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.	)	DECISION AND ORDER ON RECONSIDERATION AWCB Case No. 199905415 AWCB Decision No. 13-0135 Filed with AWCB Fairbanks, Alaska on October 25, 2013

The State of Alaska's (Employer) August 16, 2013 petition for reconsideration was heard on the written record on September 19, 2013 in Fairbanks, Alaska. This hearing date was selected on August 27, 2013. Patricia Shake represented the State of Alaska, Department of Transportation (Employer). Scott Groom (Employee) represented himself. The record closed following deliberations on October 4, 2013.

ISSUES

Employer is seeking reconsideration of *Scott A. Groom v. State of Alaska, DOT*, AWCB Decision No. 13-0091 (August 2, 2013) (*Groom VII*) which, according to Employer, concluded "that the employer was not irreparably harmed in continuing the May 23, 2013, hearing on the employer's fraud petition." It contends *Groom VII* erred "in granting the continuance on the grounds the State of Alaska as the employer was not irreparably harmed because it controlled both the civil and criminal proceedings against the employee." Employer further contends "[h]ad the hearing gone forward and the Board granted the employer's fraud petition, no additional benefits would be owed or attorneys' fees incurred." However, since the hearing was continued, it contends it has suffered

irreparable harm in the form of continuing benefits and additional attorney fees and requests a reassessment of whether it was irreparably harmed by the continuance.

Although Employee did not file a hearing brief, following service of Employer's petition for reconsideration, Employee transmitted numerous emails to board staff in apparent responses to Employer's petition. His emails do not address the issues raised by Employer's petition, but rather consist primarily of personal attacks against Employer's attorney and protestations of his innocence on the pending criminal and administrative fraud proceedings. Consequently, Employee's positions on the issues for reconsideration are unknown; however, it is assumed he opposes Employer's contentions in their entirety.

1) Did Groom VII incorrectly grant the May 23, 2013 continuance?

Employer acknowledges authority existed to grant the continuance since there was a "valid concern the employee would be forced to elect between his constitutional right to due process and his right against compulsory self-incrimination," but contends the decision "impermissibly treats the State of Alaska differently than any other public or private employer" because, Employer contends, it does not in fact control both the civil and criminal proceedings. Relying on *Payton v. State of Alaska*, 938 P.2d 1036 (Alaska 1997), Employer lists to numerous bureaucratic entities with state government and contends it, the Department of Transportation and Public Facilities, along with its attorney, the Department of Law's Civil Division, does not control the criminal prosecution of Employee. It contends that process is controlled by the Division of Workers' Compensation's Special Investigation Unit, the Director of the Division of Workers' Compensation and the Department of Law's Criminal Division. Consequently, Employer contends *Groom VII* "carved out a special class for the State of Alaska as employer" and decided Employer "deserves less due process protection or has fewer rights than any other public or private employer."

Employee's current position on Employer's contentions of disparate treatment is unknown for the reasons set forth above. It is assumed Employee denies Employer was treated differently than other employers.

2) Did granting the continuance "carve out a special exception" for Employer that "impermissibly" treated it differently than other employers?

Employer also seeks reconsideration of the decision declining to stay benefit payments during the continuance. It contends authority cited in *Groom VII* applies to stays pending appeals to the Alaska Workers' Compensation Appeals Commission but contends in this case it was seeking a stay from the board, not on appeal, so the citied authority is not applicable. Employer contends the stay it seeks is authorized by Alaska's Administrative Procedures Act and further contends the facts of the instant case meet the criteria for a stay. It cites *Cornelison v. Rappe Excavating*, AWCB Decision No. 13-0060 (May 30, 2013) in support of its position and contends it will suffer irreparable harm without a stay because it must continue to pay medical and transportation benefits. Employer renews its request for a stay.

Employee's current position on the issue of a stay is unknown for the reasons set forth above. However, it is noted he opposed a stay at hearing in *Groom VII* on grounds he requires medical treatment. It is assumed Employee continues to oppose issuance of a stay.

3) Should payment of medical and transportation benefits be stayed during the continuance?

Employer requested the oral order issued at the May 23, 2013 hearing instructing Employee to respond to Employer's discovery requests be memorialized in this decision.

Employee's current position with respect to memorializing the oral order is unknown for the reasons set forth above. It is assumed Employee opposes Employer's request to memorialize the order.

