

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

VIRGIL A. ADAMS,	)	
	)	
Claimant,	)	
v.	)	INTERLOCUTORY
	)	DECISION AND ORDER
O&M ENTERPRISES and	)	
THE MICHAEL A. HEATH TRUST,	)	AWCB Case No(s). 201113128
	)	
Uninsured Employer,	)	AWCB Decision No. 14-0136
	)	
and	)	Filed with AWCB Anchorage, Alaska
	)	On October 9, 2014
ALASKA WORKERS' COMPENSATION	)	
BENEFITS GUARANTY FUND, and	)	
WILTON ADJUSTMENT SERVICE, INC.,	)	
	)	
Defendants.	)	

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The Michael A. Heath Trust's (the Trust) November 8, 2013 petition to quash a notice of records deposition and subpoena duces tecum and for a protective order was heard in Anchorage, Alaska on October 1, 2014. The hearing date was selected on September 3, 2014. Virgil Adams (Claimant) appeared and was represented by attorney Charles Coe. Attorney Steven Smith represented Michael Heath (Mr. Heath), whom Claimant alleges to have been his employer at the time of injury. Attorney James Mathis (Mr. Mathis) of the Davis & Mathis, P.C. law firm represented the Trust. Assistant Attorney General Siobhan McIntyre represented the Workers' Compensation Benefits Guaranty Fund (the Fund) and its adjusters, Wilton Adjustment Service, Inc. (Wilton). There were no witnesses. The record closed at the hearing's conclusion on October 1, 2014.

ISSUE

Claimant's October 9, 2013 subpoena duces tecum directs the Trust to produce "any and all legal documents, tax returns, financial reports, notes, research, and statements used in the preparation of the Michael A. Heath Trust." The same day, Claimant also filed a notice of records deposition addressed to the Mathis law firm, presumably as custodian of records for the Trust. Claimant contends trust documents are relevant and necessarily discoverable because the Trust has been joined as a party, and the documents may contain information relevant to the issue of determining employee status.

The Trust contends the subpoena and notice seek production of undiscoverable information and documents under the attorney/client privilege, attorney work product doctrine, and/or information constituting client secrets and confidences. The Trust contends Mr. Heath has requested the documents not be produced. The Trust requests an order quashing Claimant's October 9, 2013 subpoena duces tecum and October 9, 2013 notice of records deposition.

The Fund has not taken a position with respect to the Trust's petition.

**Should Claimant's October 9, 2013 subpoena duces tecum and notice of records deposition be quashed?**

FINDINGS OF FACT

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

- 1) On August 30, 2011, Claimant filed a report of injury stating he injured his back and was hospitalized when "a ladder slid out from off the roof, fell 40 ft., first hitting his back, then bouncing off and hitting the ground (with railroad ties) folding in half backwards." The form states the workplace injury occurred "on Employer's premises." (Report of Injury, August 30, 2011).
- 2) On September 20, 2011, Claimant filed a workers' compensation claim, naming his employer as "Michael Heath O&M Enterprises." The claim stated Claimant was injured when "cribbing came out from under ladder while on roof, ladder slid off roof, hit back on railroad ties." The claim stated Mr. Heath was uninsured at the time of the injury, and sought to join the

Fund as a party. The claim lists the employer's address as 9102 Snow Bear Dr., Anchorage, Alaska 99516. (Workers' Compensation Claim, September 20, 2011).

3) On January 5, 2012, the claims administrator for Wilton filed a controversion, which controverted all benefits and stated:

Compensation benefits are not payable under AS 23.30.235(2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.

Per medical records from Providence Alaska Medical Center and dated 08/30/11, "Mr. Virgil Adams is an 47 yo white male carpenter from Anchorage who was roofing while intoxicated and with cocaine in his system on 08/18/11."

(Controversion, January 5, 2012).

