significant result for Employer given the high costs of medical care. Consequently, it is appropriate to order an SIME. AS 23.30.095(k); AS 23.30.110(g); AS 23.30.155(h).

Employee has been thoroughly evaluated by numerous medical specialists, both of his choosing, and through Employer's medical evaluations. These specialists have included orthopedic surgeons, neurologists, psychologists, a physiatrist, an optometrist, and a neuropsychologist. Employee has also treated with a pain a management physician and participated in psychotherapy and behavioral therapy with numerous providers. The evidence thus far tends to support the possibility of psychiatric, psychological, orthopedic, or neurological components to Employee's symptoms.

This panel is mindful of SIME costs for Employer, but the varied nature of Employee's reported injuries and his vast symptom reporting require that he be evaluated by a panel. An orthopedic surgeon is likely to provide probative opinions on Employee's numerous musculoskeletal complaints, and a neurologist is likely to provide insightful opinions on the possibility of post-concussive syndrome or a TBI. Since Employee's primary care provider, A.N.P. Brock, referred him for a neuropsychological evaluation, and considering Employer had Employee evaluated by a neuropsychologist, it was appropriate for Employee's former attorney to seek a neuropsychological evaluation on the proposed SIME form, so a neuropsychologist will complete the SIME panel.

Both neuropsychologists on the Board's SIME list perform evaluations at physical locations in the San Francisco area. One neurologist on the list, and two orthopedic surgeons on the list, also

perform evaluations at physical locations in the San Francisco area. Therefore, to minimize Employer's SIME travel costs as well as Employee's inconvenience, Employee will be evaluated by Hirsh Kaveeshvar, D.O., Adam Brooks, M.D., and Rachyll Dempsey, Psy.D. AS 23.30.155(h). SIME issues are identified on Employee's May 18, 2023 SIME form and the Board's standard SIME questions will be utilized. 8 AAC 45.092(h). The parties will be directed to schedule and attempt mediation promptly upon receipt of the SIME reports. Although the parties may choose to communicate with the SIME physicians in accordance with 8 AAC 45.092(j) after receiving their reports, such communications should not be used to excuse any delay in mediation scheduling or participation. AS 23.30.001(1); AS 23.30.005(h); AS 23.30.110(a); AS 23.30.155(h).

The parties are advised they are not required, or forced, to resolve this case through mediation. They cannot be forced to settle their differences. However, as Employer correctly notes, a knowledgeable and skilled mediator will evaluate both parties' positions and give each party an objective perspective they may otherwise be lacking. If the parties are not able to successfully resolve this claim, either party has a right to seek a hearing on the claim's merits. *Lindeke*.

CONCLUSIONS OF LAW

1) **Given Dr. Zoltani's EME report, *Toennis I* will not be reconsidered.**
2) **An SIME and mediation will be ordered.**

ORDERS

1) Employee's August 30, 2024 petition for reconsideration is denied.
2) Employer's September 4, 2024 petition for an order requiring mediation is granted.
3) The parties are directed to promptly attend a prehearing conference and schedule the preparation of SIME medical binders.
4) Hirsh Kaveeshvar, D.O., a neurologist; Adam Brooks, M.D., an orthopedic surgeon; and Rachyll Dempsey, Psy.D., a neuropsychologist; are selected to perform the panel SIME in accordance with this decision, if they are available and willing, and have no conflicts of interest.
5) The parties are directed to schedule and attempt mediation promptly upon receipt of the SIME reports.

Dated in Anchorage, Alaska on January 16, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Marc Stemp, Member

/s/
Pamela Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of LAZLO TOENNIS, employee / claimant v. CROWLEY HOLDINGS, INC., employer; OLD REPUBLIC INSURANCE COMPANY, insurer / defendants; Case No. 202128481; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 16, 2025

/s/
Rochelle Comer, Workers Compensation Technician