ALASKA WORKERS' COMPENSATION BOARD

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

RICKIE D. FOREMAN, Employee, Claimant, v. NORTHSTAR CONSTRUCTION MANAGEMENT, Employer, and CINCINNATI INSURANCE CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202406218 AWCB Decision No. 25-0003 Filed with AWCB Fairbanks, Alaska on January 21, 2025

Rickie D. Foreman's (Employee's) December 3, 2024 petition for a Second Independent Medical Evaluation (SIME), filed on December 5, 2024, was heard on the written record on January 16, 2025, in Fairbanks, Alaska, a date selected on December 9, 2024. The December 3, 2024 petition gave rise to this hearing. Non-attorney Employee represents himself. Missouri Attorney Brian Weinstock represents Northstar Construction Management and its insurer (Employer). The record closed at the hearing's conclusion on January 16, 2025.

ISSUE

Employee contends there are medical disputes between his attending physicians and Employer's medical evaluator (EME) particularly in respect to "causation" of his right-shoulder symptoms and the need to treat them. He contends this warrants an SIME.

Employer contends there are numerous factual and legal defenses that prohibit this decision from ordering an SIME. These include: Employee's and his physicians' alleged lack of credibility; Employee's alleged failure to give written, timely injury notice; Employee's and his medical providers' alleged failure to timely provide notice of his injury and treatment within 14 days of treatment; Employer's miscellaneous objections regarding word usage, and Employee's alleged admissions; Employee's reliance on medical opinions from providers who are not physicians; Employer's request to cross-examine Employee's surgeon; Alaska's jurisdiction in this matter; and Employer's recent petition to strike Employee's hearing briefs as non-conforming. Employer contends that given its objections this decision should deny Employee's request for an SIME.

Shall this decision order an SIME?

FINDINGS OF FACT

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

1) Employee alleges that or about February 18, 2024, he was moving shelving while at work for Employer near Fairbanks, Alaska, when he heard a "pop" in his right shoulder. (Tanana Valley Clinic (TVC) reports, February 19, 2024; First Report of Injury (FROI), May 14, 2024; Brief in Support of Workers' Compensation Claim, December 30, 2024).

2) On February 19, 2024, TVC in Fairbanks, Alaska, saw Employee for his alleged February 18, 2024 work injury while employed with "Borman Companies" in Missouri. In a "Workers' Compensation Initial Visit Information" sheet, Employee stated he had reported his alleged right shoulder injury. The information sheet also included Employee's signed and dated authorization for the provider to release his medical records:

> I authorize the Tanana Valley Clinic to provide my employer, its workers' compensation liability insurance company, and its claims adjuster information concerning any health care advice, testing, treatment, or supplies provided to me for the injury or illness described above. This information will be used to evaluate my entitlement to receive benefits, including payment of medical benefits, under the Alaska Workers' Compensation Act. This authorization is valid for a one-year period from the date of my signature. I know I have a right to receive a copy of this authorization and agree to [sic] a photographic copy of this authorization is as valid as the original.

This same information sheet had a space on which the attending physician could state whether or not the "claim was work-related," but this portion was not completed or signed by a physician. (Workers' Compensation Initial Visit Information, February 19, 2024). TVC also provided a "Work Ability Report" for Employee that stated the alleged February 18, 2024 injury date and described the injury as "pop in R shoulder-unable to lift R arm." In an unsigned report, Peter Dillon, MD, advised Employee to "wear sling," and not lift more than "10 lbs of weight." Dr. Dillon did not limit Employee's ability to drive, walk, stand, sit, climb, squat or bend. In an additional report, Dr. Dillon assessed Employee with "pain in right shoulder" and planned a "reassuring x-ray." He had concern for a biceps tendon injury given Employee's decreased shoulder motion, and suggested a right-shoulder magnetic resonance imaging (MRI) scan to determine if Employee had a biceps tendon injury versus a labrum tear. Dr. Dillon offered Employee Toradol, which he declined, and recommended mobilization and discussed a physical therapy (PT) referral. He assessed a, "Work related injury," completed the "work comp report" and prepared a "deluxe arm sling" for Employee. (Dillon report, February 19, 2024).

3) If, or when, TVC or Employee first sent Employer or its representatives Employee's TVC medical records cannot be determined from the agency file. (Observations).

4) Thirty days from February 20, 2024, was March 20, 2024, which was not a Saturday, Sunday or legal holiday. (Observations).

5) On March 7, 2024, Employee through his former attorney Scott G. Taylor, filed a written claim against Employer with the Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation. The claim includes: Employee's first, middle initial and last name; his address in Missouri; the last four digits of his Social Security number; his date of birth; the alleged "2-18-24" "Date of Accident or Occupational Disease"; the "Time of Accident," and states it occurred in "Fair banks [sic] Alaska." It states the body part injured "Right Shoulder" and describes how the accident occurred: "While in the course and scope of employment employee was moving, pushing, shelving and employee heard a pop in his right shoulder." The claim also included Employer's name and address and stated:

> CLAIM IS HEREBY MADE FOR ALL COMPENSATION AS PROVIDED UNDER THE MISSOURI WORKERS' COMPENSATION LAW, RELATING TO INJURY . . . OF THE EMPLOYEE ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Employee's former attorney signed the document and provided the attorney's address and phone number. Specifically, under the "Additional Statements" section the document states:

> Employee request [sic] further medical treatment to cure and relieve.
> Employee request [sic] that employer start paying employee his TTD checks.

It does not include a built-in medical record release. While the document does not include proof of service on Employer or Weinstock, the form's instructions required Employee to submit an original and three copies. At some point, the Missouri Workers' Compensation Division served Employer or its representatives with a copy, as evidenced by the next factual finding. (Claim for Compensation, March 7, 2024; observations and inferences drawn from the above).

6) On March 26, 2024, in a document dated March 25, 2024, Employer having received Employee's claim, responded stating:

> COMES NOW, Employer/Insurer in Answer to the Employee's Claim for Compensation and herein state that they are without sufficient information or knowledge to form a belief as to the truth of the averments contained in said Claim for Compensation. Therefore, the Employer/Insurer deny each and every, all and singular, of the allegations contained therein. (Answer to Claim for Compensation, March 25, 2024).

7) On May 14, 2024, in Employee's Alaska Workers' Compensation Division (Division) case file, someone filed a First Report of Injury (FROI); it cannot be determined from the agency file who provided the data for this form or who filed the form with the Division. This document is a Division form filed electronically and includes all information required under Alaska law to give notice to the Division that an alleged injury has occurred. The "Claim Administrator" at this time was "Wilton Adjustment Service, Inc.," (Wilton) which is the adjuster for the Alaska Workers' Compensation Benefits Guaranty Fund (the Fund). The Fund and its adjusting company Wilton are only involved in cases where an employer is uninsured, or thought to be uninsured, for workplace injuries. Consequently, the Fund and Wilton were initially involved in Employee's Alaska claim because, on the date the Division received the FROI, the Division could not determine if Employer was or was not insured for workplace injuries in Alaska. (FROI, May 14, 2024; experience, observations and inferences drawn from the above). Employee and Employer later stipulated to dismiss the Fund and Wilton as parties to this case. (Prehearing Conference Summary, August 1, 2024).

