Alaska Workers' Compensation Appeals Commission

Darcey A. Geister,
Appellant,

vs.

Kid's Corps, Inc., and Alaska National Insurance Co.,
Appellees.

Memorandum Decision and Order
Decision No. 045 June 6, 2007

AWCAC Appeal No. 06-022
AWCB Decision Nos. 06-0083, 06-0208
AWCB Case No. 200400770

Memorandum Decision and Order on appeal from Alaska Workers' Compensation Board Decision No. 06-0208 issued July 27, 2006 by the southcentral panel at Anchorage, Krista M. Schwarting, Chair, Bob Weel, Member for Industry, Dave Robinson, Member for Labor, and Interlocutory Decision and Order No. 06-0083 issued April 17, 2006 by the southcentral panel at Anchorage, Krista M. Schwarting, Chair, and Stephen T. Hagedorn, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant Darcey A. Geister. Trena L. Heikes, Law Office of Trena L. Heikes, for appellees Kid's Corps, Inc., and Alaska National Insurance Co.

Commissioners: Philip Ulmer, John Giuchici, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Darcey Geister appeals a board decision finding her claim is not compensable. We agree that the decision whether to grant or deny a board-ordered examination under AS 23.30.095(k) is within the board's discretion; but, because we conclude the board failed to adequately explain its reasoning in denying Geister an independent medical examination under AS 23.30.095(k), we remand to the board for further findings. We conclude that a physician's letter opinion, if offered for the truth of the attending physician's opinion, is not admissible as a "business record" and is subject to the *Smallwood* rule. We agree that cross examination of the physician who owned the

practice where the author of the letter was employed is insufficient on the facts provided in this case to cure the hearsay objection. Finally, we are convinced the board erred by admitting a surveillance video as Geister's "prior inconsistent statement." We conclude that despite our conviction that the video was improperly admitted, the error does not require remand.

Factual background and board proceedings.[1]

Geister was hired as a substitute (on call) teacher aide by Kid's Corps, Inc., to work from February 5 to February 20, 2004.[2] The next day, she reported she slipped on an access ramp and injured her left knee and back. She continued to work until her assignment ended. She obtained treatment from a massage therapist, Dr. Kmet, a physician's assistant, and Dr. Lee for back and neck pain. She returned to California in April 2004. There she obtained treatment from Dr. Howard for back and neck pain. She was seen for an employer medical evaluation in Oregon by Drs. Reimer and Schilperoot in June 2004. Following this evaluation, Kid's Corps controverted all benefits on several grounds.[3]

Geister filed a claim for compensation in June 2004.[4] In July 2004, Kid's Corps controverted all benefits on the grounds that Geister had suffered no injury in the February 6, 2004 slip, she had no impairment, she was medically stable, and she was not disabled.[5] Kid's Corps also answered the claim, denying that the claimed disability arose out of and in the course of employment.[6]

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[1] We summarize the facts to place the appeal in context; we do not make findings of fact.

[2] Hr'g. Tr. 23.

[3] R. 0006.

[4] R. 0023-24.

[5] R. 0008.

[6] R. 0030.

On a brief trip to Anchorage in August 2004, Geister saw Dr. Declan Nolan for knee pain. When she returned to California, she saw Dr. Kantor for knee pain. She also changed her attending physician to Dr. Helman and then to Dr. Dramov, who practiced in Dr. Helman's office. On referral by Dr. Dramov, she began treatment by Dr. Klassen for her knees.

Geister obtained an attorney who entered an appearance in October 2004. In January or February 2005, Geister filed a second report of injury with the board, stating that on February 18, 2004, she had injured her back picking up a child from a cot and moving the child to a table.[7] Kid's Corps controverted the February 18, 2004 injury[8] and petitioned to join this injury with the case of the February 6, 2004 injury.[9]

Kid's Corps sent Geister to another employer medical evaluation by Drs. Reimer and Schilperoort in June 2005. Geister requested a second independent medical evaluation (SIME) under AS 23.30.095(k), which Kid's Corps challenged on the grounds of lack of medical dispute. The parties agreed to a board hearing on the SIME request on February 3, 2006.[10] The board heard Geister's petition shortly thereafter and denied the requested evaluation in an interlocutory decision.[11] Geister filed a petition for reconsideration,[12] which was deemed denied by operation of law due to board inaction.[13]

The board heard Geister's claim on June 14 and 15, 2006. The issue before the board was whether Geister's "current conditions" were compensable after July 27,

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7 R. 0020.

