ALASKA WORKERS' COMPENSATION BOARD

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

GARY M. WAITE, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201412006
HOLLAND AMERICA/PRINCESS, Employer,	)	AWCB Decision No. 14-0141
and	)	Filed with AWCB Anchorage, Alaska on October 23, 2014
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Insurer, Defendants.	)	

Gary M. Waite's September 5, 2014 petition seeking review of the board designee's discovery decision was heard on the written record on October 15, 2014 in Anchorage, Alaska. The hearing was held by a two-member panel, a quorum under AS 23.30.005(f). This hearing date was selected on October 10, 2014. Mr. Waite (Employee) represented himself. Certified Legal Assistant Christi Niemann represented Holland America/Princess and Travelers Property Casualty Company of America (Employer). The record closed at the hearing's conclusion on October 15, 2014.

ISSUE

Employee contends the board designee abused his discretion in ordering him to sign releases for medical records, health insurance records, pharmacy records, employment records, social security records, as well as a general release for workers' compensation records and a release for

Alaska workers' compensation records. Employer contends the releases are appropriate and the board designee did not abuse his discretion in ordering Employee to sign them.

Did the board designee abuse his discretion in ordering Employee to sign releases?

FINDINGS OF FACT

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

1. On July 12, 2014, Employee was at work when a coworker fell, hitting Employee's left knee and causing severe pain. He finished his shift in pain. (Report of Injury, July 13, 2014; Employee, Prima Facie Affidavit, July 21, 2014).
2. Employee purchased a knee brace and worked his shift on July 13, 2014. (Employee, Prima Facie Affidavit, July 21, 2014).
3. On July 15, 2014, Employee went to the emergency room. X-rays revealed a lateral dislocation of his left patella. He was prescribed pain medication, and instructed to keep a knee immobilizer on and to use crutches. He was given an off-work slip and referred to an orthopedist. (Providence Alaska Emergency Center, Diagnosis and Discharge Instructions, July 15, 2014).
4. On July 18, 2014, Employee was seen by Bradley Sparks, M.D., who ordered an MRI. (Anchorage Fracture and Orthopedic Clinic (AFOC), MRI Referral, July 18, 2014).
5. On July 21, 2014, Employee executed a "Prima Facie Affidavit" setting out the facts of the injury and his medical treatment to date. The affidavit includes the statement:

> You have "7" days from receipt of this letter to provide the rebuttal to this affidavit. If for some reason you choose to remain silent or not respond to my affidavit, it will be considered that this document stands as truth in commerce. A judgment will then be issued in my favor. 'Silence Equates Agreement."

Employee's affidavit concluded with three "Maxims of Law:"

> 1.) An un-rebutted affidavit stands as truth in commerce. Claims made in the affidavit if not rebutted, emerge as the truth of the matter.
>
> 2.) An Un-rebutted affidavit becomes the judgment in commerce.
>
> 3.) No Court or judge can overturn or disregard or abrogate somebody's affidavit.

6. On July 22, 2014, the MRI ordered by Dr. Sparks was done. It revealed a patellar dislocation with tearing of the medial patellofemoral ligament. (AFOC, MRI Report, July 22, 2014).
7. On July 22, 2014, Employer's adjuster sent a letter to Employee by email, asking that he list all the physicians who had treated him for the work injury and sign releases for medical records, employment records, and workers' compensation records. (Letter, Joy Tuttle to Employee, July 22, 2014).
8. Also on July 22, 2014, Employee executed a "Prima Facie Affidavit re: Residency" In the affidavit, Employee provided four addresses where he had resided since 2011, and indicated he had received no medical treatment other than the treatment after the work injury. He stated he was only authorizing checks of the listed places for records, and any medical records received were to be shredded and destroyed after being reviewed. The affidavit included with same provision as the July 21, 2014 Prima Facie Affidavit requiring rebuttal within seven days as well as the same "Maxims of Law.". (Employee, Prima Facie Affidavit re: Residency, July 22, 2014).
9. On July 22, 2014, Employee signed the medical release requested by the adjuster, but included the statement "I only authorized medical records from places listed on the affidavit signed 7-22-2014," but did not identify the places. (Release, July 22, 2014).
10. On July 25, 2014, Dr. Sparks restricted Employee from work pending surgery on his left knee. (AFOC, Work Restriction, July 25, 2014).
11. On August 5, Employee executed a "Notice of Default of Prima Facie Affidavit" stating Employer had not rebutted the allegations in his July 21, 2014 and July 22, 2014 affidavits. (Employee, Notice of Default of Prima Facie Affidavit).
12. On August 6, 2014, Employer's attorney sent Employee two sets of releases. Both sets included releases for medical records related to Employee's left lower extremity, but one set also included records related to depression, high blood pressure, and psychological, psychiatric and mental health records. The letter explained that if Employee was claiming treatment for depression or high blood pressure was due to the work injury, he should sign and return those release. In addition to the medical releases, Employer requested releases for health insurance records, pharmacy records, employment records, Social Security records, and both general workers' compensation records, and Alaska worker's compensation records.