8) On May 20, 2024, Loren Olinger, a person who identified himself as "superior to Employee for all dates in question," signed a sworn affidavit. Relevant to the instant matter, Olinger stated:

> **AFFIDAVIT OF LOREN OLINGER**
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> . . . .
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> 15. At 7:06 pm CST (4:06 PM Alaska time) on February 19, 2024, Joshua Hodge, Employee's direct supervisor, received a text message from James Seals, site superintendent and subordinate to Employee at the jobsite, that continued through 7:25 pm CST (4:25 pm Alaska time). . . . James Seals also texted "He (Employee) is currently heading to the doctor's office to get his shoulder looked at. . . ."
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> . . . .
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> 21. On February 21, 2024, Employee texted me and then claimed he tore his bicep working. . . . This is the first time Employer was aware of an alleged work incident with Employee. . . . Employee's February 21, 2024 text message to Employer about his bicep did not contain the time, place, cause of the alleged injury and authority to release records of medical treatment for the alleged injury.
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> . . . .
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> 24. After Employee was terminated, Employer received on February 27, 2024 a "Form 5" which was not signed by anybody including the Employee and did not contain Employee's address, did not contain the time and the nature of the injury, and did not contain Employee's written authorization to release records of medical treatment. Form 5 requires Employee's supervisor's name, signature and date and it did not contain any of that information. Moreover, Employer received Form 5 from James Seals was not Employee's supervisor.
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> 25. Employer received a yellow piece of paper (1 page) from Employee dated 2/27/2024 which did not state the cause of the alleged injury and was not signed by the Employee. Moreover, the yellow piece of paper indicated James Seals was Employee's supervisor, but James Seals was not the Employee's supervisor.
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> . . . .
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> 27. Employer did not receive within thirty (30) days of the alleged February 18, 2024 incident and has never received, in writing, from Employee a single or one inclusive notice that included the time, place, nature, and cause of the injury and authority to release records of medical treatment for the alleged injury signed by the Employee. (Affidavitt of Loren Olinger, May 20, 2024; emphasis in original).

9) On May 20, 2024, Employer answered Employee's claim and incorporated most of Olinger's affidavit in its answer. Among other things, Employer contended that it had insurance coverage in Missouri and Alaska "for February 18, 2024." It added that Missouri has jurisdiction for Employee's alleged work injury in Alaska. Employer admitted receiving Employee's Missouri claim and timely answering it. It contended:

> Employee has never provided Employer with proper notice, under Alaska statutes 23.30.100 with the cause of the alleged injury, releasing records of medical treatment to the employer and signed by the employee.

Employer added that Employee and his Alaska medical provider did not provide it with medical records or a Physician's Report within 14 days of February 18, 2024, the alleged injury date. It further contended that Employee failed to provide proper notice to Employer and the Alaska Division under §100(b) and failed to provide written authority to release his medical records. Employer contended it was prejudiced by Employee's failure to give proper notice "because Employer was not able to timely and thoroughly investigate any alleged injury from February 18, 2024 particularly before Employee sought medical care, left Alaska and hired an attorney in Missouri." Employer's answer also included numerous other defenses to Employee's claim on its merits, not relevant to the instant issue. (Employer/Insurer's Answer to Employee's Claim for Workers' Compensation Benefits, May 20, 2024).

10) On May 20, 2024, in a document dated May 21, 2024, Employer also first filed and served on Employee a controversion of "All Benefits," based on Olinger's affidavit. Employer listed a host of alleged factual and legal bases for its denial. (Controversion Notice, May 21, 2024).

11) On May 24, 2024, the Fund filed and served on Employee a controversion based on statutes setting forth the Fund's obligation to pay benefits. (Controversion Notice, May 24, 2024).

12) On May 30, 2024, Alexis Zahn, PA, with Mercy Clinic Orthopedics (Mercy) in Ozark, Missouri, wrote a "To Whom It May Concern" letter:

> Ricky Foreman was seen in my clinic on 5/20/2024. He was seen for concerns of rotator cuff tears obtained while at work and will be receiving further care for this. He will have work restrictions of no pushing, pulling, or overhead lifting for the effective shoulder. He is currently out of work due to these issues. He will have these restrictions until we are able to obtain results of MRI and develop a further treatment plan. . . . (Zahn letter, May 30 24).

13) On August 15, 2024, PA Zahn with Mercy saw Employee, reviewed his diagnostic imaging and assessed Employee with (1) "Acute pain of right shoulder"; (2) "Traumatic incomplete tear of right rotator cuff, subsequent encounter"; (3) "Shoulder arthritis"; and (4) "Tear of right glenoid labrum, subsequent encounter." (Zahn Clinical Notes, August 15, 2024).

14) On September 10, 2024, Richard Lehman, MD, orthopedist, saw Employee for an EME. Employee gave the following history:

> He states that he injured his right shoulder pushing pallets repetitively and said he felt a pop when he was pushing the pallets or gondolas across the floor and states that he has had no treatment to date. He gives a history of pushing the pallets and states that his sore shoulder was directly related to the 02/18/2024 date and again noticed a pop.

Dr. Lehman performed a right-shoulder physical examination and found "positive impingement signs and soreness at the end range of motion." He reviewed x-rays which showed "significant degenerative arthritis at the AC joint and the glenohumeral joint with an arthritic pattern." Dr. Lehman also reviewed an MRI, which he said evidenced significant degenerative changes in the joint. Employee also had an MRI arthrogram on July 3, 2024, which Dr. Lehman said showed a "large suspected tear involving the superior, posterior and inferior aspects of the labrum." It also revealed mild degenerative changes in the glenohumeral joint, and mild chondromalacia. There was a partial articular surface tear on the supraspinatus tendon. Dr. Lehman also reviewed the medical records provided to him including Employee's February 19, 2024 TVC visit, which Dr. Lehman understood to state the injury's onset was "two days ago." Dr. Lehman understood the TVC reports to state, "The type of pain and trauma occurred at work on 02/18/2024." He also reviewed a May 14, 2024 emergency room evaluation at "Cox Health." On that date, Employee reported he injured his shoulder at work in February and was having continued pain. On x-rays, Dr. Lehman found significant arthritis and a large subacromial spur. He found no acute pathology and said the MRI showed chronic changes in the rotator cuff which he thought were "long-term in nature and degenerative changes." Lastly, Dr. Lehman gave his medical opinions:

> I believe there are significant findings in the patient's MRI of 07/03/2024. He has long-term degenerative arthritis and what appears to be a chronic pattern in the rotator cuff, i.e. supraspinatus with intraarticular debris and chondral breakdown. This appears to be degenerative . . . and long-term in nature and appears to have no acute component. The patient's work-related injury of 02/18/2024, regardless of change in history, are [sic] not evidenced on the MRI. The MRI appears to be long-term in nature with a chronic pattern with chronic breakdown. I believe that the patient had significant degenerative arthritis prior to 02/18/2024. . . . I do not believe that the work activities of 02/18/2024 are a factor in the patient's right shoulder pain. I do not believe that they are any factors and I believe that the shoulder was neither exacerbated, altered or anyway [sic] changed by the 02/18/2024 history of an event although there is no documented event and the

> history has changed a number of times in the medical records. . . . This would be consistent of [sic] [Employee's] stated age. It is my opinion that the alleged activity of 02/18/2024 is eliminated in causing [Employee's] disability and as I stated above, I do not believe it is a factor in his pathology, complaints of pain, and limited activity. . . . I do not believe that the 02/18/2024 work activity is a factor at all. It is not a prevailing factor and I do not believe it is a factor at all as it relates to aggravation, exacerbation or acceleration of his underlying degenerative arthritis. I do not believe he needs work restrictions as it relates to the 02/18/2024 incident. . . . I do not believe that the incident of 02/18/2024 is a factor in the need for further medical care. I do not believe there is anything to cure, correct or change in the shoulder as it relates to the 02/18/2024 incident because I do not think anything happened to his shoulder from that incident. I do not believe his pain is a component from the incident and I do not believe his dysfunction, albeit subjective, is a component from the incident. . . . I do not believe that the work incident of 02/18/2024 is a prevailing factor as it relates to a need to cure or relieve ill effects from 02/18/2024 and it would be my opinion that care being directed towards [Employee] is based solely on a degenerative pattern which is a long-term in nature. . . . (Lehman report, September 10, 2024).

