Alaska Workers' Compensation Appeals Commission

Stephen Olafson,
Appellant,

vs.

State of Alaska, Department of Transportation and Public Facilities,
Appellee.

Final Decision and Order
Decision No. 061 October 25, 2007

AWCAC Appeal No. 06-033
AWCB Decision No. 06-0301
AWCB Case No. 199017083

Appeal from Alaska Workers' Compensation Board Decision No. 06-0301, issued November 9, 2006, by the southcentral panel at Anchorage, Krista M. Schwarting, Chair, Patricia A. Vollendorf, Member for Labor, and S. T. Hagedorn,[1] Member for Management.

Appearances: Michael J. Jensen, Law Offices of Michael J. Jensen, for appellant Stephen Olafson. Talis J. Colberg, Attorney General, and Joe Cooper, Assistant Attorney General, for appellee State of Alaska, Department of Transportation and Public Facilities.

Commissioners: John Giuchici, Philip Ulmer, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.[2]

Stephen Olafson appeals the board's failure to strike Dr. Brooks's Second Injury Medical Examination (SIME) report. He objects to the SIME examination because the

[1] Stephen T. Hagedorn was appointed to the appeals commission on March 1, 2007. He took no part in this appeal.

[2] The chair represented the State of Alaska briefly in the employee's 1992 reemployment benefits appeal. Her work concluded 15 years ago and she had no personal recollection of it or the appellant. While the chair's employment as a former assistant attorney general is not a disqualifying conflict of interest, AS 23.30.007(l)(1), the chair nonetheless notified the parties by telephone conference call promptly following discovery of her representation in 1992. The parties responded they had no objection to the chair's continued participation in this decision.

pre-hearing officer abused her discretion by failing to disqualify Dr. Brooks for failure to disclose potential conflicts of interest. He also asserts she was required to respect the parties' stipulation to substitute another physician. We agree that once the pre-hearing officer cancelled the SIME, she could not disregard the stipulation reached by the parties without good cause. The board failed to address this issue. The board failed to decide if Dr. Brooks had an actual, disqualifying conflict of interest and if the SIME report was the result of partiality. We vacate the board's order and remand with instructions to rehear the petition.

I. FACTS AND PROCEEDINGS.

Stephen Olafson injured his lower back in the course of employment for the State of Alaska in 1990, when he was 41 years old.[3] He had surgery;[4] he was paid compensation;[5] and, he was provided a re-employment benefits evaluation, which determined that he was not eligible for benefits. The determination was upheld by the board.[6] He moved to Washington,[7] where he still lived when these events occurred.[8]

The State resumed payments to Olafson in 1999 following onset of back pain.[9] He was paid temporary total disability almost continuously from July 2, 1999 to July 13, 2004, and he received a second lump sum payment of permanent partial impairment

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[3] R. 0001.

[4] R. 0273. A left L4-5 diskectomy (removal of an intervertebral disc) was performed November 20, 1990 by Thomas Vasileff, M. D.

[5] R. 0004. His compensation included $13,500 in permanent partial impairment benefits.

[6] *Stephen V. Olafson v. State of Alaska,* Alaska Workers' Comp. Bd. Dec. No. 92-0103 (April 24, 1992).

[7] R. 0338. He reported an occupational injury to the Washington Industrial Insurance Fund in April 1994, listing his job as "lead carpenter," the location of the injury on a jobsite in Seattle, and his address in Steilacoum, Washington.

[8] R. 0194-5, showing a Lakewood, Washington address when the SIME was scheduled in 2006.

[9] R. 0008.

compensation of $17,500 paid in July 2004.[10] During his period of temporary disability, Olafson underwent two additional lower back surgeries.[11] He filed a claim for permanent total disability compensation on May 30, 2005.[12] The State controverted[13] and answered the claim on June 22, 2005.[14]

On January 12, 2006, Olafson agreed he did not object to a second independent medical examination proposed by the State.[15] The parties also agreed to set the hearing on the claim for May 23, 2006.[16] The parties stipulated to the disputed issues[17] and the pre-hearing officer, Kristy Donovan, issued an order directing the parties to submit records for the SIME on January 26, 2006.[18] On February 14, 2006, Olafson's attorney submitted questions for the SIME physician, stating in his letter to Donovan that "Mr. Olafson reserves his right to object to this SIME taking place if the SIME physician reveals a potential conflict."[19]

On March 10, 2006, Donovan wrote to Dr. Brooks confirming the appointment to the SIME and giving instructions.[20] Donovan's instructions included the following

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[10] R. 0020.

[11] R. 0463, R. 0499. Olafson had other surgeries as well between 1990 and 2005. The medical record submitted to the SIME physician exceeded 1200 pages.

[12] R. 0034-35.

[13] R. 0021.

[14] R. 0038-42.

[15] R. 2237.

[16] R. 2237.

[17] R. 1815.

[18] R. 2243-45.

[19] R. 1817.

[20] R. 1823.

paragraph concerning disclosure of potential conflicts of interest:

> It is important that the SIME is truly independent, and that neither you nor anyone with whom you practice, now or in the past, have treated or examined STEPHEN V. OLAFSON. It is also important for the parties to know if you have performed any evaluations on behalf of the employer during the previous 12 months. Therefore, before acting on this SIME, please review your records to make sure there is no conflict of interest or any reason why you should not perform the SIME. If you find any association between you, your partners, and this case, or the parties of this case, or believe there is any conflict of interest, which would affect your independence, please contact me before preparing for this SIME.[21]

The same day, Donovan sent Olafson a notice to attend the SIME on March 27, 2006, in Bellevue, Washington.[22]

Three days later, Jensen, Olafson's attorney, wrote to Donovan. He asked Donovan to "assure the lack of potential bias would you please confirm that Dr. Brooks has not performed prior medical evaluations paid directly or indirectly by the employer and/or its adjusters."[23] Jensen also asked that Donovan confirm that he "has not associated himself with the doctors retained by the Seattle Orthopedic and Fracture Clinic and/or OMAC or performed evaluations" through those organizations. "These questions," Jensen wrote, "will further ensure that Dr. Brooks has no conflict and his evaluation is truly independent. Mr. Olafson reserves his right to object to this SIME taking place if Dr. Brooks reveals a potential conflict."[24]

On Thursday, March 16, 2006, the parties held a telephone conference with Donovan. There is no note of the conference in the record. The State later related the parties agreed to "attempt to reschedule the SIME with another physician rather than

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[21] R. 1823.

[22] R. 1828.

[23] R. 1830.

[24] R. 1830.

litigate Olafson's objection to Dr. Brooks."[25] Jensen stated the parties agreed that "Dr. Brooks should not perform the SIME" and that it should be done by Dr. Puziss.[26] The record does not contain a written stipulation signed by both parties. Whatever occurred, on March 16, 2006, the State's adjuster notified Olafson that the SIME was cancelled and would be rescheduled.[27]

On Monday, March 20, 2006, Donovan notified the parties that she spoke with Dr. Brooks regarding canceling the SIME.[28] She wrote:

> Dr. Brooks informed me that he had already spent an extensive amount of time reviewing the medical records.
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> I also spoke with Dr. Brooks regarding any potential conflict of interest he may have with the State of Alaska. Dr. Brooks stated that although he has performed examinations for the State of Alaska, they have not been in a quantity that he would feel it would be a conflict of interest. Dr. Brooks did name a couple of employers that he would consider a conflict of interest because of the number of examinations he has performed for them.
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> Please inform you[r] client that he is to attend the examination with Dr. Brooks on March 27, 2006 at 10:00 a.m. as scheduled.[29]

That same day, Jensen wrote to Donovan urging her to reconsider, or, if unable to reconsider, that she "refer this matter to the Alaska Workers' Compensation Board for a hearing prior to the March 27, 2006 appointment."[30] Evidently he also had a conversation with her, which he discussed in a letter written March 21, 2006.[31] The substance of this conversation was not recorded by Donovan.

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[25] R. 0149.

[26] R. 0173, 0192.