4) Should the oral order from the May 23, 2013 hearing instructing Employee to comply with Employer's discovery requests be memorialized in this decision?

Employer contends factual finding 52 in *Groom VII* is in error and requests a correction. Specifically, it contends in its brief:

> In findings of fact #52, the Board stated 'at the 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 Fraud Investigations Unit and to the District Attorney's Office in Anchorage for possible prosecution.' The prehearing conference summary incorrectly summarizes the statements made by the employer's attorney at the October 3, 2012, prehearing conference. The employer's attorney informed the employee, his attorney and the prehearing conference officer that it had contacted the Fraud Investigation Unit regarding the employee's conduct which could lead to the Division's Director's referral to the prosecuting attorney's office for possible criminal charges. As noted above, it is the Fraud Investigation Unit through the Director of the Division of Workers' Compensation who alone has the authority to refer workers' compensation related cases to OSPA for possible criminal prosecution. The employer requests the Board to revise findings of fact #52 to stating that the October 3, 2012, prehearing conference summary incorrectly stated that the employer referred the employee's case to the District Attorney's Office.

Employee's current position on the issue of revising factual finding 52 is unknown for the reasons set forth above. It is assumed he opposes Employer's request.

5) Should Groom VII's factual finding 52 be revised?

Employer also contends factual finding 105 in *Groom VII* states an incorrect date of June 29, 2013. It contends the correct date is June 29, 2011, and requests a revision.

Employee's current position on the issue of revising factual finding number 105 is unknown for the reasons set forth above. It is assumed he opposes Employer's request.

6) Should Groom VII's factual finding 105 be revised?

FINDINGS OF FACT

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

1) The factual findings in Groom *Scott A. Groom v. State of Alaska, DOT,* AWCB Decision No. 13-0091 (August 2, 2013) (*Groom VII*) are incorporated here with the exception noted below.

2) 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)).

3) 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).

4) 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).

5) On May 17, 1999, Employee filed his initial claim based on the March 19, 1999 in jury report. (Claim, May 17, 1999).

6) 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).

7) 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).

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

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

10) 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* and *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*).

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

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

13) 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).

14) 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).

15) 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).

16) 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).

17) 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).

18) 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 and message techniques. He also reported reduced swelling in his legs. (Fast report, April 8, 2009).

19) 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).

20) 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 three to four 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 five to ten 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).

21) 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).

22) 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).

23) 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).

24) 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).

25) 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).

26) 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).

27) 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).

28) 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).

29) 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).

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

31) 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 three to five times per week. (Fast report, May 14, 2009; Fast prescription, May 14, 2009).

32) 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).

33) 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).

34) 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).

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

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

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

38) 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).

39) On December 21, 2009. Dr. DePompolo evaluated Employee at Employer's request 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).

40) 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).

41) 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).

42) 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).

43) 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).

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

45) 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).

46) 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 three to four 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 Employee's wife should be able to assist, despite her Meniere's disease. (Treiman report, April 20, 2011).

47) 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).

48) 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).

49) On June 29, 2011, 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, 2011).

50) 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).

51) 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).

52) 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 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).

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

54) 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).

55) 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).

56) 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).

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

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

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

60) 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 copied 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).

61) 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).

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

63) 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 [personal information removed] 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).

64) 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).

65) 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).

66) 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).

67) 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).

68) 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).

69) 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).

70) 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).

71) 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).

72) 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).

73) 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).

74) 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).

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

76) 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).

77) 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.).

78) 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.)

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

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

81) 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).

82) 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).

83) 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).

84) 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).

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

86) On March 29, 2013, Dr. Myers 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).

87) 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).

88) 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).

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

90) 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 said 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).

91) 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).

92) 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).

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

94) 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).

95) 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).

96) 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).

97) 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).

98) 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).

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

100) 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).

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

102) 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).

103) 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*.)

104) 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).

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

106) 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).

107) At the May 23, 2013 hearing, Employee contended an attorney has not yet been appointed to represent him in the criminal prosecution. Employee's request to continue the hearing was granted. (Record).

108) At the May 23, 2013 hearing, Employer contended Employee was not cooperating with its recent discovery efforts and would only selectively disclose evidence in defense of information Employer was providing. It sought orders closing the record and compelling Employee to comply with its discovery requests. Employer's requests were both orally granted. The designated chair orally granted Employer's requests for both orders. (*Id*.).

