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. 25-0056 Filed with AWCB Anchorage, Alaska on September 3, 2025

Crowley Holdings, Inc.'s and Old Republic Insurance Company's (Employer) March 11, 2025 petition seeking modification of a prior decision and order (D&O) was heard in Anchorage, Alaska on July 2, 2025, a date selected on June 6, 2025. Lazlo Toennis's (Employee) June 10, 2025, petition seeking review of the designee's June 6, 2025, discovery and scheduling determinations was heard on the written record on July 15, 2025, a date selected on June 11, 2025. A March 12, 2025 affidavit of readiness for hearing (ARH) gave rise to the July 2, 2025 hearing, and Employee's June 10, 2025 petition gave rise to the July 15, 2025 hearing. Attorney Adam Franklin represented Employee at both hearings. Attorney Rebecca Holdiman Miller represented Employer at both hearings. Because issues presented at the July 2, 2025 hearing were interdependent on issues to be presented at the July 15, 2025 hearing, the hearing chair and parties agreed to continue the July 2, 2025 hearing on July 15, 2025 so that all issues presented could be decided in the same D&O. The record for both hearings closed at the conclusion of deliberations on July 15, 2025.

Previous decisions in this case include *Toennis v. Crowley Holdings, Inc.*, AWCB Decision No. 24-0036 (June 24, 2024) (*Toennis I*) (denying Employee's petition to strike EME report and concluding Employer did not excessively change physicians or unlawfully interfere with Employee's selection of a treating physician); and *Toennis v. Crowley Holdings, Inc.*, AWCB Decision No. 25-0002 (January 16, 2025) (*Toennis II*) (denying Employee's petition for reconsideration of *Toennis I*, granting Employer's petition for a mediation order and ordering a second independent medical evaluation (SIME)).

ISSUES

Employee contends the designee abused his discretion and exceeded his authority in scheduling Employer's March 11, 2025 petition seeking modification for hearing because neither party requested a hearing on that petition nor filed an ARH for it be heard. He contends there is no statutory or regulatory authority for a Board designee to have scheduled the July 2, 2025 hearing on his own motion.

Employer did not directly address Employee's contentions regarding the scheduling of the July 2, 2025 hearing. It is presumed that Employer supports the scheduling of its petition for hearing.

1) Did the designee abuse his discretion when he scheduled Employer's March 11, 2025 petition for hearing?

Employee contends the designee abused his discretion in denying his petition for a protective order from attending a neuropsychological employer medical evaluation (EME) because requiring him to do so is unreasonable. He contends he has already attended three EMEs, which included a previous neuropsychological evaluation, and contends Employer has had ample opportunity to have him evaluated. Employee also objects to attending a neuropsychological EME because a prior D&O has already "established the procedure" for his claim and that procedure did not involve him attending another neuropsychological EME.

Employer contends that Employee has provided no legal support or argument that demonstrates the designee failed to apply controlling law or exercise sound legal discretion in denying his

petition for a protective order and contends the designee should be found to have not abused his discretion.

2) Did the designee abuse his discretion when he denied Employee's petition seeking a protective order from attending a neuropsychological EME?

Employer contends, since the Alaska Workers' Compensation Appeals Commission (Commission) excluded any use or consideration of a previous neuropsychological EME report, the need for a neuropsychologist on the previously ordered SIME panel became "superfluous" since there is no longer a neuropsychological dispute between the parties. Therefore, it contends the previously ordered SIME should be "quashed" so it can obtain a new neuropsychological EME and current medical disputes between the parties can be identified. Employer further contends it has a right to present its own neuropsychological evidence at a hearing on the merits of Employee's claim so a panel can determine which medical opinions are most credible. Relatedly, Employer also seeks modification of the previous mediation order, changing the timing of mediation from after the SIME, to before the SIME, given delays caused by the Commission's decision.

Employee opposes any delay in the SIME because a previous D&O "established the order of events in this claim," which were for him to attend an SIME and then mediation, and it did not contemplate him attending an additional EME. Regarding the mediation's timing, he contends Employer is welcome to schedule mediation, but he opposes any delay in the SIME process.

3) Should *Toennis II* be modified?

FINDINGS OF FACT

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

1) On November 21, 2022, Employee was involved in a motor vehicle accident while working for Employer as a truck driver. (*Toeniss I*).

2) On April 11, 2022, Employee's primary care provider referred him to Dustin Logan, PhD, for a neuropsychological evaluation. Employee's appointment with Dr. Logan was originally scheduled for October 27, 2022. (*Toennis I*).