8 R. 0068.

9 R. 0066-67.

10 R. 1216.

11 AWCB Dec. No. 06-0083 (April 17, 2006).

12 R. 0207-234.

13 AS 44.62.540(a).

2004.[14] The board applied the three-step presumption analysis. After reviewing the "copious evidence submitted to the Board," the board found Geister had attached the presumption of compensability.[15] The board found the employer had rebutted the presumption.[16] Because Dr. Dramov refused to submit to a properly noticed deposition, the board did not consider her opinion.[17] Weighing the remaining evidence, the board found that the employee did not prove her claim by a preponderance of the evidence.[18] The board denied the claim.[19] This appeal followed.

Arguments presented on appeal.

Geister argues first that the board's denial of a second independent medical evaluation (SIME) under AS 23.30.095(k) was not supported by substantial evidence because the board found no dispute existed, but the record evidence shows that a dispute did exist between Dr. Dramov and the employer's medical evaluators regarding the relationship between her work and her condition and need for treatment. She argues the board should have ordered an SIME to resolve the dispute. Geister next challenges the failure of the board to order reconsideration of its decision following the submission of Dr. Helman's deposition. Geister argues that Dr. Dramov's opinions should be admissible as a "business record" exception to the hearsay rule, or, if not, that by providing an opportunity to cross-examine Dr. Dramov's employer, Dr. Helman, she "cured" the objection to admission of Dr. Dramov's opinion. Finally, Geister argues that the board should not have admitted a video because Kid's Corps failed to file it as documentary evidence under 8 AAC 45.120(f).

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[14] *Darcey A. Geister v. Kid's Corps, Inc.,* AWCB Dec. No. 06-0208, 1 (July 24, 2006); R. 1245.

[15] AWCB Dec. No. 06-0208 at 8; R. 1242.

[16] *Id.*

[17] AWCB Dec. No. 06-0208 at 9; R. 1243.

[18] *Id.*

[19] AWCB Dec. No. 06-0208 at 10; R. 1244.

Kid's Corps argues that the grant or denial of a request for an SIME is within the discretion of the board because the statute now provides that the board *may* direct an SIME in the event of a dispute. Because the physicians' opinions rested on differing accounts of how the injury occurred, the real dispute was factual, not medical. The board's failure to mention Dr. Dramov's opinion in its April 17, 2006 decision does not prevent meaningful review. Kid's Corps argues that the board's refusal to take up reconsideration was not an abuse of discretion. Kid's Corps argues that the board properly refused to consider Dr. Dramov's opinion in reaching a decision on compensability because Geister failed to make her available for cross-examination. Finally, Kid's Corps argues the video was properly admitted as rebuttal evidence of a prior inconsistent statement by Geister, after Geister had testified. Providing Geister twenty days to rebut the video mitigated any surprise Geister may have suffered. Therefore, the board's decision should be affirmed.

Our standard of review.

This appeal presents challenges to the board's rulings to admit or reject certain evidence. The commission is directed by the Alaska State Legislature to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[20] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[21] The commission is required to exercise its independent judgment on questions of law and board procedure.[22] If we must exercise our independent judgment to interpret the workers' compensation act or regulations, where they have not been addressed by the Alaska Supreme Court, we draw upon the specialized knowledge and

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[20] AS 23.30.128(b).

[21] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[22] AS 23.30.128(b).

experience of this commission in workers' compensation,[23] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[24] When we review the board's exercise of the discretion granted to it by the Alaska State Legislature, we examine the board's ruling for an abuse of that discretion; but, we apply our independent judgment if the board's ruling turns on an issue of law or procedure.

Discussion.

This appeal asks the commission to resolve three challenges to the board's rulings, which the appellant argues are so erroneous and prejudicial an abuse of discretion as to require remanding the case to the board.

1. The decision to grant or deny a second independent medical evaluation is committed to the board's discretion, but the board must adequately explain its decision.

Following the Alaska Supreme Court's decision in *Dwight v. Humana Hospital Alaska,*[25] the legislature amended[26] AS 23.30.095(k) to provide that in the event of a medical dispute between the employee's attending physician and the employer's medical examiner, the "board *may require* that a second independent medical evaluation be conducted." As previously written, the statute gave the parties a right to request and obtain an SIME .[27] The Court noted:

> That such exams are expensive is well understood. That this economic burden was intended by the legislature to be automatically passed to the private sector and the ultimate consumer of goods and services [via the employer] when such

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[23] *See Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[24] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[25] 876 P.2d 1114 (Alaska 1994).

[26] §4 ch 75 SLA 1995.

[27] 876 P.2d at 1119 (interpreting the previous statute, which provided that in the event of a medical dispute, "a second independent medical examination *shall be conducted.*") (Emphasis added).