109) At the time of the May 23, 2013 hearing, Employer did not have a pending petition to compel discovery. (Record).

110) On August 19, 2013, Employer filed the instant petition for reconsideration. (Employer's petition, August 16, 2013).

111) At an August 27, 2013 prehearing conference, the designee advised the parties the board would entertain reconsideration of *Groom VII*. (Prehearing Conference Summary, August 27, 2013).

112) On September 12, 2013, Employer filed its hearing brief. (Employer's hearing brief, September 12, 2013).

113) Employee did not file a hearing brief. However, he transmited numerous emails to board staff in apparent responses to Employer's petition. His emails do not address the issues raised by Employer's petition, but rather consist primarily of personal attacks on Employer's attorney and protestations of his innocence on the pending criminal and administrative fraud proceedings. (Record, Employee emails, August 23, 2013; August 25, 2013; September 9, 2013; September 10, 2013; September 16, 2013; September 19, 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 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 . . . .

> **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.

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.* "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 Alaska Supreme 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 forfeiture proceedings against the 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). 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 a Fifth Amendment penalty for silence to include any sanction that makes assertion of the privilege to remain silent 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 . . . 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. . . . . 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.
>
> **AS 23.30.012. Agreements in regard to claims.** (a) At any time . . . 30 days subsequent to the date of the injury, the employer and the employee. . . . have the right to reach an agreement in regard to a claim for injury. . . . an agreement filed with the division discharges the liability of the employer for the compensation . . . . and is enforceable as a compensation order.
>
> (b) The agreement shall be reviewed by a panel of the board . . . If approved by the board, the agreement is enforceable the same as an order or award of the board . . . .
>
> **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 on its own motion 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.** (a) A compensation order becomes effective when filed with the office of the board as provided in AS 23.30.110, and, unless proceedings to reconsider, suspend, or set aside the order are instituted as provided in this chapter, the order becomes final on the 31st day after it is filed.
>
> (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 . . . 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.

The Alaska Workers' Compensation Act does not provide the board the authority to stay an award of benefits pending an appeal. *Flayac v. Banner Health Systems*, AWCB Decision No. 10-0124 (July 16, 2010) at 5; *Cornelison v. Rappe Excavating*, AWCB Decision No. 13-0060 (May 30, 2013) at 22. Rather, that authority is granted to the Alaska workers' Compensation Appeals Commission under the statute at AS 23.30.125(a). *Id*. However, in the absence of an express grant of statutory authority to issues stays under the Workers' Compensation Act, *Cornelison* found authority for the board to stay its own proceedings under the Alaska's Administrative Procedures Act. *Id.* at 22. *But see, Johns v. State of Alaska, Dept. of Highways*, 431 P.2d 148; 152 (Defining "irreparable damage" under AS 23.30.125(c): "We . . . hold that AS 23.30.125(c) is applicable solely to injunction proceedings in the superior court, and that the exclusive method of enforcing compensation orders is provided for in AS 23.30.125(c) and AS 23.30.170.").

Originally, appeals of workers' compensation awards were pursued in Superior Court and AS 23.30.125(c) afforded the application of a stay pending appeal. *Johns* at 151. Under AS 23.30.125(c), the term "irreparable damage" is a highly debatable issue. *Id.* A claimant's financial irresponsibility is not sufficient grounds upon which to base a finding of irreparable injury. *Id*. To warrant enjoining payments, the employer must produce evidence not only of the claimant's financial irresponsibility but must also demonstrate the existence of the probability of success on the merits of the appeal. *Id*; *Wise Mechanical Contractors v. Bignell*, 626 P.2d 1085; 1087 (Alaska 1981) (reiterating its holding in *Johns*). The "balancing of hardships" approach, requiring both the claimant's financial irresponsibility and the probability of success on the merits of the appeal, is based on the presumption an employee is inadequately protected in the case of continuing benefits. *Olsen Logging Co. v. Lawson*, 832 P.2d 174; 176. However, the balance is different in most cases involving lump sum benefits, so the lesser "serious and substantial questions" standard is used. *Id.*

> **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 in original).

AS 33.16.020. Board of parole. (a) There is in the Department of Corrections a board of parole consisting of five members appointed by the governor, subject to confirmation by a majority of members of the legislature in joint session. . . .