13. On August 20, 2014, Employee filed a claim for temporary total disability (TTD) beginning July 12, 2014 and continuing and a compensation rate adjustment. (Claim, August 14, 2014).
14. On August 20, 2014, Employee also filed a petition for a protective order regarding the releases requested by Employer. Employee stated he had given the adjuster a medical release, his affidavits "covered all that needed to be covered," and, as Employer had not rebutted his affidavits within seven days, further releases were unnecessary, and, as a result, Employer and its attorney were seeking information to which they were not entitled and which was irrelevant to the case.. Because he had given Employer a release, he did not believe he had a duty to release his private medical information to Employer's attorney, and objected to have to pay to have any releases notarized. (Petition, August 14, 2014).
15. A prehearing conference was held on September 3, 2014, at which Employee's petition for a protective order was addressed. The board designee explained the need for and use of releases in workers' compensation cases. Employee expressed his concern that the medical records might be seen by unauthorized parties. Employee also voiced his concern about the cost of having the releases notarized, and Employer agreed to reimburse him for the notary costs. The designee stated that under AS 23.30.107, medical records were not public records, and access was limited. The designee explained that under the Act information was only discoverable if "relative" to the injury or claim, and explained the test for relevance. The designee then reviewed Employer's requested releases, discussed them extensively with the parties, found them to be reasonably calculated to lead to evidence relevant to material issues, appropriately limited in time and scope, and denied Employee's petition. Employee refused to sign the releases and stated he would appeal the designee's decision. The designee explained the requirements for appealing his decision. (Prehearing Conference Summary, September 3, 2014).
16. On September 10, 2014, Employee filed an appeal of the board designee's discovery decision. Employee contends the designee abused his discretion by failing to consider all the facts and making a decision without a hearing. He asserts his unrebutted affidavits "emerge as the truth" and cannot be overturned. He maintains Employer and Employer's attorney have exceeded the statute and other federal and state laws, and are seeking irrelevant information, but provides no explanation other than that Employer failed to respond to his affidavits within seven days. He states the designee explained he "was not for or against"

Employee in the prehearing, but accuses the designee of not being neutral and abusing his discretion by failing to thoroughly analyze the facts before making a decision. (Employee, Notice of Appeal, September 5 2014).

PRINCIPLES OF LAW

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;
2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
3) this chapter may not be construed by the courts in favor of a party;
4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

AS 23.30.020. Chapter part of contract of hire.
This chapter constitutes part of every contract of hire, express or implied, and every contract of hire shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner provided in this chapter for all personal injuries sustained.

AS 23.30.095. Medical treatments, services, and examinations.
. . .

(e) . . . Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter.

AS 23.30.107. Release of information.
(a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file

> a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.
>
> (b) Medical or rehabilitation records, and the employee's name, address, social security number, electronic mail address, and telephone number contained on any record, in an employee's file maintained by the division or held by the board or the commission are not public records subject to public inspection and copying under AS 40.25.

Employers have a right to defend against claims of liability and it is important they be able to thoroughly investigate claims to verify information provided by a claimant. *Granus v. Fell*, AWCB Decision No. 99-016 (January 20, 1999) at 6.

Although the Alaska Rules of Civil Procedure do not apply in workers' compensation cases (AS 23.30.135), the board has looked to them for guidance. In particular, the board has looked to Civil Rule 26(b)(1), which governs the general scope of discovery in civil actions, for guidance on releases. *See e.g., Granus*.

The Alaska Supreme Court has long recognized that the civil rules should be construed to allow liberal discovery. *See, e.g., United Services Auto. Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974). When it comes to medical records, however, liberal discovery collides with the physician-patient privilege set out in Alaska Rule of Evidence 504. The Court held the privilege was waived, and discovery was allowed, as to information relating to the injury at issue as well as information that may have an historical or causal connection to the injury. *Arctic Motor Freight, Inc. v. Stover*, 571 P.2d 1006, 1009 (Alaska 1977). Medical records without an historical or causal connection to the injury at issue remain privileged.

> **8 AAC 45.095. Release of information**
> (a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 14 days after service of the request, petition for a prehearing under 8 AAC 45.065.

(b) If after a prehearing the board or its designee determines that information sought from the employee is not relevant to the injury that is the subject of the claim, a protective order will be issued.

(c) If after a prehearing an order to release information is issued and an employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the requested release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release.

Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure.

. . .

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.

. . . .

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

(c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to

> admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

Under AS 23.30.108(c), discovery decisions of the Board Designee, including decisions regarding releases, are upheld absent "an abuse of discretion." The Alaska Supreme Court has stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979) (footnote omitted). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

On appeal to the Alaska Workers' Compensation Appeals Commission, AS 23.30.128(b) provides that board decisions reviewing a board designee determination are subject to reversal under the "abuse of discretion standard." Appeals of Commission decisions to the Alaska Supreme Court are reviewed under the abuse of discretion standard of AS 44.62.570, incorporating the substantial evidence test, as cited above. To ensure that standard is met on appeal, the same standard is applied in reviewing a Board Designee's determination. In applying a substantial evidence standard, a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978) (footnotes omitted).