> exam is unnecessary to the proper performance of the Board's responsibilities seems more than doubtful.
>
> Some dispute-in the general sense-will usually exist between an employer's physician and an employee's physician in any workers' compensation case that is contested before the Board. There is no evidence that the legislature intended that a SIME occur in every such case.[28]

By amending the statute to provide that the board *may require* an SIME, the legislature made it clear that the decision to order an SIME rests within the sound discretion of the board.

The board will not find an SIME useful in every case. SIME reports are particularly useful when the conflict in medical opinion turns on a medical or scientific question. For example, when differences in the method of scientific analysis used by the employee physician and the employer medical examiner result in different opinions, the SIME may be able to assist the board by explaining the underlying assumptions of each method, how they should be applied, and why one or the other method should be used in the case at hand. SIME reports are also generally useful in cases involving unusual mechanisms of injury or occupational disease when causation is in dispute.

Based on the commission's experience of the workers' compensation system, there are reasons why a board panel may exercise its discretion not to grant a request for an SIME, even when there is a medical dispute. After weighing the expense of the evaluation, delay, need for extended travel and associated costs, significance of the medical dispute to the material and contested issues in the claim, quantity of medical evidence already in the record, likelihood of new and useful information, and the board panel's familiarity with the subject area of the dispute,[29] the board may decide that it is "more doubtful" that an SIME would assist the board in reaching a decision on the

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[28] 876 P.2d at 1119.

[29] New board members may lack experience of the subject area in dispute. Over the course of a term, however, board members are likely to review hundreds of pages of medical reports, depositions, illustrations, and testimony involving back injuries attributed to slips, falls, and lifting.

material and contested issues before it and therefore it will not grant a request for an SIME.

Settlements may be reached after the SIME report is distributed because of the inherent quality of the report or because the report acts as a "tie-breaker" in cases of limited disputes. As commendable a result as this may be, the SIME process does not exist to appoint physicians to arbitrate contested workers' compensation claims. The first purpose of the SIME is to provide information to the board; it is not a discovery tool used by one party against another. It also should not be used to delegate the board's responsibility to decide claims.

At hearing on Geister's request for an SIME, the parties focused on whether Geister presented evidence of a significant medical dispute, or whether, as Kid's Corps maintained, the dispute was a factual one, turning on Geister's account of her injury. Kid's Corps objected to Dr. Dramov's letters, and argued the board should not consider them in determining whether a dispute existed.[30]

The board found that "based on the deposition testimony of Drs. Howard and Klassen, that there does not currently exist a dispute between physicians *sufficient to warrant an SIME.*"[31] The board added, "Since the Board *does not find* a dispute, *much less a significant one,* it further finds that having a Board-ordered opinion at this time would not assist in determining the issues currently before it."[32] The first sentence suggests that the board noted a minor medical dispute, but it was not significant enough to require an SIME. The next sentence suggests it did not find a dispute, not even a minor one. These contradictory inferences, coupled with the absence of mention of Dr. Dramov's letters, suggest the board did not deny the SIME request because the dispute was not significant, or not material to the contested issue before the board, but because it had not considered Dr. Dramov's letters. On the other hand,

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30 R. 0138 (Employer's Hr'g Br. at 12, March 13, 2006).

31 AWCB Dec. No. 06-0083 at 5. (Emphasis added).

32 *Id.* (Emphasis added).

it is possible that the board did consider Dr. Dramov's letters. The board may have determined that the medical dispute established by Dr. Dramov's letters was insignificant, or that even if significant, an SIME would not assist in resolving the disputes before the board. It may be the board simply did not mention it in its limited analysis, although the board's summary of the evidence indicated it was aware of Dr. Dramov's treatment.[33]

We cannot determine from these conclusions how the board responded to the challenge to Dr. Dramov's reports. If the board *weighed* the competing reports, letters and testimony against each other 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.[34]

However, in this case, the use of Dr. Dramov's letters was contested, and we cannot find an analysis of how the board reached a decision on that issue. We agree that the board need not address every minor issue the parties raise, but when the

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[33] *Id.* at 3-4.

[34] The board may evaluate the document containing the opinion and reject it because it lacks internal indicia of reliability (i.e., it is not evidence on which a reasonable person could base a conclusion that a physician expressed an expert opinion regarding the claimant's condition).

board fails to make a finding required to address a material and contested issue, we cannot use our discretion to assume the board's analysis.[35]

We therefore remand this case to the board to decide whether Dr. Dramov's letters establish a medical dispute, and, if so, to determine whether that dispute is sufficiently significant to warrant an SIME, taking into consideration all other factors relevant to the board's exercise of its discretion to grant or deny an SIME this case.

