ALASKA WORKERS' COMPENSATION BOARD

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

JENNIFER C. FLETCHER, Employee, Claimant, v. PIKES ON THE RIVER, INC., Employer, and REPUBLIC INDEMNITY CO. OF AMERICA, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No-. 201320872 AWCB Decision No. 17-0008 Filed with AWCB Fairbanks, Alaska on January 17, 2017.

Jennifer Fletcher's (Employee) August 23, 2016 and August 30, 2016 objections to the board designee's August 3, 2016 and August 9, 2016 prehearing conference summaries and September 3, 2016 petition to strike pharmacy records and September 7, 2016 petition for protective order were heard on the written record on December 15, 2016 in Fairbanks, Alaska. This hearing date was selected on October 4, 2016. Employee represented herself. Attorney Vicki Paddock represented Pikes on the River, Inc. and Republic Indemnity Co. of America (Employer). The record closed at the hearing's conclusion on December 15, 2016.

ISSUES

Employee contends the board designee abused his discretion with various rulings he made regarding the specifics of all of the Employer's releases and has moved for a protective order from the releases.

Employer contends the board designee did not abuse his discretion in his various rulings regarding the releases and the prehearing summaries reflect the consideration and legal analysis the designee undertook before issuing his orders. Employer argues the designee's rulings should be affirmed and the protective order should be denied.

1) **Did the board's designee abuse his discretion in rulings he made regarding releases and should a protective order issue?**

Employee contends the board designee erred when he declined her request to strike a December 26, 2012 medical report inadvertently received by Employer from an earlier, unrelated injury. Employee argues that this record was not obtained pursuant to a valid medical release and should therefore be stricken form the record.

Employer contends that it has no control of records submitted to the provider by the carrier. Employer argues that the medical record is relevant to the body parts at issue in Employee's claim.

2) **Did the board's designee abuse his discretion when he declined to strike the December 26, 2012 medical report?**

Employee contends the pharmaceutical records provided should be stricken from the board's record because the provider did not redact the name and doses of the medication as instructed in the releases.

Employer contends that the content of the records which are produced during the discovery process are not something the board or the Employer can control.

3) **Should the pharmaceutical records be stricken?**

Employee contends that she should not be required to attend a video conference deposition due to security concerns with her deposition being transmitted over the internet.

Employer contends that Employee's objection to the video-conference method of taking her deposition is unfounded in light of the information about the technology to be used. Employer also contends that a video conference deposition is the most effective and cost efficient means of obtaining Employee's testimony and will allow the board to better evaluate her demeanor and credibility.

4) **Did the board's designee abuse his discretion when he ordered Employee to attend a video conference deposition?**

FINDINGS OF FACT

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

1) On July 19, 2013, Employee fell down two stairs while working as a waitress for Employer. She reported injury to her left ankle, right knee, right arm, right side, right ankle, and left knee. (Report of Occupational Injury or Illness, August 23, 2013).

2) On August 31, 2013, Employee filed a petition for a protective order on the grounds that the releases she received from the Employer were over broad in scope. (Petition for Protective Order, August 31, 2013).

3) On September 10, 2013, Employer filed an answer admitting that the request for signed medical releases initially sent to Employee were overly broad and that new, more restrictive releases had been sent to Employee. (Answer, September 10, 2013).

4) On September 18, 2013, a prehearing conference (PHC) was held and it was confirmed that the original releases were withdrawn and that Employee's August 31, 2013 petition for a protective order was resolved. The parties discussed and revised the releases and came to a compromise on the appropriate language. (PHC Summary, September 18, 2013).

5) On March 8, 2016, Employer sent Employee a new set of releases. (Releases, March 8, 2016).

6) On March 19, 2016, Employee filed a petition for a protective order on the grounds that the March 8, 2016 releases were overly board in scope. (Petition for a Protective Order, March 19, 2016).

7) On March 23, 2016, Employer filed a petition to compel Employee to sign the March 8, 2016 releases. (Petition to Compel, March 23, 2016).

8) On March 29, 2016, Employer filed an answer opposing the petition for a protective order and requested a prehearing conference. (Answer, March 29, 2016).

9) On April 26, 2016, a prehearing conference was held and the March 19, 2016 petition for a protective order was addressed. The board designee made the following rulings and findings:

> **General Medical Release**: Ms. Fletcher objects to the words "or other person" in the "TO" line of the release. She contends "upper extremities" should be limited

to the right side. Since Employer's basis for its "lower extremities" request is a 1984 left knee surgery, Ms. Fletcher contends the release should be limited to left knee. She also objects to the release of information concerning her "low back and hips" dating back to 1994. Ms. Fletcher clarified the work injury to her "right side" did not involve her low back. Additionally, she objects to the release of "other information" beyond medical records.