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

> **AS 23.30.135. Procedure before the board.**
> (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury

Legal maxims are often useful guides to determining the meaning of a statute or contract, but they do not take precedence over or abrogate clear provisions to the contrary[1]. They are not applied if the result would be contrary to the purpose of a statute. *See*, *e.g. Chevron USA, Inc. v. LeResche,* 663 P.2d 923, 930–31 (Alaska 1983), *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992). A court or adjudicative body ordinarily cannot apply equitable principles to matters that are plain and fully covered by a statute. *Riddell v. Edwards*, 76 P.3d 847, 854 (Alaska 2003)

ANALYSIS

Did the board designee abuse his discretion in ordering Employee to sign releases?

Under AS 23.30.108(c), the board designee's decision must be upheld unless Employee demonstrates the designee abused his discretion. To show an abuse of discretion, Employee must show the designee's decision was arbitrary, capricious, manifestly unreasonable, stemmed from an improper motive or that the designee failed to properly apply controlling law.

Employee contends the board designee was not neutral, implying his decision was the result of an improper motive. The mere fact the designee denied his petition is not evidence of an improper motive, and Employee even acknowledges the designee explained he "was not for or against" Employee at the prehearing. Employee gives no explanation and provides no evidence of any improper motive, and nothing in the prehearing conference summary hints of any bias or improper motive.

[1] Maxims are but attempted general statements of rules of law and are law only to extent of application in adjudicated cases ;. . . . BLACK'S LAW DICTIONARY 979 (6th ed. 1990).

To the extent Employee contends the board designee erred by not conducting a hearing, his argument is without merit. Under AS 23.30.108(b), a board designee has the authority to resolve disputes over releases at a prehearing. The designee did not abuse his discretion by failing to hold a hearing.

Employee appears to contend that the decision was arbitrary, capricious, or contrary to controlling law because the designee failed to accord proper weight to the legal maxims he cited or to his contention that Employer could no longer rebut his affidavits because it did not do so within seven days. He does not point to specific aspects of any release as being inappropriate or overbroad, but objects to signing any further releases as being unnecessary or irrelevant.

It appears Employee misunderstands the nature and effect of a "prima facie affidavit." It is not a talisman and has no special powers. "Prima facie" does not mean irrebuttable. It is defined as "a fact presumed to be true *unless disproved by some evidence to the contrary*. BLACK'S LAW DICTIONARY, 1189 (6th ed. 1990) (emphasis added). A "prima facie case" is defined as "Such as will prevail *until contradicted and overcome by other evidence*." *Id*. (emphasis added). If and when Employee's case is heard on the merits, it may well be that his affidavits establish a prima facie case. Even if they do so, however, they would not preclude Employer from offering contradictory evidence. Under AS 23.30.001(2), cases are to be decided on their merits, except as provided by statute. Nothing in the Act or other statute gives Employee's affidavits the preclusive effect he desires. Similarly, they do not preclude Employer from further discovery, including the gathering of medical and other records through releases.

Employee's attempt to limit Employer to seven days in which to rebut his affidavits is ineffectual. AS 23.30.107(a) states that upon written request, an employee *shall* provide an employer with written authority to obtain information relative to the employee's injury. It does include restrictions on the time in which the employer may make the requests or on the employee's obligation to provide the authority. The Act applies to all employment contracts; a party cannot unilaterally add requirements or change the Act's provisions. Employee can no

more unilaterally restrict Employer's rights contrary to the Act than Employer could unilaterally reduce or eliminate Employee's benefits contrary to the Act.

The purpose of legal maxims is to serve as an aid in interpreting ambiguous or unclear statutes or contracts. They do not supersede clear statutory provisions. The maxims cited by Employee may well be true, but they do not get him where wishes to go. The requirement for releases in workers' compensation cases is fully covered by a statute, AS 23.30.107(a). The section is clear and unambiguous, and equitable maxims cannot be relied upon to change the clear meaning of the statute.

Employee has shown no evidence of bias or improper motive by the board designee. He has not shown the designee's decision was contrary to controlling law or was otherwise arbitrary or capricious. His petition for review of the designee's decision is denied. Employee will be ordered to sign the releases as directed by the designee.

Employee is advised that failure to sign and return the releases as ordered may result in the suspension of benefits or the dismissal of his claim.

CONCLUSION OF LAW

The board designee did not abuse his discretion in ordering Employee to sign releases.

ORDER

1. Employee's petition for review of the designee's discovery order is denied.
2. Employee is ordered to sign the releases as ordered by the board designee and to return them to Employer within 10 days of the date of this decision.

Dated in Anchorage, Alaska on October 23, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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David Kester, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of GARY M. WAITE, employee / claimant; v. HOLLAND AMBERICA/PRINCESS, employer; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, insurer / defendants; Case No. 201412006; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on October 23, 2014.

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Elizabeth Pleitez Office Assistant