ALASKA WORKERS' COMPENSATION BOARD

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

CLARK WILLIAMS, Employee, Claimant, v. NORTH SLOPE BOROUGH, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201307960 AWCB Decision No. 16-0027 Filed with AWCB Fairbanks, Alaska on April 4, 2016

Clark Williams' (Employee) December 23, 2015 petition for a protective order on medical releases, and his motions and requests to strike or seal a physician's report were heard on March 17, 2016, in Fairbanks, Alaska, a date selected on February 16, 2016. Employee appeared, represented himself and testified. Attorney Michael Budzinski appeared and represented North Slope Borough and its insurer (Employer). There were no other witnesses. As a preliminary matter, Employee requested a hearing continuance, which was denied. However, the hearing record was held open for one week so Employee could file a post-hearing brief addressing his concerns. This decision examines the oral order denying the requested continuance and addresses Employee's requests on their merits. The record closed on March 24, 2016.

ISSUES

As a preliminary matter, Employee requested a hearing continuance. Employee contended his attorney had abandoned him and Employee was, therefore, not prepared to proceed with the hearing. Employee contended his lack of preparation and inexperience with the law would prejudice his ability to properly articulate his positions.

Employer objected to a hearing continuance. Employer noted the hearing had initially been scheduled in January 2016, and Employer had expended considerable funds to prepare for hearing and fly its attorney to Fairbanks. As the issues were predominately "legal," Employer contended there was no "good cause" to continue the hearing.

1) Was the oral order denying Employee's requested hearing continuance correct?

Employee seeks a protective order against three medical records releases Employer proffered for his signature. Employee contends if he signs these releases, Employer and its agents will, in his view, continue to improperly obtain and use medical information against him.

Employer contends Employee has claimed a mental-health injury. Accordingly, Employer contends it is entitled to broad discovery of any and all previous mental-health issues with which Employee may have suffered. Employer contends its releases are limited to this information, and reasonably calculated to lead to the discovery of admissible evidence.

2) Is Employee entitled to a protective order on medical releases?

Employee contends Keyhill Sheorn, M.D.'s employer's medical evaluation (EME) report resulted from her improper review of his medical records without a signed release. Employee further contends Dr. Sheorn's report is inaccurate, incorrect, unprofessional, filled with ridicule and sarcasm and inappropriately mocks Employee's grammatical errors. He further contends this report is intended to "extort" him and support a "ludicrous settlement." As Employee contends Dr. Sheorn's report can damage his ability to obtain future employment, and can harm Employee's family, it should be stricken from the record along with any references to it, and he demands a full accounting of all persons to whom this report has been released.

Employer contends Dr. Sheorn's report should not be excluded as evidence. While acknowledging Employee's displeasure with the report's contents, Employer contends these objections go to the report's weight and not its admissibility at hearing.

3) Should Employee's requests to strike, seal or limit Dr. Sheorn's report be granted?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On May 7, 2015, Employee filed a claim for a "nervous/psychological" injury resulting from "malfunction of equipment, stress breakdown." Specific benefits requested include permanent total disability (PTD), permanent partial impairment (PPI), medical costs, a finding Employer made an unfair or frivolous controversion, and a request for retraining in an administrative position. (Workers' Compensation Claim, May 7, 2015).

2) Employee placed his mental health history at issue by claiming benefits related to a psychological injury while working for Employer. (Experience, judgment and inferences drawn from the above).

3) On August 3, 2015, Dr. Sheorn, psychiatrist, evaluated Employee's written records from a hospital and two clinics and his recorded and written statements. Dr. Sheorn summarized these records. She also provided opinions about another physician's diagnoses and disagreed with them. Dr. Sheorn diagnosed "Adjustment Disorder" and "Acute Stress Disorder." In Dr. Sheorn's opinion, Employee needed no further diagnostic studies. She concluded it would not be "farfetched to consider that Mr. Williams was unhappy at his job and wished to find a compensable means to leave it." In Dr. Sheorn's view, Employee's temperament, genetics, background and work history dovetailed to make him unable to adapt to stress in his life, and this was the predominant cause of his diagnosed mental health conditions. Work stress is not the predominant cause of any necessary treatment or medication, in her opinion. Employee is not medically stable and his disorder will resolve "when his current grievance is satisfied." In Dr. Sheorn's view, Employee has incurred no ratable PPI. She opined Employee should "either be fully on or off his job" because having him back at work with restrictions or accommodations would "prolong his disorder." While Dr. Sheorn opined it would be in Employee's best interest

to find other work, work stress is not the predominant cause of his difficulty. (Sheorn report, August 3, 2015).

4) On August 20, 2015, the parties attended a prehearing conference at which Employee's medical records were discussed. Employee expressed concern over his confidential medical records and wanted safeguards to protect them from inappropriate or unlawful dissemination. Employer's adjuster explained the confidential records would be placed in Employee's claim file and would be available to Employer's risk management department and anyone "involved in the claims process." The adjuster did not know if Employer's risk management department would be prevented from discussing Employee's medical records with anyone "in the community." An attorney attending the prehearing said he would enter an appearance on Employee's behalf and file a petition for a protective order. (Prehearing Conference Summary, August 20, 2015).