15) On September 20, 2024, Thomas Rogers, MD, with Mercy operated on Employee's right shoulder. On examination, Dr. Rogers found a labrum tear impinging in the glenohumeral joint. He also found a partial-thickness supraspinatus tear that did not require repair. Dr. Rogers found the biceps tendon fraying and he performed a biceps tenodesis. He also performed an acromioplasty. Postoperatively, Dr. Rogers recommended a sling and formal PT. (Operative Report, September 20, 2024).

16) On December 5, 2024, in a document dated December 3, 2024, Employee filed and served on Weinstock an SIME request:

> The insurer[']s IME [EME] in no way contradicts the surgeon[']s report of bicep injury that occurred 2-18-24 as stated by Dr. Dillon who gave an assessment of Y99.0 possible bicep injury and surgeon Rogers['] tendinitis procedure. (Petition, December 3, 2024).

17) On December 9, 2024, the Division mailed a hearing notice to the parties at their record addresses. The notice stated:

> On December 5, 2024, **Employee** filed a petition for an second independent medical evaluation (SIME). If **Employer** stipulates to the SIME within 20 days of the day the petition was served, the written record hearing will automatically be cancelled. If **Employer** does not stipulate to the SIME, parties may file and serve briefs no later than (5) five working days prior to the **January 16, 2025,** written

> record hearing per 8 AAC 45.060, 8 AAC 45.114. (Written Record Hearing Notice, December 9, 2024; emphasis in original).

18) On December 12, 2024, Dr. Rogers saw Employee three months post-right-shoulder-surgery. He was doing "very well," with minimal symptoms. Employee showed Dr. Rogers Dr. Lehman's September 2024 EME report, which Dr. Rogers read in detail. Dr. Rogers agreed Employee "did have some degenerative changes in his shoulder prior to his work injury which has been previously described by [Dr. Rogers] which occurred in February 2024." After examining him, Dr. Rogers opined that Employee could proceed to "activities as tolerated." He expected Employee would make improvement up to a full year post-surgery. Dr. Rogers added:

> I do think that regarding causation from his work injury that the SLAP tear likely occurred from the work injury in February 2024 as he had a decline in shoulder function since that time. To be clear he does have degenerative changes in his shoulder that were present on his preoperative MRI and still are present but that was not the goal of the operation that I performed. I performed a biceps tenodesis an acromioplasty due to his SLAP tear. . . . (Rogers Progress Note, December 12, 2024).

19) On December 18, 2024, Employee cured his failure to include an SIME form with his SIME petition and filed and served the form he signed and same-dated along with the referenced medical reports. He requested an SIME with an orthopedic surgeon. Employer did not sign the form and did not stipulate to an SIME. (SIME form, December 18, 2024).

20) On December 23, 2024, Employer filed and served a request to cross-examine Dr. Rogers under 8 AAC 45.120(f) on his December 12, 2024 record, which "appears to be a medical record." Employer wanted to cross-examine Dr. Rogers to discuss his allegedly "speculative opinion." (Employer/Insurer's Request to Cross-Examine, December 23, 2024).

21) Beginning December 30, 2024, Employee filed at least two briefs with the Division regarding his case. His December 30, 2024 brief set forth his medical care and opinions from his attending physicians, which are set forth elsewhere in this decision. That information is useful in deciding the SIME issue. However, that brief addressed numerous other arguments and evidence not relevant to the SIME issue addressed in this decision. The December 30 brief also thoroughly addressed "causation," which while not an issue for this hearing was an Employer defense to his requested SIME. Nevertheless, Employee's December 30 brief shows medical disputes between his attending physicians and Dr. Lehman, which is also critical in deciding

whether or not to order an SIME. His reliance on the "presumption of compensability" analysis is inapplicable to the SIME issue. However, the December 30, 2024 brief does not discuss the statutory presumption of "sufficient notice," nor does it analyze all the factors this panel uses to determine whether or not to order an SIME. Employee's December 31, 2024 brief appears similar to his prior brief. Employee also filed other documents that could be construed as "briefs." (Brief in Support of Worker's Compensation Claim, December 30 and 31, 2024; observations).

22) On January 7, 2025, Employer filed and served a request to cross-examine Dr. Rogers under 8 AAC 45.052 on his December 12, 2024 medical record. (Employer/Insurer's Request to Cross-Examine Amended by Interlineation as to 8 AAC 45.052, January 7, 2025).

23) On January 9, 2025, Employer filed its hearing brief with exhibits. In it, Employer made numerous arguments not relevant to the SIME issue or defenses to it. However, issues Employer raised as defenses to an SIME included (1) Employee allegedly failed to provide written notice to Employer under §100, which Employer contended "prejudiced" it, and this failure should bar his claim altogether and thus negate the need for an SIME; (2) Employee allegedly failed to provide Employer with medical records within 14 days of his care, and since an SIME involves a medical examination, he has no "valid or enforceable claim" for medical care, under §095(c), thus rendering his request for an SIME again moot; (3) Employer contended "there is no actual or credible medical dispute" between Dr. Lehman and Employee's attending physicians, so this panel should deny an SIME; (4) Language used in Employee's pleadings suggest he is uncertain if there was an injury, and "AI" [Artificial Intelligence] suggested to Employee that he did not need an SIME; and (4) Employer implied that Alaska has no jurisdiction to hear and decide Employee's petition because he has filed a claim in Missouri "pursuing same benefits." Employer's hearing brief did not address the factors this panel considers when deciding whether or not to order an SIME. (Brief of Employer/Insurer Against Employee SIME, January 9, 2025; observations).

24) On January 9, 2025, Employer also petitioned to strike Employee's hearing briefs. It contended the briefs violated the hearing notice and did not conform to administrative regulations pertaining to briefing. (Petition, January 9, 2025).

25) On January 15, 2025, the designated chair, in an effort to understand Missouri workers' compensation law and procedures, reviewed the Missouri Workers' Compensation Division

website to find when the Missouri Division served Employer with Employee's March 7, 2024 "Claim for Compensation." The chair could not find a statute or regulation setting forth a specific time. The chair called the Missouri Division's toll-free phone number and spoke briefly to a staff member. The chair, without mentioning this case or any party to it, referenced Missouri regulation 8 CSR 50-2.010 Procedures for Non-contested and Contested Workers' Compensation Case**s**, and inquired regarding how long it took the Missouri Division to serve a person's claim on an employer and insurer. Staff advised the chair that "the goal" was no later than four days, but said claims were typically served the day after the Missouri Division received them. (Official notice).

26) Since at least statehood, statutes, regulations, parties to workers' compensation claims, adjudicators and Alaska Division of Workers' Compensation (Division) staff have used the word "claim" interchangeably with the word "injury." For many years, Employers have had an option to use either written injury report forms, or computerized forms to input data directly to an insurer or adjuster. The panel could find no evidence in the agency file showing how Employer, its allegedly injured employees, or its insurance company or adjusters normally report injuries in Alaska. (Experience; judgment and observations).

PRINCIPLES OF LAW

> **AS 01.10.040. Words and phrases;** . . . . (a) Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.
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> **AS 23.30.001. Legislative intent**. It is the intent of the legislature that
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> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .

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 23.30.030. Required policy provisions. A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
. . . .

(3) As between the insurer and the employee or the employee's beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer is notice or knowledge on the part of the insurer; . . .

AS 23.30.070. Report of injury to division. (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall file with the division a report setting out

(1) the name, address, and business of the employer;
(2) the name, address, and occupation of the employee;
(3) the cause and nature of the alleged injury or death;
(4) the year, month, day, and hour when and the particular locality where the alleged injury or death occurred; and
(5) the other information that the division may require. . . .

AS 23.30.095. Medical treatments, services, and examinations. . . .

(c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee.
. . . .

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer . . . submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . .
. . . .

> (k) In the event of a medical dispute regarding . . . causation, medical stability . . . degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

Crawford & Company v. Baker-Withrow, 73 P.3d 1227, 1228-29 (Alaska 2003) addressed only part of §095(c)'s first sentence. The worker was a receiving repetitive post-traumatic-stress-disorder treatments, which by their nature are treatments "requiring continuing and multiple treatments of a similar nature," but her therapist failed to submit a timely treatment plan. *Baker-Withrow* held "her employer is responsible for all treatments rendered after a treatment plan was submitted, plus any treatments rendered not more than 14 days before submission of the treatment plan." This decision did not address a typical "claim for medical or surgical treatment." However, in respect to any treatment covered under this subsection, *Baker-Withrow* said:

> Based on the structure of the statute it seems apparent that while notice of treatment within fourteen days following treatment is waivable in the interest of justice, because the second sentence of the subsection so provides, failure to furnish a treatment plan within the same period is not waivable because there is no similar grant of authority to waive the furnishing of a treatment plan.

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Municipality of Anchorage v. Monfore*, AWCAC Dec. No. 081 (June 18, 2008) also reviewed §095(c)'s first sentence and held the 14-day notice requirement also applies to those "who provide surgical treatment," and presumably other "medical" treatment. *Monfore* further noted that the 14-day requirement is "waivable in the interest of justice," unlike the treatment plan required in cases where an injured worker is receiving "continuing and multiple treatments of a similar nature," like chiropractic care or PT. Absent a Board waiver of the 14-day requirement, "the consequence of failure to give notice of surgical treatment is to bar a claim for payment of the treatment."

Bah v. Trident Seafoods Corp., AWCAC Dec. No. 073 (February 27, 2008) addressed the Board's authority to order an SIME. *Bah* stated in *dicta*, that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition. *Bah* said when deciding whether to order an SIME, the Board considers three criteria, though the statute does not require it:

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

Geister v. Kid's Corps, Inc., AWCAC Dec. No. 045 (June 6, 2007) involved a Board decision denying a requested SIME. On appeal, *Geister* addressed an injured worker's objections to the SIME:

> . . . If the board *weighed* and chose to rely on Dr. Klassen over Dr. Dramov in deciding a dispute did not exist, instead of merely comparing competing opinions to identify conflicts, or if the board did not consider Dr. Dramov's letters because they were the subject of an unsatisfied request for cross-examination, then we believe the board erred. It is enough that the parties present evidence of a medical dispute to request an SIME. The board is not asked to decide which physician's opinion is more persuasive when deciding if there is a qualifying conflict in opinions -- it will only do that when deciding the merits of the claim. The parties are not offering competing opinions to persuade the board of the truth of their substance; the opinions are offered solely to establish that a difference of medical or scientific expert opinion exists. Therefore, the documents containing the opinions are not hearsay evidence (footnote omitted; emphasis in original).

Betts v. Greenling Enterprises, LLC, AWCAC Appeal No. 22-013, Order on Petition for Review (November 30, 2022) addressed an employee's petition for review from a Board order granting an employer's request for an SIME. The Board had found a medical dispute regarding medical treatment. Addressing the employee's argument, *Betts* said "even if the EMEs' opinions did not rebut the presumption of compensability, there remained a substantial and significant question as to future medical treatment." *Id*. *Betts* explained:

> Ms. Betts' position that the EMEs do not rebut the presumption of compensability is a legal issue to be addressed by the Board at a hearing on the merits. The procedure is that the Board, at that time, will decide if Ms. Betts raised the presumption, then whether Greenling rebutted it and, if so, then Ms. Betts must prove her claim by a preponderance of the evidence. However, a hearing on the issue of whether to order an SIME is not a hearing on the merits and the issue of sufficiency and credibility of the EME reports is not addressed. Among the concerns addressed by the Board at

> the hearing on the SIME is whether an SIME will be of assistance to the Board in resolving the issues of the claim at a hearing on the merits. The Board has a right to order an SIME to assist it in understanding the medical issues involved in the claim and this right is independent of the issue of the presumption of compensability. . . .
> . . . .
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> This right to require an SIME arises prior to a hearing on the merits. The presumption analysis is not relevant where the Board is making a determination as to whether an SIME would assist it. . . .
>
> The Board's ordering of the SIME does not impair a legal right of Ms. Betts, because the Board has its own right to order an SIME. The Board is entitled to have a full understanding of the medical issues it is deciding, as are the parties to the claim.
>
> . . . While there is delay in the Board holding a hearing on the merits, it is better for the delay to occur prior to that hearing than to occur part-way through such a hearing. If the Board were to find it necessary to halt the proceedings in order to exercise its right to order an SIME to help this decision-making process, the cost of the parties would be substantially greater. That is, at hearing the parties usually have one or more medical experts lined up to testify. If the Board stays the hearing to conduct an SIME, there is greater expense due to the need for the experts to be called again to testify after the SIME.
> . . . .
>
> . . . To decide this issue when deciding whether to order an SIME deprives the parties of a full and fair hearing because not all evidence will be heard or considered at the preliminary hearing on the issue of the SIME. The question Ms. Betts raises as to whether the EME reports are sufficient to rebut the presumption of compensability is an important question, but it is a question for the board at a hearing on the merits of her claim. . . .
> . . . .
>
> . . . A dispute is required, not that the dispute rebuts the presumption nor is substantial evidence to support a controversion, but that there is a dispute. . . .
> . . . .
>
> At a hearing on the merits, the Board may ultimately agree with one or the other of the doctors, but at the point of ordering an SIME the question is whether there is a dispute, not which doctor's opinions are credible or sufficient. *Id*. at 11-14.

Seybert v. Cominco Alaska Exploration, 182 P.3d 1079, 1097 (Alaska 2008) stated, "The purpose of an SIME is to have an independent expert provide an opinion to the board about a contested issue." In other words, an SIME is the Board's doctor, and the Board has discretion to order an SIME even if no party timely requested one.

At the time of Employee's alleged injury, the notice statute stated:

> **AS 23.30.100. Notice of injury**. . . . (a) Notice of an injury . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury . . . to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury . . . and be signed by the employee or by a person on behalf of the employee. . . .
> (c) notice shall be given to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. . . . [T]he notice may be given to an agent or officer upon whom legal process may be served. . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> > (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
> > (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> > (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

Morrison-Knutson Co., Inc. v. Vereen, 414 P.2d 536 (Alaska 1966) stated the two-fold purpose for the §100 notice requirement: (1) to enable the employer to provide immediate medical diagnosis and treatment to minimize the injury's seriousness; and (2) to facilitate the earliest possible investigation into the facts surrounding an injury.

Jonathan v. Doyon Drilling, Inc., JV, 890 P.2d 1121, 1123 (Alaska 1995) stated the word "claim" in the Alaska Workers' Compensation Act (Act) often, but not always, refers to a written application for benefits filed with the Workers' Compensation Division (Division).

