ALASKA WORKERS' COMPENSATION BOARD

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

SCOTT A. GROOM, Employee, Respondent, v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION, Self-Insured Employer, Petitioner.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 199905415 AWCB Decision No. 13-0091 Filed with AWCB Fairbanks, Alaska on August 2, 2013.

The State of Alaska's (Employer) September 6, 2012 petition seeking a finding Scott Groom (Employee) committed fraudulent acts and seeking penalties was heard by a three member panel in Fairbanks, Alaska on May 23, 2013, a date selected on January 7, 2013. Employee appeared by telephone and represented himself. Patricia Shake represented Employer. There were no witnesses. The hearing was continued and the record held open to receive Employee's supplemental witness list and Employer's supplemental authority. The record closed on June 20, 2013 upon receipt of Employee's witness list. This decision memorializes rulings on numerous preliminary issues at hearing. Because of his resignation from the board, Jeff Bizzarro, member from labor, was unable to complete deliberations and did not participate in this decision.

ISSUES

In a May 20, 2013 letter to the Alaska Workers' Compensation Board (board), Employer contended a Superior Court Grand Jury handed down a criminal indictment against Employee and one of Employee's medical providers, who was also listed as a witness at the instant hearing. It further contended the indictment is for crimes "directly related" to the instant hearing and the board

"may wish to be prepared to issue instructions to assist [Employee] and [provider/witness] in understanding their rights and the risks associated with parallel criminal and workers' compensation proceedings as a preliminary matter at hearing."

It is unknown whether Employee received Employer's May 20, 2013 letter in advance of the hearing; however, Employee was aware of the indictment and requested a continuance of the hearing based on the pending criminal charges and because he did not have attorney representation in either the criminal case or in this proceeding.

1) Should the board issue instructions to assist Employee and a witness in understanding their constitutional rights and the risks associated with a "parallel" administrative proceeding and criminal prosecution?

Employee's contentions with respect to a continuance are set forth above.

Employer opposed a continuance because it flew both in-state and out-of-state witnesses to Fairbanks to testify at the hearing. It further contended one of its witnesses is retiring shortly after the hearing and relocating outside Alaska and another of its witnesses has been diagnosed with a life-threatening illness. Employer also contended pending criminal charges are not grounds for a continuance under regulation. Additionally, Employer contended a continuance will deprive it of due process of law since it continues to pay Employee's transportation expenses and his provider's fees.

2) Should the hearing on Employer's instant petition be continued?

If the instant hearing is continued, Employer contended a July 11, 2013 hearing on Employee's claim for medical benefits should be vacated.

Employee did not articulate opposition to Employer's request to vacate the July 11, 2013 hearing; however, it is assumed he opposes Employer's request.

3) Should the July 11, 2013 hearing on Employee's claim be vacated?

Employer objected to Employee's witness list on the basis it did not contain witness telephone numbers, addresses or the substance of their testimony.

Employee contended he is unrepresented and any deficiencies in his witness list just demonstrates his "lack of education."

4) What is the remedy for Employee's witness list when his list does not comply with regulation?

Employer contended it has been seeking discovery from Employee since February of this year on matters concerning the instant hearing and Employee has refused to comply with its efforts. It contended it disclosed its evidence against Employee in advance of the instant hearing and contended Employee is now developing his positions in response to its prehearing disclosures. Specifically, it contended it sought information concerning treatment by Employee's provider on dates and times when she was also working at another job and Employee now contends his provider's husband, and not provider, was giving him treatment on those dates. Employer contended Employee is a sophisticated *pro se* claimant and requests an order excluding evidence and prohibiting Employee from "supplementing the record with additional information."

Employee opposed Employer's request for an exclusionary order and contended he was under doctor's restrictions and did cooperate with discovery to the extent he was able.

5) Should the record be closed to filing additional evidence during the period of continuance, if granted?

Employer contended it continues to pay Employee's transportation expenses and his provider's fees, so if the instant hearing is continued, an order staying further payment of benefits should also be entered.

Employee opposed Employer's request for an order staying payment of benefits on the grounds he needs the medical treatment and his provider's fees are far less than those at the local hospital where he would otherwise have to seek treatment.

6) Should Employer's request for an order staying payment of benefits during the period of continuance be granted?

While reviewing the voluminous record in this case, significant concerns arose regarding the nature of Employee's recent attempts to make contact with certain witnesses in this case. Specifically, Employee made attempts to contact Employer's medical evaluator and a hospital employee who purportedly trained Employee's provider in lymphedema therapy. Employee's attempts to contact these witnesses were characterized by Employer as "harassing" and "threatening" in nature, and reportedly were described as a "nightmare" by one of the witnesses. During the review of the record, it was further noted Employer had incorporated a request for an order "directing Employee to cease harassment" of one of the witnesses into its opposition to an objection made by Employee. Employer's request was not an issue for hearing and the board raises this issue on its own motion.

7) Should additional action be taken regarding Employee's attempts to contact certain witnesses in this case?

FINDINGS OF FACT

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

1) It is undisputed Employee suffers from a preexisting condition known as congenital lymphedema or Milroy's disease. (Employer's Answer to Employee's May 17, 1999 Claim, June 16, 1999; Employee's Hearing Brief, July 28, 1999; Employer's Notice of Controversion, August 9, 1999; *see* Parties' Stipulation; August 26, 1999 (stipulating to amounts of Family and Medical Leave taken as a result of the condition)).

2) Congenital lymphedema is a rare genetic disorder of the lymphatic system. Vessels in the lymphatic system circulate lymph and other interstitial fluids throughout the body. Employee is missing a number of these vessels and, as a result, his arms and legs frequently swell with uncirculated fluid. In their swollen state, Employee's legs are spongy. Lymphatic vessels also transport bacteria and other hostile agents to lymph nodes, allowing the body to produce antibodies. Because Employee's body or lymphatic system cannot perform this function reliably, he is prone to cellulitis, a type of local skin infection. (*Groom v. State of Alaska, Department of Transportation*, 169 P.3d 626; 628 (Alaska 2007).

3) On March 19, 1999, Employee reported he slipped and fell on ice six days earlier, creating a "rip" in his left leg, while working as a weigh station operator at Fox, Alaska. (Report of Occupational Injury or Illness, March 19, 1999).

4) On May 17, 1999, Employee filed his initial claim based on the March 19, 1999 report of injury. (Claim, May 17, 1999).

5) On November 10, 1999, Employee reported "tears and damage to both legs" as a result of shoveling snow for Employer the previous winter. (Report of Occupational Injury or Illness, November 15, 1999).

6) On March 9, 2001 and May 10, 2001, Employee filed additional claims alleging aggravations to his lymphedema condition as a result of shoveling snow, prolonged standing and incremental injuries over time. (Claims, March 9, 2001; May 10, 2001).

7) In late 2001 or early 2002, Employee moved from Alaska to Wisconsin. (Bartling report, July 26, 2001; Wegner report, January 25, 2002; observations; inferences).

8) On August 9, 2005, Employee was determined to be disabled and found eligible for supplemental security income (SSI). (Social Security Administration letter, August 9, 2005).

9) The reported injuries and their relationships to Employee's preexisting condition have been the subject of extensive litigation over time, including six board decisions and appeals to the Superior Court and the Alaska Supreme Court. (*Scott Groom v. State of Alaska*, AWCB Decision No. 99-0209 (October 14, 1999) (*Groom I*) (finding the reported injury compensable as an aggravation of Employee's preexisting condition); *Scott A. Groom v. State of Alaska*, AWCB Decision No. 99-0236 (November 19, 1999) (*Groom II*) (affirming *Groom I* on reconsideration); *Scott A. Groom v. State of Alaska*, 4FA-99-2912 CI (Memorandum Decision, Alaska Superior Court, January 5, 2000) (affirming *Groom I* & *II*); *Scott A. Groom v. State of Alaska*, AWCB Decision No. 02-0139 (July 25, 2002) (*Groom III*) (declining to award benefits and ordering a second independent medical evaluation (SIME) to be conducted by an expert on lymphedema); *Scott A. Groom v. State of Alaska*, AWCB Decision No. 02-0168 (August 29, 2002) (*Groom IV*) (clarifying the SIME procedure on reconsideration of *Groom III*); *Scott A. Groom v. State of Alaska*, AWCB Decision No. 02-0217 (October 24, 2002) (*Groom V*) (denying Employee's petition to vacate appointment of SIME physician); *Scott A. Groom v. State of Alaska*, AWCB Decision No. 03-0125 (May 30, 2003) (*Groom VI*) (denying and dismissing Employee's claims); *Scott A. Groom v. State of Alaska*, 4FA-03-1444 CI; Memorandum Decision, Alaska Superior Court, January 31, 2005) (affirming

Groom VI); *Scott A. Groom v. State of Alaska*, 169 P.3d 626 (Alaska 2007) (reversing and remanding *Groom VI*).