AS 44.62.520. Effective date of decision; stay. (a) A decision becomes effective 30 days after it is delivered or mailed to the respondent unless

(1) a reconsideration is ordered within that time;

(2) the agency itself orders that the decision becomes effective sooner; or

(3) a stay of execution is granted for a particular purpose and not to postpone judicial review.

(b) A stay of execution may be included in the decision or, if not included in it, may be granted by the agency at any time before the decision becomes effective…

8 AAC 45.065. Prehearings. . . . . (d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request. . . .

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 . . . .

When evaluating the potential for irreparable harm, some decisions have taken a "balancing of the interests" approach where the interests of the party requesting the continuance are weighed against the interests of the party opposing the continuance. *E.g. In the Matter of Oasis Apartments*, AWCB Decision No. 12-0159 (September 12, 2012); *Harris v. M-K River*, AWCB Decision No. 12-0145 (August 23, 2012).

> **8 AAC 57.100. Applications for stay of compensation order payments**. (a) In an appeal, the appellant may apply for a stay of payments under a compensation order by filing a motion that includes the appropriate showing of the grounds for a stay, as provided in AS 23.30.125(c) or in (e) of this section.
> . . . .
>
> (d) To stay continuing future periodic compensation payments, the appellant must also demonstrate by affidavit or other evidence
>
> (1) the financial irresponsibility of the compensation recipient or the inability of the appellant to fully recover the compensation paid; and
>
> (2) the existence of the probability that the merits of the appeal will be decided adversely to the compensation recipient.
>
> (e) To stay lump-sum payments, the appellant must also demonstrate by affidavit or other evidence the existence of serious and substantial questions going to the merits of the case.
>
> (f) The commission will rule on applications for a stay.

ANALYSIS

1) Did Groom VII correctly grant the May 23, 2013 continuance?

Employer contends *Groom VII* erred in concluding it would not be irreparably harmed by continuing the May 23, 2013 hearing. As a preliminary matter, *Groom VII* has been reviewed and it could not be identified where it concludes Employer would not be irreparably harmed by the continuance. Nevertheless, even if *Groom VII* had so concluded, Employer's point here is confusing. Continuances are disfavored and can only be granted for "good cause." The regulation explicitly sets forth circumstances that constitute "good cause," and includes circumstances where "despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing." 8 AAC 45.074(b)(1)(N). The plain language of the regulation

requires a determination that a party might be irreparably harmed, not that a party will not be irreparably harmed. Perhaps, Employer's confusion over the regulation's "irreparable harm" standard is its similarity to the "irreparable damage" statute that provides for stays on appeal. This issue is more fully addressed below while examining Employer's renewed request for a stay.

Nevertheless, it is not unusual to have circumstances where one party would suffer irreparable harm by not granting a continuance and, at the same time, the other party might be harmed, irreparably or otherwise, by granting one. For this reason, some decisions have taken a "balancing of interests" approach. *Eg.*, *Oasis Apartments*; *Harris*. *Groom VII* granted the May 23, 2013 continuance based on the Supreme Court authority of *Armstrong*, *Resek* and *McCracken*, and between these three, it found *Resek* to be most analogous to the case at hand. *Groom VII* at 28-29. However, *Groom VII* also stated, "it does not appear *Resek* would require any weighing of interests under the instant circumstances." *Groom VII* at 29. Yet, notwithstanding this statement, *Groom VII* then proceeded to weigh the parties' interests and assigned less weight to Employer's pecuniary interest than to Employee's pecuniary interest, liberty interest and his constitutionally protected rights. *Id.* Although Employer now disagrees with the weight *Groom VII* afforded its interest, the decision did, in fact, consider its competing interests.

As an ancillary matter upon reconsideration, the statement "it does not appear *Resek* would require any weighing of interests under the instant circumstances" seems an improvident choice of words. Discussing *Resek*, *Groom VII* noted the following in its legal authority:

> 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.'

Groom VII at 22 (quoting *Resek*). The courses of action prescribed in *Resek* are dependent upon whether or not there are "strong countervailing circumstances," which necessarily means there must be a weighing of interests.

Although *Groom VII* did not explain in its legal analysis why *Resek* would not require a weighing of interests under the circumstances, when the parts of the decision are read as a whole, the intended meaning of the improvidently drafted sentence can be determined. In its legal analysis,

Groom VII concluded *McCracken* was less applicable than *Resek* because, in *McCracken*, the Court exercised its inherent supervisory powers over the courts and ordered evidence excluded in subsequent criminal proceedings. Here, evidence exclusion was not available as a remedy because the Board lacked any authority to excluded evidence from a proceeding in Superior Court. *Groom VII* at 28.