3) On August 30, 2022, Employee's appointment with Dr. Logan was changed to an EME. According to Employer's adjuster, the appointment was changed because Employee wanted to be evaluated as soon as possible, and Dr. Logan could see Employee sooner if the appointment was scheduled as an EME. (*Toennis I*).

4) On September 28, 2022, Dr. Logan performed a neuropsychological EME. (*Toennis I*).

5) In addition to Dr. Logan, Employee has been evaluated by two other EMEs. David Bauer, MD, an orthopedic surgeon, evaluated Employee on July 13, 2022, and Gregory Zoltani, MD, a neurologist, evaluated Employee on August 12, 2022. Employee was also scheduled to have been evaluated by Jared Kirkham, MD, a physiatrist, as part of a panel EME with Dr. Bauer, but Employee failed to appear for that appointment, so Dr. Kirkham undertook a records review instead. (*Toennis I*, *Toennis II*).

6) On November 6, 2023, Employee petitioned to strike Dr. Logan's report from the record, contending that Employer had unlawfully interfered with his choice of a treating physician. (*Toennis I*).

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

8) On January 16, 2025, *Toennis II* denied Employee's petition for reconsideration of *Toennis I*, granted Employer's petition for a mediation order and ordered an SIME. The SIME was ordered, in part, based on Employee's May 18, 2023 SIME form, which set forth disputed opinions between Employee's primary care provider, Kimbery Brock, ANP, and Employer's medical evaluator, Dr. Logan. (*Toennis II*).

9) On January 23, 2025, Employee petitioned for review of *Toennis I* and *Toennis II*. (Notice of Petition for Review, January 23, 2025).

10) On February 28, 2025, the Commission granted Employee's January 23, 2025 petition for review and concluded Employer had interfered with Employee's selection of a treating physician when it changed Employee's appointment with Dr. Logan to an EME. The Commission acknowledged the appointment with Dr. Logan was changed to an EME with Employee's repeated consent, but it was concerned because Employee was unrepresented at the time, and the record was unclear about Employee's understanding of the differences between an appointment with a treating physician and an appointment with an EME. According to the Commission, this changed

"tainted" Dr. Logan's EME report and "undermined [Employee's] right to an impartial and unbiased SIME." The Commission thought the appropriate remedy was to exclude Dr. Logan's report from the SIME records and from further Board consideration. It reversed the Board's decision not to exclude Dr. Logan's report and remanded the case with instructions to proceed accordingly. (Order on Petition for Review, February 28, 2025).

11) On March 11, 2025, Employer filed its instant petition seeking modification of *Toennis II*. Specifically, Employer contended the SIME should be "quashed," and the parties should be ordered to mediate before the SIME, instead of after the SIME, as provided for in *Toennis II*. (Petition, March 11, 2025).

12) Employer's petition consisted of the Board's petition form, Form 07-6111, and an attached memorandum in support of its petition. Box 15, "RECONSIDERATION OR MODIFICATION," of the petition form is checked, along with Box 18, "OTHER," to which Employer added, "Petition to *Modify* and Quash." The heading on Employer's attached memorandum in support reads, "Petition to *Modify* and Quash, Continuation Page," and the first sentence of the memorandum states, "Employer petitions the Board for *modification* of its January 16, 2025, Interlocutory Decisions & Order and to Quash the Board's Order for SIME." (*Id*.) (emphasis added).

13) On March 12, 2025, Employee answered Employer's March 11, 2025 petition and contended the Commission's order excluding the prior neuropsychological EME report did not create any reason to delay the SIME. Regarding mediation timing, he wrote, "Employer is welcome to schedule a mediation, but [Employee] does not agree to any delay in the SIME process." (Answer, March 12, 2025). On that same day, Employee also filed an ARH on Employer's March 11, 2025 petition. (ARH, March 12, 2025).

14) Employer did not oppose Employee's hearing request for its March 11, 2025 modification petition. (Observations).

15) Following the Commission's February 28, 2025 order, Employer sought to undertake another neuropsychological EME. (Employee Petition, May 9, 2025; Employer Answer, May 28, 2025).

16) On March 21, 2025, Employee petitioned for a protective order from attending a neuropsychological EME on the basis Employer did not have a referral to a neuropsychologist from another of its EMEs. (Petition, March 21, 2025).

17) On March 26, 2025, Dr. Bauer provided Employer with a referral for Employee to be evaluated by Neuropsychologist Donna Wicher, PhD. (Bauer referral, March 26, 2025).