10) On May 9, 2008, the board approved a compromise and release agreement settling indemnity and reemployment benefits. Employee's medical and related transportation benefits were left open. (Compromise and Release Agreement, May 9, 2008).

11) On July 25, 2008, Employee began treating with William Fast, M.D. (Fast report, July 25, 2008).

12) On January 22, 2009, Employee requested a referral from Dr. Fast to the Mayo Clinic for his lymphedema condition. Dr. Fast made the referral. (Fast report, January 22, 2009; Consultation Request, January 22, 2009).

13) The main treatment protocol for lymphedema is complete decongestive therapy (CDT). CDT consists of an initial reductive phase (phase I) followed by a maintenance phase (phase II). In phase I, the main goals are reducing the swelling of the affected body part and improving the skin. After phase I, the person with lymphedema immediately transitions into phase II, an ongoing, individualized self-management phase to insure the gains of phase I are maintained long term. The components of phase I therapy are: 1) manual lymphatic drainage (MLD or lymph massage); 2) multi-layer short stretch compression bandaging; 3) lymphatic exercises; 4) skin care; 5) elastic compression garments; and 6) education in lymphedema self-management. Phase I therapy is optimally performed daily for 3 to 8 weeks by licensed physical or occupational therapists but the frequency, duration and modalities of phase I therapy is dependent upon the individual's lymphedema condition. Phase II is a lifetime, self-care program specifically tailored to the individual's medical needs and abilities and includes: 1) self-lymph massage; 2) home exercises; 3) skin care regimen; and 4) compression garments and/or bandages the individual learns to apply. (Position Statement from the National Lymphedema Network, "Topic, The Diagnosis and Treatment of Lymphedema," February 2011 at pages 6-10).

14) On March 30, 2009, Robert DePompolo, M.D., evaluated Employee at the Mayo Lymphedema Clinic for his left lower extremity lymphedema condition and recommended complete decongestive therapy. (DePompolo report, March 30, 2009).

15) From March 30, 2009 to April 24, 2009, Employee underwent 14 days of phase I therapy at the Mayo Clinic. Therapy was administered during three visits to Mayo with Employee returning home between visits. Therapy went well for Employee. Both he and his wife received instruction

from a lymphedema therapist, Jennifer Brandt, on independent home care, including applying compression bandages and performing manual lymphatic drainage. Both Employee and his wife demonstrated they were able to perform these components of an independent, self-care program. (Mayo reports, March 30, 2009 to April 24, 2009).

16) On April 6, 2009, between therapy visits, Employee called Employer's adjuster and stated his wife should be compensated for tending to his legs and washing his dressings because it would cost more to hire a nurse to perform these activities. (S. Poynter email, April 6, 2009).

17) On April 8, 2009, Employee saw Dr. Fast for a follow-up between phase I sessions. Employee reported the Mayo Clinic taught him and his wife wrapping techniques and how to do massage. He also reported reduced swelling in his legs. (Fast report, April 8, 2009).

18) On April 14, 2009, Employee called Employer's adjuster and stated his wife "really deserves" to be paid because she "was taught and trained how to do it." He also contended he would need massage twice per day. (Voicemail transcript, April 14, 2009; experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

19) On April 16, 2009, Dr. DePompolo and therapist Brandt met with Employee to discuss Employee's progress and future treatment. Dr. DePompolo stated Employee's phase I treatment would continue for 3-4 weeks then phase II would be initiated. Employee's phase II treatment would consist of: 1) continued use of custom compression garments during the day; 2) continued use of compression bandages in conjunction with a low stretch compression device, such as a Reid Sleeve, to be used every night, 3) continued skin care with lotion to the affected areas and manual lymphatic drainage by a trained family member once per week; and 4) an ongoing exercise regimen to increase lymph flow. He stated Employee would require ongoing, lifetime care and his condition may slowly worsen as Employee ages. Moving forward, Dr. DePompolo anticipated Employee will need between two to four "rechecks" per year and an annual visit for one week of additional phase I treatment, consisting of 5-10 treatment sessions. However, should Employee develop significant cellulitis, he might need a more intensive program to return him to baseline. (DePompolo report, April 16, 2009).

20) On April 18, 2009, between therapy visits, Employee called Employer's adjuster and contended he could not find a local nurse to wrap his legs. He stated his wife wrapped them the previous evening and it took her two hours but he was not going to ask her to do it again. Employee contended if he did "not wrap these legs this weekend, we are right back to where we

were three weeks ago starting all over again." He stated his wife had been trained to wrap his legs and she does it better than anybody he could find. Employee stated "there has to [be] some way we can pay her as a trained person." He contended he was "not going to allow [his wife] to spend her time being [his] nurse," because it was not fair and it was not his wife's financial responsibility, it was the State of Alaska's financial responsibility. He stated "if you're not willing to pay her, then we're back to square one." Employee also contended he needed leg wrapping five times per week. (Voicemail transcript, April 18, 2009).

21) On April 19, 2009, Employee called Employer's adjuster and contended he contacted the Gunderson Lutheran Hospital in La Crosse and it recommended a nurse, Laurayne Fischer, to him. He stated:

> Mrs. Fischer does live over there in Fennemore. Its 26.4 miles one way. I went and saw Mrs. Fischer. This is my third time. I will go back again this evening. She's taking good care of me. She seems to do a really good job. I'll send you a fax bill Monday followed by mail and we'll go from there. . . . I did find a nurse through Gunderson Hospital and I'll send you the bill.

(Voicemail transcript, April 19, 2009).

22) Employee faxed Employer's adjuster a receipt for Ms. Fischer's treatment in the amount of $712.50 and $116.16 in mileage for travel. (Faxed receipt, April 19, 2009).

23) On April 24, 2009, Dr. DePompolo and therapist Brandt met with Employee. Dr. DePompolo found Employee had responded very well to compression garments and compression wraps. He stated Employee had a "well established home program" and anticipated weaning Employee to that program. (DePompolo report, April 24, 2009).

24) On April 24, 2009, Ms. Fischer faxed Employer's adjuster a letter detailing her visit with Employee and his treatment. She wrote:

> Purpose of Visit
>
> Met with Mr. Groom on Saturday April 18th 2009 at 2:30 pm for three hours. . . . Returned later to apply wraps for night. 1.5 hours to wrap legs. Returned sunday [sic] am for wrapping and then again in the pm for wrapping. A total of 7.5 hours for the weekend.

(Fischer letter, April 23, 2009).

25) On April 24, 2009, Employee called Employer's adjuster seeking payment for Ms. Fischer. He stated his wife was unable to assist him in wrapping his legs because she is disabled with Meniere's disease. (Voicemail transcript, April 24, 2009).

26) Employer contends it initially refused to reimburse Employee for Ms. Fischer's treatment on April 18-19, 2009 because of missing documentation, including: 1) a doctor's referral; 2) verification Ms. Fischer was a qualified health care provider; 3) a copy of Ms. Fischer's W-9; 4) a valid bill including CPT codes for the services provided; and 5) corresponding records or chart notes from Ms. Fischer documenting specific services provided for each bill. (Employer's Hearing Brief, May 14, 2013).

27) On April 27, 2009, Employee saw Dr. Fast, who wrote a "Dear Sir or Madam" letter referring Employee to Ms. Laurayne Fischer for "at least weekly maintenance massage and wrapping indefinitely." (Fast report, April 27, 2009; Fast letter, April 27, 2009).

28) On May 8, 2009, another physician, Byron Myers, M.D., wrote a "To Whom It May Concern" letter prescribing daily leg wrapping because Employee was unable to it himself and because his wife was unable to assist on account of her "medical condition." (Myers letter, May 8, 2009).

29) This is the first time Dr. Myer's appears in the medical record. There are no medical reports or chart notes from Dr. Myers until June 8, 2009. (Record, observations).

30) On May 14, 2009, Employee saw Dr. Fast seeking a referral to the Prairie Du Chien hospital for his leg wrappings. Employee told Dr. Fast he had not gotten approval for a local person to do the wrapping and massage and he had been referred by Employer to the physical therapy departments in Prairie or Veroqua. Dr. Fast prescribed wrappings and massage 3-5 time per week. (Fast report, May 14, 2009; Fast prescription, May 14, 2009).