[27] R. 0193.

[28] R. 1832.

[29] R. 1832.

[30] R. 1839.

[31] R. 1841. Jensen does not state if this was, or was not, an *ex parte* conversation, but there is no record that the State's attorney was present.

On March 21, 2006, Olafson filed an emergency petition to continue the SIME and obtain an order for disqualification of Dr. Brooks.[32] The following morning, March 22, 2006, Donovan faxed to the parties a copy of the March 21, 2006 letter she had received from Dr. Brooks:

> In response to your question whether I have a conflict of interest in performing a second independent medical examination of Mr. Olafson, the answer is no. . . . [T]he state of Alaska is for me a low volume client. I could recall two recent employer's medical examinations (EME's), the most recent being almost a year ago, on June 22, 2005. A search of my computer using Windows Explorer revealed another five EME's, for a total of seven since I began coming to Alaska in 2002. Given this low volume, and because I would answer questions in the same manner whether the claim involved the state or another private employer or governmental entity, there is in my opinion no conflict of interest.[33]

Olafson's attorney responded by filing an affidavit of readiness to proceed on the petition the same day.[34] He also informally requested that the State give him a list of all cases in which Dr. Brooks has been retained as an expert in the last 12 months, those cases in which he was currently retained and those on which he is "expected to be retained."[35] On March 23, 2006, Rebecca Cain, the State's attorney,[36] wrote to Donovan.[37] Ms. Cain stated she had agreed to substitute another physician in order to avoid just such a situation as had now occurred.[38] She was concerned that the May 23,

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[32] R. 0070.

[33] R. 0135.

[34] R. 0073. The affidavit was rejected as filed prematurely. R. 2249.

[35] R. 0136.

[36] The State is represented by Assistant Attorney General Joe Cooper in this appeal.

[37] R. 0137.

[38] *Id.*

2006 hearing on Olafson's claim would be further delayed.[39] She pointed out that "whether a witness is biased or not is an issue for the Board to review at hearing when it decides what weight to give the witness's evidence."[40]

Olafson attended the Monday, March 27, 2006, SIME by Dr. Brooks. The examination resulted in a 47-page report.

On Thursday, April 6, 2006, Olafson's attorney wrote again to Donovan, complaining that Dr. Brooks told Mr. Olafson that he had only skimmed the SIME medical binders and that "Dr. Brooks had not spent the over 20 hours he had told you he had spent preparing for the SIME at the time you spoke to him."[41] Because, he said, this was the "sole basis" for the decision to order his client to attend the deposition despite the parties' stipulation, he asked her to reconsider. Donovan responded the following day. Questions about the hours spent reviewing the SIME records could be addressed in a deposition.[42] Regarding the reason given for going forward with deposition, she said:

> Dr. Brooks spending 20 hours reviewing the medical records was not my sole reason for not continuing the SIME appointment. Once an SIME is ordered and the appointment is made it becomes a Board order that I cannot alter with[out] Board approval. My reason for not changing the SIME appointment was two fold. The amount of time Dr. Brooks had already spent on the SIME and the fact that a Board order was in place. I will not reconsider my decision.[43]

On April 7, 2006, Olafson mailed formal requests for production to the State's attorney, including a request that the State produce a list "of all cases in which Dr. Brooks has been retained as an expert by the State of Alaska since January 1, 2001

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39 *Id.*

40 R. 0137.

41 R. 0139.

42 R. 0140.

43 R. 0140.

and the fee charged by Dr. Brooks."[44] He also asked for the number of cases for which Dr. Brooks "is currently retained or expected to be retained by the State of Alaska in the next 12 months" including "all civil cases, not just workers' compensation cases, in which the State of Alaska is a party."[45] On April 21, 2006, the State responded with a list of 16 workers' compensation, tort, or maritime cases from 2001 to 2006 in which Dr. Brooks had been paid fees ranging from $200 to $55,950.[46] The State's list did not include a description of services; simply the amount of fee paid, the name of the examinee, the type of case, if it was open or closed, litigated or unlitigated,[47] and the year the fee was paid.

The parties stipulated to continue the hearing on the claim scheduled for May 23, 2006, because the SIME report had not been received.[48] The board ordered the hearing cancelled.[49] The matter finally came before the board after Dr. Brooks's deposition was taken on September 8, 2006. Although several pre-hearing conferences were scheduled, a hearing was not finally scheduled until August 2, 2006, when a hearing date of October 10, 2006 was assigned.[50] The hearing was limited to the Employee's petition to strike Dr. Brooks's SIME report and the question whether Donovan abused her discretion in ordering the SIME to proceed. No testimony was taken.

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[44] R. 0083.

[45] R. 0083.

[46] R. 0089-90. Most of the information requested was not available from the State, since it concerned Dr. Brooks' relationships with other persons, and, as the State's response noted, the State was prohibited from ex parte contact with an SIME physician. 8 AAC 45.092(i).

[47] This term was not defined, but the commission assumes that it means the examinee had filed a complaint or claim that was disputed by the State.

[48] R. 0104.

[49] R. 0105.

[50] R. 2270-71.

The board's decision examined the circumstances leading up to the SIME. First, the board determined that it would review Donovan's decision for "abuse of discretion;" that is, whether it was supported by substantial evidence, or was "arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive."[51] It cited *Keith v. Norton Sound Health Corp.,*[52] for the proposition that AS 23.30.108(c) "applied to a board designee decision to order an SIME."[53] The board found that the employee "originally stipulated to an SIME and agreed to leave the selection of a physician to WCO Donovan."[54] The board found

> WCO Donovan followed up with Dr. Brooks about the interrogatories, attempted to accommodate the parties request for a different physician, but ultimately concluded that the evaluation should remain with Dr. Brooks to avoid the expense of rescheduling an SIME after Dr. Brooks had already begun reviewing records.
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> . . . WCO Donovan followed the applicable regulations regarding setting SIMEs set forth in 8 AAC 45.092(e). WCO Donovan selected a physician from the board's SIME list, and was wholly unaware at the time that there was a potential conflict of interest in the case. . . . WCO Donovan promptly and thoroughly followed up on the employee's concerns regarding bias, and attempted to cancel the SIME without expense to the parties. It was only after Dr. Brooks asserted that 1) he had already spent a substantial amount of time on the case and 2) he did not believe he had a conflict of interest that WCO Donovan ordered the SIME to proceed as scheduled.
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> . . .. The Board finds that WCO Donovan's decision is supported by substantial evidence and concludes she did not abuse her discretion.[55]

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[51] *Stephen V. Olafson v. State of Alaska,* Alaska Workers' Comp. Bd. Dec. No. 06-0301, 4-5 (November 9, 2006).

[52] Alaska Workers' Comp. Bd. Dec. No. 03-0175 (July 28, 2003).

[53] *Stephan V. Olafson,* Dec. No. 06-0301, at 4 n. 19.

[54] *Id.* at 6.

[55] *Stephen V. Olafson,* Alaska Workers' Comp. Bd. Dec. No. 06-0301 at 6-7.

The board denied the petition to strike Dr. Brooks's report. It noted that the employee's concerns about possible bias and the value of the report go to the weight, not the admissibility, of the evidence.[56] It also cited the board's policy of opening the board's record to all evidence relative to a claim, and permitting it to be "winnowed in the adversarial process of cross-examination and weighing in a hearing before the Board."[57]

Olafson filed timely a motion for extraordinary review pursuant to 8 AAC 57.072. We granted review, limiting the appeal to the following questions:

> 1. Did the prehearing officer abuse her discretion by ignoring the parties' stipulation to choose another physician?
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> 2. Did the prehearing officer abuse her discretion by not requiring the requested disclosure to the parties before the SIME took place?
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> 3. Is there a right to object to a SIME on grounds of conflict of interest after the board chooses the SIME?
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> a. If so, what are the bounds of that right?
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> b. When can it be exercised?
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> c. What is the measure of a conflict of interest?
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> d. Does AS 39.52 apply to SIME panelists?
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> 4. Did the prehearing officer fail to provide adequate explanation of her decision to proceed so that the board could review the decision?