2. A physician's expert opinion letter is not admissible as a business record exception to the hearsay rule if offered for the truth of the physician's expert opinion on the issue in dispute.

Dr. Dramov's letters were written October 14, 2004,[36] December 15, 2004,[37] March 10, 2005,[38] March 16, 2005,[39] April 20, 2005,[40] May 19, 2005,[41] and March 16, 2006.[42] They were filed with medical summaries in accordance with 8 AAC 45.052.[43]

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[35] AS 23.30.128(a) ("appeal shall be decided on the record made before the board"). *See also, Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270, 1275 (Alaska 1999).

[36] R. 0703-04 (addressed "To Whom It May Concern").

[37] R. 0705-07 (addressed to Mr. Kalamarides, Geister's attorney).

[38] R. 0708-09 (addressed to Alaska National Insurance Co.).

[39] R. 0710 (addressed "To Whom It May Concern").

[40] R. 0742-3 (addressed Alaska National Insurance Co.).

[41] R. 0747-48 (addressed Alaska National Insurance Co.).

[42] R. 0914 (addressed Alaska National Insurance Co.).

[43] 8 AAC 45.052(c) provides in pertinent part:

> Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.
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> (1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a

medical report listed . . . the party must file . . . a request for cross-examination . . . .

(2) If a party served with an affidavit of readiness . . . wants the opportunity to cross-examine the author of a medical report listed on the medical summaries . . . a request for cross-examination must be filed . . . within 10 days . . . .

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

(A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine . . . and

(B) if a party served with an updated medical summary . . . wants the opportunity to cross-examine the author of a medical report listed . . . a request for cross-examination must be filed . . . within 10 days . . . .

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

(5) A request for cross-examination must specifically identify the document by date and author . . . be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.

(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

With two exceptions, these letters were the subject of timely requests for cross-examination.[44] The board ruled that Dr. Dramov's opinions "could not be considered in determining compensability since she refused to submit to cross-examination by the employer."[45] The appellant argues the board erred in refusing to consider Dr. Dramov's letters expressing her opinion that Geister's need for treatment was caused by the work injury, and that they are "admissible under a hearsay exception of the Alaska Rules of Evidence" as provided in 8 AAC 45.120(h)(1).

The medical summary and request for cross-examination process set out in 8 AAC 45.052 was developed in response to the Alaska Supreme Court's decision in *Commercial Union Cos. v. Smallwood*.[46] This case is so firmly entrenched in board practice that the objection to admission of medical reports based on the unavailability of the author for cross-examination is commonly referred to as a "*Smallwood* objection." In *Smallwood*, the employee introduced, and the board refused to consider after the employer's written objection, medical opinion letters from his physicians, that stated his kidney failure was caused by hypertension, which was aggravated by his work as a truck driver between Fairbanks and the North Slope. On appeal the Superior Court held that the employer waived the introduction of the opinion letters because the

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[44] R. 0070, 0096, 0254. Our review of the record found no objection to the letters dated March 16, 2005 and March 16, 2006. The *absence* of objection to these brief letters was not raised as a point on appeal. Geister claims the requests for cross-examination did not "specifically identify the document by date and author" because the author was listed as "Helman/Dramov." The letters were written on Dr. Helman's stationary, but signed by Dr. Dramov. The date was correct. This was sufficient to identify the letters.

[45] AWCB Dec. No. 06-0208 at 9.

[46] 550 P.2d 1261, 1267 (Alaska 1976). ("[T]his case illustrates the compelling need for the Alaska Workmen's Compensation Board to promulgate rules which will effectuate the Workmen's Compensation Act's policy of providing inexpensive and expeditious resolutions of claims for compensation while affording due process to all concerned parties. We therefore strongly recommend that the Board adopt procedures which will fill the present procedural void relating to medical reports and the right of cross-examination.").

employer had sufficient notice of the physicians' opinions and failed to inquire into them, so the board erred in failing to consider Smallwood's physician's letters. The Supreme Court held this was error:

> . . the statutes permitting informal administrative proceedings, AS 44.62.460(d) and AS 23.30.135(a), were never intended to, and could not, abrogate the right to cross-examination in an adjudicatory proceeding.
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> We therefore hold that the statutory right to cross-examination is absolute and applicable to the Board.[47]

Of this absolute right to cross-examine, the Court further said:

> Additionally we note that the better reasoned, and weight of, authority is to the effect that the right of cross-examination does not carry a price tag. We have not been referred to any court decision holding that a party waived his right of cross-examination when to exercise that right would have required that party to bear the initial cost of producing the witness at the hearing. Yet, if appellants in the case at bar desired to exercise their right to cross-examine the physician-authors of the medical reports introduced by Smallwood, they would have had the burden of bearing the cost of subpoenaing them. In light of the decisional law which enunciates the rule that the constitutional right of cross-examination is not dependent upon a monetary prerequisite, we further conclude that appellants did not waive their right of cross-examination in the case at bar by virtue of their failure to subpoena the authors of the medical reports.[48]

More recently, the Supreme Court has held that medical reports are admissible under the business record exception[49] to the rule barring introduction of hearsay

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[47] *Id.* at 1265 (quoting *Employers Commercial Union Ins. Group v. Schoen,* 519 P.2d 819, 824 (Alaska 1974)).