Ms. Paddock contends "or other person" enables Employer to obtain records from a custodian other than the provider. She does not oppose limiting Employer's "upper extremities" request to the right upper extremity. Ms. Paddock also does not oppose limiting Employer's "lower extremities" request to the left lower extremity dating back to 1982, based on Employee's 1984 left knee surgery, and right lower extremity to two years prior to the date of injury. She contends the use of "lower extremities," versus "knee" or "ankles," is appropriate because the locale of perceived pain may be physically removed from the focus of treatment for that pain. Given Employee's clarification her work injury did not involve her low back, Ms. Paddock does not oppose limiting Employer's release to right hip instead of "low back and hips." However, she contends a prior D&O references a 1996 inguinal hernia, so the release of right hip information should date to 1994. Ms. Paddock clarified "other information," would include routine forms containing such things as Employee's address and billing information.

Medical Release for Enumerated Providers: The parties' contentions are identical to their contentions with respect to the General Medical Release.

Pharmacy Releases: Ms. Fletcher generally contends the pharmacy release is not relevant. She also contends the Walgreens' release is not appropriately limited in time and scope. Additionally, Ms. Fletcher inquired as to importance of authorizing "redisclosure." Ms. Paddock contends the general relevancy of the pharmacy releases is to identify Employee's providers. She contends Walgreens will only honor its own, prescribed, form release; and "redisclosure" enables Employer to file the records with the Board.

Employment Release: Ms. Fletcher contends she does not understand why Employer would be seeking employment related information as far back as 2003, or at all, as she is not claiming reemployment benefits. Ms. Paddock contends the release will enable Employer to obtain incident reports describing other injuries. She does not oppose limiting employment information to two years prior to the date of injury and limiting the release of medical information identical to the General Medical Release.

Insurance Release: Ms. Fletcher objects to the words "or agency" in the "TO" line of the release. Ms. Paddock contends "or other person" enables Employer to obtain records from a custodian other than a carrier. She does not oppose limiting the release of medical information identical to the General Medical Release.

Social Security Release: Ms. Fletcher contends the release of medical information contain the same limitations as the General Medical Release. Ms. Paddock does not oppose limiting the release of medical information identical to the General Medical Release.

Social Security Earnings Information: Ms. Fletcher contends she does not understand why Employer would be seeking earnings information as far back as 2003. Ms. Paddock contends Employer's release is appropriately limited to 10 years before the date of injury, and is designed to identify other employers for whom Employee may have worked.

Workers' Compensation Release: Ms. Fletcher contends the release of medical information contain the same limitations as the General Medical Release. Ms. Paddock does not oppose limiting the release of medical information identical to the General Medical Release.

Interrogatories: Ms. Fletcher contends she has no particular objections to Employer's interrogatories. Ms. Paddock contends, if Employee does not complete Employer's interrogatories, it will seek the same information at Employee's deposition.

Analysis:

General Medical Release: In attempting to balance the goals of liberal discovery and reasonable protection of injured workers' privacy, discovery of medical information is generally limited in time - to two years before the earliest evidence of related symptoms, *Cooper*, and in scope - to the relevant medical condition or body part, *Smith*. Employee's claim contends she suffered an injury to her "right and left ankles and knees, right arm, right side" when she fell on stairs. Given this, both Employee's contentions, and Employer's proposed limitations, are generally well taken. So too, are Employer's contentions with respect to "lower extremity," versus knee and ankles. Administrative notice is taken that the locale of perceived pain may be physically removed from the focus of treatment for that pain, just as Employer contends. For examples, lumbar spine disease frequently involves pain that radiates into the buttocks and thigh; elbow injuries can involve symptoms in the hand; and knee injuries may involve pain both above, and below, the knee. Additionally, use of the word "extremity" is further appropriate, given that Employee's claim involves both her knees and her ankles. Given that the parties agree Employee's injury did not involve her low back, and the release should only seek information on her right hip, the only remaining issue is the appropriate time limitation. Employer contends Employee's history of an inguinal hernia, dating to 1996, entitles it to right hip information from 1994. On this point, Employer's contention is not well taken. Although one's groin is in close physical proximity to one's hip, an inguinal hernia and a hip injury are decidedly different medical conditions involving distinct body parts.

Therefore, the release shall be limited as follows:
- Right, upper extremity from July 19, 2011 (two years before the date of injury);
- Left, lower extremity from 1982 (based on Employee's 1984 knee surgery, which she does not dispute);
- Right, lower extremity from July 19, 2011 (two years before the date of injury); and
- Right hip from July 19, 2011 (two years before the date of injury).

Medical Release for Enumerated Providers: The release shall be limited as set forth above.

Pharmacy Releases: Since the decision issued, the board has consistently applied the holding originally set forth in *Adkins v. Alaska Job Corps*, AWCB Decision No. 07-0128 (May 16, 2007) with respect to pharmacy releases. *E.g. Blakely v. Providence Health System*, AWCB Decision No. 10-0145 (August 26, 2010). Employer's proposed primary pharmacy release is in accord with *Adkins* and provides:

INFORMATION TO BE DISCLOSED: Medical and pharmaceutical information from 7/19/11 to the expiration date of this release relating to Jennifer Fletcher. The names of drugs prescribed shall NOT be disclosed. Only disclosure of the name of the provider and the date the prescription was filled is authorized.