31) On May 15, 2009, on account of the ongoing billing dispute over payment of Ms. Fischer's bills, Employer contends it approved once daily lymphedema therapy at the Prairie Du Chien hospital based on Dr. Fast's revised opinion on frequency of treatment. It further contends it repeatedly instructed Employee in writing it would only pay for once daily treatment. (Employer's Hearing Brief, May 14, 2013).

32) Records from the occupational therapy department at Prairie Du Chien hospital show Employee treated twice per day on most days. (Occupational therapy chart notes, May 19-June 1, 2009; Fast report, May 27, 2009).

33) A dispute arose between Employee and Dr. Fast regarding the frequency of Employee's leg wrappings. Dr. Fast believed wrapping once per day was sufficient, while Employee "demanded and insisted" twice per day wrappings. (Fast report, June 3, 2009).

34) On June 26, 2009, Dr. Myers referred Employee to Ms. Fischer for twice daily therapy. (Myers letter, June 26, 2009).

35) On June 29, 2009, Dr. Fast reiterated his opinion Employee required once daily treatment. (Fast letter, June 29, 2009).

36) Following Employee's June 3, 1999 dispute with Dr. Fast, Employee began treating with Myers and discontinued treating with Dr. Fast. (Myers report, June 8, 1999, record; observations).

37) On July 8, 2009, Employer controverted twice per day leg wrapping by Ms. Fischer based on Dr. Fast's recommendation for once daily wrapping. (Controversion, July 15, 2009).

38) On December 21, 2009. Dr. DePompolo evaluated Employee at Employer's request in order to render his opinions on Employee's treatment. Dr. DePompolo thought Employee might need more intensive edema management once a year should he develop increased swelling due to weather conditions, changes to his diet, new medical issues, etc. In this event, it might be necessary to increase the frequency of Employee's treatment to twice daily for one week. Dr. DePompolo thought Employee's recurrent cellulitis was well managed and stated treatment was essential to control this condition. (DePompolo report, December 21, 2009).

39) On January 29, 2010, in response to questions from Employer, Dr. DePompolo opined it would be reasonable to have a qualified medical provider apply compression wraps in the evening if Employee's wife was unable to perform those duties. He reiterated twice daily treatment with manual lymphatic drainage would only be needed if Employee developed problems with edema. Dr. DePompolo stated Employee could don and doff his daytime compression garments independently and did not currently need daily manual lymph drainage. He also reiterated Employee might have to occasionally return to phase I treatment for a couple of weeks but he anticipated that as an infrequent occurrence. (DePompolo letter, January 29, 2010).

40) Employer contended it continued to pay Ms. Fischer for once daily treatment from June 8, 2009, through May 24, 2011, including round trip mileage of 42.8 miles. (Employer's Hearing Brief, May 14, 2013).

41) On January 25, 2010, Employee called Employer's adjuster to request another adjuster be assigned to his file. He stated Ms. Fischer was going to double her rates because the current adjuster was "so difficult to deal with." (Voicemail transcript, January 25, 2010).

42) When she submitted her billings, Ms. Fischer increased her hourly rate from $95.00 per hour to $150.00 per hour beginning January 13, 2010. (Insurance claim form, January 12, 2010; insurance claim form, January 18, 2010).

43) On February 19, 2010, Employee filed a claim seeking payment for nursing services. (Claim, February 19, 2010).

44) On March 10, 2010, Employer answered Employee's claim, admitting it was responsible for once daily lymphedema treatment but denying medical costs in excess of once daily treatment. (Employer's Answer, March 10, 2010).

45) On April 20, 2011, Gerald Treiman, M.D. performed an employer's medical evaluation (EME). He noted there was not only a discrepancy regarding frequency of treatment, but also what constitutes treatment.

> Apparently, initial phase II treatment was to include wrapping, skin care and exercises with no mention of massage and manual lymphatic drainage by another individual. However, Ms. Fischer has been performing daily massage, apparently of his entire lymphatic system, in addition to other parts of therapy. . . . It is not clear when he did not receive his daily massage however, and records indicate he received it almost every day.

Dr. Treiman opined it would be reasonable for Employee to have assistance with his compression wraps if he was unable to put them on himself but added, the records do not reflect he has tried and failed. He did not think the records indicated phase I treatment, including twice daily manual lymphatic drainage was necessary. If Employee required assistance and massage and wrapping, Dr. Treiman opined 3-4 times per week would be reasonable with each visit one and one half hours in duration. If assistance is needed just with wrapping Employee's legs, Dr. Treiman opined it should take 30 minutes per leg. He stated Employee should be able to put on his compression garments without assistance from another individual, and nighttime garments with minimal assistance. He thought Employees wife should be able to assist, despite her Meniere's disease. (Treiman report, April 20, 2011).

46) On May 25, 2011, Employer controverted treatment in excess of 4 times per week and 1.5 hours per session. (Notice of Controversion, May 25, 2011).

47) Ms. Fischer continued to treat Employee for 3.0 hours daily. (Fischer notes, June 1 – June 6, 2011; Health Insurance Claim Form, June 6, 2011).

48) In November 2011, Employer contends it initiated surveillance to determine if Employee was driving to and receiving treatment from Ms. Fischer at her home as alleged in the treatment notes and mileage logs. (Employer's Hearing Brief, May 14, 2013).

49) On February 24, 2012, Employer took Ms. Fischer's deposition. Ms. Fischer testified as follows: She is a certified nurses' aid and she received six weeks of specialized lymphedema training for three hours per day, five days per week in 2004 from Susan Sivill at the Gunderson Lutheran Rehabilitation Center. Ms. Fischer currently worked full time as a dairy farmer and part time as a customer service representative for Land's End in Dodgeville, Wisconsin and Employee was her only patient. Her treatment notes accurately reflected the dates, times and frequency of treatment. Ms. Fischer also submitted Employee's mileage logs on his behalf. (Fischer dep., February 24, 2012).

50) On June 7, 2012, L. Matthew Schwartz, M.D., conducted a second independent medical evaluation (SIME) to address Employee's treatment. He thought Employee's treatment from April 2009 to date was "probably" reasonable and necessary on a subjective basis. Dr. Schwartz stated objective evidence was lacking because circumferential and volumetric measurements in the record had been "far from rigorous." He thought additional objective documentation was required in order to determine what treatment was reasonable and necessary. Additionally, Dr. Schwartz recommended identifying a nearby certified lymphedema therapist independent of Ms. Fischer to administer "an intensive four to six weeks course of phase II treatment: daily treatment for two weeks and then three times a week treatment for an additional two to four weeks." He also suggested that particular certified lymphedema therapist could evaluate Ms. Fischer's skills and confirm the appropriateness of her fees. Dr. Schwartz explained Employee has a dynamic condition that will wax and wane indefinitely. (Schwartz report, June 7, 2012).

51) On September 7, 2012, Employer filed the instant petition seeking a finding of fraud and orders directing the restitution and termination of all medical and transportation benefits. (Employer's petition, September 6, 2012).

52) At an October 3, 2012 prehearing conference, Employer's attorney stated she had filed the instant fraud petition and also had referred this case to the Alaska Workers' Compensation Division's Fraud Investigations Unit and to the District Attorney's office in Anchorage for possible

prosecution. Employee's attorney contended he had not yet seen Employer's petition and requested additional time to answer. Employer also announced a records deposition of the Land's End records custodian on October 24, 2012. (Prehearing Conference Summary, October 3, 2012).

53) On October 11, 2012, Employer filed a request for clarification of the October 3, 2012 prehearing conference summary. It contended Employee's attorney had inquired about the specific basis for its fraud petition at that conference and it informed Employee's attorney it had evidence Employee had not been receiving medical treatment from Ms. Fischer as set forth in her treatment notes, medical bills and Employee's mileage logs. Employer further contended it informed Employee's attorney the petition was seeking a finding against Employee and Ms. Fischer for a period of time between April 2009 and 2012. (Employer's Request for Clarification, October 9, 2012).

54) On October 15, 2012, Employee's attorney filed an objection to Employer's request for clarification of the October 3, 2012 prehearing summary. Employee contended Employer's fraud petition was defective as it failed to state a claim and its request for clarification of the summary were an attempt to supplement its defective petition. He contended Employer should amend its petition through normal pleading practice and further contended its generalized fraud petition denies Employee due process of law. (Employee's Objection to Employer's Request for Clarification, October 15, 2012).

55) Attorney James Hackett represented Employee in the numerous proceedings during the adjudications and appeals process since *Groom I* in 1999. (Record, observations).