4) On January 16, 2013, Mr. Heath filed a letter styled, "Notice of Compensation Fraud." The letter states, in relevant part:

I Michael Heath (O&M Enterprises), hereby state that Virgil Adams have [sic] never work for O&M Enterprises. Furthermore, no request was ever made to hire Virgil Adams to be an employee for O&M Enterprises or Michael Heath Trust. At the time of alleged incident Virgil Adams was intoxicated at Michael Heath's home at said alleged incident.

(Letter, January 16, 2013).

5) On October 9, 2013, Claimant filed and served a subpoena duces tecum and notice of records deposition, both directed and addressed to the Mathis law firm, as the Trust's records custodian. The subpoena requested "...any and all legal documents, trust documents, tax returns, financial reports, notes, research, and statements used in the preparation of the Michael A. Heath trust." The notice of records deposition did not state its subject matter. (Subpoena and Notice, October 9, 2013).

6) On August 15, 2013, Claimant filed a petition to join the Michael A. Heath Trust as a party. The petition was served upon the Michael A. Heath Trust at Mr. Heath's address, P.O. Box 240162 Anchorage, AK 99516. (Petition, August 15, 2013).

7) No objection was filed to Claimant's August 15, 2013 petition. (Record).

8) On November 8, 2013, the Trust, through the Mathis law firm, filed a petition and brief to quash the notice of records deposition and subpoena duces tecum and for a protective order. (Petition, November 8, 2013).

9) The Trust's brief makes various arguments supporting its position it should not be required to disclose the requested documents. The brief states, in relevant part:

The firm does not represent O&M Enterprises, Michael Heath, or any other party to this workers' compensation proceeding. . . . In 2006 the firm was retained by Michael Heath for estate planning work. . . . The subpoena and the notice seek the production of information and documents which appear to fall within the definitions of client confidences and secrets. . . . Moreover, Mr. Heath has instructed the firm not to provide the documents and information. Since the subpoena and notice seek the production of documents that appear to either be secrets or confidences and Mr. Heath has not consented to their disclosure or production, the firm is required, by Professional Conduct Rule 1.6(a) to not produce the documents. . . .

(Brief, November 8, 2013).

10) On August 1, 2014, Claimant filed a hearing brief in opposition to the Trust's petition to quash. In summary, Claimant argues the subpoena duces tecum should not be quashed based upon the following:

- The Michael A. Heath Trust is a legal entity formed under Alaska law, legally separate and distinct from the individual Michael A. Heath.
- The Trust is the owner of the property where Claimant was working when he was injured. Michael A. Heath does not own this property.
- Claimant has performed a property title search which has revealed in addition to owning the property in question, the Trust also owns and operates other properties in the State of New York.
- The Trust was Claimant's employer, along with Michael A. Heath individually, and/or his company, O&M Enterprises, at the time of the injury.
- The employers in this case were not carrying workers' compensation liability insurance at the time of Claimant's injury.
- Disclosure of the trust documents will reveal what property the Trust owns, which employees it employs, what assets it holds, and what insurance it carries.

(Brief, August 1, 2014).

11) A statutory quitclaim deed evidences Michael Heath conveyed a quitclaim interest to Michael Heath, Trustee of the Trust Agreement of Michael Heath all right, title and interest Michael Heath had in Lot Six (6), Block Three (3), Bear Valley. The deed states, in relevant part:

The Grantor, MICHAEL A. HEATH, a single man, of P.O. Box 240162, Anchorage, AK 99524, for an in consideration of the sum of TEN DOLLARS (\$10.00), and other valuable consideration to Grantor in hand paid, CONVEYS and QUITCLAIMS to MICHAEL A. HEATH, Trustee of the TRUST AGREEMENT OF MICHAEL A. HEATH, dated the 8th day of January, 2007, and the Successor Trustees thereunder of P.O. Box 240162, Anchorage, AK 99524, Grantee, all right, title and interest, if any, which Grantor has in and to that certain real property situate in the Anchorage Recording District, Third Judicial District, State of Alaska, more particularly described as follows:

Lot Six (6), Block Three (3), BEAR VALLEY, according to the official map and plat thereof, filed under Plat No. 76-209. . . .

(*Id.*).