While Employer contends Walgreens will only honor its own, prescribed form release, that form does contain a section that provides: "Describe the information that you are asking us to release." Employer's proposed release then reads: "Prescription History." However, a quick internet search revealed a fillable PDF form for Walgreens' release, which provides fill-in-the-box sections for form information, including information to be released. Thus, while the form of the release itself may be prescribed by Walgreens, the specific contents of a given release are not. Therefore, Employee will be granted a protective order on Employer's proposed Walgreens pharmacy release. Employer may re-send a Walgreens release limiting the release of information to the names of prescribing providers and the dates prescriptions were filled in accord with *Adkins*.

Employment Release: Because of the potential variety of information that might be found in employment records, the issue of employment releases is generally more nebulous than other types of releases in workers' compensation cases and rulings are made on a case-by-case basis. Here, Employer's contention it is seeking incident reports describing other injuries, as well as its proposal the release be modified from 10 years (the period that would be relevant if Employee were seeking reemployment benefits) to two years (the standard for medical information under *Cooper*), indicate Employer is primarily seeking medical information with the release.

Employer's release provides:

> You are hereby authorized to release . . . copies of employment or personnel records . . . which relate to the employment of [Employee], by you or your company from 07/19/2003 (10 years prior to the date of injury) to present. Employment and/or personnel records released shall be limited to records or information regarding dates of employment, wage rate and/or payroll information, *position(s) held, work duties required, and dates during which a specific position was held or duties performed.* You are further authorized to release any medical reports or information in your possession or control regarding [Employee] which relates to any injury to or problems with upper extremities from 07/09/11, for and from 1982 for lower extremities, and from 1994 for low back and hips through the date of expiration of this release.

Wage and payroll information from the two calendar years prior to the date of injury is relevant to Employee's claim seeking time loss benefits. AS 23.30.220(a)(4). Therefore, Employer is entitled to such information from January 1, 2011.

The language from Employer's release in emphasis would be relevant if Employee were seeking reemployment benefits, which she is not. Therefore, this language shall be stricken from any future employment records releases presented to Employee.

Employee's amended claim seeking medical and time loss benefits entitles Employer to documents relevant to her claimed injuries, such as accident reports, incident reports, physical examinations, post-hire health questionnaires, etc. Medical information sought by any future release shall be limited in time and scope as set forth above for the General Medical Release.

Insurance Records Release: Again, Employer's insurance records release seeks medical information. It shall also be limited in time and scope as set forth above for the General Medical Release.

Social Security Release: Employer's social security release seeks medical and benefit information, which is relevant to Employee's claim for time loss and medical benefits. Medical Information sought by the release shall be limited in time and scope as set forth above for the General Medical Release.

Social Security Earnings Release: Employer's social security earning release seeks earning information for Employee from 2003. As discussed above, Employee's earnings from the two (not ten) previous calendar years prior to the date of injury is relevant to her claim for time loss benefits. Therefore, any future release presented shall be dated from 2011 until present.

Workers' Compensation Records Release: Workers' compensation records may well contain medical information relevant to Employee's claimed injuries.

> Therefore, any future release presented shall be limited in time and scope as set forth above for the General Medical Release.
> (PHC Summary, April 26, 2016).

10) On May 5, 2016, Employer mailed revised releases to the Employee. (Releases, May 5, 2016).

11) On May 13, 2016, Employer filed a notice to take Employee's Deposition on June 23, 2016 in Anchorage, AK. (Notice of Taking Deposition, May 13, 2016).

12) On May 15, 2016, Employee filed a petition for a protective order from the pharmacy records release stating, "scope over broad, not limited to only pharmaceutical information. Also requesting medical or rehabilitation of records information." (Petition for a Protective Order, May 15, 2016).

13) On May 23, 2016, Employee wrote Employer and requested that her deposition be conducted telephonically on June 24, 2016. (Employee's Letter, May 23, 2016).

14) On May 24, 2016, Employer filed an Answer to Employee's May 15, 2016 petition for a protective order and a petition to compel employee to sign the releases. (Answer; Petition to Compel, May 24, 2016).

15) On June 1, 2016, Employee filed a petition for a protective order from the employment and insurance records releases on the grounds that the scope was over broad. (Petition for a Protective Order, June 1, 2016).

16) On June 1, 2016, Employee also filed a petition to strike medical records that were released by mistake and without a valid release. (Petition to Strike Medical Records, June 1, 2016).

17) On June 2, 2016, Employee wrote the board and asked that her May 15, 2016 petition for protective order be disregarded. (Employee Letter, June 2, 2016).

18) On June 7, 2016, a prehearing conference was held. Employer agreed to change the language regarding Employee's left side and left lower extremity that was the subject of Employee's June 1, 2016 protective order. (PHC Summary, June 7, 2016).

19) On June 10, 2016, Employer mailed a revised set of employment and insurance records releases. (Releases, June 10, 2016).

20) On June 13, 2016, Employer filed an Answer to Employee's June 1, 2016 petition to strike medical records. Employer argued the medical records in question were obtained with a

release that was signed by the Employee on October 7, 2013 and were relevant. (Answer, June 13, 2016).