Tinker v. VECO, Inc., 913 P.2d 488, 491-92 (Alaska 1996) also discussed §100, found that the injured worker failed to give timely written notice of his injury, and said:

> The Board then proceeded to determine whether this failure was excusable under AS 23.30.100(d)(1). Two requirements must be met before this excuse can be

> applied: first, knowledge of the injury by the employer, in-charge agent, or carrier, and second, a lack of prejudice to the employer or carrier. . . .

In *Kolkman v. Greens Creek Mining Co*., 936 P.2d 150, 156 (Alaska 1997), a worker began having symptoms, later determined to be a heart attack, while on the job in June 1990. That evening, he reported to the company medic and described his symptoms. Two days later, and after the worker had obtained treatment for his heart attack, his wife notified the employer that the claimant had suffered a heart attack. The worker filed his injury report in June 1991 and a claim for benefits that same day. In September 1991, the claimant's cardiac expert wrote a letter opining that the heart attack was work-related. *Kolkman* noted the short 30-day §100 timeframe within which an injured worker must report an injury, and noted an injury's work-relatedness is often "gradually" and "not dramatically" acquired. It further noted difficulty fixing the day from which the 30-day notice period began to run, and highlighted the distinction between §100, and AS 23.30.105, the latter which requires both knowledge of the injury *and* knowledge of its work-relatedness. *Kolkman* found there was "no doubt" that the worker's employer knew the claimant had suffered a heart attack. Consequently, *Kolkman* overruled previous precedent that had erroneously required notice indicating to a reasonably conscientious manager that a case might involve a potential compensation claim. Having found that the employer had actual knowledge of the employee's heart attack, *Kolkman* reviewed the record for prejudice to the employer, and held the employer provided no evidence to support a conclusion it was prejudiced by late notice. As the employee did not know his injury was work-related until almost a year after the fact, his obligation to provide notice did not arise until that time.

In *Cogger v. Anchor House*, 936 P.2d 157, 159-61 (Alaska 1997), the injured worker did not "formally" file an injury report, but told his supervisors about his April 1992 work injury. The worker filed a claim for benefits for that injury in September 1992. After a hearing, the Board held his claim was barred under §100 for failure to give the employer timely written notice. On appeal, *Cogger* treated §100's notice requirement like a "discovery rule" for statutes of limitation in civil cases. *Cogger* noted the exact date when an employee could reasonably discover compensability "is often difficult to determine." But, on the other hand, missing the short notice period "bars a claim absolutely." "For reasons of clarity and fairness," *Cogger* held the 30-day period "can begin no earlier than when a compensable event first occurs. However, it is not

necessary that a claimant fully diagnose his or her injury for the thirty-day period to begin." *Cogger* stated the compensable event occurred "when he visited the emergency room and incurred medical costs for this emergency room visit." That visit was on July 15, 1992; therefore, the claimant's injury became "compensable on July 15, 1992," when the injured worker visited the emergency room. *Cogger* determined that because the injured worker waited until September 9, 1992, to give his employer "formal written notice" through his claim, "the board and the court were correct to hold that his formal notice was untimely."

Cogger next examined the record to determine if there was something to excuse the worker's failure to give timely written notice, under §100(d). It found "there [was] no question" that the employer had "knowledge" of the worker's injury. *Cogger* said the employer had "sufficient actual knowledge" of the injury to "trigger the protections of the statute." In other words, the "actual knowledge" exception in §100(d) applied. *Cogger* next turned to the other required finding for §100(d) to apply, and found the employer was not prejudiced by the worker's failure to give timely, formal written notice.

Dafermo v. Municipality of Anchorage, 941 P.2d 114, 116-19 (Alaska 1997) held the Board's late-notice finding was supported by substantial evidence. However, it also found that a §100(d) exception applied because the worker gave his supervisors "knowledge of the injury." *Dafermo* reviewed the record and found the employer was not prejudiced by the failure to give timely written notice. Therefore, *Dafermo* concluded that the Board should have excused the employee's failure to give timely written notice under §100(d). *Hammer v. City of Fairbanks*, 953 P.2d 500, 505 (Alaska 1998) held that "knowledge" does not appear to be a "term of art." In context, it means no more than "awareness, information, or notice of the injury. . . ."

In *McGahuey v. Whitestone Logging*, *Inc*., 262 P.3d 613, 615-18, n. 1 (Alaska 2011) (*McGahuey V*), a worker was involved in a bunkhouse fight. He did not file a "timely written notice of injury." When he finally filed one, his employer controverted based on a §100 notice defense. The worker then alleged he had verbally told his supervisor about the injury. After the first hearing, the Board determined the claim was barred because the worker did not give his employer timely notice. He appealed and won a remand. A convoluted procedural process followed.

McGahuey v. Whitestone Logging, Inc., AWCB Dec. No. 08-0108 (June 11, 2008) (*McGahuey III*) stated in relevant part:

> Applying the presumption analysis to the notice issue, AS 23.30.100 requires an employee to give notice of an injury to the employer within thirty (30) days of the occurrence of that injury. The Board finds the employee in the instant case never did fill out or sign an ROI identifying his back injury condition on March 2004 until June 8, 2005. The Board finds that although the employee asserts he was prevented from filing a report of injury by company personnel, namely Mr. Rivers, and/or obtaining treatment for his back after the March 2004 altercation, his testimony is lacking in credibility. The Board finds the employee is not credible. (AS 23.30.122). . . . *Id*. at 11.

The Board also performed an alternative analysis assuming the worker had given timely notice of his injury and decided his claim was not compensable on its merits. After a second hearing, the Board came to the same result, the worker appealed again and the AWCAC affirmed.

On appeal to the Alaska Supreme Court, *McGahuey V* noted that §120(a) "creates a presumption that 'sufficient notice of a claim has been given' as well as a presumption that a claim is compensable," and in its first decision the Board "did not mention these presumptions." It further found the Board and AWCAC failed to apply the §120(a)(2) presumption to the second Board decision, by finding the worker "not credible" in the analysis' first step, which is inappropriate. However, *McGahuey V* affirmed the claim denial because the AWCAC correctly determined that substantial evidence in the record supported the Board's alternate decision on the claim's merits. Clearly referring to an "injury" notice, and not a "claim for benefits," *McGahuey V* stated that if "written notice is not given as required, the claim is barred." *McGahuey V* further found "the Commission and the Board both erred in failing to identify when the 30-day period for giving written notice began," but that the error was harmless. *McGahuey V* reiterated from *Cogger* that the 30-day period for giving written notice "can begin no earlier than when a compensable event first occurs." It stated the date the 30-day period began to run is important in determining whether formal notice was timely, and in assessing prejudice to the employer if notice was late.

> **AS 23.30.107. Release of information.** (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. . . .

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
> (2) sufficient notice of the claim has been given. . . .

The standard presumption of compensability analysis applies to any compensation claim under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. In the first step, to attach the presumption, and without regard to credibility, an injured worker must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, and in the second step, again without regard to credibility, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). If the employer's evidence rebuts the presumption, it drops out and in the third step the employee must prove his claim by a preponderance of the evidence. *Id*. This means the worker must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Huit*.

> **AS 23.30.135. Procedure before the board**. (a) . . . 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. . . .

> **AS 23.30.395. Definitions**. (a) In this chapter
> . . . .
>
> (3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
> . . . .
> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;

AS 44.62.480. Official notice. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of a generally accepted technical or scientific matter within the agency's special field, and of a fact that is judicially noticed by the courts of the state. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to in the record, or appended to it. A party present at the hearing shall, upon request, be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority. The agency shall determine the manner of this refutation.

