ALASKA WORKERS' COMPENSATION BOARD

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

CLARK K. JACKSON, Employee, Claimant, v. FOOD EX CORP., Employer, and AK NATIONAL INSURANCE CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200914669 AWCB Decision No. 14-0019 Filed with AWCB Anchorage, Alaska on February 18, 2014.

The parties' five petitions were addressed in Anchorage, Alaska on January 28, 2014, a hearing date selected on December 5, 2013. Clark K. Jackson (Employee) appeared personally, represented himself and testified. Attorney Rebecca Holdiman-Miller appeared and represented Food Ex Corporation and Alaska National Insurance Company (collectively, Employer). Adjuster Tami Jo Banahan attended for Employer. The petitions considered included (1) Employee's August 19, 2013 petition appealing the board designee's August 6, 2013 order denying his petition for protective order and requiring he sign a medical release for multiple body parts dating back to 1991; (2) Employee's September 4, 2013 petition to compel Employer to provide to him all medical records in its possession; (3) Employee's October 25, 2013 petition for admission of Anchorage Police Department (APD) investigation records and photographs pertaining to the assault upon him which forms the basis for his workers' compensation claim; (4) Employer's November 15, 2013 petition to compel discovery or to dismiss Employee's claim; and (5) Employer's December 30, 2013 request for mediation.

After on and off-record discussion, Employee conceded his September 4, 2013 petition to compel production of medical records from Employer was moot. Employer stated its non-opposition to Employee's petition for admission of evidence, and the APD investigation records and photographs were admitted. Employer withdrew its petition to compel discovery or to dismiss Employee's claim. The parties agreed to mediate substantive issues, and mediation was scheduled for Friday, January 31, 2014, with Hearing Officer William Soule. The parties' agreements left the only issue for consideration Employee's August 19, 2013 petition appealing the board designee's August 6, 2013 order denying his petition for protective order and requiring he sign releases. The record was held open until mediation concluded. The record closed on January 31, 2014.

ISSUES

Employee contends the board designee abused his discretion when he ordered Employee to sign medical releases dating back to 1991 for "deep vein thrombosis (DVT), pulmonary, blood disorders, head, vision, ear, nose, throat, spine, ribs, chest." Employer contends the medical release "refers back to 1991 based on the employee's prior work injuries and medical history that are relative to the current conditions he is claiming as work-related, such as a prior pulmonary condition/treatment and vision condition/treatment."[1] Employer further contends Employee previously signed a medical release dating back to 1991, and thereby "waived any objection to the date limitation."[2] Employer finally contends Employee's appeal of the board designee's discovery order should be dismissed as untimely filed.

Employee contends he has no history of injury to his throat, spine, ribs and chest, and never suffered DVT or a head injury prior to the work injury. He contends he was previously diagnosed with cataracts, sinusitis, and lung problems, specifically occupational asthma, chronic obstructive pulmonary disease and bronchitis,[3] and if required to sign additional releases, they should be appropriately limited. Employee further contends he has previously signed releases and should not be required to sign them again, discovery should not be of unlimited duration, and

[1] Employer's Opposition to Petition for Protective Order, July 7, 2013, at 2.
[2] *Id*.
[3] Employee's Opposition to Medical Release and Petition for Protective Order, August 19, 2013.

a previous compromise and release agreement states all records were previously filed.[4] Finally, Employee contends he timely appealed the board designee's order denying his petition for protective order.

1. *Did Employee timely appeal the board designee's order denying his petition for protective order?*
2. *Did the board designee abuse his discretion when he ordered Employee to sign the disputed medical releases?*

FINDINGS OF FACT

The following findings of fact and factual conclusions, limited to those necessary to determine the narrow issue presented, are established by a preponderance of the evidence:

1. On September 10, 2009, while employed as a food delivery driver, Employee was assaulted by an unknown assailant and robbed. Police photographs reflect Employee bloodied at the nose, mouth, right cheek, right temple, center right back of the head and right eye. (Anchorage Police Department photographs, admitted without objection at hearing).
2. Employee was diagnosed with right orbit floor fracture, with fracture into the right maxillary sinus, and right sided epidural hematoma, 7 x 3 mm in size. He was admitted to Providence Alaska Medical Center (PAMC). Treating neurosurgeon, Marshall E. Tolbert, M.D., noted Employee's past medical history included intermittent hypertension, chronic obstructive pulmonary disease (COPD), hemorrhoidectomy and bilateral cataract surgery. (PAMC, September 10, 2009).
3. On October 1, 2009, Employee filed a Report of Occupational Injury or Illness (ROI) for injury to his "right side of face, eye, nose, mouth, hit with baseball bat. . ." (ROI, October 1, 2009).
4. Employee thereafter developed a deep vein thrombosis (DVT) in his left calf, which progressed to bilateral pulmonary emboli. In a November 17, 2009 admitting note, Richard D. Church, M.D., reported Employee with no previous episode of DVT, nor family members with a history of blood clots. Employer medical evaluator (EME), internal medicine specialist Alvin J. Thompson, M.D., attributed Employee's DVT and pulmonary emboli to

[4] *Id.*

the September 10, 2009 work injury. (Robert D. Church, M.D., November 17, 2009; John R. Hanley, M.D., November 17, 2009; Martha J. Moore, M.D., November 24, 2009; Radiology report, December 1, 2009; EME Report, April 5, 2010).

5. A November 10, 2009 brain MRI identified a possible anterior communicating artery aneurysm. (Marshall Tolbert, M.D., December 2, 2009).
6. On April 5, 2010, Employer convened a panel of independent medical evaluators comprised of internist Dr. Thompson, Richard E. Marks, M.D., neurology; Aleksandra M. Zietak, M.D., physiatry; and Richard E. Bensinger, M.D., ophthalmology. In its review of Employee's prior medical records, the panel noted Employee past medical diagnoses, consisting of COPD, asthma, and upper respiratory infection in September, 1993; fish and shellfish allergy, occupational asthma, COPD, chronic bronchitis and mild eczema in January, 2002; and reactive airways dysfunction syndrome (RADS) and emphysema in August, 2002. (EME Report at 3-4).
7. On January 30, 2012, a second independent medical evaluation (SIME) was conducted by John Cleary, M.D., neurosurgeon. Dr. Cleary reported a past medical history similar to the EME panel, with diagnoses of COPD, bronchitis, fish and shellfish allergy, but also noted a traumatic amputation of the tip of Employee's left index finger in 1993; an over-the-counter drug overdose in 1995; right eye cataract, 2001; bilateral groin hernias, 2002; sinus problem and rash on forearms and legs, 2007; and heart palpitations in 2008. (SIME report, January 30, 2012).
8. During the litigation, Employer has proffered, and Employee signed general medical releases for "deep vein thrombosis (DVT), pulmonary, blood disorders, head, vision, ear, nose, throat, spine, ribs, chest," for the time period "1991 to present." (Record; Employer representation at hearing).
9. On June 13, 2013, Employer sent Employee for signature a facility-specific medical release required by Lovelace Medical Center and its affiliates, in Albuquerque, New Mexico. Other than Employee's signature, the release was completed and read:

   By Initialing the following, I request the specific type of information be released:

   X Any and all medical records/laboratory/radiology/diagnostic test, for time period: 1991 to PRESENT.

   _ Any and all . . . (re psychiatric records) [***No body part specific limitations noted***]

_ Any and all . . . (re substance abuse records)

_ Any and all . . . (re HIV/AIDS treatment)

_ Pharmacy profile

X Photos, video tapes, Digital or other images related to deep vein thrombosis (DVT), pulmonary, blood disorders, head, vision, ear, nose, throat, spine, ribs, chest. (***Use of one-point font for body parts at issue in original***).

_ Billing information . . .

_ Billing information . . .

_ . . . (re electronic copy . . .)

_ . . . (re electronic copy . . .)

Other (Please specify) any and all medical records/diagnostic images related to DVT, pulmonary, blood disorders, head, vision, ear, nose, throat, spine, ribs and chest (***Use of one-point font for body parts at issue in original***).

. . .