5) On November 23, 2015, Employee filed a petition seeking a protective order and making other requests not pertinent to a petition for a protective order. As to his request for a protective order in respect to releases, Employee stated:

> **Protective Order**
>
> This Order Seals any Findings or Reports of Dr. Keyhill Sheorn to any other person, party, or entity, including public dissemination, on the subject of Clark D. Williams, as discussed by Alaska's Workers' Compensation, or Alaska National Insurance Company. This includes persons employed or contracted to the North Slope Borough, including agents and attorneys.
>
> This Order Seals any Findings, Notes, or Reports by Dr. Thurston Hicks from Release to Dr. Keyhill Sheorn, or any person of [sic] agent of the Alaska National Insurance Company, or the North Slope Borough, including agents or attorneys, regarding Clark D. Williams.
>
> This Order prohibits Alaska National Insurance from contacting any Medical Provider, or other person or Entity, without communication to attorney Jason Crawford, under the Alaska Rules of Court Formal Rules of Evidence in Civil Procedure, in regards to the subject of Clark D. Williams.
>
> This Order is effective commencing this date November 18, 2015. (Petition, November 20, 2015, with attachment).

6) Addressing Dr. Sheorn's EME report, Employee stated:

CONFIDENTIAL

Discussion of Protective Order

Motion to Seal

Alaska National Insurance Company of Anchorage, Alaska did employ a Dr. Keyhill Sheorn, of the State of Virginia, to review confidential notes and findings of three Medical Doctors, without a Signed Release.

This included the Psychiatric Notes of Dr. Thurston-Hicks of Fairbanks Psychiatric and Neurological Clinic.

These are the observations and perceptions as seen by Clark D. Williams;

This material was used to prepare a complete 'Psychiatric Report' which appears to be crafted for the sole purpose of destroying the credibility and character of the Injured, Clark D. Williams. Within this 'Report' we find every possible damaging bit of information revealed in completely unprofessional terms (in this layman's opinion), literally dripping with ridicule and sarcasm, and mockery of such things are [sic] grammatical verbal errors.

The intent of this 'Report' is Malicious in nature. The intent of this Report was to use this, among other Motives, as a method of Extortion. On receipt, Opposing Counsel immediately proposing [sic] a ludicrous settlement. The intent of this Report was to create further harm to this individual, to effectively [sic] to impair and/or destroy his ability to again seek gainful employment in the future, to cause emotional and psychic harm, and other reasons detailed.

The Employer, the North Slope Borough, did seem to wish to recruit this Medical Doctor by reputation. Keyhill Sheorn is promoted as her specialty 'discovering what is NOT (emphasis and capitalization not added) Posttraumatic Stress Disorder' as an expert witness.

The Intent of Dr. Keyhill Sheorn has these effects;

(1) This bypasses, obviates, and destroys the need for Civil Procedure and Rules of Court, as outlined in Discovery in future legal proceedings. This is meant to prejudice future Civil proceedings in other legal mechanisms to seek compensation.

(2) This was crafted and worded in extremely prejudicial terms. A review of the 'Report' of Sheorn will reveal malignant and inflammatory language, as well as other extremes which are not typical of any sort of Medical Report.

(3) There are mistakes which are incorrect, which were later (August 2013) corrected to Dr. Thurston Hicks, which Sheorn does not take note of. This is in respect to allusion, mistakenly, to addictive drugs, which is a falsehood. This was inserted in order to defame this injured person, and became a lynchpin on which much supposition was made.

(4) References were made to a dangerous condition wherein an individual who had made many threats to this victim, (and other people), and is attempting exposure in a document meant to be made public, thereby very possibly causing harm not simply [sic] this person, but members of this person's family, to the very real threat of physical danger from malevolent individuals.

(5) There are technical falsehoods regarding Electrical Contact. This was discussed in written form with grammatical errors, even as Sheorn had ridiculed errors in spoken grammar, from the many recordings she reviewed.

(6) Irrelevant health information is disclosed, meant to this [sic] to be exposed publicly. The nature of this information is such that this individual would become [sic] pariah to a great host of persons, including family, friends, and possible future co-workers.

(7) This 'Report' was crafted in such a way as to destroy this individual's chances for ever seeking future employment, as this is meant and crafted to be disclosed in Public Record.

(8) This 'Report' was prepared in order to cause and create further Psychic and Psychological Trauma. (Alaska National Insurance Company's agents, and Dr. Sheorn, may take great satisfaction in knowing that they have caused this harm.)

(9) This Report has been most probably widely distributed already within the North Slope Borough (and beyond), if not in written form, then by verbal discussion with the intent to disseminate and cause harm, and other effects. This would be symptomatic. This will be the subject of examination. Steps should be taken to interview those this 'Report' has been disclosed to, and to begin immediate Mitigation.