21) On June 23, 2016, Employer filed a notice of taking Employee's deposition by video conference on July 7, 2016. On June 20, 2016, Employer re-noticed the deposition to July 8, 2016. (Notice of Deposition, June 23, 2016; Re-Notice of Deposition, June 20, 2016).

22) On July 1, 2016, Employee filed a petition for protective order from attending the video-conference deposition. (Protective Order, July 1, 2016).

23) On July 7, 2016, Employer filed a petition to compel Employee to attend her deposition as scheduled. (Petition to Compel, July 7, 2016).

24) On August 3, 2016, a prehearing conference was held. The designee addressed Employee's June 1, 2016 petition for a protective order regarding releases and July 7, 2016 petition for protective order from attending the video-conference deposition. The board designee made the following rulings:

> Releases - A designee may exercise discretion and make orders concerning discovery issues. 8 AAC 45.054(b); 8 AAC 45.065(a)(10). Without drawing any conclusions beyond those expressly stated here, a simple visual comparison between the releases Employee contends she received from Employer, and the releases Employer contends it sent Employee, show they are not the same documents. The text setting forth the specifications for information to be released appears in two notably different places between Employee's submitted releases and Employer's. This conclusion is easily reached by comparing the relative positioning on the text setting forth the specifications for information to be released to other text and lines in the releases. The designee photocopied the releases attached to Employer's answer and did not experience any shift in the text setting forth the specifications for information to be released whatsoever. The text setting forth the specifications for information to be released was not pushed further into the margin or off the page. Employee's petition on this point will be denied. *Id.* The designee has included both the "original" releases copied, as well as the actual photocopies of these releases, to alleviate any concerns Employee may have on this issue. Employee will be ordered to sign and return Employer's enclosed workers' compensation release, and its social security release, within 10 days of service of this summary.
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> Video Deposition - A party to a workers' compensation case may take depositions "in accordance with the Alaska Rules of Civil Procedure." 8 AAC 45.054(a). The Alaska Rules of Civil Procedure expressly authorize video recording of depositions. Civ. R. 30.1. Employee's privacy concerns about her deposition being transmitted over the internet are not well taken. The designee takes administrative notice the telephone in his office, provided by the State of Alaska, is a ubiquitous Cisco VoIP (voice over internet protocol) phone currently found in

> virtually every office environment today. Today's prehearing conference was conducted using VoIP technology. The board's hearings are conducted using VoIP and video conferencing technology. The technology is, as Employer contends, IP address to IP address, and Employee's deposition will not somehow be publicly available on the internet. VoIP and video conferencing technology is mature, trusted and proven. Employee's petition will be denied on this point as well. *Id*.
>
> Employer's May 13, 2016 notice shows it first attempted to depose Employee in Anchorage. Ms. Reed's affidavit illustrates Employer's further efforts to accommodate Employee by deposing her in Wisconsin. Employer's petition to compel will be granted. 8 AAC 45.054(a)(1). Employee and Employer are encouraged to schedule a mutually convenient time to conduct Employee's deposition. If, after 14 days of service of this summary, the parties cannot agree on a mutually agreeable time for Employee's deposition, Employer may schedule Employee's deposition at a time of its choosing, with reasonable notice to Employee.
>
> **Orders:**
> 1) Employee's July 7, 2016 petition seeking a protective order is denied.
> 2) Employer's July 7, 2016 petition to compel is granted.
> 3) Employee shall sign and return releases as set forth above.
> 4) Employee's video deposition shall be taken as set forth above.
> 5) Parties will proceed in accordance with this prehearing conference summary.
> (Prehearing Conference Summary, August 3, 2016).

25) On August 9, 2016, a prehearing was held to address Employee's June 1, 2016 petition and letter regarding employment and insurance release language and petition to strike December 26, 2012 medical record. The designee reviewed with Employee her June 1, 2016 letter accompanying her June 1, 2016 petition. The following arguments were made at the prehearing:

> Employee contends her concerns expressed in that letter regarding release language were resolved at the June 7, 2016 prehearing conference. However, Employee contends a December 26, 2012 report by PAC Ferris should be stricken from the record because that report was generated prior to the instant injury and is unrelated to it. She also contends Employer came into possession of that record when her provider sent it to Employer incident to billing. Employer contends providers will send insurance carriers medical reports and it has no control over them doing so. Employer contends the report references Employee's right thigh, right leg pain and a prior knee surgery, so the record is relevant. Ms. Fletcher contends her prior knee surgery involved her left knee, not her right, and the purpose of her visit at the time was sciatica, which is referred pain from her back and unrelated to any leg injury.