Under *Resek* there are two possible outcomes: 1) either staying the proceeding when there are not strong countervailing interests; or 2) granting immunity when there are. However, just as the Board does not have authority to order evidence exclusion as did the Court in *McCracken*, neither does it have the authority to grant immunity from criminal prosecution as in *Resek*. AS 22.10.020(a); AS 23.30.005(h); *see also Groom VII* at 27, 28 (concluding the board lacks authority in criminal matters). Therefore, since one of the two Court-prescribed remedies in *Resek* is unavailable in the instant case, by default, the only course of action available in *Groom VII* was to continue the hearing. Rather than *Groom VII* stating "it does not appear *Resek* would require any weighing of interests under the instant circumstances," the decision should have more properly stated: any consideration of Employer's countervailing interest under *Resek* would be futile since there is no authority to effectuate the Court's prescribed remedy. Therefore, the continuance was properly granted.

2) Did granting the continuance "carve out a special exception" for Employer that "impermissibly" treated it differently than other employers?

Employer also contends *Groom VII* impermissibly treats it than differently than other employers on account of the state's criminal enforcement authority. Its brief lists numerous bureaucratic entities, including: the State of Alaska, Department of Transportation and Public Facilities; the State of Alaska, Department of Law Civil Division; the State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation; the State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation, Fraud Investigation Unit; the State of Alaska, Department of Law, Criminal Division, Office of Special Prosecutions and Appeals; and finally, the State of Alaska, Alaska Court System. (Employer's brief at 3-4). Employer contends there are many constituent parts of state government, and since one part does

not control the other parts, the state should not be treated as a single entity. It cites *Payton v. State of Alaska*, 938 P.2d 1036 (Alaska 1997) in support of its position.

Payton involved a Board of Fisheries decision denying appellants' repeated proposals for a subsistence fishery in the upper Yentna River area. *Payton* at 1036-1037. One of appellants' arguments on appeal was the Board of Game had determined the area was within a subsistence area for hunting. *Payton* at 1045. The Alaska Supreme Court noted "the Board of Fisheries and the Board of Game are separate entities acting under different statutory authority; they may reach different conclusions based on the same facts," and held the Board of Game's decision that an area was within a subsistence area for hunting did not limit the Board of Fisheries on appellants' proposals for a subsistence fishery. *Id.* By citing *Payton*, Employer is analogizing itself and its attorney on one hand, and the Special Investigation Unit, the Director of the Workers' Compensation Division and the Department of Law's Criminal Division on the other hand, to the Board of Game and the Board of Fisheries in *Payton*. However, Employer's analogy is faulty and *Payton* is inapplicable to the instant facts.

First, the Board of Game and the Board of Fisheries (Boards) are administrative agencies with rule making authority similar to the Workers' Compensation Board. *See generally* AS 16.05.010 *et seq*. (enabling statutes for the Boards). Consequently, of the entities Employer listed, the Workers' Compensation Division is more similar to the Boards in Payton than is Employer and its attorney on one hand, or the Special Investigations Unit and the Department of Law's Criminal Division on the other hand, since none of the latter possess rule making authority. Similarly, although the Alaska Court System is not an administrative agency, with judicial decision making authority, it bears a closer resemblance to the rule-making Boards in *Payton* than does either the Special Investigations Unit or the Department of Law's Criminal Division. Thus, while the Workers' Compensation Division and the Alaska Court System might be analogous to the Boards in *Payton*, the Special Investigations Unit and the Department of Law's Criminal Division are not.

Second, the Court's holding in *Payton* is axiomatic: fishing is distinct from hunting. Here, fraud is the subject of both the administrative and criminal proceedings.