56) On November 28, 2012, Mr. Hackett withdrew as Employee's attorney. (Notice of Withdrawal, November 28, 2013).

57) On December 7, 2012, Employer filed its affidavit of readiness for hearing (ARH) on the instant petition. (ARH, December 5, 2012).

58) On December 21, 2012, Employee filed an opposition to Employer's December 5, 2012 ARH. He attached a "response" to Employer's "allegations" contending he copies his dates and times from Ms. Fischer and stated Employer's petition was the result of paperwork mistakes and forgetfulness on his part. Employee also wrote he was running a high fever and had an infection in his right leg. He requested Employer's attorney be removed from the case and contended "If [Employer's attorney's] games carried any real truth the real DA would have me locked away." (Employee's Affidavit of Opposition, December 17, 2012).

59) At a January 7, 2013 prehearing conference, Employer's September 7, 2012 fraud petition was set for hearing on May 23, 2013. The designee also set an April 23, 2013 deadline for witness lists, a May 16, 2013 deadline for written briefs and reminded the parties their evidence must be filed 20 days in advance of the hearing. (Prehearing Conference Summary, January 7, 2013).

60) On January 28, 2013, Employee filed an ARH on his February 19, 2010 claim. (ARH, January 24, 2010).

61) On January 18, 2013, Employee filed a "To Whom It May Concern" letter signed by Crystal and Stephen Richardson. The letter stated they rent from Employee at 206 Dwight Street and Employee uses a storage room at their address to receive treatment from Ms. Fischer, who spends "1-3 hours wrapping." It also stated the storage room is used "as a convenience to both their drive times." (Richardson letter, January 13, 2013).

62) On January 18, 2013, Employee filed a "To Whom It May Concern" letter signed by Mark Whiteaker. Mr. Whiteaker's letter stated he rents from the O'Daniels and Ms. Fischer treats Employee in a storage room at his address. The letter also stated: "I would also like to say that I know for a fact that Mr. Groom gets his legs all wrapped up by Nurse Fischer." (Whiteaker letter, January 4, 2013).

63) On January 18, 2013, Employee filed a letter signed by Tammy Brand, Kassy Whiteath, Katie McGinnp and John Stagnus. The letter states:

> I/We, the undersigned, work at Piggly Wiggly in Boscobel, Wi.. [sic]. Mr. Scott Groom has come in to [sic] the store to send faxes to Alaska. His feet are all wrapped up and he has big medical shoes on. He usually goes to the counter by the copier and does his sheet while looking at the other two, then faxes all three to 1-907-277-4143. He has done this on a regular basis for several yrs. I know this to be true by working the service counter and talking to other store personnel.

(Piggly Wiggly letter, January 14, 2013).

64) On January 18, 2013, Employee filed a letter stating his legs were in "horrible condition" and his doctor had ordered him back to the Mayo Clinic for one week of twice a day phase I treatment. (Groom letter, January 13, 2013).

65) On January 18, 2013, Employee filed a letter requesting Ms. Fischer's deposition be struck from the record on the basis she was "crying uncontrollable and had to be helped from the building" after the deposition and because the deposition was obtained under "sneaky false

pretenses." Employee also stated Employer's attorney "had already used a dirty Dr. to cheat Nurse Fisher out of her pay." (Employee letter, January 18, 2013).

66) On February 4, 2013, Employer filed an opposition to Employee's January 24, 2013 ARH. It contended a hearing on Employee's claim might not be necessary depending on the outcome of the instant fraud petition. (Employer's Opposition, February 1, 2013).

67) On February 11, 2013, Employee filed letters signed by his mother, Mary Jane O'Daniel; Ms. Fischer; Employee himself and Employee's son, Keith Groom. Ms. O'Daniel's letter complained of the way Employer's attorney had treated her son. Ms. Fischer's letter expressed her opinion she had taken "very good care" of Employee and complained about her deposition and Employer's attorney. Employee's letter complained about workers' compensation paperwork and Employer's attorney "bullying" him. Keith Groom's letter stated he observed *Mr.* Fischer massage and wrap Employee on one occasion and his opinion Mr. Fischer was "entirely capable of handling [his] fathers [sic] care without Mrs. Fischer's expertise." (O'Daniel letter, undated; Fischer letter, undated; Employee letter, February 9, 2013; Keith Groom letter, February 9, 2013).

68) At a February 13, 2013 prehearing conference, Employee's February 19, 2010 claim for medical benefits was set for hearing on July 11, 2013. (Prehearing Conference Summary, February 13, 2013).

69) On February 15, 2013, Employer wrote Employee seeking specific discovery on treatments administered by Mr. Fischer, including specific descriptions of the treatment, dates, times, locations, records, referral letters, his credentials, etc. (Employer letter, February 15, 2013).

70) On March 4, 2013, Employee filed a letter contending Employer's February 15, 2013 discovery request was unreasonable. He specifically objected to Employer's requests for the dates, times, locations and durations of treatments and contended: "Folks, I wrap as often as I crap." (Groom letter, February 25, 2013).

71) On March 4, 2013, Employee filed a letter authored by William Monroe. Mr. Monroe wrote he had seen Mr. Fischer wrapping Employee's legs on one occasion. He stated Employee told him his nurse's schedule "ran close" at times and "her husband would fill in." Mr. Monroe also stated he had seen Employee around town with his legs wrapped many times and he had "seen the good effect this treatment has on his life." He concluded by writing: "Boscobel is a small town and it is well known that the Fischer's [sic] take care of Scott's legs." (Monroe letter, February 21, 2013).

72) On March 7, 2013, Employee filed an amended claim seeking benefits arising from mental stress caused by Employer's treatment of him while he was employed and by the workers' compensation litigation process. (Claim, March 4, 2013).

73) On March 15, 2013, Employer noticed Employee of the taking of Ms. Sivill's deposition. (Deposition Notice, March 15, 2013).

74) On March 19, 2013, Employer wrote Employee and stated it had rescheduled Ms. Sivill's deposition for April 3, 2013 pursuant to his request. (Employer letter, March 19, 2013).

75) On March 19, 2013 at 8:46 a.m., the legal department for Gundersen Health System (Gundersen) emailed Employer requesting it notify Employee to refrain from calling her because it was "upsetting Sue and he is disrupting her work time." It also requested Employee attend the deposition telephonically. (Kakuska email, March 19, 2013 at 8:46 a.m.).

76) On March 19, 2013 at 2:33 p.m., Gundersen's legal department emailed Employer and wrote: "since [Employee] has received the letter he has called two more times. Once he left a voice mail saying he is sorry if he upset Sue and will not call again. He called again in 5 minutes and tried to get through to Sue through the appointment desk." (Kakuska email, March 19, 2013 at 2:33 p.m.)

77) On March 19, 2013, Employer wrote Employee and requested he "cease and desist harassing Ms. Sivill." (Employer letter, March 19, 2013).

78) On March 21. 2013, Employee filed an objection to taking Ms. Sivill's deposition. (Employee objection, March 21, 2013).

79) On March 22, 2013, Gundersen's legal department emailed Employer and wrote Employee called the legal department wanting to speak with someone at Gunderson Lutheran. It stated Employee wanted to know why Ms. Sivill is being deposed and also stated Employee has "made threats that he will let the whole world know that Sue and Gundersen hurts the disabled if she does not communicate with him." It wrote it did not want to "get in the middle of this," and requested Employer address the situation with Employee that same day. (Kakuska email, March 22, 2013).

80) On March 22, 2013, Employer wrote Employee and stated:

> Gunderson Lutheran Clinic contacted us today to report that not only have you continued in your harassment of Ms. Sivill, but you have escalated your improper behavior to include threats against Ms. Sivill and the Gundersen Lutheran Clinic. . . Until the deposition, Ms. Sivill does not wish to speak with you. She requests that you stop calling her and stop calling her employer. If your blatant attempts to

> intimidate this witness continue, we will seek sanctions against you before the Board.

(Employer letter, March 22, 2013).

81) On March 23, 2013, Employee filed a letter denying he had threatened Ms. Sivill and contended he was just trying "to see what this was about." Employee contended he had developed an infection and attached a statement from his mother, Mary Jane O'Daniel, and Norman O'Daniel stating Employee had developed an infection in his right arm. (Employee letter, March 23, 2013; O'Daniels' statement, March 23, 2013).

82) On March 29, 2013, Employer filed an opposition to Employee's March 21, 2013 objection to taking Ms. Sivill's deposition. It also requested an order directing Employee to cease harassing Ms. Sivill. (Employer's Opposition, March 27, 2013).