12) A public search on the Municipality of Anchorage property appraisal website lists the property at 9102 Snow Bear Drive in Anchorage listed under plat number 76-0209 and owned by “HEATH MICHAEL A. TRUST.” (<http://www.muni.org/pw/gswweb>, accessed October 8, 2014).

13) The Mathis law firm does not represent the Trust in this case. Mr. Mathis stated he did not have additional oral argument and relies on the brief in support of the petition to quash. (Mathis).

#### 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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . .

(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 23.30.115. Attendance and fees of witnesses.** (a) . . . the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. . . .

**8 AAC 45.040. Parties.** . . .

. . .

(d) Any person against whom a right to relief may exist should be joined as a party.

. . .

(f) Proceedings to join a person are begun by

(1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties. . . .

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action. .

. .

**8 AAC 45.054. Discovery.** (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The

party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition.

(b) Upon the petition of a party, the board will, in its discretion, order other means of discovery.

(c) The board or division will issue subpoenas and subpoenas duces tecum in accordance with the Act. The person requesting the subpoena shall serve the subpoena at the person's expense. Neither the board nor the division will serve subpoenas on behalf of a party. . . .

**8 AAC 45.120. Evidence.**

. . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. . . .

To be admissible at hearing, evidence must be relevant. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), provided guidance in determining relevancy:

Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action . . . . To be admissible at hearing, evidence must be 'relevant.' However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing. *Smart v. Aleutian Constructors*, AWCB Decision No. 98-0289 (November 23, 1998).

The scope of admissible evidence in board hearings is broader than in civil courts because AS 23.30.135 makes most civil rules inapplicable. Information inadmissible at a civil trial may be discoverable in a workers' compensation claim if it is reasonably calculated to lead to relevant facts. *Granus* at 14.

The Alaska Supreme Court encourages “liberal and wide-ranging discovery under the Rules of Civil Procedure.” *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 at 4, n. 2 (December 11, 1987). *Granus* defined the term “relevant” in AS 23.30.107(a) as follows:

We frequently look to the Alaska Rules of Civil Procedure for guidance in interpreting our procedural statutes and regulations. Civil Rule 26(b)(1) governs the general scope of discovery in civil actions and provides in pertinent part, ‘[p]arties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.’

We find the definition of ‘relevant’ for discovery purposes in Civil Rule 26(b)(1) is persuasive as to the meaning and legislative intent of the phrases ‘relative to employee’s injury’ and ‘that relate to questions in dispute’ used in AS 23.30.107(a) and AS 23.30.005(h), respectively. The Civil Rules favor liberal and wide-ranging discovery. . . . However, the scope of evidence we may admit and consider in deciding those narrow issues is broader. Information which would be inadmissible at trial, may nonetheless be discoverable if it is reasonably calculated to lead to admissible evidence. . . .

To be admissible at hearing, evidence must be ‘relevant.’ However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing.

**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. . . .



**Alaska Rule of Professional Conduct 1.6. Confidentiality of Information.** (a)

A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information. . . .

Comment 3 to ARPC 1.6 states:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in the Rules of Professional Conduct. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality also applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all client secrets. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

**Alaska Rule of Professional Conduct 1.9. Duties to Former Clients.**

. . .

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use confidences and secrets to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal confidences and secrets except as these Rules would permit or require with respect to a client.

The Alaska Supreme Court has stated, "[a] trust is defined in the Restatement as 'a fiduciary relationship with respect to property subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.' Restatement (2d) of Trusts § 2 (1959). Comment 'h' of section 2 describes the elements of a trust. They are:

(1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) trust property, which is held by the trustee for the beneficiary.

*Alaska State Employees Ass'n v. Alaska Public Employees Ass'n*, 825 P.2d 451, 459 (Alaska 1991).