X Workers Comp (date of accident/onset of symptoms): ____/____/1991

10. On June 21, 2013, Employee filed a petition for a protective order seek protection from a medical release proffered by Employer for release of medical records pertaining to "deep vein thrombosis (DVT), pulmonary, blood disorders, head, vision, ear, nose, throat, spine, ribs, chest" from 1991 forward. **(**Medical release; Petition for Protective Order, June 21, 2013; Prehearing conference summary, June 25, 2013; Employer's Opposition to Petition for Protective Order, July 5, 2013).
11. At an August 6, 2013 prehearing conference, the board designee ordered Employee to sign the proffered release. **(**Prehearing conference summary, August 6, 2013).
12. The prehearing conference (PHC) summary included the text of AS 23.30.108, and contained boilerplate language gleaned from prior board decisions encouraging "liberal discovery" of information "relevant to the injury," "reasonably" "calculated to lead to admissible evidence." The PHC summary quoted from *Granus v. Fell* [5] the seminal board decision for analyzing the propriety of proposed medical releases. (*Id.*).

[5] *Granus v. Fell,* AWCB Decision No. 99-0016 (January 20, 1999) at 13-15 ("The proponent of a release must be able to articulate a reasonable nexus between the information sought to be released and evidence that would be relevant to a material issue in the case").

13. On August 19, 2013, Employee appealed the board designee's discovery order, objecting to the Lovelace release, and to signing any further medical releases, arguing, *inter alia*, they were overbroad in scope and duration, as his prior medical history included only occupational asthma, bronchitis, COPD, bilateral cataract removal and sinusitis. (Employee's Opposition and Petition for Protective Order, August 19, 2013).
14. Neither the board designee's summary of the parties' arguments, nor his order requiring Employee to sign the medical release, identify any of the body parts at issue in the case, or the medical records justifying releasing medical records back to 1991. The order contains no factual or legal analysis for requiring Employee to sign the proffered medical release. (Prehearing conference summary, August 6, 2013; judgment, observation, facts of the case).
15. There is no evidence Employee's September 10, 2013 work injury caused injury of any kind to his ears, throat, spine, ribs or chest. (Medical records, police report and photographs, Employee testimony).
16. Employer has not stated any nexus between Employee's ears, throat, spine, ribs or chest, and any material issue in in this case. (Record; judgment, observation).
17. There is no evidence Employee suffered DVT or any head injury prior to the September 10, 2009 work injury. (Medical records; EME Report; SIME report; Employee).
18. Employer has articulated no reason why a release for information pertaining to DVT or a head injury occurring more than two years prior to the work injury is appropriate in this case. (Record; judgment, observation).
19. The first medical record or evidence Employee suffered any nasal disorder was a sinus problem reported in 2007. (Medical records; SIME report).
20. Employer has provided no explanation justifying a medical release for Employee's nose exceeding two years prior to the reported sinus problem in 2007. (Record; judgment, observation).
21. The first medical record or evidence Employee suffered any vision disorder was the 2001 right eye cataract diagnosis. (Medical records; SIME report).
22. Employer has articulated no relevant purpose for a release concerning Employee's vision prior to 1999. (Record; judgment, observation).

23. The first medical record or evidence Employee suffered from a lung (pulmonary) disorder is from September 6, 1993, when he was diagnosed with COPD. (David G. Ingram, M.D., September 6, 1993).
24. The term "blood disorders," used by Employer in its proffered medical releases, encompasses a category of illnesses including cancers of the blood, anemia, hemophilia, eosinophilic disorders, and a host of unrelated platelet, excessive blood clotting and bleeding disorders, far broader than the deep vein thrombosis or aneurysm Employee suffered or claims to have suffered as a result of the September 10, 2009 work injury. (*http://www.nlm.nih.gov/medlineplus/blooddisorderse.html*, February 10, 2014; judgment, observation).
25. There is no evidence Employee suffered from any "blood disorders" of any kind until he developed deep vein thrombosis and aneurysm following the workplace injury. (Medical records; SIME report; EME report).
26. Employer has articulated no relevant purpose for a medical release for the overbroad terminology of "blood disorders." (Record; judgment, observation).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> 1) this chapter be interpreted 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) worker's compensation cases shall be decided on their merits except where otherwise provided by statute;
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> 3) this chapter may not be construed by the courts in favor of a party;
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> 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 decisions not only on direct testimony 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, 533-534 (Alaska 1987).

An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (2009).

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . .
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **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.
> . . .