Following oral argument, we asked the parties to brief the applicability of the recently announced Supreme Court decision in *AT&T Alascom v. Orchitt*, 161 P.3d 1232 (Alaska 2007). We took this case under deliberation when briefing was complete on July 27, 2007.

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[56] *Id.* at 8.

[57] *Id.*

II. STANDARD OF REVIEW

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[58] 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.[59] The commission exercises its independent judgment on questions of law and procedure.[60] If we must exercise our independent judgment to interpret the law of workers' compensation, where it has not been addressed by the Alaska Supreme Court or the Alaska State Legislature, we draw upon the specialized knowledge and experience of this commission in workers' compensation, and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[61]

III. DISCUSSION

This appeal presents new issues of law and procedure concerning the role of the Second Independent Medical Evaluation (SIME) and the obligations of physicians who conduct them. The SIME was introduced by the 1988 amendments to the Alaska Workers' Compensation Act.[62] Following the Supreme Court's decision in *Dwight v.*

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[58] AS 23.30.128(b).

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

[60] AS 23.30.128(b).

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

[62] § 18 ch 79 SLA 1988 added a new subsection to AS 23.30.095 to read:

> (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, a second independent medical evaluation shall be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of the

Humana Hosp. Alaska,[63] in 1995 the legislature amended AS 23.30.095(k) to clarify that the decision to order an SIME rests in the discretion of the board, even if requested jointly by the parties.[64]

The board maintains a list of physicians for SIME appointment.[65] The list is created by a panel composed of two attorneys who represented employees in at least five cases presented to the board in the past year and two attorneys who represented employers in at least five cases presented to the board in the past year, chosen by the

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> examination and medical report shall be paid by the employer. The report of the in-dependent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence.

In order to select the physicians who performed the evaluations, the legislature directed in 4 ch 79 SLA 1988 that the "department shall adopt rules for . . . procedures for the periodic selection, retention, and removal of . . . physicians under . . . AS 23.30.095, and shall adopt regulations to carry out the provisions of this chapter." The department, with approval by the board, adopted 8 AAC 45.092.

[63] 876 P.2d 1114 (Alaska 1994) (holding the board was obligated to give notice of the right to an SIME in the event of a medical dispute, and to provide one if requested, but that the board was not obligated to initiate an SIME in every medical dispute).

[64] § 4 ch 75 SLA 1995 amended the first sentence of AS 23.30.095(k) to insert "the board may require" and delete "shall" before "be conducted." The sentence now reads:

> 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.

[65] 8 AAC 45.092(a).

commissioner of labor.[66] The division provides staff support, but neither the director nor the commissioner sit on the panel. To be considered by the panel, the physician must be recommended by an Alaska professional organization or suggested by one of the attorneys on the panel.[67] A physician must receive three affirmative votes to be placed on the list, thus assuring that a physician receive at least one vote each from the employer and employee blocs.[68] After receiving three affirmative votes, the physician is sent an application to complete for the board with a letter "asking if the physician is interested in performing second independent medical examinations."[69] The regulations require the physician to provide a "completed application listing the physician's education, training, work experience, specialty, and the particular discipline in which the physician is licensed."[70] If the physician submits an application, proof of licensure, and insurance, the physician "will be added to the board's list of independent medical examiners" for three years.[71]

The physician may be removed from the list by the board before the end of a term if the physician resigns, loses licensure or insurance coverage, or for cause in the board's discretion.[72] The listed reasons for discretionary removal concern primarily physician competence and adherence to professional standards of practice.[73] The physician has a right to notice and a hearing before removal from the board's list.[74]

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66 8 AAC 45.092(a)(4).

67 8 AAC 45.092(a)(5).

68 8 AAC 45.092(a)(5).

69 *Id.*

70 8 AAC 45.092(a)(5)(A).

71 8 AAC 45.092(a)(6).

72 8 AAC 45.092(a)(7).

73 8 AAC 45.092(c) provides:

> (c) The board will, in its discretion, remove a physician's name from the list for

(1) the physician's repeated failure to
(A) timely file medical reports for treatment of injured workers;
(B) timely file written treatment plans when required by AS 23.30.095 (c); or
(C) provide medical services and examinations to injured workers;
(2) the physician's failure to comply with an order of the board;
(3) revocation by the appropriate licensing agency of the physician's license to provide services;
(4) decertification of or disciplinary action against the physician by an applicable certifying agency or professional organization;
(5) disciplinary action taken against the physician by the State Medical Board, a representative of Medicare or Medicaid, or a hospital, for fraud, abuse, or the quality of care provided;
(6) fraudulent billing or reporting by the physician;
(7) knowingly falsifying information on the physician's application;
(8) conviction of the physician in a state or federal court of any offense involving moral turpitude or drug abuse, including excessive prescription of drugs;
(9) unprofessional conduct or discriminatory treatment by the physician in the care and examination of patients;
(10) use of treatment by the physician which is not sanctioned by the physician's peers or national provider associations as beneficial for the injury or disease under treatment;
(11) declaration of the physician's mental incompetency by a court of competent jurisdiction;
(12) failure by the physician to maintain professional liability insurance or, if required, workers' compensation insurance; or
(13) failure by the physician to annually submit a certificate of insurance for professional liability insurance and, if required, workers' compensation insurance.

[74] 8 AAC 45.092(d).

The board does not pay physicians selected to perform a SIME; the employer pays for the physician's services.[75] There is no provision in the regulations for an employer to protest the cost of the evaluation or for an employee to protest the inconvenience of attending the evaluation.[76] There is no provision in the regulation for appeal of the appointment of a particular physician from the list. A party may petition the board for relief under 8 AAC 45.050, but other than the general authority to "conduct its hearing in the manner by which it may best ascertain the rights of the parties," the board has no explicit statutory authority to review the physician selection by the board's designee.[77]

The appellant argues that he has a right to a "truly independent" examination. He relies on the board's interlocutory order in *Gamez v. United Parcel Serv.*,[78] in which the board modified its prior order directing an examination by a physician who was now employed in the same practice as the employer's first medical evaluator. He argues that AS 39.52, the Executive Branch Ethics Act, should apply to physicians on the SIME list because the SIME is an administrative unit of the board.[79] Because the SIME

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[75] AS 23.30.095(k) ("The cost of an examination and medical report shall be paid by the employer."). The reasonableness of the physician's charges is not listed as a factor in choice.

[76] However, when choosing the physician, the board's designee must take into account the "proximity of the physician to the employee's geographic location." 8 AAC 45.092(e)(6). The Alaska Supreme Court recently criticized an *employer* medical examination as "manifestly unreasonable" because it required the employee to travel from Florida to Utah. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1255 (Alaska 2007).

[77] AS 23.30.135(a). In *Gamez v. United Parcel Serv.*, Alaska Workers' Comp. Bd. Dec. No. 05-0289, 8-9 (November 8, 2005), the board reviewed and modified its own order in *Gamez v. United Parcel Serv.*, Alaska Workers' Comp. Bd. Dec. No. 05-0178 (July 6, 2005) under AS 23.30.130, plus the general authority under AS 23.30.135(a) and AS 23.30.155(h).

[78] Alaska Workers' Comp. Bd. Dec. No. 05-0289 (November 8, 2005).

[79] He does not argue that AS 39.52 (or AS 39.50) applies to the attorney panel that selects physicians for the board's list.

physician had performed evaluations for the opposing party, he must have a conflict of interest and therefore should not have been allowed to perform the evaluation. Allowing him to do so, Olafson argues, was an abuse of discretion. He also argues that it was an abuse of discretion to disregard the parties' stipulation.

The State argues that the SIME physician is neither a public officer nor a public employee, so AS 39.52 does not apply to SIME physicians. The State also argues that the prehearing officer did not abuse her discretion because she weighed the factors she was required to consider and made a decision based on the evidence available at the time. She could have chosen to accept the stipulation, the State concedes, but it was within her discretion not to do so given the shortened time available. The State suggests that a regulation permitting hearings on short notice would be useful in resolving questions involving the SIME appointment. Nonetheless, the State argued, the prehearing officer's decision was adequately explained and therefore the board properly upheld it.