83) There is no evidence in the record Ms. Sivill's deposition was taken. (Record; observations).

84) On March 29, 2013, Dr. Myer's wrote a "To Whom It May Concern" letter, which stated:

> [Employee] is showing signs of significant depression and anxiety related to poor control of his underlying lymphedema due to poor insurance coverage for the treatments to maintain a reasonable quality of life. Patient has also been having severe stress related to the need to represent himself against the State of Alaska.
>
> We are currently working on arranging psychotherapy but according to [Employee], workers' compensation has refused to cover this necessary service as well despite that obvious connection between his workers' compensation claim and his underlying anxiety. We will continue to attempt to arrange this through his private insurance.
>
> [Employee] is mentally and physically unable to represent himself at this time and rescheduling upcoming depositions is needed.

(Myers letter, March 29, 2013).

85) Attached to Dr. Myers' March 29, 2013 letter are two additional letters: one from Raymond Wright and the other from Jacob Fischer. Mr. Wright's letter is a statement of his observations of Employee's condition before he visited the Mayo Clinic, the improvement in Employee's condition when he was receiving twice daily treatment and how Employee had deteriorated over the previous year due to "inadequate treatment." Jacob Fischer's letter identifies himself as the son of Ms. Fischer and her husband, Lonny Fischer. He wrote his dad was qualified to administer massage therapy to Employee and would do so at times when his mother was working at Land's End. Jacob Fischer contended a "specialist" showed his mother how to do this type of massage

therapy at Gundersen Hospital in La Crosse, Wisconsin. He concludes by writing Employee had a motor home parked at his parents' residence and Employee would "relax" in it after receiving therapy. (Jacob Fischer letter, March 30, 2013).

86) Employer has filed requests for cross examination of the signatories to the numerous letters Employee filed, including, Tammy Brand, Kassy Whiteath, Katie McGinnp and John Stagnus, Mark Whiteaker, Mary Jane O'Daniel, Norman O'Daniel, Crystal Richardson, Stephen Richardson, Lauryne Fischer, Jacob Fischer, Employee, Keith Groom, Dr. Myers, Raymond Wright and William Monroe. (Employer's Request for Cross Examination, June 21, 2011; July 14, 2011; August 22, 2011; October 27, 2011; January 25, 2013; February 11, 2013; February 15, 2013; March 1, 2013; March 27, 2013; April 1, 2013; April 2, 2013; April 3, 2013).

87) On April 1, 2013, Employer sent a medical release to Employee because the previously executed one had expired. (Employer letter, April 1, 2013).

88) On April 12, 2013, Dr. Myers wrote Employer regarding Employee's condition and care. Dr. Myers attributed Employee's depression to his "poor quality of life" resulting from "poor control" of his lymphedema although, he stated "excessive" litigation might have also been a cause. He contended Ms. Fischer was providing services under his supervision and orders and stated he "strongly recommended" daily treatment. Dr. Myers thought the currently "allowable" four times per week was insufficient and had caused Employee's condition to deteriorate. He concluded by stating Employee was given counseling and brief pharmaceutical treatment following his last letter and Employee's depression had improved so he could now participate in litigation. (Myers letter, April 12, 2013).

89) On April 19, 2013, Employee filed a one-page hearing brief that stated Employer's attorney engaged in "Lying, bullying, hiring dirty dr." He contended treating with the Fischers in the privacy of his home is cheaper than a "clinic setting," and Employer's attorney "accuses me of a crime and shes [sic] is the criminal in the pile." Employee further contended: "Steady treatments no infections for 2yrs. [sic] Dirty Dr. [sic] schedule 4 infections in 2yrs [sic]. Employee also stated "I provided all my evidence as collected." (Employee's hearing brief, April 15, 2013).

90) Employee attached his witness list to his April 15, 2013 hearing brief. It states, in entirety: "I hereby request all person whom have written letters in the past 4 yrs, all Drs. Plus any and all persons which may have knowledge to show the truth." (Employee witness list, undated).

91) On April 23, 2013, Employer filed its witness list. Employee and Ms. Fischer are listed as witnesses. (Employer's Witness List, April 23, 2013).

92) On May 2, 2013, Employer filed its documentary evidence. The list identifies 77 specific documents, in addition to all depositions, previously filed documents, documents obtained after the filing and rebuttal documents. Employer also served documents in a copy paper box. The box is nearly full and contains Employer's documentary evidence arranged by number, as well as case documents arranged by month. (Employer's Documentary Evidence, May 1, 2013; observations).

93) Employer also served a 27 page spreadsheet as a hearing exhibit that purports to show 147 separate dates where Ms. Fischer was working at Lands End, where Employee and Mr. Fischer were talking to each other on the telephone, and where Employee or Ms. Fischer were observed as being physically present elsewhere during surveillance during the same times as Ms. Fischer was reportedly treating Employee. (Employer's Exhibit 24).

94) On May 9, 2013, Employer controverted benefits on the basis of Employee's failure to sign and return the medical release. (Controversion Notice, May 9, 2013).

95) On May 13, 2013, Employee signed a medical release for Employer and crossed out two specifically named providers and added the notation "You Made Hostile." (Annotated Release, May 13, 2013).

96) On May 13, 2013, Employer wrote Employee and stated it was not going to rescind the controversion because Employee had modified the release. (Employer letter, May 13, 2013).

97) On May 16, 2013, Employee signed the medical release without alteration. (Release, May 16, 2013).

98) On May 16, 2013, Employer filed its hearing brief, seeking recovery of $316,849.87 in medical costs and $21,932.50 in transportation costs as well as attorney fees and costs related to the instant petition. (Employer's hearing brief, May 14, 2013).

99) On May 17, 2014, Employer rescinded its May 9, 2013 controversion, effective May 14, 2013. (Annotated Controversion Notice, May 9, 2013).

100) On May 17, 2013, a Grand Jury seated by the Superior Court for the Third Judicial District at Anchorage issued a 93 count criminal indictment against Employee and Ms. Fischer, with 38 counts against Employee and 55 counts against Ms. Fischer. Charges included perjury, fraud, theft by deception, and falsifying business records. The specified offenses are "class A" and "class B" felonies. (Indictment, May 17, 2013).

101) Individual counts in the indictment explicitly reference Employee's workers' compensation case number, the dates Ms. Fischer purportedly provided Employee with treatment and Employee's transportation logs. (*Id*.)

102) The indictment is based on the same conduct that serves as the basis for Employer's instant petition. (*Id*.; experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all the above).

103) On May 22, 2013, Employer filed supplemental documentary evidence and an additional four documents. (Employer's Supplemental Documentary Evidence, May 21, 2013).

104) On May 22, 2013, Employee filed a "Motion to Postpone Hearing." Employee contended: "I can not [sic] be made to do this with a criminal charge over my head and no legal council [sic] at this time." (Employee's petition, May 22, 2013).

105) On June 29, 2013, EME physician Dr. Treiman emailed Employer. He wrote: "This is a nightmare – please call me." Incorporated into the email message was correspondence authored by Katie Schatz, a secretary for surgical services at the Veteran's Administration hospital where Dr. Treiman worked. She wrote she has received two or three phone calls from Employee wanting to speak with Dr. Treiman and Employee had also tried to reach Dr. Treiman through "several outlets" including the "University" and the hospital's chief of staff. Ms. Schatz stated Employee accused Dr. Treiman of falsifying his report in exchange for payment and threatened to sue Dr. Treiman with the backing of his church. (Treiman email, June 29, 2013).

106) Employee contends an attorney has not yet been appointed to represent him in the criminal prosecution. (Employee).

107) On June 6, 2013, Employer filed its supplemental authority. (Employer's Supplemental Authority, June 4, 2013).

108) On June 20, 2012, Employee filed his supplemental witness list. Employee and Ms. Fischer are listed as witnesses on Employee's witness list. (Employee's Witness List, June 20, 2013).

PRINCIPLES OF LAW

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).

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Alaska Supreme Court has held that *pro se* litigants are held to a lesser standard than attorneys. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789; 795 (2002). A judge must inform a *pro se* litigant "of the proper procedure for the action he or she is obviously attempting to accomplish." (*Id.*) (citation omitted). Specifically, a judge must notify a *pro se* litigant of defects in his or her brief and give the party an opportunity to remedy those defects. (*Id.*). It is an abuse of discretion to not allow a claimant to amend his witness list at subsequent hearings when significant developments raise new factual issues. *Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170; 1180 (1994).