(10) This is in keeping with the methods of the North Slope Borough, which Retaliates against anyone who has been injured, who brings forwards [sic] safety concerns, or files complaints, or concerns, in any way, shape, or form. Typically, this has involved releasing 'scuttlebutt' and is used as a tool of isolation, and intimidation. This in regards to public safety as well as Personal Safety. Therefore, Sheorn appears to have been recruited on the basis of reputation for crafting 'Reports' of this nature, which are meant to cause harm to individuals who have been impacted or injured by circumstances which Employers (among others) are responsible for. And that this method is used to circumvent the law, regardless of the consequences to victims, and their dependents.

These statements are true and correct to the best of my knowledge.

This is a confidential document. (*Id.*).

7) On December 23, 2015, Employee filed another petition seeking a protective order against attorney Budzinski and Alaska National Insurance Company. Employee stated unspecified actions from Employer were "overly broad and asking to continue to exercise Abuse of Process with Confidential Medical Records." Employee requested a prehearing conference to "limit abusive disclosures as in Sheorn M.D. 'report.'" (Petition, December 23, 2015).

8) On January 11, 2016, Employee re-filed the same petition. However, this petition included as attachments attorney Budzinski's December 18, 2015 cover letter and attached releases as follows: Two documents styled Authorization to Release Medical Information; an Authorization to Release Mental Health Treatment Information; and a Social Security Administration Release. (Petition, December 23, 2015).

9) On January 11, 2016, Employee also filed a "Demand to Compel" against an Alaska National Insurance Company adjuster. In summary, Employee's pleading, which generally appears in petition format, alleges a "Breach of Information" in which Employee's confidential information was distributed "to persons who were not authorized to view such information." Employee attached to his pleading an interrogatory for adjuster Debbie Wilson to complete and return, seeking information about parties to whom Employer or its representatives had provided his confidential medical records. (Demand to Compel, undated).

10) On February 16, 2016, the parties attended another prehearing conference. The designee stated the parties had attended a January 13, 2016 prehearing conference at which Employee's December 23, 2015 petition for a protective order and his related motion to seal Dr. Sheorn's report were initially set for hearing on February 18, 2016. The designee initially directed the parties to file their evidence by February 1, 2016, and their briefs and witness lists by February 11, 2016. A division error resulted in the January 13, 2006 prehearing conference summary not being generated or served. Consequently, the designee on her own motion rescheduled the February 18, 2016 hearing to March 17, 2016, with evidence filed by February 26, 2016, and briefs and witness lists filed no later than March 10, 2016. The February 16, 2016 prehearing conference summary stated that, at the January 13, 2016 prehearing conference, Employer said it would withdraw the Social Security Administration release if Employee stated he currently had

no involvement with Social Security. Employee stated he had no involvement with Social Security. Employer's counsel stated he was currently working on responses to Employee's informal discovery requests and would respond within 30 days. Employee would not sign the proffered information releases. The designee noted the parties had not provided responses to informal discovery requests. (Prehearing Conference Summary, February 16, 2016).

11) Employer withdrew the Social Security Administration release. (Inferences drawn from the above; Employer's hearing statements).

12) One release to which Employee objected is titled "Authorization to Release Medical Information" (Authorization to Release Medical Information I). This release is directed to a general cross-section of unspecified providers or entities who could possibly have Employee's medical records. This release seeks medical records and information from 1996 to the present, and is specifically limited to and addresses "mental stress, anxiety, depression, PTSD, or other mental health complaints." The release further states Employee understands the information disclosed "may be subject to re-disclosure" by Employer or its representatives "as is reasonably necessary in accordance with applicable laws." The release expires one year from the date Employee signs it, or until he revokes it in writing. (Authorization to Release Medical Information I).

13) The second release also called "Authorization to Release Medical Information," (Authorization to Release Medical Information II) is addressed to specific, named health-care providers. In all other relevant respects, this release is identical to Authorization to Release Medical Information I. (Authorization to Release Medical Information II; observations).

14) The third release styled "Authorization to Release Mental Health Treatment Information" is directed to unspecified providers or entities that could possibly have mental health evaluation or treatment records for Employee. This release is limited to records, including "prescription drug and/or rehabilitation records and information" from 1996 and continuing until the release expires or Employee revokes it in writing. This release is limited to records concerning: "anxiety, cognition, depression, memory loss, mood stabilization, mental stress, post-traumatic stress, or other mental health conditions and the sequella of said conditions." In all other relevant respects, this release is identical to Authorization to Release Medical Information I. (Authorization to Release Mental Health Treatment Information; observations).

15) Employee is displeased with Dr. Sheorn's EME report. (Employee; inferences drawn from the above).

16) Employee's agency record does not include an entry of appearance from attorney Jason Crawford, who appeared at least twice at prehearing conferences purportedly on Employee's behalf. (Observations).

17) On March 17, 2016, Employee represented himself at hearing and requested a continuance stating he was unprepared because his attorney had abandoned him. Employee contended he was legally disadvantaged because even though he had read the law "pretty thoroughly," he was unfamiliar with procedures and how to cite specific laws and statutes. (Employee).