1. The SIME physician is not a "public official" as defined by AS 39.52, but the SIME physician serves the interests of the board in the performance of quasi-official SIME duties.

The Alaska Workers' Compensation Board, its members, and the division employees that serve as staff to the board, are subject to the Executive Branch Ethics Act, AS 39.52. The appellant argues that as a member of the board's list, Dr. Brooks is also subject to the Ethics Act because the list is an administrative unit of the board.[80] A board or commission is defined at AS 39.52.260(4) as "a board, commission, authority, or board of directors of a public or quasi-public corporation, established by a statute in the executive branch, including the Alaska Railroad, but excluding members of a

[80] Appellant's Br. 14. AS 39.52.960(1) defines an administrative unit as "a branch, bureau, center, committee, division, fund, office, program, section, or any other subdivision of an agency." An "agency" includes boards and commissions. AS 39.52.960(2). While an SIME is a process that furthers the goal of the board to provide fair and impartial hearings, it is not a program in the sense of an office, bureau, section, fund, branch, or other subdivision of the board. The only subdivision of the board recognized by AS 23.30 is the hearing panel. AS 23.30.005.

negotiated regulation-making agency under AS 44.62.710 – rr.62.800." A public officer, on the other hand, is defined by AS 39.52.260(21) as a public employee and a "member of a board or commission." Thus, a member of a board or commission is a public officer.

Our first question is whether the board's list is a subdivision of the board, or a board or authority established by statute in the executive branch. The board is authorized by AS 23.30.095(k) to select SIME physicians "from a list established and maintained by the board." The process for establishing and maintaining the list is set out in 8 AAC 45.092. Physicians are recommended for inclusion on the list by an affirmative vote of three attorney members of the SIME panel, but an affirmative vote results in an invitation to join the list only. A physician may apply for appointment only if invited. A physician may resign at any time. There is no requirement for a specific number of physicians or specialties. The board's list serves no collective public function and its members are not authorized to act collectively. As a body, the list does not meet, takes no official action, makes no recommendations, and decides nothing. We conclude the list, because it has no collective responsibility or authority, is not a board or commission established by statute. We also conclude that the list, because it has no function except to list physicians who may be called on by the board,[81] is not an "administrative unit" of the board.[82]

We turn next to the question whether a physician is individually a "public officer." The decision to order an SIME is discretionary; although a party has a right to request

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[81] Because a physician may decline the appointment when called upon, the list serves only to name those physicians the board may ask to perform an SIME; not those physicians who, like employees, may be required to perform them.

[82] There is a much stronger case to be made for the members of the SIME panel, composed of attorneys, who vote collectively to recommend physicians to the board's list, to be considered an "administrative unit" of the board. The question is not before us, and we do not decide it. We mention it here only to point out that appellant's argument is flawed because he does not include the intermediary body, without whose action the SIME physician may not be listed, in the chain of the administrative structure that he argues compels AS 39.52 oversight of listed physicians.

one, a party does not have a right to an SIME, if the board or its designee, in the sound exercise of discretion, decides an SIME is not necessary for the board's purposes. The physician plays no role in the decision whether or not an SIME is required. A physician appointed to the board's list serves as an expert appointed by the board if requested, if available, and if he or she agrees to the appointment.

Once appointed to a specific case, the physician serves the board by examining the medical records and the claimant and producing a report responding to the board's questions. The board does not control when or where the examination takes place, nor provides the tools by which it is done. The physician is not paid by the department or board. The board exercises no control of the fee charged by the SIME physician. The SIME physician takes no part in deciding the claim; he or she does not vote on the board panel or participate in deliberations, or approve, or disapprove a claim for compensation. The SIME physician's report is not given special status as a "recommendation;" it may be disregarded by the board that requested it.[83] The SIME physician makes no *decision* about the claim; the SIME report simply offers an expert *opinion* on the medical issues in dispute. We conclude that an SIME physician is not a "public officer" as defined by AS 39.52.960(20). Therefore, inclusion on the board's list, or appointment from the list to perform an SIME, does not subject a physician to AS 39.52.

While we do not find that an SIME physician is a public official within the meaning of AS 39.52, we agree that an SIME physician is in some sense a public officer, albeit not one within the definition of AS 39.52.960(20). While performing the SIME, the physician acts pursuant to the authority of the board to make an investigation or inquiry in the claim,[84] and, while the physician does not participate in decision-making, the physician provides the board with impartial and expert opinion. In recognition of this quasi-official status, the SIME physician enjoys certain protections and immunities

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[83] *Brown v. State Workers' Comp. Bd.*, 931 P.2d 421 (Alaska 1997).

[84] AS 23.30.135.

while performing the evaluation and testifying afterwards.[85] In return for recognition of this quasi-official status, and the payment the appointment provides, the SIME physician is obligated to provide, to the best of his or her ability and knowledge, a thorough, professional, informed and impartial evaluation of the examinee and a similarly thorough, professional, impartial, informed and timely report to the board.[86] We conclude that the SIME physician has a duty to perform his or her quasi-official function as an appointed expert impartially and, as we explain below, that duty requires pre-appointment disclosure of conflicts of interest to the appointing authority.

2. The SIME physician owes a duty of disclosure of potential conflicts in writing so the pre-hearing officer may consider impartiality of the physician before making the appointment, and, once appointed, in the performance of quasi-official duties the SIME physician is presumed to be impartial.

SIME physicians are unique among those who participate in the adjudicatory process. Unlike special masters, they do not "take evidence," weigh evidence, or make recommended findings on the adjudicatory facts. They do not act as investigators or auditors who then bring charges or testify on behalf of charging agencies before regulatory bodies. They do not mediate or conciliate parties' disputes. They have no fact-finding duties. They are not charged with developing proposed actions. Their duties are limited to giving an informed, impartial opinion on identified medical disputes based on the medical records and their examination of the injured worker, if selected.

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[85] AS 23.30.095(k) immunizes an SIME physician from actions for damages "caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence." 8 AAC 45.092(i)-(j) isolates the physician from questions by the parties, and limits communication after a report is received. If a party otherwise communicates with the physician, evidence obtained thereby is not admissible. 8 AAC 45.092(k).

[86] Every expert witness who testifies to the board, because the board recognizes the expertise of the witness, shares the obligation to be honest and professional, to fully use the knowledge, skill, experience, training, or education that qualify him or her to be an expert, and to give an opinion based on facts or data of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. The duty of impartiality is unique to the SIME physician or other board-appointed expert.

They may not express opinions regarding the legal outcome of the claim, although, unlike non-expert witnesses, they are permitted to give an opinion, or testify to an inference, that embraces the ultimate issue to be decided by the board.

The closest Alaskan analogy to the SIME physician is to a member of an expert advisory panel under Civil Rule 72.1, or a child custody investigator appointed under Civil Rule 90.6.[87] In both such cases, the appointee is required to disclose conflicts of interest to the court.[88] However, we also note that Evidence Rule 706 permits the court to appoint an expert witness, who is not required by rule to disclose conflicts of interest, although the process of appointment (from nominations submitted by the parties) suggests that such would be considered.[89]

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[87] The expert advisory panel provides a report to the court that responds to the "questions listed in AS 09.55.536, clarified or changed as the court deems appropriate to the case." Alaska Rule of Civil Pro. 72.1(e)(1). A custody investigator is charged to perform a "thorough and impartial" investigation and "offer an informed opinion to the court regarding custody and visitation issues." Alaska Rule of Civil Pro. 90.6(b)(1).