[48] 550 P.2d at 1266-67. (Citations omitted).

[49] Alaska Rule of Evidence 803(6):

> Business Records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum,

evidence, even if the declarant is available for cross-examination. In *Dobos v. Ingersoll,*[50] the plaintiff, Ingersoll, was struck by a taxi driven by Dobos. Ingersoll asked Dobos to concede admission of medical records from Kodiak Island Hospital and North Pacific Medical Center, but Dobos denied the records were non-hearsay or admissible.[51] As a result, Ingersoll called doctors to testify to lay a foundation for their admission, and the records were admitted without objection.[52] After prevailing at trial, Ingersoll sought attorney fees under Alaska R. Civil Pro. 37(c)(2) because Dobos failed to admit the genuineness of the records when requested under Civil Rule 36. The trial court refused the request, and Ingersoll cross-appealed.

The Supreme Court concluded that the trial court abused its discretion. The Court stated that "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule."[53] To the extent that Alaska R. Evid. 803(6) leaves any doubt as to the admissibility of *hospital records,* the Court said, "the commentary to this provision definitively resolves the question. Noting that entries in the form of opinions are 'commonly encountered with respect to medical diagnoses, prognoses, and test results,' the commentary states . . . 'the rule specifically includes both diagnoses and opinions as . . . proper subjects of admissible entries."[54] Dobos admitted that he had no doubt as to the genuineness of

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> report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

50 9 P.3d 1020 (Alaska 2000).

51 *Id.* at 1025.

52 9 P.3d at 1025.

53 9 P.3d at 1027.

54 9 P.3d at 1027 (citations omitted).

the records, but he denied the request to admit so that Ingersoll would put the doctors on the stand, so Dobos could cross-examine them as to their "medical conclusions."[55] The Court held this was not a reason to deny that the records were admissible because "if Dobos wished to question Ingersoll's doctors, he could have called them to the stand himself."[56]

The Court's holding in *Dobos v. Ingersoll* was reinforced in *Loncar v. Gray.*[57] Loncar, a taxi driver, was injured in a traffic accident. She claimed on appeal that she was prejudiced by the admission of all the medical records of doctors who testified and of those medical records upon which they relied. She argued that admission of the records was prejudicial because she did not have the opportunity to cross-examine all of the doctors. "However," the Court said, "if [Loncar] wished to question [the] doctors, [s]he could have called them to the stand [her]self."[58]

However, in *Liimatta v. Vest*,[59] the Supreme Court upheld the trial court's exclusion of a letter written by Dr. Kim Smith to the Social Security Determination Unit because Dr. Smith did not testify about the letter.[60] The Supreme Court agreed "the evidence . . . was not a medical record" and, because Liimatta did not establish that it was Dr. Smith's regular practice to prepare and send such evaluation reports, the letter was not a business record admissible under Alaska Evidence Rule 803(6).[61]

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55 *Id*. at 1028.

56 *Id.*

57 28 P.3d 928 (Alaska 2001).

58 *Loncar*, 28 P.3d at 935 (quoting *Dobos v. Ingersoll,* 9 P.3d at 1028).

59 45 P.2d 310 (Alaska 2002).

60 *Id.* at 318.

61 *Id.*

Finally, in *Municipality of Anchorage v. Devon*,[62] the Supreme Court answered the question of whether *Smallwood* continued to apply to workers' compensation cases in light of the Court's view of the business records exception. The Municipality argued it was entitled to cross-examine the author of medical reports under *Smallwood*, and, because its request was not granted, the reports were inadmissible.[63] The Court noted, "In Smallwood we held that parties have a right to cross-examine authors of reports submitted for review by the board."[64] Nonetheless, the Court held the Municipality did not establish the board abused its discretion. The Municipality did not object to introduction of two doctors' reports and did not request an opportunity to cross-examine the third doctor, so "Devon did not have the opportunity to establish the requisite foundation. Further, even assuming for the sake of argument that the board erred in admitting the reports, the municipality bears the burden of showing that it was prejudiced by the board's admission of these reports."[65] Without a showing of prejudice, the Court held, the admission of cumulative medical records was harmless error.