A central question in most workers' compensation proceedings is the cause, nature, and/or extent of an employee's injury, need for medical care, impairment, and disability. In the typical case, medical records and doctors' reports are the most relevant and probative evidence on these issues. Employers have a right to thoroughly investigate workers' compensation claims to verify information provided, properly administer claims, and effectively litigate disputed claims. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Medical and other releases are important means of doing so. Under AS 23.30.107(a), an employee must release all evidence "relative" to the injury. Evidence is "relative" to the claim where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

In *Granus*, the board established a two-step analysis for determining whether information is properly discoverable. The first step is to evaluate what matters are "at issue" or in dispute in the case. The parties' pleadings and the prehearing conference summaries are the initial source of the specific benefits employee is claiming, and the employer's defenses to these claims. Next, the elements the employee must prove to establish his entitlement to each benefit claimed and of the

employer's affirmative defenses are examined to determine what propositions are properly the subjects of proof or refutation in the case. It is also necessary to review available evidence to determine if there are specific material facts in dispute. The question then becomes whether the information sought is relevant for discovery purposes, *i.e.*, whether it is reasonably "calculated" to lead to facts that will have any tendency to make a question at issue in the case more or less likely. *Granus.*

The main question in determining if the board has the power to compel the signing of *a particular* release is whether the information being sought is reasonably calculated to lead to the discovery of facts "relevant" to the employee's injury or a question in dispute. The burden of demonstrating the relevancy of information being sought rests with the proponent of the release, who must "articulate a reasonable nexus between the information sought to be released and evidence that would be relevant to a material issue in the case." *Granus* at 13-15; *Wariner v. Chugach Services, Inc.*, AWCB Dec. No. 10-0075 (April 29, 2010).

Granus and its progeny have consistently held that medical releases covering a period of two years prior to the work injury, or prior injury to the affected body part, were sufficiently likely to lead to admissible evidence and thus reasonable in most cases. *Id.*; *Smith v. Cal Worthington Ford, Inc.*, AWCB Decision No. 94-0091 (April 15, 1994). The two-year, same body part limitation has become a rule of thumb for medical releases. See, e.g., *Fernandez v. Trident Seafoods Corporation,* AWCB Decision No. 12-0155 (September 6, 2012); *Crain v. West Coast Paper Co.*, AWCB Decision No. 12-0018 (January 30, 2012).

Pursuant to AS 23.30.107(a), medical records that have nothing to do with the body part injured are *per se* irrelevant and hence not discoverable without the employer having some reasonable and articulable basis for such discovery. *Syren v. Municipality of Anchorage* AWCB Decision No. 06-0004 (January 6, 2006).

Requiring separate and individual medical releases in cases involving injury to multiple body parts with differing release dates represents a considered weighing of an employer's right to obtain relevant medical records, and an employee's right to privacy in medical records not

relevant because they seek information outside established reasonable time and body part limitations. *Liston v. Alaska Consumer Direct Personal Care, LLC,* AWCB Decision No. 13-0111 (September 10, 2013).

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.** (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
>
> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.
> . . .

AS 23.30.108(c) gives the board designee authority and responsibility to decide all discovery issues at the prehearing conference level, with the right of both parties to seek board review. *Smith v. CSK Auto, Inc.* "The scope of review for an agency's application of its own regulations . . . is limited to whether the agency's decision was arbitrary, unreasonable, or an abuse of discretion." *AT&T*

Alascom v. Orchitt, 161 P.3d 1232, 1246 (Alaska 2007) *citing J.L. Hodges v. Alaska Constructors, Inc*., 957 P.2d 957, 960 (Alaska 1998). A board designee's decision on releases must be upheld absent "an abuse of discretion."

An "abuse of discretion" is defined as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive," failing to apply controlling law or regulation, or failing to exercise sound, reasonable and legal discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, n. 13 (Alaska 1999); *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979; *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The Administrative Procedure Act (APA) includes a "substantial evidence" standard when reviewing decisions for abuse of discretion:

> **AS 44.62.570. Scope of review.**
> . . .
> Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record. AS 44.62.570.

On appeals to the Alaska Workers' Compensation Appeals Commission or the courts, decisions reviewing board designee determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570, incorporating the "substantial evidence test." Concerned with meeting that standard on appeal, the board also applies a substantial evidence standard when reviewing a board designee's discovery determination. *Augustyniak v. Safeway Stores, Inc*., AWCB No. 06- (April 20, 2006). When applying a substantial evidence standard, "[the 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).