Ruling:
Information that may have a historical or causal connection to the work injury is generally discoverable. *Granus*. Employee's January 25, 2015 claim seeks benefits resulting from an injury involving her bilateral ankles, bilateral knees, right arm and "right side." Although the December 26, 2012, Ferris report does appear to have been generated while Employee was seeking treatment for low back pain as she contends, it nevertheless mentions "right leg symptoms," "right thigh" pain, a prior knee surgery, and includes an impression of "intermittent right leg pain." The fact that Employee's prior knee surgery may have involved her left knee, rather than her right, is of no consequence since she now claims injury to her bilateral knees. Neither is it of consequence that Employee contends her right, lower extremity complaints at the time were the result of sciatica. Administrative notice is taken that sciatica resulting from lumbar or sacral disc disease often involves referred pain into the buttocks and lower extremities. Employer is entitled to investigate the relative contributions of different causes for Employee's disability, and while Employee thinks her disability resulted from a July 19, 2013 fall, Employer is entitled to its theory of the case and may come to a different conclusion regarding Employee's right side complaints. AS 23.30.010(a). Employee's petition to strike will be denied.

Order:
1) Employee's June 1, 2016 petition to strike medical record is denied.
2) Parties will proceed in accordance with this prehearing conference summary.
(Prehearing Conference Summary, August 9, 2016).

26) On August 22, 2016, Employer wrote to Employee regarding attempts to contact her to schedule her deposition as ordered by the board. (Employer letter, August 22, 2016).

27) On August 22, 2016, Employer mailed a new medical release to Employee. This release has not been signed. (Releases, August 22, 2016; Record).

28) On August 23, 2016, Employee filed a written objection to the August 3, 2016 and August 9, 2016 prehearing summaries. Employee reiterated her objection to the formatting of the releases and argued that information was being typed into the margins and was prone to being cut off when photo copied and printed. Employee also objected to the inconsistent manner in which dates were reflected; i.e. the year being abbreviated at times and written out at times. Employee continued to object to December 26, 2012 medical record the Employer received through billing records that she believes they were not entitled to, nor billed for. Employed continued to object to the video conference deposition and argued that she is worried about a breach of her personal/confidential information. (Objection, August 23, 2016).

29) On August 30, 2016, Employee filed another written objection to the August 9, 2016 prehearing. Employee re-iterated all of her objections in her August 23, 2016 objection. Employee also argued that specific body parts should be listed and that the word "extremity" is overboard. Employee again argued that the medical record Employer inadvertently received were related to her sciatic, which is pain from a back injury, not an injury to the leg. (Objection, August 20, 2016).

30) On September 3, 2016, Employee filed a petition to strike pharmacy records from Denali Pharmacy because the pharmacy did not redact the prescription drug names from the records as instructed in the release. (Petition to Strike, September 3, 2016).

31) On September 7, 2016, Employee filed a petition for a protective order from all releases, asserting the dates are not being represented in a consistent manner and may be misinterpreted, "extremity" is vague, body parts should be specified as listed in the September 8, 2013 PHC summary, and information sought being listed in the margins is "prone to being cut off." (Petition for Protective Order, September 3, 2016).

32) On September 7, 2016, Employer answered the Employee's objections to the PHC summaries and orders. Employer also filed an Affidavit of Readiness for Hearing (ARH) on these issues. (Answer; ARH, September 7, 2016).

33) On September 21, 2016, Employer filed an answer to Employee's September 3, 2016 petition to strike medical records and petition for a protective order. (Answer, September 21, 2016).

34) On October 4, 2016, a prehearing conference was held and a hearing on the written record was scheduled for December 15, 2016. Employee did not attend. (PHC Summary, October 4, 2016).

35) On October 21, 2016, a prehearing conference was held and the briefing deadline was changed to December 1, 2016. The designee noted that Employee's September 3, 2016 petition to strike medical records was not in the case file. The designee encouraged the Employee to refile the petition so that it could be addressed at hearing. (PHC Summary, October 21, 2016).

36) On October 27, 2016, Employee re-filed her September 3, 2016 petition to strike medical records.

37) On November 8, 2016, Employee filed an objection to the October 21, 2016 prehearing conference summary. (Objection, November 8, 2016)

38) On December 1, 2016, both parties filed briefs. (Parties' Briefs, December 1, 2016).

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.
> . . .
>
> **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. . . .

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). 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). *Granus* held medical releases covering a period of two years prior to the work injury were sufficiently likely to lead to admissible evidence and were reasonable in most cases.

The main question in determining if we have 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 employee's injury or a question in dispute. The burden of demonstrating the relevancy of sought information rests with the proponent of the release. *Wariner v. Chugach Services, Inc.*, AWCB Decision No. 10-0075 (April 29, 2010).

Based on the policy favoring liberal discovery, "calculated" to "lead to admissible evidence" means more than a mere possibility, but not necessarily a probability, the information sought by the release will lead to admissible evidence. For a discovery request to be "reasonably

calculated," it must be based on a deliberate and purposeful design to lead to admissible evidence, and that design must be both reasonable and articulable. The proponent of a release must be able to articulate a reasonable nexus between the information sought and evidence relevant to a material issue in the case. *In the Matter of Mendel*, 897 P.2d 68, 93 (Alaska 1995). To be "reasonably calculated" to lead to admissible evidence, both the scope of information within the release terms and the time periods it covers must be reasonable.