3 AAC 26.100. Additional standards for prompt, fair, and equitable settlements of workers' compensation claims. Any person transacting a business of insurance who participates in the investigation, adjustment, negotiation, or settlement of a workers' compensation claim:
. . . .

(2) shall provide necessary claim forms, written instructions, and assistance that is reasonable so that any claimant not represented by an attorney is able to comply with the law and reasonable claims handling requirements; . . .

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. . . .

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. . . .

8 AAC 45.900. Definitions. In this chapter

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

8 CSR 50-2.010 Procedures for Non-contested and Contested Workers' Compensation Cases. . . .

> (8) Upon receipt of a Claim for Compensation, the division shall forward a copy of the claim to the employer and its insurer, or third-party administrator, if applicable, or Second Injury Fund, if applicable, and within thirty (30) days from the date of the division's acknowledgment of the claim, the employer or its insurer, or third-party administrator, if applicable, or the Second Injury Fund, if applicable, shall file an Answer to Claim for Compensation, with sufficient copies for the division, the claimant(s) and each of his/her attorneys.

ANALYSIS

Shall this decision order an SIME?

Employee petitioned for an SIME under §095(k). Employer objected to the request on numerous grounds. Ordinarily, potentially-litigation-ending defenses like a §100 notice defense are heard as preliminary issues and are not heard along with an SIME request. However, Employer raised several defenses to the SIME, which is understandable. If for example Employer were successful on its §100 defense, Employee's claim would be barred and there would be no need for an SIME. *Cogger*. Thus, this decision will address Employer's various defenses as preliminary issues to ensure "quick, efficient, fair, and predictable" delivery of benefits to Employee if he is entitled to them, at a "reasonable cost" to Employer. AS 23.30.001(1). To be clear, this decision will not address or decide Employee's claim for benefits and other relief on its merits because the only issue set for hearing is the SIME petition. *Betts*.

(1) Are Employee and his physicians credible?

Employer contends that an SIME should not be ordered because Employee is not credible and because his physicians have poor or inconsistent medical opinions based on incomplete or inaccurate information. A claimant's or witnesses' credibility is not determined or weighed in a SIME determination hearing. *Betts* said, "even if the EMEs' opinions did not rebut the presumption of compensability, there remained a substantial and significant question as to future medical treatment." As *Geister* stated in an SIME dispute, if this panel "*weighed* and chose to rely on" one physician's opinion over another's "in deciding a dispute did not exist, instead of merely comparing competing opinions to identify conflicts . . . then we believe" this panel will have "erred" (emphasis in original). Although Employee's credibility, as well as all other medical and non-medical witnesses' credibility and weight accorded their opinions and testimony is important and

will be examined at a merits hearing, these fact-finding functions do not apply to SIME hearings, with one exception, discussed in the "presumption of sufficient notice" analysis below. *Geister*.

(2) Is Employee's claim barred under AS 23.30.l00?

Employer contends Employee failed to give timely written notice of his alleged injury within 30 days and contends it was prejudiced by this failure. It contends since his claim is therefore barred under §100 there is no need for an SIME. Employee's briefs do not directly address this contention. Section 100(a) requires written notice of an injury be given to an employer within 30 days of the injury date. If written notice is not given as required, the claim "is barred," unless the failure is excused under an exception to the statute. *Cogger*; *McGahuey V*. Timely notice is important to allow an employer to investigate the alleged injury, diagnose it, and give prompt, proper treatment. *Vereen*. Failure to give written notice can be excused under §100(d) when *either* (1) Employer had actual notice of the injury *and* was not prejudiced by lack of written notice, *or* (2) fact-finders determine that notice could not be given "for some satisfactory reason," *or* (3) Employer failed to raise the §100 defense at the first hearing on the claim. *Tinker*; *McGahuey*.

AS 23.30.120(a)(1), and (2) create presumptions that (1) a "claim" is compensable, and (2) "sufficient notice of the claim has been given." *McGahuey V*. This decision does not reach the merits of Employee's claim, so the "presumption of compensability" analysis is inapplicable. However, Employer's "notice" defense is relevant to the SIME issue, making a §120(a)(2) "presumption of sufficient notice" analysis applicable. "Claim" sometimes refers to a claim for benefits, as opposed to an "injury report" now referred to as a "FROI." *Jonathan*. However, since statehood "claim" and "injury" have commonly been used as synonyms. AS 01.10.040(a); *Rogers & Babler*. When §120 and §100 are construed together, and case law decisions are reviewed, it becomes evident that by using the word "claim" in §120(a)(2) the legislature meant notice of an "injury." This is clear from *McGahuey III* and *V*, which recognized the "presumption of sufficient notice," and addressed a failure to given notice of an "injury," not notice of a "claim." Thus, this decision will apply a standard §120(a)(1) presumption analysis, used regularly in nearly every claim-merits decision, to the §120(a)(2) facts relevant to Employer's "sufficient notice" defense under §100, based on well-settled decisional law. *Meek*.

The injury notice must be in writing and contain Employee's name and address, the time, place, nature and cause of the alleged injury and authority to release records of medical treatment for the alleged injury, and be signed by Employee or "a person on" his " behalf" under §100(b). The notice must be delivered to Employer or mailed to employer or its "agent or officer on whom legal process may be served" under §100(c).

Employee contends his injury occurred on February 18, 2024. Employer contends one medical record states that it may have happened on February 17, 2024. Before applying the "presumption of sufficient notice" analysis, this panel must first determine when the 30-day period for Employee to give written notice of his injury to Employer began. *McGahuey V*. For time-calculation purposes, the date of an event is not included but the last day of the prescribed period is included. 8 AAC 45.063(a). Moreover, the time period for giving notice does not begin to run until a "compensable event," like obtaining medical care for an injury, occurs. *Cogger*; *McGahuey V*. Employee first sought medical care for his alleged work injury on February 19, 2024, when he went to TVC. Therefore, under §063(a) the 30-day clock began to run the next day, February 20, 2024. The calendar shows that 30 days from February 20, 2024, was March 20, 2024, which was not a Saturday, Sunday or legal holiday. *Rogers & Babler*. The March 20, 2024 deadline date applies regardless of whether the alleged injury happened on February 17 or 18, 2024, because the evidence shows that the "first compensable event" happened when Employee went to TVC for treatment on February 19, 2024. *Cogger*; *McGahuey V*.

In the "presumption of sufficient notice" analysis' first step, to raise the presumption that he gave sufficient notice to Employer of his alleged right-shoulder injury, Employee without regard to credibility, must make a "preliminary link" showing that he gave Employer written notice that he allegedly hurt his right shoulder on February 17 or 18, 2024, by no later than March 20, 2024. *Tolbert*. Employee through attorney Scott Taylor gave Employer written notice of his alleged right-shoulder injury as follows: When Employee filed his Missouri "Claim for Compensation" on March 7, 2024, the Missouri Workers' Compensation Division served that claim on

Employer, its insurer, adjuster or other "agent," or on Weinstock, its "officer on whom legal process may be served," "upon receipt." 8 CSR 50-2.010(8).