In a case involving a defendant who was arrested and charged for being a felon in possession of a firearm, which was also a violation of his parole, the Alaska Supreme Court addressed the issue of a criminal defendant being forced to elect between his constitutional right to due process and his right against compulsory self-incrimination. *McCracken v. Corey*, 612 P.2d 990 (Alaska 1980). McCracken's parole revocation hearing was scheduled prior to his trial on the criminal charges which, he contended, forced him to make an unconstitutional election between the two constitutionally protected rights. After reviewing decisions from U.S. Supreme Court and California Supreme Court, the Alaska Supreme Court agreed. (*Id.*) (citations omitted). "In the interest of fairness, a parolee should not be forced to choose between remaining mute at a revocation proceeding, thereby surrendering his right to present a defense, or testifying at the revocation hearing and incurring the possibility of incriminating himself." (*Id.* at 997-98). In an exercise of its inherent supervisory powers over the administration of the courts, the Court held evidence or testimony presented by McCracken at his parole revocation hearing was inadmissible

by the state in subsequent criminal proceedings "in order to remove completely any illegitimate incentive to schedule revocation hearings in advance of trial." (*Id.* at 998) (citation omitted).

In another case, a defendant was indicted by an Anchorage grand jury on drug charges. *Resek v. State*, 706 P.2d 288 (Alaska 1985). Two weeks later, the state initiated *in rem* forfeiture proceedings against defendant's property. Acknowledging the danger of self-incrimination in the forfeiture proceeding, the Alaska Supreme Court stated:

> These concerns are presented whether or not the person who may incriminate himself is afforded the assistance of counsel. However, when one is unaided by an attorney and therefore not even aware of the scope of his privilege against self-incrimination, the problems are obviously aggravated. In forfeiture actions, the self-incrimination issue can be resolved simply by staying the proceeding until the criminal prosecution is concluded.

(*Id.* at 294). The Court concluded, when a claimant requests, the "trial court should stay the independent in rem forfeiture proceeding, in the absence of strong countervailing circumstances. If such circumstances do exist, the use of . . . immunity may serve to protect the claimant's privilege against self-incrimination." (*Id.*).

In a third case, a defendant, Armstrong, was charged with possession and distribution of child pornography after giving a book to a 14 year old child. *Armstrong v. Tanaka*, 228 P.3d 79 (Alaska 2010). The Armstrong then brought a defamation action against the child's father, Tanaka. The Alaska Supreme Court noted the U.S. Supreme Court has defined penalty broadly in context of Fifth Amendment penalty for silence to include any sanction that makes assertion of the privilege costly. (*Id.* at 82). It also noted, under the due process clause of the Alaska Constitution, Alaskans have a general right of access to the courts, *id.* at 82-83, and a personal injury claim is a form of property, *id.* at 83-84. Deprivation of access to the courts denies an individual's "ability to reduce the claim to a money judgment . . . or otherwise convert it into property of an appreciable value and liquid in nature." (*Id.*) (citation omitted). The Court distinguished *McCracken* and *Resek* by noting those cases implicated an individual's right to defend himself against the government's efforts to take his liberty or property where both the civil and criminal proceedings were controlled by the State of Alaska. However, in *Armstrong*, the adverse party in the civil action was a private individual. (*Id.* at 83-84). Under these circumstances, since the state had filed criminal charges

against Armstrong, it was obligated to move its case forward in an expeditious manner, *id*. at 83, and the trial court was instructed to apply a balancing test; balancing Armstrong's Fifth Amendment rights and his right of access to the courts against Tanaka's interest in a timely resolution of the proceedings against him, *id*. at 84-86.

> **AS 23.30.005. Alaska Workers' Compensation Board.** (h) The department shall adopt rules for all panels, and procedures for the periodic selection, retention, and removal of both rehabilitation specialists and physicians under AS 23.30.041 and 23.30.095, and shall adopt regulations to carry out the provisions of this chapter. The department may by regulation provide for procedural, discovery, or stipulated matters to be heard and decided by the commissioner or a hearing officer designated to represent the commissioner rather than a panel. If a procedural, discovery, or stipulated matter is heard and decided by the commissioner or a hearing officer designated to represent the commissioner, the action taken is considered the action of the full board on that aspect of the claim. Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. The superior court, on application of the department, the board or any members of it, shall enforce the attendance and testimony of witnesses and the production and examination of books, papers, and records.

The board does not have authority to adjudicate civil, criminal or constitutional claims. *Dougan* at 793.

> **AS 23.30.110. Procedure on claims.** (a) . . . . the board may hear and determine all questions in respect to the claim.
>
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . . .

The language "all questions" is limited to questions raised by the parties or by the agency upon notice duly given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska

1981). The board has discretion to raise questions *sua sponte* with sufficient notice to the parties. *Summers v. Korobkin Constr.*, 814 P.2d 1369, 1372 n. 6 (Alaska 1991).

> **AS 23.30.125. Administrative review of compensation order.** (c) . . . . The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment, in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

Statutory authority to stay awarded benefits is exclusively granted to the Alaska Workers' Compensation Appeals Commission. *Flayac v. Banner Health Systems,* AWCB Decision No. 10-0124 (July 16, 2010) at 5. In *Contreras v. State of Alaska,* AWCB Decision No. 12-0134 (August 6, 2012), payment of permanent partial impairment benefits (PPI) benefits was stayed pending a decision when employee was not expected to receive any further compensation beyond her PPI benefit and when employee admitted she had been overpaid $11,000.00 in disability benefits. *Id.* at 6-7.

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

Continuing jurisdiction over a compensation matter is conferred by law upon the Alaska Workers' Compensation Board. *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965). The Alaska Supreme Court addresses modification of board orders in

Underwater Construction, Inc. v. Shirley, 884 P.2d 156 (Alaska 1994). Citing AS 23.30.130(a), the Court stated:

> [A]n employer seeking to modify or terminate payments made under a Board order must first seek the approval of the Board. The statute provides: 'Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, ... the board may ... review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110.' . . . . The above statutory . . . provisions indicate that an employer or insurer does *not* 'have the authority to change an injured worker's pay status when the evidence in a given claim warrants a change.' If payments are being made pursuant to a Board order, the employer or insurer must petition the Board for rehearing or modification of its order on the basis of 'a change in conditions.'

Id. at 161 (citations omitted). Discussing the Court's holding in *Shirley*, *Wood v. Quest Diagnostics, Inc*., AWCB Decision No. 10-0122 (July 13, 2010) stated:

> The Supreme Court in *Shirley* was unequivocal in its holding an employer seeking to terminate compensation payments made under a Board order '*must first* seek the approval of the Board.' With clarity and certainty the Court held that where compensation payments are being made pursuant to a Board order, an employer does *not* have the authority to change an injured workers' pay status, even "when the evidence in a given claim warrants a change," *without* having first petitioned for modification, and without an adjudication from the Board. The Court affirmed the procedural requirements for modification set out in AS 23.30.130 . . . must be followed before a Board award may be modified. A Board order may *only* be modified by another Board order, after a full hearing on the merits . . . .

Id. at 14 (citations omitted) (emphasis original).

> **8 AAC 45.074. Continuances and cancellations**.
>
> (a) A party may request the continuance or cancellation of a hearing by filing a
>
> (1) petition with the board and serving a copy upon the opposing party . . . .
>
> (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 deposing the witness is not feasible. . . .

> (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 . . . .
>
> **8 AAC 45.112. Witness list**. A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. . . .
>
> **AS 22.10.020. Jurisdiction of the superior court.** (a) The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents. . . .
>
> (b) The jurisdiction of the superior court extends over the whole of the state.
>
> **AS 44.62.450. Hearings.** (a) A hearing in a contested case shall be presided over by a hearing officer. . . .
>
> (b) If the agency hears the case the hearing officer shall preside at the hearing . . . . The agency shall exercise all other powers relating to the conduct of the hearing . . . .
>
> **Code of Judicial Conduct. Cannon 1.** A Judge Shall Uphold the Integrity and Independence of the Judiciary.
>
> **Canon 3.** A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.
>
> B. Adjudicative Responsibilities.
>
> (3) A judge shall take reasonable steps to maintain and insure order and decorum in judicial proceedings before that judge.
>
> (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. The judge shall take reasonable steps to maintain and insure similar conduct from lawyers and from court staff and others subject to the judge's direction and control.

