ALASKA WORKERS' COMPENSATION BOARD

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

SHANNON K. PATTERSON, Employee, Respondent, v. MATANUSKA-SUSITNA BOROUGH SCHOOL DISTRICT, Self Insured Employer, Petitioner.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201416158 AWCB Decision No. 17-0029 Filed with AWCB Anchorage, Alaska on March 16, 2017

Matanuska-Susitna Borough School District's (Employer) December 8, 2016 petition for sanctions and Shannon Patterson's (Employee) request for a protective order providing terms and restrictions, if any, for future Employee depositions were heard in Anchorage, Alaska, on February 21, 2017, a date selected on January 18, 2017. Attorney Richard Harren appeared and represented Employee. Attorney Constance Livsey appeared and represented Employer. Witnesses included Employee, Megan Sandone, and William Wuestenfeld. Employee responded to questions from the panel. Ms. Sandone and Mr. Wuestenfeld are general counsel for Employer and testified on Employer's behalf. The record remained open at the hearing's conclusion to receive Employer's December 7, 2016 medical summary. On March 13, 2017, Employer filed 393 documents, including the December 7, 2016 medical summary with medical records numbering 382 pages. The record closed on March 14, 2017.

ISSUES

Employer contends neither Employee, nor her attorney have the right to obstruct Employer's right to take Employee's deposition or dictate who may attend Employee's deposition as

Employer's representative. Employer contends it is entitled to attorney fee and cost reimbursement from Employee because Ms. Livsey attended Employee's deposition for which Employee gave notice and Employee failed to attend.

Employee contends she and her attorney were present at the time and place noticed for her deposition. However, Employer brought William Wuestenfeld to the deposition, unannounced, to intimidate and upset Employee and there was no need for his presence. Employee contends the lawsuit brought by the Estate of Kenneth Terrance Hayes (Student), Employer's former student, presumably alleges Employer was negligent in handling Student's traumatic event leading to his death. She contends the lawsuit also presumes Employee was negligent, and may have been able to prevent Student's death if she had acted other than she did. Employee contends this is a primary factor causing her posttraumatic stress disorder (PTSD). Employee contends the estate's litigation, and Employer's attempt to assign blame and culpability to her triggers her PTSD symptoms. She further contends because Mr. Wuestenfeld is an attorney defending Employer in the estate's litigation, his presence is a trigger for her PTSD symptoms.

1) Shall sanctions for Employee's failure to attend and participate at her deposition be ordered?

Employee requests a protective order detailing terms and restrictions, if any, for Employee's future depositions. Employee seeks restrictions on who may attend her deposition and Ms. Livsey should appear with Nicole Limstrom, the same Employer representative who appeared at the November 13, 2016 prehearing conference. Employee contends there should be no physical reminders or visual stimuli of the estate's lawsuit, and Mr. Wuestenfeld and Ms. Sandone are both. Employee contends an appropriate protective order is to set her deposition within the next 30 days with no visual stimuli of the estate's litigation except a video camera and if Mr. Wuestenfeld, Ms. Sandone, and the entire school board wish to participate, they do so telephonically. Employee contends she is entitled to a calm deposition setting where she does not feel like she is under siege.

Employer contends Employee cannot dictate whom Employer's representative is and Employee must sit through her deposition with whomever Employer chooses to have present as its

representative. Employer contends for the deposition to occur without impediments, a hearing officer should attend to make rulings on any objections or requests for protective orders.

2) Are any terms or restrictions for future depositions of Employee appropriate?

FINDINGS OF FACT

Review of the relevant record establishes the following facts by a preponderance of the evidence:

1) On November 6, 2004, Employee had suicidal ideation. Daniel Safranek, M.D., diagnosed her with depression and started her back on an anti-depressant, Lexapro, "which she has done well with before." Dr. Safranek told Employee to follow up with psychiatry in the valley. (Providence Alaska Medical Center, Dr. Safranek, November 6, 2004.)