> **AS 23.30.108(c). Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**. . . .
> . . .
> (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 party demonstrates informal means of developing medical evidence have failed, the board "will consider the relevance of the requested information and the method of discovery to be authorized." *Brinkley v. Kiewit-Groves*, AWCB Decision No. 86-0179 at 5 (July 22, 1986). If an employee unreasonably refuses to release information, AS 23.30.135 and AS 23.30.108(c) grant the board broad discretionary authority to make orders that will assure parties obtain the relevant evidence necessary to litigate or resolve their claims. *See, e.g., Bathony v. State of Alaska, D.E.C.*, AWCB Decision No. 98-0053 (March 18, 1998). In extreme cases, the board has authority to dismiss claims if an employee willfully obstructs discovery. *Sullivan v. Casa Valdez Restaurant*, AWCB Decision No. 98-0296 (November 30, 1998); *McCarrol v. Catholic Public Social Services*, AWCB Decision No. 97-0241 (November 28, 1997).

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.*, AWCAC Decision No. 002 (January 27, 2006). "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." AS 23.30.108(c).

Although no definition of "abuse of discretion" appears in the Act, it has been defined to include "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) (footnote omitted); *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, n. 13 and accompanying text (Alaska 1999); *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979) (footnote omitted); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The Administrative Procedure Act (APA) at AS 44.62.570 provides another definition for reviewing administrative agency decisions. It contains terms similar to those noted above, but also expressly refers to a "substantial evidence" standard:

> **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.

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).

Teel v. J.E. Thornton General Contracting, et. al, AWCB Decision No. 09-0091 (May 12, 2009) provided a comprehensive explanation of the workers' compensation system in general and the policies governing the discovery process under the Act. This explanation is repeated here verbatim for the parties' benefit in this case:

> The purpose of the Alaska Worker's Compensation Act (Act) is to provide injured workers with a simple and speedy remedy to compensate them for work related injuries. Misunderstandings about rights and obligations can slow the process down considerably. Assuming an employee has 'slight' or 'minimal' evidence to support his claims, he is presumed to be entitled to benefits under the Act.
>
> Employers have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. Employers must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it 'controverts,' i.e., denies liability. The Act gives employers a direct financial interest in making timely benefit payments. Employers have a right to defend against claims. However, because injured employees who have minimal evidence supporting their claims are presumed to be entitled to benefits, before an employer may lawfully and in good faith controvert a benefit, it must have substantial evidence sufficient in the absence of additional evidence from the employee, to warrant a Board decision the employee is not entitled to the benefit at issue.
>
> We have long recognized it is important for employers to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. We find Employers' statutory duty to adjust claims fairly and equitably, necessarily implies a responsibility to conduct a reasonable investigation. An employer's right to develop evidence that may support a good faith controversion serves its direct financial interest. However, we also find Employers' resistance to unmeritorious claims is essential to maintaining the integrity of the benefits system under the Act.
>
> The Board has wide latitude to conduct its investigations, inquiries, and hearings in the manner which best ascertains the parties' rights. We have consistently construed our statutes and regulations to favor liberal discovery. Process and procedure under the Act shall be as 'summary and simple' as possible. Unnecessary disputes over discovery releases make our process and procedure lengthier and more complicated. Because the Act does not permit the parties to engage in most formal discovery proceedings, unless a written claim for benefits is filed pursuant to 8 AAC 45.050(b), we must not unduly circumscribe the availability or effectiveness of less intrusive, less litigious discovery procedures, such as informational releases. We have long recognized medical and other record releases are an important means by which an employer can investigate a claim.

> In 1988, the legislature directed the Act be interpreted to ensure the 'quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers.' Our duty to ensure a speedy and economical remedy requires the discovery process to move quickly. An injured employee signing discovery releases assists in speedy claim resolution. We have always encouraged parties to cooperate in the discovery process and to only seek our assistance when voluntary compliance is not forthcoming.
>
> We take administrative notice thousands of Alaskan workers annually file notices of injury and receive workers' compensation benefits. Most of the cases of reported injury with time loss are never litigated. In our experience, one reason employers pay many claims without dispute is because employees release sufficient information to verify the nature and extent of their injuries and their entitlement to benefits. We find the prompt execution of reasonable releases plays a critical role in making it possible for employers to fulfill the Act's intent to provide a speedy remedy to injured workers. We also find demanding overly broad releases is destructive to the cooperative spirit on which informal discovery depends, delays the delivery of benefits, results in needless claim administration, and creates excessive litigation costs.
>
> *Teel*, at 11-13 (citations omitted).

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.

ANALYSIS

1) Did the board's designee abuse his discretion in rulings he made regarding releases and should a protective order issue?

a. Presentation of Dates on Releases.

Employee argues that the dates on the Employer's releases are represented in an inconsistent manner, as they are abbreviated in some instances and not abbreviated in others, and may confuse recipients as to how far back to search for records.

Employer did not brief this issue specifically and the designee did not address this issue in the prehearing conference summary. However, the designee represented the dates in a four-digit format. The panel therefore finds that for purposes of clarity, a four-digit year should be used in a consistent manner on all outstanding releases so that months and years are not confused.

b. Use of the Word "Extremity."

Employee argues that the word "extremity" is vague and the body parts should be specified on the releases.