18) At an April 2, 2025 prehearing conference, the parties advised the designee they were awaiting a decision on Employer's March 11, 2025 petition. (Prehearing Conference Summary, April 2, 2025).

19) On April 7, 2025, Employer answered Employee's March 21, 2025 petition for a protective order and contended his petition was moot because it had obtained a referral. (Answer, April 7, 2025).

20) At an April 23, 2025 prehearing conference, the parties advised the designee they were awaiting a decision on Employer's March 11, 2025 petition. The designee described the petition as a "Petition for Reconsideration." (Prehearing Conference Summary, April 23, 2025).

21) On May 9, 2025, Employee petitioned for a protective order from attending a neuropsychological EME on the basis a panel SIME, which includes an neuropsychological evaluation, had already been ordered, and because an additional neuropsychological EME was not reasonable. (Petition, May 9, 2025).

22) On May 28, 2025, Employer opposed Employee's May 9, 2025 petition for a protective order on several bases. It contended that the removal of Dr. Logan's report from the record negated any disputes over neuropsychological issues that served as a basis for ordering the SIME, the Workers' Compensation Act (Act) allows for an EME every 60 days, and Employee provided no legal authority or valid reason not to attend the EME. (Answer, May 28, 2025).

23) At a May 29, 2025 prehearing conference, the parties advised the designee they were awaiting a decision on Employer's March 11, 2025 petition. The designee described the petition as a "Petition for Reconsideration." (Prehearing Conference Summary, May 29, 2025).

24) On June 3, 2025, the designee issued an amended prehearing conference summary that stated: "Parties advised they are awaiting an updated Decision regarding Employer's 3/11/2025 Petition for Reconsideration . . . . Employee objected to the scheduling of a Hearing on Employer's 3/11/2025 Petition. Designee elected to schedule a Hearing on said Petition over Employee's objection." (Prehearing Conference Summary, June 3, 2025).

25) On June 6, 2025, the designee issued another amended prehearing conference summary, in which he elected to rule on Employee's March 21, 2025, and May 9, 2025, petitions for a protective

order. He denied both Employee's petitions and ordered Employee to attend a neuropsychological EME. (Prehearing Conference Summary, June 6, 2025).

26) On June 10, 2025, Employee sought review of the designee's June 6, 2025 determination denying him a protective order and a review of the designee's decision to schedule Employer's March 11, 2025 petition for hearing. (Petition, June 10, 2025).

27) The panel SIME ordered in *Toennis II* is currently scheduled for September 10-12, 2025. (Physician Referral Letters, July 21, 2025).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

Employers have a right to defend against claims of liability. It has long been recognized that it is important for employers to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims and to detect fraud. The statutory duty of employers to adjust claims fairly and equitably necessarily implies a responsibility to conduct a reasonable investigation. An employer's right to develop evidence that may support a good faith controversion serves its direct financial interest. However, an employer's resistance of unmeritorious claims is also an essential component to maintaining the integrity of the Alaska workers' compensation benefits system. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> (h) The department shall adopt rules for all panels, and procedures for the periodic selection, retention, and removal of both rehabilitation specialists and physicians under AS 23.30.041 and 23.30.095, and shall adopt regulations to carry out the provisions of this chapter. . . .
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> (i) The department may adopt regulations concerning the medical care provided for in this chapter. In addition to the reports required of physicians under AS 23.30.095

> (a) - (d), the board may direct a physician or hospital rendering medical treatment or service under this chapter to furnish to the board periodic reports of treatment or services on forms procured from the board.
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> (l) Regulations adopted by the department under (h) and (i) of this section become effective only after approved by a majority of the full board.
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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).

In *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851 (Alaska 2010), the Supreme Court examined when an administrative agency may set and interpret policy using adjudication instead of agency rulemaking. At issue in *Burke* was the adoption of a discovery rule by adjudication concerning deadlines for requesting a reemployment eligibility evaluation when procedures for requesting reemployment eligibility evaluations had already been adopted by the Board. *Burke* concluded that administrative agencies are bound by their regulations, just as the public is bound by them, and if the Board wished to apply a discovery rule to a request made after the statutory period at issue, it was obligated to promulgate and adopt the rule according to the Administrative Procedures Act and could not do so through adjudication. *Id*. at 868-69.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) . . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .
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> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician

> is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . .
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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. . . .
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> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. . . . If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. . . . The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

The Alaska Supreme Court describes abuse of discretion as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply controlling law, or follow its own regulations, may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

> **AS 23.30.110. Procedure on claims.**
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> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. . . . If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. . . .