2) In 2010, Kathleen Matthews, RN, ANP, treated Employee for Depressive Disorder, not otherwise specified. (Chart Notes, Kathleen Matthews, September 16, 2010, November 7, 2010, November 15, 2010.)

3) On September 25, 2014, Employee reported a September 23, 2014 injury: "While performing mouth to mouth resuscitation on a student, got some of student's vomit, blood tinged foam nasal and mouth secretions on my face and inside my mouth when student released them. I had / was using a micro shield mask; however, during attempts to remove foreign bodies to clear / establish airway, vomit, blood tinged foam secretions got onto the mask and in my face and mouth & post incident stress responses are occurring now." (Employee Report of Occupational Injury or Illness to Employer, September 25, 2014.)

4) On October 3, 2014, Employee sought assistance to cope with the emotional aftermath of attempting to assist Student with CPR after Student lost consciousness, including "anxiety, sadness, residual undifferentiated feelings of shock, etc." "Pt reports and displays symptoms of severe anxiety, upset, and general distress at having witnessed the child's medical struggle and having been a part of the medical care attempts." Employee reported "repeated nightmares of 'seeing his head' with bodily fluids being expelled through all conceivable orifices and cavities, and her hands rendered useless in the dream." Kevin O'Leary, Psy.D., told Employee to use meditation and relaxation exercises, and to explore what in her background may have left her predisposed to "PTSD – like shock after such an event." Dr. O'Leary diagnosed Employee with

adjustment disorder with mixed anxiety and depression and indicated PTSD had to be ruled out. (Employee's Hearing Exhibit 5: Initial Intake Interview, Dr. O'Leary, October 3, 2014.)

5) On October 22, 2014, through an email appointment, Dr. O'Leary told Employee she had post-traumatic stress and adjustment disorder. Dr. O'Leary advised Employee she needed to "get back on the horse" and get back to work. He expressed confidence Employee could "get over this" but will have "a little scar tissue forever." (E-mail Appointment Record, Patterson and O'Leary, October 22, 2014.)

6) On November 26, 2014, Dr. O'Leary reported, "Explored how egocentric trauma defenses have made Kenneth's trauma and death 'all about her' even when these issues are obviously not, produced confirming associations, this line of logic can hopefully help her 'put this stress down.'" Employee's mental status continued to improve slowly; she was less anxious. (Chart Note, Dr. O'Leary, November 26, 2014.)

7) On December 9, 2014, S. David Glass, M.D., Employer's medical evaluator (EME) administered a MMPI-2 evaluation. He determined Employee's testing did not reinforce an Axis I psychiatric disorder, nor did it indicate Employee has PTSD. Dr. Glass "considered" diagnosing Employee with dysthymic disorder "in view of [Employee's] longstanding history of a mood disorder with the waxing and waning of depressive symptomatology beginning in childhood and the use of antidepressant agents - Wellbutrin." Dr. Glass opined Employee does not have a formal DSM-IV disorder caused by her employment as an elementary school nurse. Dr. Glass noted Employee reported feeling frustration and stress working with elementary students in the past and had discontinued that work in 2007, and returned to elementary school duties in the 2014 school year. Dr. Glass opined the cause of Employee's dysthymic disorder was multidimensional and included both constitutional and developmental components, but work stress did not contribute to her dysthymic disorder diagnosis, which is not a true psychiatric disorder. Dr. Glass said, "While the tragedy in September can be considered unusual - fortunately not a common occurrence - aspiration crises with small children would not be as extraordinary or unusual in a comparable work environment (small children aspirating)." Dr. Glass indicated Employee's perception of the September incident was accurate; however, despite the emotionally traumatic nature of the event, psychosocial factors, including personality psychodynamics and Employee's prior psychiatric issues along with past and ongoing dissatisfaction with elementary school nursing "are the reason for her remaining off work and

reporting symptoms." Dr. Glass said any continuing need for psychotropic medication or counseling "involves her pre-existing psychiatric issues / diagnosis and personality psychodynamics," which preexisted her work injury. Dr. Glass believed Employee should have dealt with the distress generated by the incident after a few counseling sessions and returned to work. Dr. Glass acknowledged Employee continued to report insecurities and apparent distress with elementary school nursing. Despite that, Dr. Glass found Employee was able to return to work as an elementary school nurse and any psychiatric disorder caused directly by the September 23, 2014 incident was medically stable without a ratable permanent psychiatric impairment. (EME Report, Dr. Glass, December 9, 2014.)