[88] Alaska Rule of Civil Pro. 72.1(b)(2) requires nominated panel members to "inform the court within 10 days of the notice of appointment of any financial relationship with a party or party's attorney, of any other reason which would cause the nominee to be biased in the case or present an appearance of bias, and of any other reason why the nominee cannot serve on the panel." The rule also provides that the court shall disqualify the nominee if "biased for or against a party or if a conflict of interest raises a substantial appearance of bias." Alaska Rule of Civil Pro. 90.6(c) requires the custody investigator to "disclose any relationships or associations between the investigator and any party which might reasonably cause the investigator's impartiality to be questioned" no later than 10 days after appointment.

[89] Alaska Rule of Evidence 706. The California model cited by the appellant is not apposite. A qualified medical examiner (QME) is chosen by the employee – not the employer or tribunal – from a random panel of three physicians who have passed a test administered by the industrial medicine council to provide evaluation of disability or a standardized medico-legal evaluation in listed disputes. An agreed medical evaluator may be chosen by the parties only if the employee has a lawyer. The only medical reports the administrative law judge may see are those of the primary physician and the QME. QME fees are also subject to a strict fee schedule. However, unless the employee has designated a primary physician *before* the injury, the employer controls the choice of treating physician for at least the first 30 days after injury, and the employee may, after 30 days, make only a single choice of primary physician. In light

The regulatory design established in 8 AAC 45.092 provides that the board or board designee considers the impartiality of the SIME physician prior to appointment. The SIME physician is obliged to follow the instructions of the board and to answer the board's questions in his or her report. Although the SIME physician individually is not an employee of the board, or a member of a board, or even an "administrative unit" of the board, the appointment itself is a function of the board's exercise of its powers of investigation. The SIME physician is required to serve the interests of the board, which is required to be impartial. Therefore, once appointed, during the performance of quasi-official duties, the SIME physician shares the same obligation and presumption of impartiality applied to other administrative agency personnel.[90]

A. Disclosure prior to appointment is important because there is no appeal from the board designee's selection.

8 AAC 45.092(e) requires the board or its designee to consider the impartiality of the physician prior to appointment.[91] Other factors are ranked higher, including the nature and extent of the employee's injuries; the physician's specialty and qualifications; whether the physician or an associate has previously examined or treated the employee; and the physician's experience in treating injured workers. The factor "previously examined or treated" is not limited to the employee's physician; it also

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of the employer's control of the choice of treating physician, the QME may be seen as a controlled opportunity for the *employee* to obtain an independent medical evaluation.

[90] *ATT Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

[91] 8 AAC 45.092(e) provides in pertinent part:

> . . . [T]he board or its designee will select a physician to serve as an independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:
>
> * * *
>
> (5) the physician's impartiality;
>
> (6) the proximity of the physician to the employee's geographic location.

applies to a physician who performed an employer medical examination of the employee. Factors such as the nature of the injury, and the physician's specialty, qualifications, and experience bear on the suitability of the physician selected. The physician's prior specific contact with the employee, either as an employer medical examiner or as a treating physician, addresses *claim-specific* partiality; that is, bias that may have formed in the specific case, either through a relationship with the claimant or the employer in the context of the claimant's current claim.[92]

Unlike consideration of claim-specific partiality, 8 AAC 45.092(e) requires the board or its designee to consider the physician's impartiality, that is, whether the physician is predisposed against, or a partisan for, one of the parties. In order for the board designee or board to "consider" the physician's impartiality, the physician must first disclose those relationships that could result in reasonable questioning of impartiality to the board or its designee. We believe that disclosure should be in writing, so as to avoid just such disputes as occurred here.

The board found that Donovan followed the regulations in appointing Dr. Brooks, but we see no evidence that prior to the appointment Donovan requested disclosure of information that would allow her to consider the physician's impartiality in selecting a physician. Instead, she instructed Dr. Brooks not to begin work until he had determined that he had no relationship with the parties or conflict of interest. This regime effectively allows the physician to decide whether or not he is impartial in each case, which does not satisfy the regulatory requirement that the board, or its designee, considers the physician's impartiality "in selecting the physician." The board, or its designee, may not abrogate its responsibility to consider the listed factors to the judgment of the subject of that consideration after the appointment is made.

The regulation is designed to require the oversight of the board or its designee prior to appointment because there is no appeal of the designee's appointment

[92] This factor also addresses the probability that a physician may have acquired knowledge of the employee that has not been included in reports.

provided by the statute or regulation.[93] The petitions to cancel the SIME because the parties disagree with the choice, or to require another physician, insert delay in a process designed to be quick and efficient, as this case so well demonstrates.[94] In this case, as in most cases, the employee and employer specifically stipulated to allow the board's designee to select a physician to perform the evaluation. A party may not agree to allow the board designee to choose an SIME physician yet retain the right to disagree with the designee's choice. Such a process would permit infinite veto rights to the designee's choice. The SIME physician is not an arbitrator or a mediator.[95] The parties do not pick from a list until the last physician is left.[96] The SIME physician is chosen by the board, or its designee, because the SIME physician is *the board's expert.* Because there is no right to appeal the board designee's choice, so long as it is made as

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[93] The board relies on *Keith v. Norton Sound Health Corp.,* Alaska Workers' Comp. Bd. Dec. No. 03-0175, 6 (July 28, 2003), for the proposition that AS 23.30.108(c) "applied to a board designee decision to order an SIME" thus giving the parties the right to board review of the board designee's selection of an SIME physician after the parties stipulated to allow the designee to chose one. We do not agree that AS 23.30.108(c) grants a broad right of board review of the SIME choice in such circumstances. AS 23.30.108(c) provides a right of review of pre-hearing officer decisions on discovery disputes between the parties. The board is not a party to the dispute, and an SIME is not a discovery process like a deposition. This is not to say that the parties do not have a right to appeal the board designee's decision to order, or not to order, an SIME, under 8 AAC 45.092(g), or a specific failure to comply with the regulation, under the board's authority to govern procedure on claims in AS 23.30.135.

[94] The parties retain the right to challenge the weight accorded the physician's opinion, and seek to undermine it as the product of bias, as they may any other evidence. The SIME physician's opinion, once given, is no more than another expert opinion.

[95] The SIME physician is not a substitute for the true finder of fact, and the SIME process is not an alternative dispute resolution mechanism, notwithstanding the appellant's attempt to vest him or her with such authority.

[96] Even when a physician is not available from the list, the board or its designee will choose from lists submitted by the parties, or of its own choice; and the parties do not have the right to veto the board's choice. 8 AAC 45.092(f). The interests of employers and employees as a class have been represented in the process of inviting the physician to join the list.

provided by law, the process of making that choice must be adhered to by the board's designee.

B. Existence of a potential conflict triggers an obligation to disclose. Only actual partiality is disqualifying.

The process of choosing an SIME physician requires the board or its designee to consider, with other factors, the physician's impartiality. In order to do so, the board, or its designee, must be informed of the physician's financial or personal relationships with the parties before the appointment. Thus, the physician must disclose to the board or the designee those relationships that present a potential conflict of interest, so that the board or designee may evaluate whether the potential conflict is an actual conflict that affects impartiality so as to disqualify the physician.