> 2010 Legislature added sections (d) and (e) to AS 23.30.108:
>
> (d) If the employee files a petition seeking a protective order to recover medical and rehabilitation information that has been provided but is not related to the employee's injury, and the board or the board's designee grants the protective order, the board or the board's designee granting the protective order shall direct the division, the board, the commission, and the parties to return to the employee, as soon as practicable following the issuance of the protective order, all medical and rehabilitation information, including copies, in their possession that is unrelated to the employee's injury under the protective order.
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> (e) If the board or the board's designee limits the medical or rehabilitation information that may be used by the parties to a claim, either by an order on the record or by issuing a written order, the division, the board, the commission, and a party to the claim may request and an employee shall provide or authorized the production of medical or rehabilitation information only to the extent of the limitations of the order. If information has been produced that is outside of the limits designated in the order, the board or the board's designee shall direct the party in possession of the information to return the information to the employee as soon as practicable following the issuance of the order.

The 2010 amendments which added AS 23.30.108(d)-(e) reflects the legislature's concern an injured worker's constitutional right to privacy in medical information irrelevant to his claim is violated by its dissemination to employers, or by filing with the board. These sections strengthen injured workers' privacy rights, prevent discovery of unrelated information and provide for its return to the employee. Furthermore, the "amendment attempts to craft a remedy in those cases . . . where a protective order to prevent inappropriate disclosure was not obtained in the first place." *Blakely v. Providence Health System*, AWCB Decision No. 10-0145 at 13 (August 26, 2010).

> **8 AAC 45.060. Service.** . . .
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> (b) A party shall file a document with the board . . . either personally or by mail; the board will not accept any other form of filing. . . . Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.
> . . .

8 AAC 45.063. Computation of time. (a). In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day, which is neither a Saturday, Sunday nor a holiday.

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues . . . .

. . .

(6) the relevance of information requested under AS 23.30.107(a) and AS 23.30.108;

. . .

(10) discovery requests; . . . .

. . .

(15) other matters that may aid in the disposition of the case. (emphasis added).

(c) After the prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made between the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(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.

. . .

ANALYSIS

1. Did Employee timely appeal the board designee's order denying his petition for protective order?

A party may appeal a board designee's discovery order by filing a petition within 10 days of the date the prehearing conference summary containing the discovery order is served. 8 AAC 45.065(h). When a document is served on a party by mail, three days is added to the

time allowed for any subsequent right to be exercised or act done. 8 AAC 45.060(b). In computing any time period under the Alaska Workers' Compensation Act (Act), the day of the event after which the designated time period begins to run is not counted, while the last day of the period is included in the calculation. 8 AAC 45.063(a). The discovery order from which Employee appealed was contained in an August 6, 2013 prehearing conference summary served on the parties by mail on August 7, 2013. Accordingly, August 8, 2013 is Day One in the computation. Allowing three days for the order to reach Employee by mail (August 10, 2013), and another 10 for filing his petition (August 20, 2013), Employee had until August 20, 2013 to file his petition appealing the board designee's discovery order. He filed it on August 19, 2013. Employee timely appealed the board designee's order denying his petition for protective order.

2. Did the board designee abuse his discretion when he ordered Employee to sign the disputed medical release?

The board will uphold a board designee's decision except where the designee abused his or her discretion. An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, stems from an improper motive, or fails to apply controlling law, or exercise sound, reasonable and legal discretion. While Employee alleged the board designee was biased, there is no objective evidence to support the assertion the designee's decision stemmed from an improper motive. However, given the absence of any discussion by the designee of the matters at issue in the case, it is impossible to eliminate the possibility the designee's conclusory order was reached arbitrarily and capriciously. Nor can it be found that the designee exercised sound, reasonable and legal discretion. When the designee failed to apply the *Granus* analysis to the facts of the case before entering his discovery order, he failed to apply controlling law and thus abused his discretion.

In order to promote the quick, fair and efficient application of the Act, the hearing panel reviewed the record, and applied the *Granus* two-step analysis to determine whether the information Employer seeks through the medical releases proffered is properly discoverable.