This issue was addressed at the April 26, 2016 prehearing. The designee made the following ruling:

> Administrative notice is taken that the locale of perceived pain may be physically removed from the focus of treatment for that pain, just as Employer contends. Additionally, use of the word "extremity" is further appropriate, given that Employee's claim involves both her knees and her ankles. Given that the parties agree Employee's injury did not involve her low back, and the release should only seek information on her right hip, the only remaining issue is the appropriate time limitation. Employer contends Employee's history of an inguinal hernia, dating to 1996, entitles it to right hip information from 1994. On this point, Employer's contention is not well taken. Although one's groin is in close physical proximity to one's hip, an inguinal hernia and a hip injury are decidedly different medical conditions involving distinct body parts.
>
> Therefore, the release shall be limited as follows:
> - Right, upper extremity from July 19, 2011 (two years before the date of injury);
> - Left, lower extremity from 1982 (based on Employee's 1984 knee surgery, which she does not dispute);
> - Right, lower extremity from July 19, 2011 (two years before the date of injury); and
> - Right hip from July 19, 2011 (two years before the date of injury).

At the June 7, 2016 prehearing conference summary, Employer again agreed to modify the language in the employment and insurance records releases due to language regarding Employee's left side and left lower extremity.

A review of the record reveals that the designee and the parties have extensively discussed the appropriate language of each release. Employee has not shown any evidence that the designee was arbitrary, capricious, manifestly unreasonable, or acted from an improper motive. To the contrary, the designee's ruling regarding the word "extremity" is rational, well-reasoned, and consistent with controlling law.

c. Format of Releases.

Employee also objected to the format of the releases and argued that information being sought is listed in the margins and is prone to being cut off when photocopied or printed.

This issue was addressed at the August 3, 2016 prehearing. The designee made the following ruling:

> Releases - A designee may exercise discretion and make orders concerning discovery issues. 8 AAC 45.054(b); 8 AAC 45.065(a)(10). Without drawing any conclusions beyond those expressly stated here, a simple visual comparison between the releases Employee contends she received from Employer, and the releases Employer contends it sent Employee, show they are not the same documents. The text setting forth the specifications for information to be released appears in two notably different places between Employee's submitted releases and Employer's. This conclusion is easily reached by comparing the relative positioning on the text setting forth the specifications for information to be released to other text and lines in the releases. The designee photocopied the releases attached to Employer's answer and did not experience any shift in the text setting forth the specifications for information to be released whatsoever. The text setting forth the specifications for information to be released was not pushed further into the margin or off the page. Employee's petition on this point will be denied. *Id*. The designee has included both the "original" releases copied, as well as the actual photocopies of these releases, to alleviate any concerns Employee may have on this issue. Employee will be ordered to sign and return Employer's enclosed workers' compensation release, and its social security release, within 10 days of service of this summary.

The designee's analysis demonstrates that he looked carefully at the formatting of the releases. The fact that the designee went to so far as to test photo coping the releases and sending the examples to Employee to alleviate her concerns, supports his decision. Employee has not shown any evidence that formatting remains an issue. Employee will be ordered to sign and return Employer's workers' compensation release and its social security release.

2) Did the board's designee abuse his discretion when he declined to strike the December 26, 2012 medical report?

Employee contends the board designee erred when he declined her request to strike a December 26, 2016 medical report inadvertently received by Employer from an earlier, unrelated sciatic injury. Employee argues that this record was not obtained pursuant to a valid medical release and should therefore be stricken form the record.

Employer contends that it has no control of records submitted to the provider by the carrier. Employer argues that the medical record is relevant to the body parts at issue in Employee's claim.

This issue was addressed at the August 9, 2016 prehearing. The designee made the following ruling:

> Information that may have a historical or causal connection to the work injury is generally discoverable. *Granus*. Employee's January 25, 2015 claim seeks benefits resulting from an injury involving her bilateral ankles, bilateral knees, right arm and "right side." Although the December 26, 2012, Ferris report does appear to have been generated while Employee was seeking treatment for low back pain as she contends, it nevertheless mentions "right leg symptoms," "right thigh" pain, a prior knee surgery, and includes an impression of "intermittent right leg pain." The fact that Employee's prior knee surgery may have involved her left knee, rather than her right, is of no consequence since she now claims injury to her bilateral knees. Neither is it of consequence that Employee contends her right, lower extremity complaints at the time were the result of sciatica. Administrative notice is taken that sciatica resulting from lumbar or sacral disc disease often involves referred pain into the buttocks and lower extremities. Employer is entitled to investigate the relative contributions of different causes for Employee's disability, and while Employee thinks her disability resulted from a July 19, 2013 fall, Employer is entitled to its theory of the case and may come to a different conclusion regarding Employee's right side complaints. AS 23.30.010(a). Employee's petition to strike will be denied.

The panel agrees with the Employer and designee that the Employer does not have any control over what a provider may send to them. The panel agrees that the information is relevant and the Employer is entitled to use it in order explore whether there may be another cause of Employee's injuries. Employee has not shown any evidence that the designee was arbitrary, capricious, manifestly unreasonable, or acted from an improper motive. To the contrary, the designee's ruling is appropriate, well-reasoned, and consistent with controlling law.