We conclude that *Smallwood* is still the law in workers' compensation cases, and that the right to cross-examination remains "absolute." However, 8 AAC 45.120(h) provides that an opportunity for cross-examination "will be provided unless the request is withdrawn *or* the board determines that . . . under a hearsay exception of the Alaska Rules of Evidence, the document is admissible." While the Court's decisions in *Dobos* and *Loncar* hold "medical records kept by hospitals and doctors" are business records, this holding is qualified by *Liimatta* and *Devon;* letters written by a physician to a party or party representative to express an expert medical opinion on an issue before the tribunal are not admissible as business records unless the requisite foundation is

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62 124 P.3d 424 (Alaska 2005).

63 *Id.* at 432.

64 124 P.3d at 432, n. 26.

65 124 P.3rd at 432.

established.[66] In this case, no such foundation was laid. The letters were written to the patient's attorney and to the workers' compensation insurer to express opinions on the core issue before the board. We conclude the board did not abuse its discretion in excluding Dr. Dramov's letters.

In *Smallwood,* the Court noted that Smallwood's physician was not an Alaskan resident, and therefore he

> would be outside the reach of process in this case. . . . Since we do not know whether Dr. Tenckhoff would voluntarily comply with a request for appearance, we decline to consider questions of the weight to be given his letters, assuming they are admissible at all, should he not appear after request.[67]

The parties agree that Dr. Dramov would not voluntarily comply with a request for a deposition. The appellant argues that, because Dr. Dramov is "unavailable," and Dr. Helman's adoption of Dr. Dramov's opinions, and deposition, "cures" the objection to using Dr. Dramov's letters, the letters should be admitted. However, Dr. Helman's deposition did not provide foundational information on how Dr. Dramov arrived at her opinions, and from his statements he had little basis to be able to testify regarding her opinions.[68]

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[66] *Liimatta v. Vest*, 45 P.3d at 318. We believe this balances the need to introduce medical business records, against the absolute right of the parties to cross-examination recognized in *Smallwood.* If the business record exception becomes so large that it includes expert medical opinion on the core issues litigated before the board, such as the relationship of the employment to the injury, the absolute right to cross-examination becomes an illusion. *But see, Thoeni v. Consumer Electronic Services,* 151 P.3d 1249, 1257 (Alaska 2007) (commenting that reports by the employee's physician, Mason, and the employer's physician, Rivard, "would likely be admissible under Evidence Rules 803(a)(4) . . . statements for purposes of medical diagnosis or treatment - or (a)(6) . . . business records."). It may be that the Supreme Court is ready to abandon *Smallwood,* but until it does, we are compelled to uphold the *Smallwood* rule.

[67] 550 P.2d at 1266-67 n. 20.

[68] Dr. Helman testified that Dr. Dramov was his employee. Helman Depo. 18:18. He also testified his contact with her was "confined to reporting the results of findings of the EMG tests." *Id.* at 7:21-22.

An exception to the hearsay rule exists for certain statements of a witness who is unavailable, because of persistent refusal to testify concerning the content of the statement despite an order of the court or a subpoena.[69] However, Dr. Dramov's letters do not match one of the listed types of statements not excluded by the hearsay rule if the declarant is unavailable.[70] Her letters, if she were unavailable, could be admitted *if* they met the residual hearsay exception.[71] We express no opinion on whether they do or do not, because it has not been established that Dr. Dramov's testimony is unavailable.

Both parties agreed that attempts were made to schedule a telephone deposition, but Dr. Dramov did not want to be deposed. As the Court noted in *Smallwood,* process is not available to compel the resident of another state to be a witness in an Alaska Workers' Compensation Board proceeding.[72] However, another reasonable means exists to secure the testimony of a witness in another state in workers' compensation proceedings. We note that neither party requested the board to "arrange to have hearings held by the commission, officer, or tribunal having authority to hear cases under the workers' compensation law" of California to take Dr. Dramov's testimony in California pursuant to AS 23.30.005(j).[73] The commission is aware that

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[69] Alaska R. Evid. 804(a).

[70] Alaska R. Evid. 804(b). The list includes former testimony, statements made under belief of impending death, statements against interest, and statements of personal or family history.

[71] Alaska R. Evid. 804(b)(5).

[72] The record does not contain a statement from Dr. Dramov that she refused to testify to the board.