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

If the Board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013). The Board alone is charged with determining the weight it will give to medical reports. *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

Continuing jurisdiction over a compensation matter is conferred by law upon the Board. *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965). The Alaska Supreme Court discussed AS 23.30.130(a) in *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 162 (Alaska 1996), and said "under this statute, the Board 'is granted broad discretion to modify its prior decisions and findings"' (citations omitted).

> **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. . . .

The statute gives the Board wide latitude in making its investigations and in conducting its hearings and authorizes it to receive and consider not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. *Cook v. Alaska Workmen's Compensation Board.*, 476 P.2d 29 (Alaska 1970).

> **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. . . .

> **8 AAC 45.060. Service.**
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> (e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties. . . .

> **8 AAC 45.070. Hearings.**
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> (b) . . . a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed. . . .
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> (3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

> **8 AAC 45.082. Medical treatment.**
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> (b) A physician may be changed as follows:
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> (1) an employee injured before July 1, 1988, may change treating physicians at any time without board approval by notifying the employer and the board of the change; notice must be given in writing no later than 14 days after the change of treating physician; if, after a hearing, the board finds that the employee's

repeated changes were frivolous or unreasonable, the board may refuse to order payment by the employer;

(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service

(A) at a hospital or an emergency care facility;

(B) from a physician

(i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;

(ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

(iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

(3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records; to constitute a panel, for purposes of this paragraph, the panel must complete its examination, but not necessarily the report, no later than five days after the first physician sees the employee; if more than five days pass between the time the first and last physicians see the employee, the physicians do not constitute a panel, but rather a change of physicians;

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;

(C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;

(D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

(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. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

8 AAC 45.090. Additional examination.

. . . .

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

(1) give the employee and the employee's representative, if any, at least 10 days' notice of the examination scheduled by the employer;

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

(3) arrange, at least 10 days in advance of the examination date, for the employee's room and board at no cost to the employee if the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, requires the employee to be away from home overnight.

> **8 AAC 45.150. Rehearings and modification of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
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> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

ANALYSIS

1) Did the designee abuse his discretion in scheduling Employer's March 11, 2025 petition for hearing?

Both statute and regulation provide, if a party wants a petition heard, it must first file an ARH. AS 23.30.110(c); 8 AAC 45.070(b). Employee's current contentions that Employer's March 11, 2025 petition should not have been scheduled for hearing are at first confusing since he himself requested a hearing on it the day after it was filed. It is presumed Employee simply forgot he filed his March 12, 2025 ARH. *Rogers & Babler*.

Employee is further mistaken in his contentions that a designee lacks authority to schedule a hearing in the absence of an ARH. The regulation expressly provides that a designee may schedule a hearing, even if no party has filed an ARH, if the designee determines a hearing should be scheduled. 8 AAC 45.070(b)(3). After Employee filed his March 12, 2025 ARH, the designee was statutorily obligated to schedule a hearing. AS 23.30.110(c). Since the designee properly applied controlling law, he did not abuse his discretion. *Smith*; *Manthey*.

2) Did the designee abuse his discretion in denying Employee's petition seeking a protective order from attending a neuropsychological EME?

Employer is entitled to have Employee evaluated by a physician of its choosing during periods of Employee's disability. AS 23.30.095(e). An examination requested by Employer every 60 days is presumed reasonable and Employee shall submit to the examination without further request or order. *Id*. Here, Employee does not contend the neuropsychological EME Employer seeks is unreasonable because he underwent an EME less than 60 days ago. In fact, Employer's last EME was over three years ago. Neither does he contend Employer's neuropsychological EME is

unreasonable for reasons set forth at 8 AAC 45.090(d). Instead, Employee contends he has already attended three EMEs, which included a previous neuropsychological evaluation, and contends Employer has had ample opportunity to have him evaluated. However, the controlling statute does not limit Employer to three EMEs, does not set forth a timeframe within which all EMEs must be completed, and does not suspend an Employer's right to an EME when an SIME has been ordered. AS 23.30.095(e).