18) Employer contended the hearing should not be continued because it had paid to prepare its attorney and flew him to Fairbanks for the hearing at considerable time and expense. Employer contended since the issues before the board for hearing were primarily "legal," there was no "good cause" to continue the hearing, at least regarding the request for a protective order against the three releases. Employer agreed to continue the issue involving Dr. Sheorn's report, but was also prepared to address the issue if required. (Employer's hearing arguments).

19) After deliberating about the continuance, the panel issued an oral order denying the request. The panel noted the hearing had been scheduled in January 2016 for February 2016, with Employee's full knowledge and acquiescence, and had been rescheduled in February 2016, to the March 17, 2016 hearing date without objection. The panel noted Employer had prepared its lawyer and had flown him to Fairbanks at considerable expense. Further, the panel found no "good cause" for the requested continuance, which is required by the applicable administrative regulation. Lastly, under these circumstances the panel determined Employee's continuance request was not in keeping with quick, efficient, fair, predictable delivery of benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. (Record).

20) Employee asked if he could bring the same issues up again at a subsequent hearing. The panel advised him he could not. (*Id.*).

21) Employee testified his June 6, 2013 work accident with Employer caused no physical injury. It caused only mental stress and trauma. His main objections to the three proffered releases were that Employer may misuse the information it obtains, and the releases appear to hold Employer harmless for any such misuse. Employee contends Employer should cooperate with him and show "dignity" in the discovery process. Employee specifically stated he had no

objection to the retroactive 1996 release date. When repeatedly and specifically asked if he had any objection to the releases' limitations, *i.e.*, "mental stress, anxiety, depression, PTSD, or other mental health complaints" or "anxiety, cognition, depression, memory loss, mood stabilization, mental stress, post-traumatic stress, or other mental health conditions and the sequela of said conditions," Employee expressed no specific objection to this language. Employee's main concern was how Employer would use the information it obtained should he sign the releases. For this reason, Employee requested a protective order. He denied having ever signed a release and questioned how Employer obtained records it already had. (Employee).

22) At hearing, Employer contended Employee had signed a medical record release on June 4, 2013, which Employer used to obtain some medical records. Further, Employer said providers had sent bills and reports to the adjuster to be processed for payment. Employer conceded it withdrew its Social Security record release at a prior prehearing conference because Employee denied he had applied for or received any Social Security benefits. Employer contended the releases were properly framed and limited to medical records necessary to obtain discovery in Employee's mental stress claim. Employer conceded it sometimes receives unrelated medical records even though its releases are specific and limited. Employer said in such case, it would voluntarily return all such records to Employee as it is not interested in medical records not pertaining to Employee's work injury. Employer asked the board to deny Employee's request for a protective order. (Employer's hearing arguments).

23) As for Dr. Sheorn's medical report, Employee reluctantly testified the report "brings out corruption" too serious to discuss in a public forum. Employee requested a "closed hearing" so he could fully express his concerns with Dr. Sheorn's report. Among the things he was willing to share in public, Employee contended Dr. Sheorn's EME report "blighted his reputation," the things she said would "affect his life forever," and the report made him look like he is not a "desirable person." In Employee's view, the report is malicious, and demonstrates Dr. Sheorn's bias and prejudice against him. While Employee trusts Employer's attorney, he does not trust Employer. He contends Employer's "*modus operandi*" is to "smear people" who file claims against it. Lastly, Employee averred Dr. Sheorn advertises herself on the Internet as a hired witness who will testify about "what is not" PTSD. Employee opines this renders her report useless as a reliable information source. He requested an order sealing or striking the report in its entirety and every reference to it. Alternately, Employee offered to unilaterally "redact" the

report to his satisfaction, and if this process was agreeable to Employer, he would withdraw his request to seal or strike the report. (Employee).

24) Employer did not accept Employee's invitation to redact the report. Employer noted Employee failed to attend the EME examination with Dr. Sheorn. Consequently, Dr. Sheorn performed only a "written record review" EME. Employer recognized Employee thinks Employer is "corrupt" and will somehow improperly use Dr. Sheorn's EME report against him. But Employer's attorney stated Employer has not yet been given the report and only Employer's attorney, Employee, the adjuster and the board has seen it. Nevertheless, Employer contends it is a party to this claim and if a person in proper authority with Employer had a reason to review the report, and requested a copy, that person would have a legal right to review it. Lastly, Employer contends Employee's main problem with Dr. Sheorn's report is that he does not agree with it for various reasons. Employer contends this objection goes to the report's weight, not its admissibility. (Employer's hearing arguments).

25) At the hearing's conclusion, Employee asked if he could have one week to file a written, post-hearing brief addressing these issues. Employer had no objection, and the panel ordered the record left open until March 24, 2016, to receive Employee's written arguments. (Record).

26) Employee was confident and well-spoken at hearing and represented himself well. (Experience, judgment and observations).