3) Should the pharmaceutical records be stricken?

Employee contends the records provided by Denali Pharmacy should be stricken from the board's record because the provider did not redact the name and doses of the medication as instructed in the releases.

Employer contends that the content of the records which are produced during the discovery process are not something the board or the Employer can control. Employer states that they will seek the chart notes related to these prescriptions and file any relevant medical information in a medical summary. Employer asserts that if the records are not relevant, they will return the records to Employee.

The panel again agrees with Employer that it cannot control how a provider responds to a release. Despite the fact that irrelevant information was included, the records will not be stricken because they include relevant information. Employer is allowed to use this information to seek potentially relevant information. Employee's petition to strike pharmacy records is therefore denied. Should Employer wish to admit the reports as evidence at hearing, Employee may object at that time.

4) Did the board's designee abuse his discretion when he ordered Employee to attend a video conference deposition?

Employee contends that she should not be required to attend a video conference deposition due to security concerns with her deposition being transmitted over the internet.

Employer contends that Employee's objection to the video-conference method of taking her deposition is unfounded in light of the information about the technology to be used. Employer asserts that the transmission is direct from one source to another (IP address to IP address) and not publically broadcast and the security risk is no different than a phone call. Employer contends that a video conference deposition is the most effective and cost efficient means of obtaining Employee's testimony and will allow the board to better evaluate her demeanor and credibility.

This issue was addressed at the August 3, 2016 prehearing. The designee made the following ruling:

> Video Deposition - A party to a workers' compensation case may take depositions "in accordance with the Alaska Rules of Civil Procedure." 8 AAC 45.054(a). The Alaska Rules of Civil Procedure expressly authorize video recording of depositions. Civ. R. 30.1. Employee's privacy concerns about her deposition

> being transmitted over the internet are not well taken. The designee takes administrative notice the telephone in his office, provided by the State of Alaska, is a ubiquitous Cisco VoIP (voice over internet protocol) phone currently found in virtually every office environment today. Today's prehearing conference was conducted using VoIP technology. The board's hearings are conducted using VoIP and video conferencing technology. The technology is, as Employer contends, IP address to IP address, and Employee's deposition will not somehow be publicly available on the internet. VoIP and video conferencing technology is mature, trusted and proven. Employee's petition will be denied on this point as well. *Id.*
>
> Employer's May 13, 2016 notice shows it first attempted to depose Employee in Anchorage. Ms. Reed's affidavit illustrates Employer's further efforts to accommodate Employee by deposing her in Wisconsin. Employer's petition to compel will be granted. 8 AAC 45.054(a)(1). Employee and Employer are encouraged to schedule a mutually convenient time to conduct Employee's deposition. If, after 14 days of service of this summary, the parties cannot agree on a mutually agreeable time for Employee's deposition, Employer may schedule Employee's deposition at a time of its choosing, with reasonable notice to Employee.

The panel agrees with the Employer's arguments and the designee's findings regarding the security of the video conference technology. The panel finds that use of the technology was an appropriate decision in light of Employee's own assertion that she did not wish to travel to Alaska to be deposed. Employee has not shown any evidence that the designee was arbitrary, capricious, manifestly unreasonable, or acted from an improper motive. To the contrary, the designee's decision was rational and consistent with controlling law.

CONCLUSIONS OF LAW

1) The board designee did not abuse his discretion when he ordered Employee to sign releases in the PHC summaries dated August 3, 2016 and August 9, 2016.

2) The board designee did not address the issue of how dates should represented in the releases. Dates shall be presented using a four-digit format for the year.

3) The board designee did not abuse his discretion when he declined to strike the December 26, 2012 medical report.

4) The board designee did not abuse his discretion when he ordered Employee to attend a video-conference deposition.

ORDER

1) Employee's August 23, 2016 and August 30, 2016 objections to the board designee's August 3, 2016 and August 9, 2016 prehearing conference summaries are GRANTED in part and DENIED in part.

2) Employer shall prepare any outstanding releases for Employee's signature, representing years in a four-digit format.

3) Employee is ordered to sign and return releases within 14 days of receiving them from Employer. Failure to do so may result in sanctions, up to including dismissal of Employee's claim.

4) The December 26, 2012 medical report shall be included in the record.

5) A protective order shall not issue.

6) Employee's September 3, 2016 petition to strike pharmaceutical records is DENIED.

7) Employee's September 7, 2016 petition for a protective order is DENIED.

8) Employee shall attend a video-conference deposition as outlined in the August 3, 2016 prehearing conference summary.

Dated in Fairbanks, Alaska on January 17, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kelly McNabb, Designated Chair

/s/
Lake Williams, Board Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 JENNIFER C. FLETCHER, employee / claimant; v. PIKES ON THE RIVER, INC., employer; REPUBLIC INDEMNITY CO. OF AMERICA, insurer / defendants; Case No. 201320872; dated and filed in the Alaska Workers' Compensation Board's office in

Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on January 17, 2017.

/s/_____
Jennifer Desrosiers, Workers' Compensation Tech