Impartiality is freedom from partisanship in the matter, an absence of partiality or favoritism for one party or the other, and disinterest in the outcome of the matter. Impartiality requires, for example, that there is no spousal relationship with a party, no financial interest in the outcome, and no employment relationship with a party or a party's attorney. In the case of an SIME physician, impartiality should not be measured against the heightened standard required of a judge,[97] because the SIME physician is

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[97] See Alaska Code of Judicial Conduct Canon 3E, "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including" listed circumstances and AS 44.64.050(b)(3), requiring an administrative law judge or hearing officer to "perform the duties of the office impartially and diligently." The listed circumstances in Canon 3E include:

> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during their association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household:

(i) has an economic interest in the subject matter in controversy, or

(ii) is employed by or is a partner in a party to the proceeding or a law firm involved in the proceeding, or

(iii) has any other, more than *de minimis* interest that could be substantially affected by the proceeding, or

(iv) is likely to be a material witness in the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding or is known by the judge to be an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

The Code of Hearing Officer Conduct provides further explanation of AS 44.64.050(b)(3) at 2 AAC 64.030(b)(3):

to perform the duties of the office or of the hearing function impartially and diligently, a hearing officer or administrative law judge

(A) shall faithfully follow the law;

(B) shall maintain professional competence in the law;

(C) may not be swayed by partisan interests or fear of criticism;

(D) shall maintain order and decorum in hearings and related proceedings;

(E) shall show patience, dignity, and courtesy to all parties, their representatives, witnesses, and others with whom the hearing officer or administrative law judge deals in an official capacity, and shall require similar behavior from parties and their representatives;

(F) shall refrain from initiating, permitting, or considering improper ex parte communications;

not a trier of fact, a hearing officer, or other adjudicator and because the injured employee will have an opportunity to challenge the SIME physician's biases, prejudices, and other bases for his opinion in the hearing. There would be no point in providing opportunity to examine the SIME physician on such subjects if the SIME physician was required, like a judge, to avoid even the possibility that his impartiality could be questioned before appointment and forming an opinion. The SIME physician is not obligated to *avoid the possibility* that his impartiality will be questioned later.[98]

The board or designee is required to consider whether the SIME physician's relationship with a party or its representative, if one exists, renders him a partisan by

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> (G) shall dispose of all hearing-related matters promptly, officially, and fairly;
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> (H) shall require participants in proceedings to refrain from manifesting personal bias or prejudice against parties, witnesses, their representatives, or others;
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> (I) shall refrain from making public comment outside of the proceedings on a case before the hearing officer or administrative law judge while the case is pending; and
>
> (J) shall refrain from disclosing or using, for any purpose unrelated to official duties, information acquired in an official capacity that by law is not available to the general public;

Provisions related to hearing officer avoidance of conflict of interest are treated separately in 2 AAC 64.040. In *ATT Alascom v. Orchitt*, the Alaska Supreme Court, held that holding office in an employee union was not sufficient to disqualify a board hearing officer *under the Alaska Code of Judicial Conduct*, because unions "are not generally parties before the workers' compensation board." 161 P.3d at 1247. A relationship of the type that would not disqualify the board's hearing officer cannot disqualify the board's expert witness.

[98] A physician, unlike a judge or a hearing officer, is not an employee of the state court or agency, and may, depending on the specialty, not be assigned more than one or two SIME's in a quarter. There would be soon no physicians on the list if every physician on the list had, like judges, to devote all their employment to their office for the entire duration of their appointment in order to avoid the possibility that their impartiality could be questioned.

making the outcome of the claim one in which he has a financial or personal interest.[99] A physician whose bill for treating the employee may be paid if the claim is found compensable has a financial interest in the outcome. A physician whose spouse is an attorney in the same firm as the employer's attorney, or whose child is married to the claimant, has a personal interest in the outcome. A physician whose partner is the retained expert for the employer in the case has a present financial relationship with a party in the case. We agree that actual partisan interest in the outcome of the case, or actual conflict of interest between the physician's duty to the board and the physician's personal or financial interests, may require the designee, on consideration of the case, the other factors, and the significance of the interest involved, to select another physician than the board or designee might otherwise have selected. The possibility that impartiality may be questioned is not sufficient to disqualify the physician from selection; however, it is sufficient to require disclosure to the selecting authority, who may then determine if there is an actual partisan interest in the outcome or conflict between the duty to the board and the physician's personal or financial interests.

> *C. Past employment by a party or the party's representative on another case, especially in cases not concerning workers' compensation, is not an actual conflict, but an active on-going relationship may produce an actual conflict and partisanship.*

We turn now to the appellant's assertion that the relationship between Dr. Brooks and the employer is an actual conflict or partisan interest that should have disqualified him from appointment. Mr. Jensen asserts that Dr. Brooks performed "over 25 EIME's" for the employer and its adjusters, and that he was still retained in four

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[99] The standards for determining "impartiality" in the Alaska Code of Judicial Conduct Canons or the Administrative Procedure Act and the Code of Hearing Officer Conduct are not directed at a person who serves the board in its investigative role. We find, however, that AS 39.52.120 serves as a useful, albeit not entirely applicable, model. The consideration of "impartiality" directs the board or board designee to consider whether the physician will be placed in the position of taking or withholding official action (expressing an expert opinion) on a matter in which he or she has a personal or financial interest.

active cases.[100] He states that Dr. Brooks was paid $66,000 in the past twelve months by the State and $197,000 over the past five years by the State.[101] He urges that this is the kind of information that should be disclosed because it reveals a potential conflict of interest.

Dr. Brooks's status as a *former* contractor of the State would not alone present a present conflict of interest with his duties to the board, or constitute a partisan interest. The Executive Branch Ethics Act contains no provision limiting a public official from acting on matters relating to a former employer if there is no retained financial interest in the former employer. The lack of such a provision was addressed in 1993 *Inf. Op. Atty Gen.*, WL 667345 (Feb. 17; 663-93-0257). On page 7, the opinion states:

> The Ethics Act, at present, does not directly set forth any restrictions on a public officer's ability to serve based on conflicts of interest that might arise for the officer's prior employment with or involvement in a private organization. The absence of a direct provision should be contrasted with the Act's restrictions relating to a public officer's private employment after leaving state service. AS 23.39.180.

Thus, a state official's relationships and interests that do not survive the beginning of state service are not grounds for a violation of the Ethics Act. Specifically,

> Contractual relationships and compensation for services before [an official's] state employment are not under the scrutiny of the Ethics Act. Only official actions during [the official's] tenure, and

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[100] Appellant's Br. 10, 21. Appellant's counsel stated that Dr. Brooks performed 25 employer medical evaluations for the State and its adjusters. The employer is self-insured and costs of the evaluations are borne directly by the employer, not the adjuster, who merely serves as an agent of the State. The claim is not against either adjuster, it is against the State. Therefore, the fact that Dr. Brooks performed *any* evaluations for other employers or insurers through the adjuster is not relevant to whether he has a financial or personal relationship with the parties. Using the conjunctive to join the State and its adjusters as one entity, suggests that the number 25 reflects the number of full employer medical evaluations Dr. Brooks did for the State and its adjusters jointly, thus imputing the number 25 to the State. The evidence does not support the inference.

[101] *Id.*

> for two years after [the official] leave[s] state service, are covered by the Ethics Act.[102]

The Ethics Act is concerned with the *current* relationships of a public officer and their impact on the official's ability to serve the state; it does not seek to enforce an official's responsibilities to a former employer. Similarly, the board may only base its assessment of impartiality on the physician's current status and relationship to the parties.[103] We cannot require more of a *quasi*-official than is required of state officials and employees, especially when his duties are not adjudicative, but investigative.

Thus, an order to Dr. Brooks to disclose *all matters* in which the State, or either of its former adjusters, was a client five years or more previously was overbroad for the *board's* purposes.[104] The board or its designee is entitled to know of any employment or contractual relationships with a party in which the physician has some current financial interest, e.g., a contract with a partner or employee, or residual financial interest, e.g., an unpaid bill for fully completed work, or personal interest, such as a familial tie. When looking at residual interests, the board or its designee must examine whether (1) the interest is insignificant, (2) the interest does not differ from that of a large class of persons, or, (3) the SIME physician's report would have an insignificant or conjectural effect on the matter.[105] Assuming the physician has no current or residual

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[102] 1987 *Inf. Op. Atty Gen.* (Apr. 7; 663-87-0398), 1987 WL 121066 (Alaska A.G. 1987). *See also* 1995 *Inf. Op. Atty Gen*. (Jan. 11; 663-95-0310), 1995 WL 325222 (Alaska A.G. 1995) (holding that if an official severs all financial ties with a partnership, his former partnership could continue to contract with the state, and Ethics Act did not preclude the official from being involved in decisions affecting his *former* partnership).

[103] It is not uncommon that a party will assert there is an "appearance of impropriety" when a public official moves from a private firm to state service and then works in the same field. However, the SIME physician is not an adjudicator, and the standards applicable to judges do not apply to investigative appointees of the board.