Considering the statutory authority to conduct hearings in a manner "to best ascertain the rights of the parties," it is in the best interest of all parties for non-attorney representatives "to adhere to some basic standards." *Lacy v. Hotel Captain Cook,* AWCB Decision No. 99-0255 (December 14,

1999) at 5. The Alaska Rules of Professional Conduct reflect the general responsibilities of any diligent representative and provide valuable guidance for non-attorney representatives. *Id.*

ANALYSIS

1) Should the board issue instructions to assist Employee and a witness in understanding their constitutional rights and the risks associated with a "parallel" administrative proceeding and criminal prosecution?

On May 17, 2013, a Superior Court Grand Jury in Anchorage issued a 93 count criminal indictment against Employee and Ms. Fischer, charging them with perjury, fraud, theft and falsifying business records. Individual counts in the indictment explicitly reference Employee's workers' compensation case number, specific dates Ms. Fischer purportedly provided Employee with treatment and Employee's transportation logs. The indictment is based on the same conduct that serves as the basis for Employer's instant petition seeking a finding of fraud. As a result of the indictment, Employer essentially suggested the board "Mirandize" Employee and Ms. Fischer before proceeding with the hearing, including advising them of their constitutional privilege against self-incrimination, potential assistance of counsel issues and other potential legal risks to their criminal prosecutions arising from this proceeding.

The board's authority is prescribed by statute and limited to administering and enforcing the Alaska's Workers' Compensation Act. AS 23.30.005. Meanwhile, the superior court is the trial court of general jurisdiction and has original jurisdiction in all civil and criminal matters. AS 22.10.020. The board does not have authority to adjudicate civil, constitutional or criminal claims. *Dougan.* It is unknown what authority would confer upon the board the obligation to instruct Employee and Ms. Fischer on their constitutional rights and advise them on matters that could impact their criminal prosecutions. It is also unknown what ability the board has to render such advice, given its administrative expertise is limited to the Act. Therefore, Employee and Ms. Fischer will not be so instructed or advised. These matters are properly the province of the superior court and are outside the scope of the board's authority under the Act. AS 22.10.020(a); AS 23.30.005; *Dougan.*

2) Should the hearing on Employer's instant petition be continued?

Although the board lacks authority to decide constitutional issues, it does have an obligation to afford the parties due process in its proceedings. AS 23.30.001(4). Now facing numerous felony criminal charges in the court system, which are based on the same conduct that is the subject of this hearing, Employee is faced with an impossible situation in this proceeding. If Employee were to testify, he would risk making statements that may be used to incriminate him in superior court or, if he refuses to testify, notwithstanding his being named as an Employer witness, he would effectively be denied a meaningful opportunity to be heard and to defend Employer's petition in this forum. Here, Employee is in a position where he must choose between his privilege against self-incrimination and his right to due process. Valuable benefits are at risk. He must elect one constitutionally protected right and will be forced to forfeit the other; he cannot enjoy both.

Additionally, Employee contends the superior court has yet to appoint an attorney to represent him in the criminal prosecution. While Employee does not enjoy the same right to an attorney in this forum as he does in criminal court, if Employee's contention is true, Employee would also be going forward without the assistance of counsel to advise him on potential consequences this proceeding could have upon his criminal prosecution. Such circumstances would "obviously aggravate" Employee's danger of self-incrimination since he may not appreciate the scope of his privilege. *Resek.*

The Alaska Supreme Court has recognized these risks and addressed them on at least several occasions. *Armstrong*; *Resek*; *McCracken.* Of these cases, *Resek* is the most applicable to the circumstances here. In *McCracken*, the Alaska Supreme Court exercised its inherent supervisory powers over the courts and ordered evidence and testimony excluded in subsequent criminal proceedings. No authority exists here to order evidence excluded from criminal prosecutions in superior court. AS 23.30.105. As the Court pointed out in *Armstrong*, that case involved weighing the interests of a private individual, not the state. Here the State of Alaska controls both the civil and criminal proceedings against Employee, just as it did in *Resek.* In *Resek*, the Court stated "the self-incrimination issue can be resolved simply by staying the proceeding until the criminal prosecution is concluded."

Although it does not appear *Resek* would require any weighing of interest under the instant circumstances, the parties' interests will nevertheless be addressed. Employee's risks are great, and set forth above. He risks the loss of both liberty and property. Employer opposes a continuance because it contends one of its witnesses will be retiring shortly after the hearing and relocating outside Alaska and another of its witnesses has been diagnosed with a life-threatening illness. The regulations provide for depositions and in this case perpetuating witness testimony by deposition would require a negligible effort and expense from Employer considering Employee's risks. Employer opposes a continuance because it went to the expense of flying witnesses to Fairbanks to testify. As pointed out above, the State of Alaska controls both the instant petition and well as Employee's criminal prosecution. The choice to proceed on the instant petition in advance of its criminal prosecution was its own and its point here is afforded little weight. *Resek*. Employer contends a continuance would deprive it of its due process rights because it continues to pay Employee's medical and transportation expenses. Certainly, Employer enjoys the same rights to due process, access to adjudication and a speedy resolution as Employee. AS 23.30.001(1); AS 23.30.001(4); *Armstrong*. However, again, Employer controls both proceedings and its point is afforded little weight. *Resek*. It was ideally situated to avoid any "irreparable harm" it might now contend it will suffer. *Id*. It is unknown how a continuance would otherwise prejudice Employer's petition. Employer appears to have thoroughly prepared its case and was ready to proceed on the scheduled hearing date. With its investigation complete, its witnesses identified and its evidence already filed, it is positioned to immediately resume this hearing.

A continuance may only be granted for good cause as set forth by regulation. AS 23.30.110(c); 8 AAC 45.074(b)(1). Good cause exists when irreparable harm may result from a failure to grant the continuance, 8 AAC 45.074(b)(1)(N), or when a material witness is unavailable on the scheduled hearing date, 8 AAC 45.074(b)(1)(A). Both of these subsections apply to the instant situation. Employee faces irreparable harm in the form of loss of liberty when, it is conceivable, he might not lose it if a continuance is granted. 8 AAC 45.074(b)(1)(N). The inconvenience or expense to Employer is minimal and other prejudice to its case cannot be identified. Additionally, faced with a coerced, mutually exclusive election of protected rights, as a practical matter, Employee, who is

certainly a material witness in this case as his conduct is the basis for Employer's instant petition, is unavailable to testify. 8 AAC 45.074(b)(1)(A).

Here, Employer seeks orders forfeiting Employee's future medical and transportation benefits and requiring the repayment of past benefits. The amount Employer claims it is entitled is substantial. Employee has both a property right in defending Employer's petition and a right to a fair and impartial adjudication. AS 23.30.001(4); *Armstrong*. Meanwhile, the State of Alaska controls both its instant petition and the criminal prosecution against Employee. A continuance will protect Employee's due process rights and completely remove any "illegitimate incentive" for the State of Alaska to proceed with a fraud petition hearing in advance of a criminal prosecution. *McCracken*. Having filed criminal charges against Employee, the state is now obligated to move its criminal case forward in an expeditious manner. *Armstrong*. Therefore, in order to protect the parties' due process rights, the hearing on Employer's instant petition will be continued until the criminal proceedings against Employee have been brought to a final conclusion, to include the expiration of any appeals period. AS 23.30.001(4); AS 23.30.135(a); *Resek*. This decision intentionally does not address Ms. Fischer's situation and jurisdiction will be retained to address any disputes regarding her subsequent appearance as a witness in this case.

3) Should the July 11, 2013 hearing on Employee's claim be vacated?

The basis for continuing this hearing: Employee's inability to testify; will also preclude hearing Employee's claims on July 11, 2013. Additionally, as Employer pointed out in its February 1, 2013 opposition to Employee's ARH, should Employer's instant petition be granted, the need for a hearing on Employee's claims would be obviated. Therefore, the currently scheduled hearing on Employee's claims will be vacated.

4) What is the remedy for Employee's witness list when his list does not comply with regulation?

Employer objects to Employee's witness list on the basis it did not contain witness telephone numbers, addresses or the substance of their testimony. Employee contends he is unrepresented and any deficiencies in his witness list just demonstrates his "lack of education." Employee has been embroiled in fierce litigation with Employer for fourteen years and, although he was

represented by Mr. Hackett during most of this period, it is not believed Employee is as naive as he contends. Nevertheless, Employee is no longer represented by counsel and *pro se* litigants are afforded leniency. *Dougan.* Meanwhile, Employer is rightfully entitled to the information it seeks. 8 AAC 45.112. Therefore, Employee will be instructed on submitting a witness list in conformity with the regulation and given additional time for its submission. *Dougan.*

5) Should the record be closed to filing additional evidence during the period of continuance, if granted?