The first step in determining whether information sought is relevant is to analyze what matters are "at issue." The second step is to decide whether the information sought is reasonably

calculated to lead to facts that have any tendency to make a question at issue in the case more or less likely. Records of medical treatment to the body part or organic system an employee alleges was injured in the course and scope of employment, covering a period of two years prior to the date of injury, or prior injury to the affected body part, have consistently been held sufficiently likely to lead to admissible evidence discoverable in most contested cases.

The burden of demonstrating the relevancy of information being sought rests with the proponent of the release, who must articulate a reasonable nexus between the information sought to be released and evidence that would be relevant to a material issue in the case. In the instant case, in the course of his employment in September 2009, Employee alleges injury to his head, nose, and eyes. He developed a deep vein thrombosis, or excessive blood clot, in his left calf, which progressed to bilateral pulmonary emboli, or blockage, in his lungs.[6] A brain aneurysm was later uncovered. Employee did not suffer nor allege injury to his ear, throat, spine, ribs and chest. Employer has not stated any nexus between these body parts and any material issue in in this case. These latter body parts are not relevant to matters at issue in this case, and thus no basis exists for a medical release requiring disclosure of information pertaining to Employee's ear, throat, spine, ribs and chest. Employee's petition for protective order for these body parts will be granted.

There is no evidence Employee suffered injury to his head, or experienced a deep vein thrombosis, brain aneurysm, pulmonary embolus, or any excessive blood clotting problem prior to the September, 2009 work injury. There is no evidence that other than the 2009 DVT, Employee suffered any "blood disorders." Accordingly, a medical release pertaining to Employee's head, DVT, or excessive blood clotting, dating to 2007, two years before the work injury, is sufficiently likely to lead to admissible evidence. Employer has articulated no reason why a release exceeding two years prior to the work injury is appropriate in this case. Employee's petition for a protective order for information pertaining to his head, DVT and excessive blood clotting dating to 1991 will be granted. Employer will be ordered to limit a single medical release for "head, DVT, and excessive blood clotting" to 2007. Once properly limited, Employee will be ordered to sign it.

[6] A pulmonary embolus is a blockage of an artery in the lungs by fat, air, a blood clot, or tumor cells. *http://www.nlm.nih.gov/medlineplus/ency/article/000132.htm* (viewed February 13, 2014).

Considering the facts in this case, the term "blood disorders" is overbroad and will not be permitted in any proffered medical release.

Employee alleges injury to his nose and the bones surrounding his nose. The medical evidence reflects Employee seeking treatment for a sinus problem in 2007. Therefore, a medical release pertaining to Employee's nose, dating to 2005, two years before the first complaints concerning this body part, is sufficiently likely to lead to admissible evidence. Employer has provided no explanation justifying a medical release for this body part exceeding two years prior to the first evidence Employee sought treatment for a sinus problem. Employee's petition for a protective order for information pertaining to "nose" dating to 1991 will be granted. Employer will be ordered to limit a single medical release for "nose" to 2005. Once properly limited, Employee will be ordered to sign it.

Employee alleges injury to his vision as a result of the work injury. The medical evidence reflects Employee seeking treatment for a right eye cataract in 2001. Hence, a medical release pertaining to Employee's vision dating to 1999, two years before the first evident complaint concerning his vision, is sufficiently likely to lead to admissible evidence. Employer has articulated no relevant purpose for a release concerning Employee's vision prior to 1999. Employee's petition for a protective order for information pertaining to his vision dating to 1991 will be granted. Employer will be ordered to limit a single medical release for "vision" to 1999. Once properly limited, Employee will be ordered to sign it.

Following the work injury, Employee developed bilateral pulmonary emboli, a blockage in his lungs related to his DVT. The medical evidence reflects Employee first suffering lung problems in 1993 when he was diagnosed with COPD and asthma. Accordingly, a medical release dating to 1991 with respect to Employee's lungs is appropriate. Employee's petition for protective order against a medical release for his lungs dating to 1991 will be granted in part and denied in part. Employer will be ordered to limit a single medical release for "lungs" dating to 1991. Once properly limited, Employee will be ordered to sign it.