[104] This does not apply to the breadth of such a request in a deposition or interrogatories posed to the physician under 8 AAC 45.092(j).

[105] See AS 39.52.110(b). The SIME physician's report may be rejected by the board, so to some extent its effect on the matter is always "conjectural." We are concerned with the importance of the SIME to the disputed issues of the case. For

financial or personal interest in a party, the focus should be on whether, if appointed, the physician will be required to act on a matter (in which he was previously involved while employed by, or contracted to, a party) that is now pending before the board.

We closely examined Dr. Brooks's deposition testimony and the State's request for production. We note that the State's request for production did not describe the nature of the service Dr. Brooks provided; it simply listed the amount, and the name of the plaintiff or claimant on the case file. The State listed 16 files, which ranged in payment totals from $200 dollars in two cases to $55,950 in one case.[106] Of the 16 case files, four were not workers' compensation claims. Of all 16 case files, six were characterized as open files, but no information was provided whether Dr. Brooks's work for the State had concluded. Of the six open files, two were not workers' compensation cases. The four remaining open workers' compensation files reflected payments of $200 in 2005, $200 in 2005, $18,800 in 2005, and $11,500 in 2005-2006.[107]

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example, the SIME may be ordered owing to a dispute over a seven percentage point difference in an impairment rating. The physician's report may not be significant where the difference is between 20% and 25% and the focus of the case is on a significant rate adjustment. On the other hand, if the difference is between 0% and 7%, and the employee's right to reemployment rests on a finding of impairment, the SIME physician's opinion is significant.

[106] Of the total 16 reported cases, six were for charges under $2,000. Of the 10 files remaining, four were not workers' compensation cases and six case files that could be characterized as charges for employer medical evaluations under the workers' compensation system. Of that six, two were described as open files paid in 2005-2006.

[107] Our experience of the cost of employer medical evaluations tells us that a physician charges substantially more than $200, or even $2,000, for a full employer medical evaluation. We note that the bill for the 67 hours of Dr. Brooks's time devoted to Olafson's SIME was $26,800. Brooks Depo. 27:14-15. Dr. Brooks charges $400 per hour. *Id.* at 26:16. Dr. Brooks testified that a $200 charge "clearly wasn't an IME," *id.* at 41:6-7, and that "the average IME takes me days, maybe a week." *Id.* at 26:12. Including files with no more than a $200 charge in the count of employer medical evaluations Dr. Brooks performed veers perilously close to asserting a frivolous claim of fact in briefs to the commission.

Dr. Brooks wrote to Donovan that "I could recall two recent employer's medical examinations (EME's), the most recent being almost a year ago, on June 22, 2005."[108] Given the facts established by the State's response to Olafson's production request, it appears Dr. Brooks was not incorrect in this statement. He went on to say, "A search of my computer using Windows Explorer revealed another five EME's, for a total of seven since . . . 2002."[109] In his May 20, 2006, letter to Donovan, Dr. Brooks stated "Computer searches for Harbor Adjustment or Northern Adjusters in all IME or record review reports I have authored since January 1, 2001, revealed the following claimant/plaintiff names. However, Harbor Adjustment or Northern Adjusters might have appeared in the Record Review or Record Source List of a report prepared for another client."[110]

Dr. Brooks's May 20, 2006, letter to Donovan lists nine file names with "Harbor Adjustment" in the text; one name is not included in the State's list, and two names

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[108] R. 0135.

[109] *Id.* Dr. Brooks's letter reported seven EME reports for the State, based on his computer search, "which may also include record reviews," Brooks Depo. 39:3-13, while the State's reported charges suggest six EME charges paid. EME, EIME, and IME are used interchangeably by the parties to refer to an employer medical examination requested under AS 23.30.095(e). As an IME (independent medical evaluation) may refer to an examination under a different regime than workers' compensation, we prefer the abbreviation EME.

[110] R. 0144. The letter addressed the questions posed by Olafson's attorney in his letter to Donovan on April 25, 2006. R. 0142. In his deposition, Dr. Brooks explained how he arrived at the list of names associated with the two adjusting firms. He used Windows Explorer to search for computer files of "IME or Record Review" containing in text a name of the two adjusting firms. He then added up the files and listed the name of the claimant/plaintiff. He did not verify whether the name reflected a workers' compensation EME or record review for either firm. Brooks Depo. 50:8-13. He explained that the search revealed that the adjusting firm's name appeared somewhere in the text of the document, but not where or in what context. Brooks Depo. 50:16-18, 48:16-20. This is a process understandable to a person familiar with Microsoft Windows and its associated computer applications. The evidence is that 25 IME or record review reports, which Dr. Brooks wrote between January 1, 2001 and May 20, 2006, contain the words "Harbor Adjustment" or "Northern Adjusters" somewhere in the text of the report.

show charges of only $200. The letter lists 16 names for Northern Adjusters, of which two are on the State's list; one of the two names is also in the Harbor Adjustment list. Thus, a total of seven "IME" or "Record Review" file names cross-match the State's list of workers' compensation files with payments exceeding $2,000. Mr. Jensen did not establish when Northern and Harbor were the State's adjusters. Since Dr. Brooks released information for the entire 5-year period for both firms, he included periods when each adjuster was not the State's adjuster. The adjuster is only the "State's adjuster" when under contract with the State.[111]

Whether the board's designee would have found Dr. Brooks had an actual conflict or impartiality based on personal or financial interest in the outcome of the claim, or current financial interest in a party, is not something we may decide. We agree that the information Dr. Brooks supplied in his letters to Donovan was both overbroad (in that it concerned matters not pertinent to the case in issue) and insufficient to provide her the information she needed to determine impartiality, that is, whether Dr. Brooks's work for the State had ended, and whether he had any personal or financial interest in the outcome of Olafson's case. Dr. Brooks listed the number of times he had performed an EME for the State, and the number he was most recently employed, but he did not state when he completed his work in those cases. His letters do not resolve whether he had an ongoing employment or contractual relationship with a party that would give him a stake in the outcome of the claim. His assurance that he believed he could be impartial, while important, is not a substitute for the proper

[111] The board did not make findings of fact on whether Dr. Brooks reported a financial interest in the outcome of the proceedings. However, the evidence in the record would not support a finding that Dr. Brooks, as the appellant claims, *performed 25 employer medical examinations for the State and its adjusters.* At best, the evidence is that up to a maximum of 25 reports of EME's or record reviews were prepared for Harbor Adjustment and Northern Adjusters combined. Some of those reports were prepared when either, but not both, of the firms was the State's adjuster. Logically, the reports could not all be written for the State and its adjuster, because both firms could not simultaneously be the State's adjuster, and not all of those reports were EME reports. The commission cautions against overstating the factual inferences that the evidence supports.

execution of the regulation. We conclude that the requirement that Donovan consider impartiality in selecting Dr. Brooks could not have been satisfied, because she did not have the information she needed at the time of selection.

3. After the board's designee cancelled the appointment of Dr. Brooks to the SIME, the stipulation by the parties became the effective order, and could not be disregarded without good cause.

8 AAC 45.092(e) and (f) provide for certain circumstances by which the parties may stipulate to appointment of an SIME physician who is not on the list. No regulation directly addresses the situation here, when the parties sought to stipulate to use a physician on the list, after having stipulated to allow the board designee to choose a physician. Again we are asked to apply our judgment, based on our experience in workers' compensation, to address an issue not previously addressed by the department, the legislature, or the Supreme Court.

The parties agree that they asked the SIME to be rescheduled, and that they stipulated to use Dr. Puziss, a physician on the list, in a telephone conference with Donovan.[112] The State's adjuster then sent Olafson a letter informing him that the SIME with Dr. Brooks was cancelled.[113] No contemporaneous note of the conference was preserved in the record, and Donovan did not testify at the board hearing. However, the State's adjuster's letter cancelling the SIME is evidence that the State, at least, believed that the SIME had been cancelled on March 16, 2006.