[73] *Compare,* AS 09.43.440(g) (permitting state courts to enforce the subpoena of an arbitrator from another state under the Uniform Arbitration Act); AS 25.27.086 (directing compliance with a subpoena of another state's child support agency, subject to certain requirements); AS 23.30.280(h) (permitting director of Alaska Division of Workers' Compensation to designate official of another state to examine documents in that state on behalf of the director); "Draft Interstate Depositions and Discovery of Documents Act," National Conference of Commissioners on Uniform State

this provision is little used, but it is also uncommon that an out-of-state physician flatly refuses to be deposed in a workers' compensation claim.[74]

> *3. A video recording of the observations of actions alone by an investigator conducting surveillance is not admissible without foundation testimony as to the circumstances of the recording if the recording is not known to, or adopted by, the subject of surveillance as a statement.*

We turn finally to the issue of the video recording of Geister, which the board admitted over Geister's objection as a "prior inconsistent statement"[75] in rebuttal[76] to

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Laws (Jan. 31, 2007), available by link to the Drafting Committee on a Uniform Interstate Depositions and Discovery Act at the website of the NCCUSL, www.nccusl.org, last viewed May 25, 2007.

[74] Dr. Helman offered no explanation as to why Dr. Dramov did not want to be deposed. But, he said, "I can tell you generally I've heard remarks about how she is emotionally intimidated by the medical legal process." Helman Depo. 19:20-22.

[75] Alaska R. Evid. 613 provides:

> (a) General Rule. Prior statements of a witness inconsistent with the testimony of the witness at a trial, hearing or deposition, and evidence of bias or interest on the part of a witness are admissible for the purpose of impeaching the credibility of a witness.
>
> (b) Foundation Requirement. Before extrinsic evidence of a prior contradictory statement or of bias or interest may be admitted, the examiner shall lay a foundation for impeachment by affording the witness the opportunity, while testifying, to explain or deny any prior statement, or to admit, deny, or explain any bias or interest, except as provided in subdivision (b) (1) of this rule.
>
> > (1) The court shall permit witnesses to be recalled for the purpose of laying a foundation for impeachment if satisfied that failure to lay a foundation earlier was not intentional, or if intentional was for good cause; even if no foundation is laid, an inconsistent statement may be admitted in the interests of justice.
> >
> > (2) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed

Geister's testimony regarding her physical abilities. We reject the appellant's argument that recorded conduct cannot be a statement. If conduct can be "symbolic speech," or so expressive as to be entitled to constitutional protection as speech, it can be a "statement." A video recording of the declarant's conduct can be a statement that is inconsistent with the declarant's testimony in hearing or deposition. An example of this is the person who testifies "I do not know how to play golf" and is recorded a month earlier winning a golf tournament. The recorded conduct is an expression of the declarant's knowledge of the game of golf. A video can be a statement of the abilities and disabilities of an employee after injury. Our concern here is whether the statement that was offered to rebut Geister's testimony and impeach her credibility displayed sufficient internal indicia of expression and reliability as to be admissible over Geister's objections as a prior inconsistent statement *by Geister*, without introducing testimony regarding the authenticity and circumstances of the recording.

A video recording made by the declarant is the functional equivalent of the declarant's own writing; the declarant controls both the expression and means of recording the expression. Such videos clearly can be introduced as prior inconsistent statements. Just as a declarant's written statements to governmental agencies for governmental purposes, such a Department of Fish and Game Harvest Report or Hunt application, may be prior inconsistent statements; so also video recordings given in similar circumstances, such as a video recording of declarant's participation in a public meeting of a state agency, may be statements. A video recording made by another but *adopted by the declarant*, (for example, by the declarant placing it on a personal web page, on Facebook, or similar sites, or otherwise distributing copies), becomes the declarant's statement. A video recording made by a non-party with the permission of the declarant, such as a film of a tournament or festival, or with the declarant's

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> to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

[76] Appellee filed a witness list that included "rebuttal witnesses, if necessary." R. 0252.

knowledge, such as a closed circuit camera at a shop, has sufficient indicia of the declarant's intentional expression and reliability to be admissible as a prior inconsistent statement.

When the declarant's conduct is recorded without the knowledge or permission of the declarant by an agent of the party opponent, the resulting video may certainly be a record of prior conduct that is inconsistent with the declarant's testimony, but it is not necessarily the declarant's inconsistent statement of expressive conduct. Such videos are more like a record of the witness's observations than a record of the declarant's own expressive conduct, unless the conduct recorded is clearly intended to be expressive to the public, such as participation in a parade.