After Employee's continuance was granted, Employer sought an order closing the record to additional evidence. It contended Employee was not cooperating with its recent discovery efforts and would only selectively disclose evidence in defense of information Employer was providing. Employer's request was orally granted. However, it is now decided the ruling requires further clarification and modification.

Upon further review of the record, Employer's contentions in support of its request are neither shared, nor adopted. First, Employer contends it has been seeking discovery from Employee since February of this year and he has refused to comply with its efforts. In the first instance, Employer's remedy lies in a petition to compel, not the exclusion of evidence. It filed no such petition. Second, it is noted Employee was, according to Dr. Myer's and however briefly, unable to represent himself as a result of "significant depression and anxiety" and "severe stress" related to the litigation. Therefore, Employee might not have been able to respond to Employer's discovery requests, at least for a short period of time, as he contends. Third, Employer essentially contends Employee is changing his story in response to litigation developments. From Employer's perspective, such may seem to be the case. For example, Employer filed its fraud petition and scheduled a records deposition with Ms. Fischer's employer, Land's End. In response to Employer's instant petition, Employee initially attributed any billing discrepancies to unintentional paperwork errors on his part. Employer contended it obtained records at the Land's End deposition showing Ms. Fischer was working there at the same times she was billing Employer for treating Employee at her home. Employee then produced letters from his son, provider's son and Mr. Monroe stating that *Mr.* Fischer would treat Employee when *Ms.* Fischer's schedule "ran close." While Employer might contend these facts are representative shifting positions in an

amorphous defense, Employee might also contend he is just attempting to marshal evidence and witnesses in defense of Employer's petition. Ultimately, Employer's concerns, as they are understood, involve issues of credibility and evidentiary weight, and are matters for hearing.

Upon granting Employer's request, the chair noted that deadlines had been previously set for the filing of evidence and applied equally to both parties. Each party had the same opportunity to prepare for hearing and file their evidence. Since hearing of the instant matter is being continued on grounds unrelated to sufficiency of the record, neither party should be afforded any advantage from the continuance in the adjudication of issues related to the alleged fraud. The ruling is not to be construed as a blanket prohibition on filing additional evidence. For example, Employee still has pending claims that may require adjudication and relevant medical evidence will almost certainly be generated in the interim and should be filed. Furthermore, it cannot be known at this time whether new issues will arise from subsequent developments. *Schmidt*.

The intention of the ruling was to take a "snapshot in time" of the record in order to prevent either party from gaining an unfair advantage from the continuance. The record remains open to the filing of additional evidence, as each party sees fit, subject to the other party's objections and arguments at hearing. Upon resumption of the hearing, after-filed evidence can be reviewed on a case-by-case basis, and appropriate determinations can then be made.

6) Should Employer's request for an order staying payment of benefits during the period of continuance be granted?

Employer seeks an order staying payment of benefits during the period of continuance and submitted *Contreras* in support of its position. However, *Contreras* is distinguishable as it only stayed future payment of PPI benefits because the employee agreed she had been grossly overpaid disability benefits. *Id.* at 6. Essentially, the stay in *Contreras* was the product of an admission. Here, Employee clearly opposes Employer's request to stay payment of benefits and *Contreras* will not be followed.

Employer only raised the issue of a stay at hearing in the event of a continuance. Since Employee was not afforded sufficient notice of Employer's request, it must be denied. AS 23.30.110(c).

Furthermore, any order modifying the payment of benefits requires a full hearing. *Shirley*. Since AS 23.30.125(c) grants the Commission express statutory authority to issue stays, and given the concerns unique to this case and set forth above, if a stay can be issued at all under these circumstances, it should most appropriately be sought at the Commission. Therefore, Employer will be referred to the Commission regarding its request to stay payment of benefits. AS 23.30.125(c); *Flayac*.

7) Should additional action be taken regarding Employee's attempts to contact certain witnesses in this case?

Immediately after Employer noticed Employee of Ms. Sivill's deposition, numerous emails from the Gundersen Health System's legal department indicate Employee repeatedly attempted to contact Ms. Sivill prior to her deposition. Employee's attempts were "upsetting" Ms. Sivill and "disrupting" her work time. Notwithstanding Employee's promise to stop calling, he continued to call and tried to contact Ms. Sivill both directly and indirectly through other hospital departments. Employee threatened Ms. Sivill and Gundersen by stating he would "let the whole world know that [Ms. Sivill] and Gundersen hurts the disabled if [Ms. Sivill] does not communicate with [Employee]." Gundersen repeatedly reached out to Employer for assistance with Employee since Gundersen did not "want to get in the middle of this," and Employer repeatedly wrote Employee reminding him Ms. Sivill did not wish to speak with him and directing him to stop his attempts to contact her.

Dr. Treiman also reached out to Employer to request its assistance with Employee. His email indicates Employee had also made repeated attempts to contact him both directly and indirectly through "several outlets," including the "University" and the hospital's chief of staff and had accused him of falsifying his report in exchange for payment. Employee also threatened to sue Dr. Treiman "with the backing of his church." Dr. Treiman described Employee's efforts to contact him as a "nightmare."

Employee's conduct towards Ms. Sivill and Dr. Treiman can be fairly characterized as harassing and threatening as stated in Employer's letters. Furthermore, that Employee was attempting to contact Ms. Sivill and Dr. Treiman indirectly, through other departments and entities, is indicative

of subterfuge and the timing and frequency of Employee's efforts to contact Ms. Sivill in particular indicate his efforts were likely an attempt to influence her deposition testimony rather than to merely "see what [her deposition] was all about" as he contended. Employer repeatedly made clear to Employee he could participate in Ms. Sivill's deposition, yet he persisted in his course of action.

The Alaska Administrative Procedure Act imposes a responsibility to control the conduct of proceedings, AS 44.62.450(b), and this responsibility includes ensuring the integrity of the adjudications process, *see* Cannon 1 (Code of Judicial Conduct); maintaining the decorum of proceedings, *see* Cannon 3B(3); and ensuring the courteous and dignified treatment of witnesses, *see* Cannon 3B(4). Employee's conduct clearly indicates further action may be needed to ensure these standards are met. AS 23.30.110(a); *Summers*. For whatever reason, Employer's request for an order "directing Employee to cease harassment" of Ms. Sivill was not an issue for hearing. Perhaps it was because her deposition was never taken. In any event, if Employer still thinks a protective order is required during the period of continuance to protect both witnesses and the integrity of these proceedings, it is encouraged to request a conference with the Fairbanks office. *Id.* In the meantime, Employee is advised attorneys are required to act ethically in the course of litigation and his conduct will be held to a standard similar to attorneys. *See Lacy* (establishing standards for non-attorney representatives in workers' compensation proceedings). Should he require additional guidance on permissible discovery methods, he is also encouraged to request a conference. *Id.*

CONCLUSIONS OF LAW

1) Employee and a witness will not be instructed on their constitutional rights or advised on matters that could impact their criminal prosecutions.

2) The hearing on Employer's instant petition will be continued.

3) The July 11, 2013 hearing on Employee's claim will be vacated.

4) Employee will be ordered to submit a witness list in conformity with regulation.

5) The record will remain open to the filing of additional evidence subject to the other party's objections and arguments upon resumption of the hearing.

6) Employer's request for an order staying payment of benefits during the period of continuance will be denied.

7) The record is insufficient to determine whether additional action should be taken regarding Employee's attempts to contact certain witnesses in this case.

ORDER

1) The hearing on Employer's instant petition is continued until the criminal proceedings against Employee have been brought to a final conclusion, to include the expiration of any appeals period.

2) The July 11, 2013 hearing on Employee's claim is vacated.

3) Employee is ordered to submit a witness list in conformity with the regulation 8 AAC 45.112.

4) The ruling on filing additional evidence is modified as set forth above.

5) Employer is referred to the Alaska Workers' Compensation Appeals Commission regarding its request for a stay.

6) If Employer believes a protective order is required during the period of continuance to protect witnesses and the integrity of these proceedings, it is encouraged to submit a request for conference form to staff in the Fairbanks office. If Employee requires additional guidance on permissible discovery methods, he is also encouraged to submit a request for conference form.

Dated in Fairbanks, Alaska on August 2, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Robert Vollmer, Designated Chair

Sarah Lefebvre, Member

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.

PETITION FOR REVIEW

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of SCOTT A. GROOM employee / respondent v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION, self-insured employer / petitioner; Case No. 199905415; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served upon the parties this 2nd day of August, 2013.

Nicole Hansen, Office Assistant