On March 20, 2006, Donovan contacted Dr. Brooks, and, "spoke with Dr. Brooks regarding canceling the SIME." After speaking to him, she withdrew from the cancellation. Based on the "extensive correspondence" in the record, the board found that Donovan "promptly and thoroughly followed up on the employee's concerns . . . and attempted to cancel the SIME without expense to the parties."[114] However, we find

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[112] R. 1839., Appellant's Br. 5; Appellee's Br. 1.

[113] R. 0193.

[114] *Olafson,* Alaska Workers' Comp. Bd. Dec. No. 06-0301 at 6.

nothing in the record indicating that the initial cancellation was conditioned upon the parties being spared expense. We find that there is no evidence in the record to support the board's finding that Donovan did not agree to cancel the SIME as stipulated by the parties or that she conditioned the cancellation on the lack of expense to the parties. We do not say that the board was incorrect; but, the record does not support the board's finding of fact.

The board did not reach the issue whether Donovan had authority to cancel the SIME she had ordered to take place[115] and we find it is unnecessary as well. The parties acted in the belief that the SIME had been cancelled, and the parties agree that they did agree in a telephone conference with Donovan to cancel the SIME. 8 AAC 45.050(f)(2) provides that stipulations may be made orally in the course of a prehearing conference. 8 AAC 45.050(f)(3) provides that stipulations to procedures are binding upon the parties to the stipulation and have the effect of an order, "unless the board, for good cause, relieves a party from the terms of the stipulation." Once Donovan agreed to cancel the SIME, the stipulation acted as an order of the board, directing procedure for appointment of the substitute SIME physician. While the stipulation could be set aside for good cause, we find there is no evidence in the record as a whole that a party asked to be relieved from the stipulation.[116] We therefore conclude that the stipulation was, in effect, a later order of the board which Donovan could not, without the board finding good cause, disregard.

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[115] *Id.* at 7 n. 26.

[116] The State's March 23, 2006 letter to Donovan, R. 0137, highlights the State's concern regarding delay in light of the hearing date, but it also confirms the stipulation's existence. We cannot say it was a clear request to be relieved from the stipulation. Whether avoiding delay and expense was good cause in the circumstances is not for the commission to decide.

4. The board failed to address the failure of its designee to abide by the stipulation and the physician to disclose potential conflicts so that the board's designee could examine them. Resolution of the case requires further fact finding.

We have concluded that the board's findings of fact are not supported by substantial evidence in light of the whole record in two respects. We found that the board's finding that Donovan "followed the applicable regulations" is not supported by substantial evidence in light of the whole record because Donovan did not consider impartiality in selecting Dr. Brooks. Similarly, we found the board erred in not considering whether Donovan had good cause to set aside the parties' stipulation. While the board found that Donovan's decision to go forward with the SIME was supported by substantial evidence and not arbitrary capricious, or manifestly unreasonable, they did not analyze her actions in light of the stipulation – i.e., that the board must set aside the stipulation for good cause.

We do not, however, agree that the procedural defects asserted by the appellant require the commission to direct the board to require another SIME, or to strike Dr. Brooks's report. The process was confused as much by the parties as by the board's designee, who, we agree, does not appear to have acted with an improper motive. Sanctions that may be appropriate in discovery violations are inappropriate because an SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the board to assist the board by providing disinterested information. It may be that Donovan understood the cancellation to be conditional or that the board would find there was good cause to set aside the stipulation. We cannot make those findings of fact, however, as the legislature has given the board that duty.

As to the remedy for failure to request disclosure before the selection, and to disclose the appropriate information, we agree that first the board must decide the facts. The SIME physician's avoidance of partisan interest and financial or personal conflicts serves to insulate the resulting report from charges of partiality; the absence of conflict with duties to the board serves to ensure that the physician's duty to the board is discharged without regard to influence by the parties. The remedy, therefore, is to determine whether Dr. Brooks in fact had a retained financial or personal interest

in a party, when he began his appointment to serve as an SIME physician in this case, and whether that interest was insignificant and thus not disqualifying. If the board finds that Dr. Brooks had no such actual partisan interest, he is entitled, as a quasi-official investigative officer of the board, to the same presumption of impartiality as the board.[117] If the board finds Dr. Brooks had a personal or financial partisan interest that was not insignificant, the board must decide whether his report was actually influenced by, or the product of, such partisan interest. The board may exercise its discretion in crafting a remedy if it determines that is the case, ranging from striking only those portions of the report that are affected by partisan interest if the report is substantially unaffected, to requiring another SIME.

IV. CONCLUSION

We conclude that 8 AAC 45.092(e) requires the board, or its designee, to consider impartiality in selecting a physician to perform an SIME. In order for this consideration to take place, the board, or its designee, must require disclosure *to the board or its designee* of current financial or personal interests in the parties to the matter, that might reasonably call into question the physician's impartiality. The scope of required disclosure is limited to that information needed to assess the physician's present impartiality, and does not encompass past employment or contractual relationships unless the physician retains a financial or personal interest in them, or the relationship was so recent and extensive that it might reasonably call into question the physician's impartiality.[118] We found there was no evidence in the record that Donovan engaged in this consideration prior to selecting Dr. Brooks.

However, because there was no consideration by the board's designee of Dr. Brooks's potential partisan interests in selecting him, and because the SIME has been performed, the board must determine whether Dr. Brooks had an actual retained financial or personal interest or other partisan interest that would be affected by his

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[117] *ATT Alascom v. Orchitt*, 161 P.3d at 1246.

[118] We do not view Donovan's request to know if Dr. Brooks had performed any evaluations for the parties in the past 12 months unreasonable.

opinion in the matter. We remand for the board to determine whether Dr. Brooks had a retained financial or personal interest in a party, when he began his appointment to serve as an SIME physician in this case, and whether that interest was insignificant and thus not disqualifying. If the board finds Dr. Brooks had a personal or financial partisan interest that was not insignificant, the board must decide whether his report was actually the product of such partisan interest. If the report is found to have been the product of a disqualifying partisan interest, the board may fashion a remedy that addresses with specificity the impact of the interest on the report and minimizes further expense and delay.

We concluded that there was insufficient evidence in light of the whole record to support the board's finding that Donovan "attempted" to cancel the SIME without expense to the parties. We agree that the board must determine if Donovan's acceptance of the stipulation to cancel was conditioned on lack of incurred expense, or, if not, whether there was good cause to set aside the stipulation. Because the record is devoid of notes by Donovan, or her testimony, we direct the board to take such evidence on remand.

We therefore VACATE the board's interlocutory order no. 06-0301 and we REMAND with the instruction to conduct further proceedings in accord with this decision. The commission does not retain jurisdiction.

Date: *25 Oct. 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal, but it is not a final decision on the workers'

compensation claim. The commission's decision remands (returns) the case to the board to make additional findings of fact, which may, or may not, result in a change in the board's decision. This appeal concerned a non-final order of the board; the board has not made a final decision on the workers' compensation claim. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Alaska 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. However, because this is not a final administrative agency decision on the workers' compensation claim, the Supreme Court may not accept an appeal. The Supreme Court may accept review on a a petition for hearing or review as allowed by the Appellate Rules. The time allowed to file a petition for hearing or review is short, 15 days or 10 days from the date of this decision respectively. If you wish to seek review by the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately to learn if these options for review are available to you:

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

RECONSIDERATION

A party may ask the appeals 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.

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).

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of this Final Decision and Order No. 061 in the matter of *Stephen Olafson v. State of Alaska, Dep't of Trans. and Pub. Facilities,* AWCAC Appeal No. 06-033; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *25* day of *October*, 200*7*.

Signed
R. M. Bauman, Appeals Commission Clerk

Certificate of Distribution
I certify that a copy of this Decision No. 061 in AWCAC Appeal No. 06-033 was mailed on *10/25/07* to: Jensen & Cooper, at their addresses of record and faxed to Jensen, Cooper, Director WCD, & AWCB Appeals Clerk.

Signed *10/25/07*
L. A. Beard, Deputy Appeals Commission Clerk Date