However, uncertain how Missouri applies the "upon receipt" rule, the designated chair, using the panel's investigatory and inquiry authority under §135(a), researched the issue on the Missouri workers' compensation division's website, unsuccessfully. The chair then inquired to the Missouri workers' compensation division and spoke to a staff person who answered the toll-free number. The chair learned that normally claims are served the next day; the "goal" is to serve all claims within four days of receiving the claims. This panel hereby advises the parties that it takes "official notice" under §135(a) and AS 44.62.480, in conjunction with Missouri regulation 8 CSR 50-2.010(8), that Employer or its representatives received the March 7, 2024 Missouri claim by no later than March 11, 2024. This written claim provided more information than required on an injury notice under §100, with exception of the signed medical record release, addressed below. Through his Missouri claim, served on Employer or its agents at least nine days before his 30-day deadline to provide written notice expired, Employee successfully raised the statutory presumption that he gave "sufficient notice" in writing to Employer under §120(a)(2) for his alleged right-shoulder injury arising from a February 2024 incident. *Tolbert*.

The presumption of "sufficient notice" like many presumptions is rebuttable. *Tolbert*. Employee having attached the "sufficient notice" presumption under §120(a)(2) to this case, shifted the burden to Employer to prove with substantial contrary evidence that it received no written notice. In the presumption analysis' second step, again without regard to credibility, on May 20, 2024, Olinger signed a sworn affidavit stating Employer did not receive within 30 days of the alleged February 18, 2024 incident "and has never received, in writing" from Employee a "single or one inclusive notice" that included the "time, place, nature, and cause of the injury and authority to release records of medical treatment for the alleged injury signed by the Employee (emphasis in original)." This statement is substantial evidence to rebut the raised presumption of sufficient notice. This shifted the burden back to Employee who must prove he gave written injury notice to Employer by no later than March 20, 2024, by a preponderance of the evidence. *Saxton*.

This is where a limited credibility assessment applies. In this, the third step of the standard presumption analysis, statements and evidence are given credibility and weight. Employee's March 7, 2024 Missouri claim, and Missouri's administrative service processes show, that Employee gave Employer detailed written notice of his alleged injury as required under §100, within 30 days of the alleged injury, with exception of the medical record release. This conclusion resolves the §100 defense and does not require this panel to "excuse" anything, because Employee provided written notice that substantially complied with the statute. Moreover, there are several fundamental problems with Employer's §100 argument.

First, while Employee was required to provide Employer with a written injury report "in a format prescribed by the director," within 30 days, which included a built-in medical record release, Employer, its insurer or its adjuster had to provide the "prescribed" form to Employee to complete. Employer or its agents had to provide "forms" and "necessary" and "reasonable" assistance to Employee, who at the time was not represented by an attorney, to enable him to "comply with the law and reasonable claims handling requirements." 3 AAC 26.100. By Olinger's admission, on February 21, 2024, "Employer was aware" for "the first time" that Employee alleged a work injury. There is no evidence Employer, its insurer, its adjuster or its workplace supervisor over Employee provided him with a prescribed injury report to complete within 30 days of that date.

Second, on February 21, 2024, once Employee told Olinger that he alleged a work injury, Employer had a legal duty, distinct from Employee's duty, to report Employee's alleged injury, "within 10 days from the date the employer has knowledge of an injury . . . alleged by the employee . . . to have arisen out of and in the course of the employment." AS 23.30.070(a)(1)-(5).

Third, the "format prescribed by the director" has changed numerous times since 1959 when the Alaska Legislature first adopted §100. For many years, Employers have had an option to use either written injury report forms, or computerized forms to input data directly to an insurer or adjuster. *Rogers & Babler*. Employee was not likely to have an injury report form on hand in

preparation for a possible injury, or have access to an Electronic Data Interchange computer terminal to report an injury unless Employer provided access to these reporting methods.

Lastly, Employer contends it never had a medical release, but would have if Employee had timely filed an injury report form. Although a standard employee's injury report contains a built-in medical release allowing an employer to obtain medical records, the absence of this form did not prevent Employer from requiring Employee to sign a medical record release under §107(a). This statute requires Employee to sign written authority for Employer to obtain medical records for his alleged injury. There is no time limit for Employer to make this request, and it could have done so as soon as it "first knew" on February 21, 2024, of Employee's alleged injury. The panel found no evidence that Employer provided medical releases for Employee to sign within 30 days of that date. Any disputes over Employee's cooperation months *later* with Employer's medical record release requests are irrelevant to the fact that Employer had a right to remedy the absence of a signed release within 30 days of the alleged injury, but did not.

Therefore, on this record, including Employer's admissions, Employee gave Employer "sufficient notice" of the injury. The fact that Employee used a Missouri claim form to provide written notice rather than an Alaska injury report is immaterial; he substantially complied with the reporting requirement and Employer could have required him to sign a medical record release at any time. To hold otherwise would place "form" over substance. If Employer has evidence that Employer, its insurer, adjuster, and other agents and Weinstock did not receive Employee's March 7, 2024 Missouri claim by March 20, 2024, Employer may petition for modification of this determination as instructed at the end of this decision and order, and under §480. Unless and until that happens, and modification is granted, Employee has proven by a preponderance of the evidence, that he gave Employer sufficient written notice of his alleged right-shoulder injury. *Saxton*. Therefore, because he provided Employer with timely written notice of his alleged injury, Employee's claim on its merits will not be barred under §100, and this defense has no effect on the SIME issue.

Alternately, even if Employer or its agents did not timely receive Employee's March 7, 2024 Missouri claim, which contained the required information to give Employer notice of

Employee's alleged injury, §100 would still not bar his merits claim. Under §100(d)(1), failure to give written notice does not bar a claim if Employer, its agent in charge of the business where the injury occurred, or the carrier "had knowledge of the injury" and this panel determines that Employer or its carrier has not been prejudiced by failure to give written notice. Under the Act, notice to or knowledge of the occurrence of an injury on the insured Employer's part "is notice or knowledge on the part of the insurer." AS 23.30.030(3). In other words, Employer's supervisors had a duty to pass their knowledge of Employee's alleged injury to its insurer.

Again, Olinger's May 20, 2024 affidavit states with clarity that on February 21, 2024, Employee texted him and "claimed he tore his bicep working. . . ." Olinger continued, "this is the first time Employer was aware of an alleged work incident with Employee. . . ." "Knowledge" does not appear to be a "term of art." In context, it means no more than "awareness, information, or notice of the injury. . . ." *Hammer*. There can be "no doubt" that on February 21, 2024, Employer knew Employee was claiming a work-related injury. *Kolkman*. Therefore, the first part of the §100(d)(1) exception to the rule is satisfied.

As for the second part, prejudice to Employer, there is no evidence that Employer suffered any prejudice by the manner in which Employee provided notice of his alleged work injury. *Dafermo*. First, Employer had actual knowledge of Employee's alleged injury from three or four days post-injury, even though he had 30 days to report it. Second, Employer, its insurer or its adjuster could have and should have provided Employee a means to report his injury in writing within 30 days; there is no evidence they did. Third, the absence of an injury report form that contained a medical record release is immaterial, because once Employee reported an injury, Employer's authority to request that he "provide written authority to the employer" or carrier to obtain his medical records relative to his alleged injury was triggered under §107(a). Fourth, once Employee reported his injury by texting his supervisor, Employer's right to require him to see an EME physician "not less than 14 days after injury," arose under §095(e). Employer could have sent Employee to its physician before his 30-day deadline even expired. Fifth, Employer ultimately exercised the right to have Employee seen by Dr. Lehman prior to his right-shoulder surgery. Thus, Employer's physician examined Employee before his right-shoulder was

internally disrupted by surgery. Employer failed to demonstrate it has been prejudiced and the panel finds no evidence that it was.

Given the above analysis, the last two §100(d) exceptions, (2) excusing failure to give written notice because for some satisfactory reason notice could not be given, and (3) if Employer failed to raise it at the first hearing of "a claim for compensation," are inapplicable. There is nothing to excuse under (2) and Employer clearly raised the issue at the first hearing under (3).