27) On March 24, 2016, Employee timely filed his post-hearing briefing and attachments. Employee reiterated his argument concerning Dr. Sheorn's Internet "presence." His briefing renewed his discussion about Dr. Sheorn reviewing Employee's medical records without a medical record release, purportedly in violation of federal law. Employee repeated his assertions that Dr. Sheorn's report will be humiliating, damaging and cause him extreme harm. Employee suggested he, his family and friends have already been damaged through Dr. Sheorn's report. Employee suggested Dr. Sheorn was wrong and violated the law by quoting extensively from Employee's attending physician's notes in her written report. Employee's post-hearing brief provided more specifics than his hearing testimony. For example, he argued Dr. Sheorn's report reveals at least five categories of information, which Employee contended were either too personal to reveal, exposed him to danger or ridicule or were otherwise irrelevant. Employee also repeated his arguments concerning allegedly erroneous statements in the report. He cited an exclusionary evidence rule applicable only before the Alaska Workers' Compensation Appeals

Commission as support for his objection to Dr. Sheorn's report. He also cited "HIPPA" and referenced "CFR 164.514(d)(3)(iii)(A)" contending Employer and Dr. Sheorn violated federal law by improperly disclosing his medical information. Moving on to the release issue, Employee took umbrage at a phrase in the subject releases acknowledging Employer may need to "re-disclose" the information, language he took as removing Employee's medical records from any protection "under 45 CFR, Subpart E." In summary, Employee seeks sanctions against Employer including: (1) the March 17, 2016 hearing should be "closed from public access"; (2) an unclear reference to "public safety" concerns; (3) releases and discovery should be "subject to review" to detect "abuse"; and alternately (4) Drs. Sheorn's and Thurston-Hicks' reports should be redacted. (Discussion and Brief Petitions and Motions, March 24, 2016).

28) Employee's post-hearing brief also included renewed calls for discovery from Employer. He attached a previously-filed document reiterating his concerns. (*Id.*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
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> (h) The department shall adopt rules for all panels. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

In *Richard v. Fireman's Fund*, 384 P.2d 445, 449 (Alaska 1963) the Alaska Supreme Court stated the board has a duty to act promptly in an advisory, instructive role:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

The Alaska Supreme Court in *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114 (Alaska 1994) stated the board has the duty to inform injured workers of their legal rights, such as the right to request an SIME. In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009) the Alaska Supreme Court reiterated the board's duty to self-represented claimants:

> A central issue [in] Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim. . . . In *Richard v. Fireman's Fund Insurance Co*. we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation (footnote omitted). We have not considered the extent of the board's duty to advise claimants. . . . But we do not need to consider the full extent of the duty here. . . . This requirement is similar to our holdings about the duty a court owes to a *pro se* litigant (footnote omitted). . . . [The information given] must inform him of deficiencies in his . . . paperwork. In evaluating the accuracy of notice of procedural rights by an opposing party, we have noted that *pro se* litigants are not always able to distinguish between 'what is indeed correct and what is merely wishful advocacy dressed in robes of certitude' (footnote omitted). The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants. (*Id.* at 319-20).

The appeals commission gives non-attorney claimants leeway in their filings and holds them to a less demanding standard than attorneys. *Khan v. Adams & Associates*, AWCAC Decision No. 057 (September 27, 2007). The board generally accords self-represented litigants leeway in all regards. *Mow v. Peter Pan Seafoods, Inc.*, AWCB Decision No. 11-0051 (April 22, 2011).

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

examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who subject to the compensation provisions of this chapter. If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . .
. . . .

(k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent 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.

AS 23.30.107. Release of Information. (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury. . . .

AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance. (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after

service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.

(b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.

(c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

(d) If the employee files a petition seeking a protective order to recover medical and rehabilitation information that has been provided but is not related to the employee's injury, and the board or the board's designee grants the protective order, the board or the board's designee granting the protective order shall direct the division, the board, the commission, and the parties to return to the employee, as soon as practicable following the issuance of the protective order, all medical and rehabilitation information, including copies, in their possession that is unrelated to the employee's injury under the protective order.

(e) If the board or the board's designee limits the medical or rehabilitation information that may be used by the parties to a claim, either by an order on the record or by issuing a written order, the division, the board, the commission, and a party to the claim may request and an employee shall provide or authorize the production of medical or rehabilitation information only to the extent of the limitations of the order. If information has been produced that is outside of the

> limits designated in the order, the board or the board's designee shall direct the party in possession of the information to return the information to the employee as soon as practicable following the issuance of the order.

Employers have a right to thoroughly investigate workers' compensation claims to verify information provided, properly administer claims, and effectively litigate disputed cases. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Medical and other releases are important means to do so. Under AS 23.30.107(a), an employee must release all evidence "relative" to the injury. Evidence is "relative" to the injury where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

Records of medical treatment to the body part or organ system an employee alleges was injured in the course and scope of employment, covering a period of two years prior to the date of injury, are sufficiently likely to lead to admissible evidence discoverable in most contested cases. However, releases the Act requires an employee to sign can only be determined by a review of the unique facts presented, and specific benefits claimed in each case. Significantly broader medical releases are routinely approved where mental injury was alleged, or where there was a reasonable indication a physical injury may have a psychological component such as chronic pain syndrome, or a somatoform or conversion disorder. *Granus.* Under AS 23.30.107(a), medical records having nothing to do with the body part or function injured are irrelevant and not discoverable without the employer having some basis for the request. *Syren v. Municipality of Anchorage,* AWCB Decision No. 06-0004 (January 6, 2006).