Videos, like photographs, may be manipulated and edited; portions of the declarant's conduct may be omitted so as to result in a recording that is so altered that it is not an accurate representation of the declarant's conduct. That is why the recording witness should be available to lay a foundation for admission of the video and for cross-examination. While the appellant's objection could have been more clearly articulated at the hearing,[77] we conclude the appellant was attempting to draw this distinction, which the board failed to address. The board did not require authenticating evidence, or testimony from the witness who recorded his observations, when it admitted the videotape; it did, however, permit Geister to respond to the content of the tape. Thus, while we are convinced the board did abuse its discretion in admitting excludable hearsay, we are not firmly convinced the error was prejudicial.

Factors relevant to this determination include the relative amount of time at hearing devoted to the evidence and whether the inadmissible evidence was cumulative and largely replicated other admissible evidence. In this case, the board heard no testimony about the videotape, except Geister's own explanation of the circumstances. The videotape was not dramatic and relatively short. The hearing did not include much discussion of the videotape. In its decision, the board's substantive discussion focused on the doctors' reports – it did not mention Geister's credibility and did not base its

[77] Hrg Tr. 67:12 – 68:6.

decision on the video tape. However, the videotape was the only evidence of its kind: direct observation of conduct contradicting Geister's testimony.

The appellant has the burden of demonstrating that the challenged evidence prejudiced the outcome of the hearing. She argues that because the reliability of Geister's later statements to her physicians was a significant issue in the hearing, and the board's rejection of some medical opinions derived from an assessment of the credibility of Geister's later statements compared to her statements closer in time to the injury, the video may have affected the outcome of the case, even if the board made no explicit findings that Geister did not testify credibly.[78] On the other hand, since the board made no explicit finding that Geister was not credible,[79] the tape was not shown to any of the physicians for their opinions, and the board did not state that it relied on the videotape in its decision, the board may well have not given the tape any weight. The board had substantial evidence to support its decision without the videotape and the board decision was clearly based on the medical opinions, not Geister's testimony. We can only conclude that the appellant has demonstrated a *possibility* that the board's opinion of Geister was affected by the board's admission of the videotape, but Geister did not establish that it is *probable* that she was prejudiced. We cannot act on mere possibilities of what the board may have been thinking. We therefore decline to remand on this issue.

Conclusion.

We VACATE the board's order in decision no. 06-0083. We REMAND this case to the board for additional findings and explanation of the board's decision not to order a

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[78] *Hoth v. Valley Constr.*, 671 P.2d 871, 874 n. 3 (Alaska 1983) ("Absent specific findings by the Board that it chose to disbelieve a witness's testimony, we will not assume that lack of credibility was a relevant factor in the Board's decision."). Neither will we assume that credibility of witness whose testimony was contradicted was a relevant factor in the board's decision in the absence of a finding by the board.

[79] *Williams v. State, Dept. of Revenue*, 938 P.2d 1065, 1075 (Alaska 1997) ("Board noted that Williams was the source of much of the information on which witnesses relied in forming opinions supporting Williams's claim; however, the Board made no finding that Williams was not a credible or reliable reporter.").

second independent medical evaluation in accord with this decision, and further proceedings as the board determines are required. We AFFIRM the board's decision to refuse to consider Dr. Dramov's letters. The board may, if further proceedings are opened under our remand order, choose to commission the California workers' compensation authorities to take Dr. Dramov's testimony pursuant to AS 23.30.005(j). We REVERSE the board's decision to admit the videotape as a "prior inconsistent statement." We REMAND the case to the board for further proceedings in light of this decision. The board may exercise its discretion to determine what further proceedings are required, and whether to reopen the record and consider additional evidence to allow the parties to be afforded due process and an opportunity for their evidence to be fairly considered. The commission clerk is requested to return the record to the board's appeal clerk within 45 days, if no proceedings are initiated in the Supreme Court from this decision.

Date: *June 6, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

Although this is a final commission decision on this appeal from the board's decision and order, but it is NOT a final decision on Ms. Geisters's workers' compensation claim. The effect of this decision is to return the case to the board. The commission reversed some parts of the board's decision, and affirmed (upheld) other parts of the board's decision. However, because the commission remanded (sent the case back) to the board, there will be further proceedings before the board before Ms. Geister's claim is fully concluded and a final decision is issued by the board. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on all of Ms. Geister's claim, since the commission directed further proceedings, the Supreme Court may, or may not, accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Memorandum Decision and Order in the matter of *Darcey A. Geister vs. Kid's Corps, Inc., and Alaska National Insurance Co.*; AWCAC Appeal No. 06-022; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *6th* day of *June*, 2007.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No.06-022 was mailed on *6/6/07* to Kalamarides and Heikes at their addresses of record and faxed to Heikes, Kalamarides, AWCB Appeals Clerk & Director WCD.

Signed
L. A. Beard, Deputy Appeals Commission Clerk