Employer provides no legal argument, nor citation to case law or legal treatise for the proposition that once Employee signed a proffered release for multiple body parts dating to 1991, he waived his right to contest similar releases later tendered. Nor is the panel aware of any legal support for this proposition. The argument is unpersuasive.

In its 2010 amendments to the Act, at AS 23.30.108(d) and (e), the Alaska legislature acknowledged injured workers' constitutional rights to privacy in medical information irrelevant to his workers' compensation claim. The amendments reflect the legislature's concern an injured worker's constitutional right to privacy is violated by dissemination of medical records unrelated to his claim to his employers, its insurers, and the board. The amendments strengthened injured workers' privacy rights by preventing discovery of unrelated information, and requiring the board to order their return to the employee upon petition under .108(d). *Blakely v. Providence Health System*, AWCB Decision No. 10-0145 at 13 (August 26, 2010).

To protect employee's legitimate privacy interests, it is incumbent on the board to ensure discovery takes place in the least intrusive manner possible. Requiring separate and individual medical releases in cases involving injury to multiple body parts with differing information release dates represents a considered weighing of an employer's right to obtain relevant medical records, and an employee's right to privacy in medical records not relevant because they are outside established and reasonable time and body part limitations. Any additional cost to Employer to prepare additional releases, a simple matter of changing a word and date in a word processed document, is considered *de minimis*. Any further medical releases Employer proffers for Employee's signature must be limited to a single body part with the appropriate date limitation.

CONCLUSIONS OF LAW

1. Employee's timely appealed the board designee's order denying his petition for protective order.
2. The board designee failed to apply controlling law when he ordered Employee to sign releases for body parts not injured or at issue in this case, and for years exceeding two years prior to the last known injury or medical treatment sought for affected body parts.
3. Employee's petition for protective order for information pertaining to his ear, throat, spine, ribs, and chest will be granted.
4. Employee's petition for a protective order from a release for information pertaining to his head, DVT and excessive blood clotting dating to 1991 will be granted. Employee will be ordered to sign a medical release for his head, DVT, and excessive blood clotting, with a 2007 date limitation. The term "blood disorders" is overbroad considering the facts in this case, and will not be permitted in any proffered medical release.
5. Employee's petition for a protective order from a release for information pertaining to his nose dating to 1991 will be granted. Employee will be ordered to sign a single medical release for his nose, with a 2005 date limitation.
6. Employee's petition for a protective order from a release for information pertaining to his vision dating to 1991 will be granted. Employee will be ordered to sign a single medical release for his vision, with a 1999 date limitation.
7. Employee's petition for protective order from a release for information concerning his lungs dating to 1991 will be denied in part and granted in part. Employee will be ordered to sign a single medical release, limited to his lungs, dating to 1991.

ORDER

1. Employee's petition for protective order from a release for information pertaining to his ear, throat, spine, ribs, and chest is granted.
2. Employee's petition for a protective order from a release for information pertaining to his head, DVT and excessive blood clotting dating to 1991 is granted. Employer shall limit to a single medical release any release for "head, DVT, and excessive blood clotting." The release may not seek records for these body parts earlier than 2007. Once properly limited, Employee shall sign the proffered release.
3. Employee's petition for a protective order for information pertaining to "nose" dating to 1991 is granted. Employer shall limit to a single medical release any release for "nose." The release may not seek records for this body part earlier than 2005. Once properly limited, Employee shall sign the proffered release.
4. Employee's petition for a protective order for information pertaining to his vision dating to 1991 is granted. Employer shall limit to a single medical release any release for "vision." The release may not seek records for "vision" earlier than 1999. Once properly limited, Employee shall sign the proffered release.
5. Employee's petition for protective order against a medical release for his lungs dating to 1991 is denied in part and granted in part. Employer shall limit to a single medical release any release for "lungs." The release may not seek records for this body part earlier than 1991. Once properly limited, Employee shall sign the proffered release.

Dated in Anchorage, Alaska on February 18, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Linda M. Cerro, Designated Chair

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Ron Nalikak, Member

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Mark Talbert, 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 CLARK K. JACKSON, employee / claimant; v. FOOD EX CORP., employer; ALASKA NATIONAL INSURANCE CO., insurer / defendants; Case No. 200914669; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 18, 2014.

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Kimberly Weaver, Office Assistant