Third, Employer contends because it had "**no** control" over the criminal proceedings, it "had no choice" but to pursue its fraud petition against the employee. (Employer brief at 4-5) (emphasis original). However, *McCracken* involved both a parole revocation hearing and a criminal prosecution for the same offense – being a felon in possession of a firearm. Parole revocation hearings are controlled by the Parole Board, which is organized under the Department of Corrections. AS 33.16.020. As Employer points out in its brief, the Department of Law's Criminal Division is responsible for criminal prosecutions. Yet, the Court did not find it significant that the parole revocation and criminal prosecution were conducted by two separate departments. To the contrary, the Court cautioned: "There is the danger that the prosecution will use the revocation hearing, with its lower standard of proof, to gain evidence for the criminal trial, thus slighting its investigatory responsibilities." *McCracken* at 996. Chief Justice Rabinowitz, quoting the American Bar Association in his concurring opinion, identified additional dangers:

> The relative informality of a probation revocation proceeding, as compared to the trial of an original criminal charge, underlines the danger. Relaxation of rules of admissibility of evidence, the absence of a jury, a lesser burden of proof factors such as these can lead to an abuse of the proceedings by basing revocation upon a new criminal charge when the offense could not be proved in an ordinary criminal trial.

McCracken at 999-1000. The Chief Justice then went further and not only offered, but even encouraged, a solution to Employer's purported state of helplessness under these circumstances. Citing *McGuiniss v. Stevens*, 543 P.2d 1221; 1232-33 (Alaska 1975), he quoted:

> The Division of Corrections' regulations pertaining to major infractions involving conduct constituting felonies provide for referral to the local district attorney, together with a request that he advise the institution within five working days whether prosecution will be undertaken. If the district attorney informs the institution that prosecution will be undertaken and the case goes to trial, there will be no further disciplinary action taken by the institution against the offender for the particular conduct.

McCracken at 1000. He continued:

> I am of the view that either the parole board . . . or the legislature should consider adopting a similar regulation or statute providing that the parole or probation officer seeking revocation based on conduct constituting a crime must refer the matter to the district attorney to consider the bringing of criminal charges. If the district attorney, within stated time constraints, informs the parole or probation officer that he will not seek criminal charges, then the officer can proceed with the revocation proceeding. If the district attorney does plan on bringing criminal

> charges, the parole or probation officer must suspend any revocation proceedings until after the outcome of the criminal prosecution.
>
> I believe that such a procedure will adequately protect the parolee or probationer's constitutional rights against self-incrimination while offering the state adequate measures to deal with criminal conduct committed by parolees or probationers.

McCracken at 1000-01. Here, the State was not treated differently than other employers. Rather, it is different than other employers by virtue of its criminal enforcement authority.

Just because the process of governing is compartmentalized into many bureaucratic entities for convenience and efficiency does not mean the individual actions taken by those entities are not products of the same corporate enterprise, *i.e.* the State of Alaska. Whether the Workers' Compensation Division chooses to adopt regulations similar to those Chief Justice Rabinowitz proposed in *McCracken* is a matter for its board. In any event, Employer's counsel can control future proceedings by simply referring potential workers' compensation fraud cases to the Special Investigations Unit so it can make determinations on referrals for criminal prosecution to the Director and, in turn, to the Department of Law's Criminal Division prior to Employer filing its administrative petitions. *Groom VII* correctly concluded Employer could have avoided the harm to which it now objects. *Groom VII* did not impermissibly treat Employer differently than other employers.

3) Should payment of medical and transportation benefits be stayed during the period of continuance?

Employer contends it will suffer irreparable harm in the absence of a stay because it is obligated to continue to pay Employee's medical and transportation benefits during the period of the continuance. It renews its request for a stay from the board, distinct from the Alaska Workers' Compensation Appeals Commission (Commission), and cites *Cornelison v. Rappe Excavating*, AWCB Decision No. 13-0060 (May 30, 2013) in support of its position.

Though unnecessary to determination of the issue, as a preliminary matter, the "irreparable damage" standard will be examined in the context of stays of workers' compensation awards for the convenience of the parties. The Alaska Supreme Court's standards for a stay of execution of a

workers' compensation award evolved from the equitable standards for issuance of an injunction. *Lawson.* Originally, appeals of workers' compensation awards were pursued in Superior Court and AS 23.30.125(c) afforded the application of a stay pending appeal. *Johns.* The statute requires a showing of "irreparable damage." *Id.*; AS 23.30.125(c). In a series of decisions, the Court examined the construction and application of that standard. *Johns*; *Bignell*; *Lawson.* Ultimately, in *Lawson,* the Court established different standards for showings of "irreparable damage" based on whether the benefits to be stayed were "continuing" or "lump sum." In the case of a lump sum payment, the lesser "serious and substantial questions" standard is applied. The "balance of hardships" standard, along with its more stringent "probability of success on the merits" component, is applied in cases that involving continuing benefits. *Id.* at 175-76.