The Alaska Supreme Court encourages "liberal and wide ranging discovery under the Rules of Civil Procedure." *Schwab v. Hooper Electric,* AWCB Decision No. 87-0322 at 4, n. 2 (December 11, 1987). If a party unreasonably refuses to provide information, AS 23.30.108(c) and AS 23.30.135 grant broad discretionary authority to make orders to assure parties obtain relevant evidence.

A central question in most workers' compensation proceedings is the cause, nature, and extent of an employee's injury, need for medical care, and impairment and disability. In typical cases, medical records and doctors' reports are the most relevant and probative evidence on these issues. To ensure

ready access to such evidence, the legislature abrogated the physician-patient privilege as to "facts relative to the injury or claim" in a workers' compensation proceeding. The main question in determining if a particular release should be signed is whether the information being sought is reasonably calculated to lead to discovery of facts "relevant" to an employee's injury or a question in dispute. The releases' proponent has the burden of demonstrating the relevancy of information being sought. *Wariner v. Chugach Services, Inc.*, AWCB Decision No. 10-0075 (April 29, 2010). Based on the policy favoring liberal discovery, "calculated" to "lead to admissible evidence" means more than a mere possibility, but not necessarily a probability, the information sought by the release will lead to admissible evidence. For a discovery request to be "reasonably calculated," it must be based on a deliberate and purposeful design to lead to admissible evidence, and that design must be both reasonable and articulable. The releases' proponent must be able to articulate a reasonable nexus between the information sought and evidence relevant to a material issue in the case. *In the Matter of Mendel*, 897 P.2d 68, 93 (Alaska 1995). To be "reasonably calculated" to lead to admissible evidence, both the scope of information within the release terms and the time periods it covers must be reasonable. *Granus.*

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

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing. . . .

. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness, becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d) ;

(F) a second independent medical evaluation is required under AS 23.30.095 (k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041 (d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

> (K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
>
> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
>
> (M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d) (1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
>
> (N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing.

ANALYSIS

1) Was the oral order denying Employee's requested hearing continuance correct?

As a preliminary matter, Employee requested a hearing continuance because his attorney "abandoned" him. 8 AAC 45.074(a). Employee felt uncomfortable proceeding as he is not an attorney and has difficulty citing to specific statutes or regulations to support his positions. Employer objected to a continuance on the record release issue though it would agree to continue the hearing on Employee's request to seal or otherwise restrict Dr. Sheorn's EME report. Employer had paid its attorney to prepare for the hearing and had flown him to Fairbanks. After deliberation, the panel denied Employee's continuance request.

Continuances are not favored and are not routinely granted. 8 AAC 45.074(b). The parties agreed to a February 2016 hearing at a January 2016 prehearing conference. The hearing was later changed to March 17, 2016. Employee knew in January 2016, there was soon going to be a hearing in his case limited to these issues within roughly 30 days. The hearing date was rescheduled to about 30 days later. Employee never objected to either hearing date, until the

March 17, 2016 hearing date arrived. Attorney Crawford ultimately never entered an appearance on Employee's behalf though he participated somewhat at two prehearing conferences and suggested he was going to enter an appearance. The fact, known in January, there was going to be a hearing soon should not have come as a surprise to Employee in March. *Rogers & Babler*. Nevertheless, at hearing Employee said he needed a continuance because he had no attorney and was not prepared because he did not understand how to properly cite the law. On the other hand, Employee also he said he had read the law "pretty thoroughly" and thought his positions on the March 17, 2016 hearing's merits were sound.

Discretion to continue hearings is limited. 8 AAC 45.074(b). The moving party must demonstrate "good cause" to support a continuance request. 8 AAC 45.074(b)(1). There are 14 expressed "good cause" reasons for granting a continuance. 8 AAC 45.074(b)(1)(A)-(N). Employee did not demonstrate his situation fit into any "good cause" category. For example, Employee never formally had an attorney who entered an appearance on his behalf. Therefore, none of the reasons otherwise constituting "good cause" related to a missing legal representative apply in this case. 8 AAC 45.074(b)(1)(B)-(D). It may be Employee believed attorney Crawford would enter an appearance and represent him at hearing. But it was Employee's responsibility to obtain an attorney's representation before the hearing. Failing that, Employee could have filed a petition seeking a hearing continuance before Employer's attorney prepared for the hearing and traveled to Fairbanks. Allowing a last-minute continuance under these circumstances would thwart the legislature's mandate to ensure quick, efficient, fair and predictable benefits delivery to Employee, if he is entitled to benefits, at a reasonable cost to Employer. AS 23.30.001(1). Even had Employee requested a continuance earlier, not being able to obtain an attorney is not necessarily "good cause," to grant a continuance. If Employee wanted and needed an attorney, he should have exercised greater diligence to find one in a timely manner. If attorney Crawford was not cooperating, Employee could have and should have tried to locate another attorney.