### ANALYSIS

#### **Should Claimant's October 9, 2013 subpoena duces tecum and notice of records deposition be quashed?**

No objection was timely filed to Claimant's August 15, 2013 petition to join the Michael A. Heath Trust as a party. Therefore, the Trust was joined by operation of law. 8 AAC 45.040(h)(2). Claimant may potentially have a right to benefits from an uninsured employer, and therefore the issue determination of employee status may be central in resolution of this case. Moreover, Mr. Heath has filed a letter stating Claimant was not his employee, or an employee of O&M Enterprises or the Trust. Because Claimant has produced evidence the Trust owns the property where Claimant alleges to have been injured, information concerning ownership and management of the Trust's property, as well as Trust employees, is relevant and therefore discoverable. Civil Rule 26(b)(1); *Granus*; 8 AAC 45.120.

If not quashed, Claimant's October 9, 2013 subpoena duces tecum will require the Mathis law firm to hand over its entire client file concerning the Trust. While a portion of this file is arguably relevant, not privileged, and therefore discoverable, Claimant's October 9, 2013 subpoena would compel disclosure of privileged and confidential documents, including attorney work product. Such disclosure would jeopardize the Mathis firm's duty to preserve client confidences and secrets. ARPC 1.6. While the Mathis law firm does not represent the Trust in the case at bar, its fiduciary duty as former attorney and present trust documents custodian is ongoing and continuous. *Alaska Public Employees*; ARPC 1.9; Rest. (2d) of Trusts § 2. The scope of admissible evidence in matters before the Alaska Workers' Compensation Board is broader than in civil courts. *Granus*. However, the regulations are clear the rules of privilege apply to the same extent as in civil actions. 8 AAC 45.120(e).

It is not necessary that privileged material used in creating the Trust or establishing the attorney-client relationship be disclosed to determine employee status, or ownership of the property where Claimant alleges to have been injured. The trust document itself, combined with associated tax and employment records and property transfer documents, will show ownership and control of the property and equipment Claimant alleges to have been working on when he was injured. These documents are sufficient to resolve these issues in a quick, efficient, and fair manner without need for a time-consuming and piecemeal *in camera* inspection. AS 23.30.001(1), (4). Therefore, Claimant's subpoena duces tecum will be limited in scope. 8 AAC 45.054.

The Trust, and the Mathis law firm as records custodian, will be directed to produce the trust document itself, all filed tax documents, and all records concerning any interest in real property held or operated by the Trust. The Trust will be directed to produce any records concerning payroll, employment taxes, and any information concerning any employees the Trust has employed in the past, or is now employing, and any businesses it has operated or is operating.

The Mathis law firm is not a party to this case, and would be unable to testify concerning its representation of the Trust without violating attorney-client privilege or client confidences. The Mathis law firm will not be compelled to divulge irrelevant attorney work product or client confidences and secrets made during the course of its representation of the Trust. As stated above, trust documents should speak for themselves, are direct evidence of Trust assets and holdings, and provide ample information to allow Claimant to pursue his claim. Therefore, Claimant's October 9, 2013 Notice of Records Deposition will be quashed. Civil Rule 26(b)(1); 8 AAC 45.120.

CONCLUSIONS OF LAW

1) The Trust's November 8, 2013 petition to quash notice of records deposition and subpoena duces tecum and for a protective order is granted in part and denied in part.

ORDER

1) The Michael A. Heath Trust, and the Mathis law firm as records custodian, is directed to produce the trust, all filed tax documents, and all records concerning any interest in real property held or operated by the Trust.

2) The Michael A. Heath Trust, and the Mathis law firm as records custodian, is directed to produce any records concerning payroll, employment taxes, and any information concerning any and all employees the Trust has or is now employing either directly or through businesses owned or operated by the Trust.

3) Claimant's October 9, 2013 Notice of Records Deposition, addressed to Davis & Mathis, P.C. is quashed.

Dated in Anchorage, Alaska on October 9, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Matthew Slodowy, Designated Chair

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Donna Phillips, 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 VIRGIL A. ADAMS, employee / claimant; v. O&M ENTERPRISES and THE MICHAEL A. HEATH TRUST, insurer / defendants; Case Nos. 201113128; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on October 9, 2014.

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Pamela Murray, Office Assistant