Employer's belief that there must be a determination it would not suffer irreparable harm appears to originate from the third part of a four-part test in *Cornelison*, which stated:

> A stay is not a remedy available as of right. Whether a stay will be granted is a question directed first to the original adjudicating body, which is more familiar with the case and better able to exercise the discretion needed to balance the equities on a request for stay. *Powell v. City of Anchorage*, 536 P.2d 1228, 1229-1230 (Alaska 1975). The criteria applied on a request for stay is much the same as it would be to grant a preliminary injunction: (1) the likelihood that the petitioner will prevail on the merits of its appeal or petition for review; (2) irreparable injury to the petitioner unless the stay is granted; (3) no substantial harm to other interested persons, and (4) no harm to the public interest. *Id*. at 1229, fn. 2.

Cornelison at 16. However, the issue in *Powell* was an injunction in a case involving an Anchorage ordinance that prohibited exposure of genitalia or the pubic area in a liquor establishment, not workers' compensation benefits. In the meantime, the law governing stays in workers' compensation cases is well developed. *Johns*; *Bignell*; *Lawson.* There is need to barrow from *Powell.* Additionally, although *Lawson* noted the standard for stays in workers' compensation awards evolved from the equitable standards for issuance of an injunction, the two are not necessarily identical. *See id.* ("Motions for stays . . . are . . . much like motions for preliminary injunctions."). Furthermore, the four-part standard articulated in *Cornelison* was taken from a footnote that states "Professor Moore suggests a four factor test." *Powell* at 1235, n.2. Finally, even if Professor Moore's four-part test for a preliminary injunction were to apply to stays of execution in workers' compensation cases, the third part of the test requires the absence of

"substantial harm," not the absence of "irreparable harm." Employer's reliance on *Cornelison* which, in turn, relies on dicta from a footnote in *Powell* that merely suggests a four part test be applied to applications for injunctions, is not persuasive. Neither does it explain Employer's notion that there must be a determination a party will not suffer irreparable harm before a continuance can be granted. Such a standard cannot be found under either the continuance regulation or in the law governing stays of awards.

Regarding Employer's renewed request for a stay under AS 44.62.520, the statute cannot be applied here. Following the Supreme Court's decision in the instant case, the parties entered into a settlement agreement that provided Employer would remain responsible for medical and transportation costs. The agreement was filed on May 9, 2008. Upon its filing, an agreement is enforceable the same as an award of the board. AS 23.30.012(b). An award becomes final on the 31st day after it is filed. AS 23.30.125(a). In this case, Employee's award became effective on June 8, 2008. *Id.* *Cornelison* is unique; additional decisional authority concluding the Administrative Procedures Act authorizes the board to issue stays could not be found. Nevertheless, assuming such authority does, it explicitly prescribes a "stay of execution . . . may be granted by the agency at any time before the decision becomes effective." AS 44.62.520(b). Here, the award Employer seeks to stay became effective some five and a half years ago. Employer's request is untimely and was properly denied in *Groom VII*. *Id.*

That is not to say, however, Employer's position is unsympathetic. Based on the volume of evidence it filed to support its fraud petition, it might well be able to establish its "probability of success on the merits" before the Commission, should the Commission grant a discretionary review. In the meantime, Employer is obligated to continue paying benefits and, given that Employee has been found disabled by the Social Security Administration, the Commission might also find it unlikely that Employer would ever be able to recover payments fraudulently obtained, should that prove to be the case. However, as the Alaska Supreme Court made clear in *Shirley*, an employer seeking to terminate payments made under an award must first seek Board approval, which can only be granted following a hearing on the merits. *Id.*; *Woods*; AS 23.30.130; AS 23.30.110. Under the facts of the instant case, what Employer seeks to accomplish cannot be accomplished through issuance of a stay from the board.

4) Should the verbal order from the May 23, 2013 hearing instructing Employee to comply with Employer's discovery requests be memorialized in this decision?

At the hearing in *Groom VII*, Employer contended Employee was not cooperating with its recent discovery efforts. It sought orders to close the record and compel Employee to comply with its discovery requests. Employer's requests were both orally granted. Although *Groom VII* subsequently declined to memorialize the order to close the record, it did not explicitly address the oral order compelling Employee to provide discovery. Employer now requests the latter be memorialized.