The only other possible regulatory basis for granting Employee's continuance request comes under 8 AAC 45.074(b)(1)(N). This is a catchall provision allowing for an order granting a continuance if, despite a party's "due diligence, irreparable harm may result from a failure to grant the requested continuance." As the preliminary issues address disputes concerning

information releases and an EME report, and there were no factual questions, Employee could not demonstrate how "irreparable harm" may come from proceeding with the hearing with Employee representing himself. As it turned out, Employee was well spoken and represented himself well. For example, he asked for and was granted an opportunity to file a post-hearing brief further elucidating his positions. AS 23.30.135.

Lastly, in the event Employee is dissatisfied with this decision, he has a right to seek prompt appellate review by filing a "petition for review" with the Alaska Workers' Compensation Appeals Commission. The commission, in its discretion, can remedy any errors or infirmities in this decision and can prevent any perceived "irreparable harm." This further protects his due process rights. The oral order denying Employee's continuance request was therefore correct.

2) Is Employee entitled to a protective order on medical releases?

Employee seeks a protective order against three medical releases from Employer. AS 23.30.108(a). This decision is supposed to review a prehearing conference designee's decision on Employee's petitions for protective orders for "abuse of discretion." AS 23.30.108(c). For some reason, no such order was issued at the prehearing conference level. Therefore, this decision addresses and decides the protective order issue in the first instance. Employee's main objection is fear of what Employer might do with his medical records upon obtaining them.

The Act is to ensure quick, efficient, fair and predictable delivery of indemnity and medical benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. AS 23.30.001(1). The law favors liberal and open discovery in workers' compensation cases. *Granus*; *Schwab*; AS 23.30.107. Workers' compensation cases are supposed to be "summary," *i.e.*, swift, and should employ "simple" procedures. AS 23.30.005(h). Employee filed a workers' compensation claim. He seeks benefits related to his "mental stress trauma injury." Mental health and stress-related claims are among the most difficult cases to adjudicate. *Rogers & Babler*. There may be many reasons why Employee is suffering with mental health related symptoms. Some may be related to his work incident with Employer. Others may not. Given this uncertainty, allowing broad, liberal discovery will help best ascertain the parties' rights in this case. AS 23.30.135.

In workers' compensation cases, requested discovery need not be "relevant." It must simply be reasonably calculated to lead to evidence admissible at hearing. *Granus*. There must be a nexus between the injury and the discovery requested. *Mendel*.

Employee has no objection to the medical releases' retroactive date going back to 1996. Similarly, he stated no specific objection to the releases' expressed limitations, which appear appropriately tailored to discover only medical records concerning mental health related issues. Employee's reluctance to release more personal information than absolutely necessary is understood. But on the other hand, Employer's right to investigate his past and ongoing need for medical care and either accept the claim or develop any related defenses is an important right the Act protects. AS 23.30.107(a); AS 23.30.108; *Cooper*. It must be remembered Employee filed a claim against Employer, not the other way around. By claiming a mental stress type injury, Employee placed his mental health history in dispute. *Schwab*; *Werley*. Employer has a right to investigate and defend. By defining Employee's injury as one caused by "mental stress," and by limiting its releases accordingly, Employer has met its burden of showing the releases are designed to obtain "relative" and discoverable evidence. *Granus*; *Wariner*. It is impossible for Employer to defend against a mental health or stress claim without access to Employee's prior mental health and stress-related medical records. *Rogers & Babler*. Given the above analysis, and notwithstanding Employee's misgivings, he will be directed to sign and deliver the releases. AS 23.30.108(c).

Employee also contends Employer failed to provide his requested discovery. Employee is advised the above analysis works both ways. Employee's suggestion Employer was not forthcoming with discovery he requested was not identified as an issue for hearing. Employee is advised that should Employer not comply with his reasonable discovery requests, or otherwise seek a timely protective order, Employee may petition for an order compelling Employer to cooperate with discovery. *Richard*; *Bohlmann*. Employee is further advised should he decline to sign and deliver the proffered releases as ordered in this decision, his claims on their merits may be dismissed in whole or in part. AS 23.30.107(a); AS 23.30108(c); *Richard*; *Bohlmann*. This is a serious sanction to which Employee should give careful attention.

3) Should Employee's requests to strike, seal or limit Dr. Sheorn's report be granted?

Though his pleadings were not drafted perfectly, Employee made it clear he is displeased with Dr. Sheorn's EME report. *Khan*; *Mow*. He ascribes to it many and varied attributes he finds offensive and prejudicial to his case. Employee further suggested, without specifics, the EME report may place him or his family and friends at personal risk. But this is an adversarial system. Employer has a statutory right to send Employee to a physician of its choosing for an evaluation. AS 23.30.095(e). It did so and Employee has not objected to the manner or means by which the evaluation was scheduled, even though he failed to attend. As Employee did not attend the evaluation personally, Dr. Sheorn proceeded in his absence by performing a medical "records review." To this point, Employee has shown no infirmity restricting Dr. Sheorn's report.