Employee also objects to attending a neuropsychological EME because a prior D&O has already "established the procedure" for his claim and that procedure did not involve him attending another neuropsychological EME. Procedures in workers' compensation cases are controlled by applicable statutes and regulations. AS 23.30.005(h), (i). A panel lacks authority to establish procedures for a claim when statutory and regulatory procedures have already been provided. *Burke*. Moreover, broad discretion is granted to modify prior decisions and findings. *Sulkosky*. Furthermore, the Workers' Compensation Act (Act) does not prohibit an EME once an SIME has been ordered. Employee's stated reasons in support of his petition for a protective order are unpersuasive, and since the designee properly applied controlling law, he did not abuse his discretion. *Smith*; *Manthey*.

3) Should *Toennis II* be modified?

Continuing jurisdiction over a compensation matter is conferred by law upon this panel. *Lynn*. Under AS 23.30.130, broad discretion is granted to modify prior decisions and findings. *Sulkosky*. It is observed at the outset that the circumstances presented here differ from other cases where a physician's report might be stricken from the record, most commonly for an excessive change of physician. Those cases involve brightline rules set forth at AS 23.30.095(a), (e) and 8 AAC 45.082(b)-(c), whereas here, in its Order on Petition for Review, the Commission based its decision on far more subtle notions of "taint" and "undermining," as well as murkiness in the record about Employee's understanding of the differences between an appointment with a treating physician and an appointment with an EME.

Employers have a right to defend against claims of liability and to develop evidence that may support a good faith controversion. *Granus*. Under the facts of this case, denying Employer an

opportunity to obtain a new neuropsychological EME would be tantamount to denying it an opportunity to present any evidence at all on Employee's cognitive and behavioral symptoms, which are now the predominant bases of his claim. *Rogers & Babler*. Employer has a right to present its own neuropsychological evidence at a hearing on the merits of Employee's claim so a panel can determine which medical opinions are most credible and the parties' rights can be ascertained. *Granus*; AS 23.30.095(e); AS 23.30.122; AS 23.30.135(a); AS 23.30.155(h).

Moreover, hearings in workers' compensation cases shall be impartial and fair to all parties and all parties shall be afforded an opportunity for their arguments and evidence to be fairly considered. AS 23.30.001(4). Since the Commission concluded that Dr. Logan's report was tainted, as a matter of fundamental fairness, Employer should now be afforded an opportunity to obtain an untainted neuropsychological EME report since its evidence could not be fairly considered if it were now denied an opportunity to develop that evidence at all. *Id*.

Finally, the SIME was ordered, in part, based on Employee's May 18, 2023 SIME form, which set forth disputed opinions between Employee's primary care provider, ANP Brock and Employer's medical evaluator, Dr. Logan. Employer is correct in its contention that the Commission's decision to strike Dr. Logan's report alters the panel's analysis concluding an SIME was needed on neuropsychological issues. Since, as stated above, Employee's cognitive and behavioral symptoms are now the predominant bases of his claim, another neuropsychological EME is necessary to define medical disputes between the parties that can then be addressed by a neuropsychological SIME. The Commission's decision to strike Dr. Logan's report is a change of conditions that warrants modification of *Toennis II*, such that the SIME, currently scheduled for September 10-12, 2025, should be cancelled and postponed until a later date. AS 23.30.130.

As a concluding matter, Employer also requests modification of *Toennis II*'s order for the parties to mediate after the SIME and now seeks an order for the parties to mediate prior to the SIME. Since Employee does not oppose the timing of mediation, and since delays in case progress resulting from the Commission's decision to strike Dr. Logan's EME report, as well as this D&O's conclusion regarding Employer undertaking a neuropsychological EME, are changes of conditions sufficient to support modification, the mediation order will also be modified. AS 23.30.130. A

new neuropsychological EME will give the parties a fresh perspective that may change their evaluations of their claims and defenses. Should mediation fail, then the SIME ordered in *Toennis II* will proceed.

CONCLUSIONS OF LAW

1) The designee did not abuse his discretion when he scheduled Employer's March 11, 2025 petition for hearing.
2) The designee did not abuse his discretion when he denied Employee's petition seeking a protective order from attending a neuropsychological EME.
3) *Toennis II* should be modified.

ORDERS

1) Employer's March 11, 2025 modification petition is granted.
2) The panel SIME currently scheduled for September 10-12 is cancelled.
3) Employee is ordered to attend a neuropsychological EME.
4) The parties are ordered to attempt mediation following receipt of the neuropsychological EME report.
5) Should mediation fail, the parties are ordered to request a prehearing conference, at which new SIME deadlines will be established.

Dated in Anchorage, Alaska on September 3, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Sarah Faulkner, 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 September 3, 2025.

/s/
Rochelle Comer, Workers' Compensation Technician