Action by a party other than a claim for benefits is initiated by the filing a petition, 8 AAC 45.050(a). Employee is entitled to notice and an opportunity to be heard on a petition. AS 23.30.001(4). In deciding not to memorialize the oral order closing the record, *Groom VII* observed: "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." *Groom VII* at 31. The same basis for declining to memorialize the order to close the record will now be used to deny Employer's request to memorialize the order compelling Employee to provide discovery. The oral order was improvidently granted and based on the presumption Employer had a petition pending. It did not. Therefore, Employer's request to memorialize the oral order will be denied.

5) Should Groom VII's factual finding 52 be revised?

Employer contends the October 3, 2012 prehearing conference summary incorrectly states Employer referred Employee's case to the District Attorney's Office and requests a revision of factual finding 52 in *Groom VII*. Employer is apparently requesting the finding be revised to state "its attorney informed the employee, his attorney and the prehearing conference officer that it had contacted the Fraud Investigation Unit regarding the employee's conduct which could lead to the Division's Director's referral to the prosecuting attorney's office for possible criminal charges." (Employer's brief at 13).

The regulations provide a mechanism for a party to amend or modify a prehearing conference summary when it believes the summary contains a factual misstatement. 8 AAC 45.065(d). On October 11, 2012, Employer submitted such a request, apparently in response to a contention by Employee's attorney that Employer's fraud petition was defectively pled. Employer's October 11, 2012 request for a clarification of the October 3, 2012 summary and Employee's subsequent objection to Employer's request are set forth in *Groom VII* at findings 53 and 54, respectively.

Employer's October 11, 2012 request did not dispute the statement it had referred this case to the District Attorney's office in Anchorage. Rather, its request contended it had provided Employee's attorney with specific details concerning Employee's alleged fraud at the October 3, 2012 prehearing conference. Employer was aware of the procedure to modify the record and attempted to do so. It only now seeks modification of its statement regarding referral to the District Attorney's office.

The October 3, 2012 prehearing conference summary has been reviewed and finding 52 in *Groom VII* accurately sets forth the summary's contents. There is no basis on which to now modify either the finding or the summary. Furthermore, its request is untimely and will, therefore, be denied. 8 AAC 45.070(d).

6) Should Groom VII's factual finding 105 be revised?

Employer seeks to amend factual finding 105 in *Groom VII*. It contends the subject email was sent on June 23, 2011, not on June 23, 2013, as stated in the decision's finding. The subject email has been reviewed and Employer's point is well taken. The finding has been revised above to reflect the correct date of the email.

CONCLUSIONS OF LAW

1) *Groom VII* correctly granted the May 23, 2013 continuance.
2) Granting the continuance did not improperly "carve out a special exception" for Employer that "impermissibly" treated it differently than other employers.
3) Payment of medical and transportation benefits will not be stayed during the period of continuance.

4) The oral order from the May 23, 2013 hearing instructing Employee to comply with Employer's discovery requests will not be memorialized in this decision.

5) *Groom VII*'s factual finding 52 will not be revised.

6) *Groom VII*'s factual finding 105 will be revised.

ORDER

1) The May 23, 2013 oral order instructing Employee to comply with Employer's discovery requests is vacated.

2) Employer's May 23, 2013 request for an order instructing Employee to comply with Employer's discovery requests is denied.

3) Factual finding 105 from *Groom VII* is revised as set forth above.

4) The following sentence on page 29 of *Groom VII* is deleted: "Although it does not appear *Resek* would require any weighing of interests under the instant circumstances, the parties' interests will nevertheless be examined." The following language replaces the deleted sentence: "Any consideration of Employer's countervailing interest under *Resek* would be futile since there is no authority to effectuate the Court's prescribed remedy. Nevertheless, the parties' interests will be examined."

5) In all other respects, *Groom VII* remains in full force and effect as issued.

Dated in Fairbanks, Alaska on October 25, 2013.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Sarah Lefebvre, Member

/s/
Rick Traini, 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 Decision and Order on Reconsideration in the matter of SCOTT A. GROOM employee / respondent v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION, self-insured employer / defendant; Case No. 199905415; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served upon the parties this 25th day of October, 2013.

Nicole Hansen, Office Assistant