Employee further contends Dr. Sheorn's EME report is illegal or improper because he never signed a release for Dr. Sheorn to obtain and review his medical records. Nothing in the law requires Employer to obtain a release to disseminate Employee's medical records to its properly selected EME physician. Employer's statutory right to an EME requires the examining physician to use "existing diagnostic data to complete the examination." AS 23.30.095(e). Necessarily, an EME physician must have access to Employee's relevant medical records to track Employee's medical history and analyze any "existing" diagnostic testing or data. Again, Employee has failed to show a problem with Dr. Sheorn's EME evaluation and report.

Employee's objection to Dr. Sheorn's report stems mainly from his displeasure with the report's substance and his vague arguments the report may endanger him or his family and friends. While the report may offend Employee, and though he may disagree strenuously with Dr. Sheorn's alleged facts and factual conclusions, these objections and arguments go to the report's weight, and not to its admissibility. In other words, if at hearing, Employee can demonstrate Dr. Sheorn's opinions are based on incorrect facts or factual conclusions, he may dramatically affect the weight the fact-finders give her opinions. Similarly, if at hearing Employer can demonstrate Employee gave incorrect information to his attending physicians, and they relied upon his assertions in forming their opinions, Employer may effectively diminish the weight accorded Employee's doctors' reports. AS 23.30.122; *Smith*; *Rogers & Babler*. But Employee has not demonstrated a legal basis for striking, sealing or otherwise limiting Dr. Sheorn's EME report.

Irrelevant medical evidence is not discoverable. *Syren*. According to its attorney, if Employer accidentally obtains irrelevant medical information its lawyer will return the information to Employee. Further, if Employee knows Employer has medical information "not related" to his injury, he may petition to "recover" from Employer all such medical information. AS 23.30.108(d), (e). If Employer or its agents misuse Dr. Sheorn's report or Employee's medical information in any way, Employee is free to pursue any available civil or criminal remedies. However, any such remedies lie outside the Act's parameters. *Richard*; *Bohlmann*. Employee's request to strike, seal or restrict Dr. Sheorn's EME report will be denied, as will his related request for the identities of all persons to whom Employer may have given the report. Employee has demonstrated no legal basis for this relief.

Since Employee is a self-represented layperson, he is advised he has a right to seek a second independent medical evaluation (SIME) in the event he can demonstrate a "medical dispute" between his physicians and Employer's EME physician. AS 23.30.095(k); *Richard*; *Dwight*; *Bohlmann*. For example, EME Sheorn states Employee's work is not the predominant cause of his mental injury. If Employee's physicians say his employment with Employer is the predominant cause of his mental injury, this would create a medical dispute and he may petition for an SIME. Other grounds for requesting an SIME besides "causation" include whether Employee's alleged work injury is medically stable, whether he has the ability to enter a reemployment plan, his degree of permanent impairment, his functional capacity, or "the amount and efficacy of the continuance of or necessity" for additional treatment and compensability. AS 23.30.095(k). If granted, an SIME may provide an additional medical opinion useful in deciding Employee's claims. AS 23.30.135. Employee can discuss an SIME with a Workers' Compensation Technician if he needs assistance in filing an SIME petition and associated paperwork. An SIME form may be found on the division's website. The parties may also stipulate to an SIME.

CONCLUSIONS OF LAW

1) The oral order denying Employee's request for a hearing continuance was correct.
2) Employee is not entitled to a protective order on medical releases.
3) Employee's motions to strike, seal or limit Dr. Sheorn's report will not be granted.

ORDER

1) Employee's December 23, 2015 petition for a protective order on medical releases and his motions to strike, seal or otherwise limit Dr. Sheorn's EME report are denied.

2) To the extent Employee made similar requests in multiple pleadings or other documents, all similar petitions, motions and requests are also denied for the reasons set forth above.

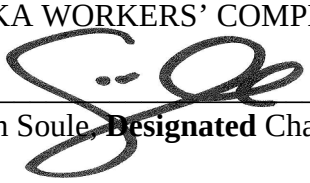
3) Employee is ordered to sign, date and return the three releases referenced above to Employer's attorney within seven days from this decision's date.

4) If Employee no longer has the three releases, he is ordered to contact Employer's attorney immediately and request a new copy of the same releases.

5) In the event Employee requests duplicate releases, Employer is ordered to provide a new set of the same releases to Employee within seven days, after which Employee will have seven days to sign, date and return them to Employer's attorney.

Dated in Fairbanks, Alaska on April 4, 2016.

ALASKA WORKERS' COMPENSATION BOARD



William Soule, **Designated** Chair

/s/_____
Julie Duquette, Member

/s/_____
Lake Williams, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Clark Williams, employee / claimant v. North Slope Borough, employer; Alaska National Insurance, insurer / defendants; Case No. 201307960; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on April 4, 2016.

/s/_____
Jennifer Desrosiers, Office Assistant II