Case: *Darcey A. Geister v. Kid's Corps, Inc. and Alaska National Insurance Co.,* Alaska Workers' Comp. App. Comm'n Dec. No. 045 (June 6, 2007)

Facts: Geister appealed a board decision finding her claim was not compensable. She challenged three board rulings. First, the board denied a second independent medical evaluation (SIME) in her case either because it found no medical dispute or an insignificant medical dispute. Second, she challenged the exclusion of Dr. Dramov's opinions. His opinions were excluded as hearsay because she did not provide the employer an opportunity to cross-examine him. However, she argued that either the business records exception to the hearsay rule applied or that the opportunity she provided to cross-examine the doctor's employer should be sufficient. Finally, she argued that a video was erroneously admitted because the employer did not file it as documentary evidence under 8 AAC 45.120(f). The employer contended that the video was admissible because it was rebuttal evidence of a prior inconsistent statement by the employee after the employee testified under Alaska Rules of Evidence 613.

Applicable law: AS 23.30.095(k) provides that the "In the event of a medical dispute . . . 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 . . . ." Legislature amended .095(k) to provide "may require," making it clear that ordering an SIME is in the board's discretion. The main purpose of an SIME is to assist the board and there are many reasons why a board panel may not require an SIME such as

> 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[.] Dec. No. 045 at 7.

Right to cross-examine in a workers' compensation proceeding is "absolute," *Commercial Union Cos. v. Smallwood*, 550 P.2d 1261, 1267 (Alaska 1976). After *Smallwood*, board developed medical summary and request for cross-examination procedures in its regulations, 8 AAC 45.052. Objection to admission of medical reports based on author's unavailability for cross-examination is commonly referred in workers' compensation proceedings as a "*Smallwood* objection." But there are exceptions. 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[.]"

Summarizing Court decisions, the commission concluded that,

> While the Court's decisions in *Dobos v. Ingersoll,* 9 P.3d 1020 (Alaska 2000), and *Loncar v. Gray,* 28 P.3d 928 (Alaska 2001), hold "medical records kept by hospitals and doctors" are business records [a hearsay exception], this holding is qualified by *Liimatta v. Vest*, 45 P.2d 310 (Alaska 2002), and *Municipality of Anchorage v. Devon*, 124 P.3d 424 (Alaska 2005); 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 established." Dec. No. 045 at 16-17 (full citations to cases added).

Alaska Rules of Evidence 803(6) Business Records, provides that

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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, 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.

Alaska Rules of Evidence 613 on prior inconsistent statements:

> (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.
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> (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.
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> (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.
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> . . . .

Issues: Did the board abuse its discretion in denying an SIME? Were Dr. Dramov's opinions properly excluded from evidence? Was the video properly admitted as evidence?

Holding / analysis: On SIME issue, 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.*' 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.'" Dec. No. 045 at 8 (footnotes omitted).

These statements were contradictory as the first sentence suggested a minor medical dispute, not significant enough to require an SIME, while the second suggested there was no dispute at all. Also, board made no mention of Dr. Dramov's letters, which were challenged by the employer as hearsay.

Thus, board's reasoning was insufficient for commission to determine whether it properly exercised its discretion in denying an SIME. Commission remanded, noting that (1) Board should not analyze which opinion is more persuasive. The board is supposed to compare competing opinions merely to determine if there is a significant conflict. (2) Board should consider Dr. Dramov's letters as they are not hearsay in this context because they are not offered to persuade the board "of the truth of their substance; the opinions are offered solely to establish a difference of medical or scientific expert opinion exists." Dec. No. 045 at 9. Board was also free on remand to consider any other factors relevant to its exercise of discretion to grant or deny an SIME.

On the admissibility of the doctor's opinions, the commission concluded that Dr. Dramov's letters were not admissible under the business records exception to the hearsay rule because the requisite foundation in Alaska R. Evid. 803(6) was not 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. In addition, the commission concluded that cross-examination of the doctor who owned the practice where the author of the letter was employed was insufficient to cure the hearsay objection. This was because Dr. Helman's deposition did not provide foundational information on how Dr. Dramov arrived at her opinions, and his statement that his contact with her was "confined to reporting the results of findings of the EMG tests" indicates that he had little basis to be able to testify regarding her opinions. The commission noted that the residual hearsay exception could be considered if it was established that she was unavailable (commission concluded record did not currently support unavailability, even though Dr. Dramov had declined to do a telephone deposition). Lastly, although there was no process under which the Alaska workers' compensation board could compel the resident of another state, as Dr. Dramov was, to be a witness in its proceedings, the board could ask the California workers' compensation authorities to take the California doctor's testimony in California under AS 23.30.005(j). The commission therefore affirmed the board's decision to not consider Dr. Dramov's letters but noted that "[t]he 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)." Dec. No. 045 at 23.

On the admissibility of the video, the commission concluded that the board should have excluded it as it did not satisfy the requirements for a prior inconsistent statement under Evid. R. 613. But the commission concluded the error did not require remand because the employee did not prove that the challenged evidence prejudiced the

outcome of the hearing. First, the commission concluded that recorded conduct qualifies as a "statement." But the commission found that the statement did not contain "sufficient internal indicia of expression and reliability as to be admissible over [employee's] objections as a prior inconsistent statement *by* [*her*], without introducing testimony regarding the authenticity and circumstances of the recording." Dec. No. 045 at 20. The commission stated:

> 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. *Id.* at 21.

Nevertheless the commission concluded that the employee failed to prove that the erroneous admission of the video was prejudicial. She was permitted to respond to contents of tape at the hearing, the tape and discussion of it did not take up much time during the hearing, the tape was not shown to any of the doctors who formed opinions in the case, the board did not explicitly base its ultimate decision on the tape (but rather focused on the doctors' opinions) or on an explicit finding of the employee's credibility, and the board had substantial evidence to reach the decision that it made without the tape.

The commission states in the conclusion that "We REVERSE the board's decision to admit the videotape as a 'prior inconsistent statement.'" *Id.* at 23. The commission remanded to the board because of SIME issue.