(3) Should Employee's SIME request be denied under AS 23.30.095(c)?

Employer contends that since Employee and his providers allegedly did not provide his medical records within 14 days of obtaining his initial medical care at TVC and later in Missouri, and since in Employer's view an SIME equates to "medical care," the SIME "is not valid and enforceable" against Employer under §095(c). *Monfore*. It is not clear how an SIME constitutes "medical care." It is not. An SIME is intended to give an independent medical opinion to assist the panel in resolving this case. *Seybert*. Moreover, Employer failed to cite the sentence immediately following its citation from that section. It states this panel "shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee." For reasons not clear from the record, there was confusion regarding Employer's insurance coverage. This resulted in the Fund becoming involved in this case until the parties stipulated to dismiss the Fund. Given this confusion, it was likely unclear to whom Employee's providers should serve its records and billing statements. Furthermore, it is not even clear from the record whether his providers did or did not in fact send its bills and records to Employer, its carrier or its adjuster. There is no evidence that Employer or its agents provided reasonable "instruction and assistance" to Employee for appropriate claims handling under 3 AAC 26.100(2). Therefore, to the extent that §095(c) arguably even applies to an SIME, this decision under §095(c) will excuse any alleged failure by Employee or his providers to furnish medical records to Employer and the Division within 14 days, "in the interest of justice." *Baker-Withrow*. In any event, any alleged failure does not prevent this panel from ordering an SIME. *Seybert*.

(4) Should Employee's SIME request be denied for incidental reasons?

Employer points out Employee's various alleged failures to follow discretionary regulations. For example, it contends Employee failed to file medical summaries. Notably, the statutes requiring parties to file medical summaries do not have an associated sanction. In any event, incidental failures do not prohibit this panel from ordering an SIME in an appropriate case. *Seybert*. Employer further contends that "AI" by Employee's own admission, allegedly agreed with it and informed Employee that he did not need an SIME. Hearing panels do not decide issues based on opinions from "AI." Employer further contends that Employee's use of words like "seem" versus more affirmative statements like "disagree" in his pleadings are somehow admissions from Employee that there are no medical disputes, and therefore an SIME is unwarranted. This panel will apply the standard SIME-dispute analysis to this case, notwithstanding the words or phrases a party chooses to use in its petition, answer or associated SIME documents.

(5) Should Employee's SIME request be denied if he relies on PA Zahn's opinions?

Employer appears to contend that PA Zahn is not a "doctor," and therefore, a medical dispute between an attending physician and Employer's EME cannot exist based on her opinions. However, the Act defines "attending physician" to include "a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy." AS 23.30.395(3)(D). There is no evidence that Zahn does not meet this requirement. Therefore, relevant opinions from PA Zahn may create a medical dispute if they disagree with Dr. Lehman's opinions.

(6) Do Employer's Smallwood objections to Dr. Rogers' opinions prevent an SIME?

Employer "*Smallwooded*" Dr. Rogers' reports and requested his cross-examination. 8 AAC 45.900(11). In the event Employer is implying that this decision cannot rely on Dr. Rogers' reports to find a medical dispute, this same issue has already been decided. *Geister* said issues for an SIME hearing are if a medical dispute exists, if it is significant, and whether an SIME will assist the factfinders in deciding the case. It specifically stated that if a panel decided an SIME dispute in favor of one party because medical records upon which the disputes were based "were the subject of an unsatisfied request for cross-examination," the panel would "err." Moreover, Dr. Rogers' records are not hearsay, because they are not offered at an SIME hearing to prove the opinions asserted in the records; they are offered to prove the existence of a medical dispute. Thus,

this panel will consider Dr. Rogers' *Smallwooded* reports for this SIME issue, in accordance with *Geister*.

(7) Does Alaska have jurisdiction over this case?

Employer has repeatedly stated Missouri has jurisdiction over this matter. It has not stated Alaska does not have jurisdiction. Employer cited no law in support of either position. Moreover, at the August 1, 2024 prehearing conference, the designee and the parties "addressed the issue of jurisdiction." At that prehearing conference, Weinstock stated "Missouri has jurisdiction," but clarified that "Missouri and Alaska both have jurisdiction," in his opinion. Thus, seeing no actual objection to this panel exercising its jurisdiction over this case, and finding no law to support either position, Alaska will exercise its jurisdiction over the SIME issue.

(8) Shall this panel strike Employee's briefs?

Employee has filed at least two briefs on this SIME issue. Employer has objected to them and has asked for an order striking his briefs. Self-represented litigants unfamiliar with the law are not held to the same standards as attorneys. 8 AAC 45.195. In any event, Employee's hearing briefs provided minimal useful information for the panel to decide the SIME issue before it. Therefore, Employer's petition to strike the briefs will be denied and the briefs will be considered. Employee will be directed to adhere to briefing regulations and instructions provided at prehearing conferences in the future to avoid unnecessary litigation.

Having found no reason to not decide Employee's SIME petition, this decision will address the appropriate analysis. Notably, neither party's brief addressed the factors this panel must consider in deciding whether or not to order an SIME set forth in *Bah*. The panel considers three criteria:

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

This decision will address these *Bah* factors in order:

1) Is there a medical dispute between Employee's physicians and an EME?

There can be "no doubt" that there is a medical dispute between Drs. Rogers and Lehman. *Kolkman*. Dr. Rogers, who is the attending surgeon, opined that Employee had a work-related SLAP lesion caused by his alleged February 2024 work injury with Employer. By contrast, Dr. Lehman made it clear that in his opinion, the alleged February 2024 injury did not cause any issue with Employee's right shoulder, nor did it aggravate, accelerate, or combine with or exacerbate his preexisting shoulder condition. Accordingly, there is a clear medical dispute regarding "causation" under §095(k).

2) Is the dispute significant?

Employee has already had right-shoulder surgery. In this panel's experience, temporary disability and permanent impairment typically result from such surgery. Surgery, disability and impairment may create significant medical costs and require Employer to pay Employee considerable indemnity benefits, if his claim is ultimately found compensable at a merits hearing. Therefore, significant benefits are at stake. Thus, the medical dispute between the physicians is significant because if the evidence demonstrates that Employee had a work-related injury that arose out of and in the course of his employment with Employer, it will have to pay significant benefits.

3) Will an SIME physician's opinion assist the fact-finders in resolving the dispute?

Experience teaches that when opposing physicians disagree on critical issues such as "causation" of the need for treatment, a disinterested third-party physician's opinion will frequently assist the fact-finders in resolving this difficult issue. *Seybert*; *Rogers & Babler*. While panel members are not physicians, and although they have considerable experience listening to physicians explain injuries, a neutral physician's opinion can be valuable as the panel grapples with difficult, hotly disputed cases such as this one. Therefore, given the above analyses, Employee's petition for an SIME will be granted. The Division will be directed to convene a prehearing conference as soon as possible to begin the SIME process.

CONCLUSION OF LAW

This decision shall order an SIME.

ORDER

1) Employer's petition to strike Employee's hearing briefs is denied.

2) Employee's petition for an SIME is granted.

3) The Division is directed to schedule a prehearing conference at the earliest opportunity and the appropriate designee will begin the SIME process forthwith.

Dated in Fairbanks, Alaska on January 21, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Lake Williams, 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 Rickie D. Foreman, employee / claimant v. Northstar Construction

Management, employer; Cincinnati Insurance Co., insurer / defendants; Case No. 202406218; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 21, 2025.

/s/
Whitney Murphy, Office Assistant II