8) On December 10, 2014, Dr. O'Leary clarified he had engaged Employee in cognitive therapy but a return to work goal date had not been set. Although Dr. O'Leary had suggested many return to work dates, Employee's reported symptoms precluded setting a return to work goal date. Employee's mental status and anxiety levels improved slowly but steadily. A February 1, 2015 return to work goal was set. (Chart Note, Dr. O'Leary, December 10, 2014.)

9) On January 5, 2015, Employee felt anxious about returning to work and feared regression into PTSD symptoms. Dr. O'Leary encouraged her to try and, if symptoms progressed, Dr. O'Leary would consider additional steps. Dr. O'Leary advised Employee to consult with human resources and her union representative so she fully understood her rights and responsibilities. (Chart Note, Dr. O'Leary, January 5, 2015.)

10) On January 13, 2015, Employer controverted temporary total disability (TTD) and temporary partial disability (TPD) benefits effective January 5, 2015; permanent partial impairment (PPI) benefits; reemployment benefits; and mental health treatment benefits from January 5, 2015 and ongoing. Employer relied on Dr. Glass's, EME report and stated the reasons these specific benefits were controverted are:

1. Employee is capable of returning to work as an elementary school nurse (her job at the time of work incident).

2. Employee has no ratable impairment related to the work incident.

3. Any ongoing need for care is unrelated to the work incident.

4. The work incident is not unusual and extraordinary in comparable work environment.

(Controversion Notice, January 13, 2015; EME Report, Dr. Glass, December 9, 2014.)

11) On January 14, 2015, Dr. O'Leary considered Dr. Glass's report, reviewed the DSM-IV criteria for PTSD, and opined Employee met the diagnostic criteria stemming from the September 23, 2014 incident with Student. Dr. O'Leary stood by his adjustment disorder diagnosis. (Chart Note, Dr. O'Leary, January 14, 2015.)

12) On February 9, 2015, Employee returned to work at Wasilla Middle School. (Email from Patterson to Dr. O'Leary, February 9, 2015.)

13) On February 10, 2015, Employee filed a workers' compensation claim and requested a second independent medical evaluation (SIME). Employee claimed TTD, TPD, medical and transportation costs, a compensation rate adjustment, penalty, interest, and a finding of unfair or frivolous controversion. (Workers' Compensation Claim, February 9, 2015.)

14) On February 24, 2015, Burr, Pease & Kurtz entered its appearance as counsel for Employer. Ms. Livsey is an attorney with Burr, Pease & Kurtz. (Entry of Appearance, Ms. Livsey, February 23, 2015.)

15) On February 27, 2015, Duane Odland, D.O., reviewed Employee's school nurse job description, predicted she would not have a PPI rating resulting from the September 23, 2014 work injury and had the physical capacities to perform the school nurse position's physical demands. He approved Employee to perform the job and released her to return to work with no restrictions. Dr. Odland noted Employee was to continue her appointments with Dr. O'Leary. Based on Dr. Odland's responses, rehabilitation specialist Forooz Sakata determined Employee is not eligible for reemployment benefits. (Return to Work Authorization, Dr. Odland, February 27, 2015; Response to Job Description, Dr. Odland, February 27, 2015; Reemployment Benefits Eligibility Evaluation, Ms. Sakata, March 10, 2015.)

16) On March 4, 2015, Employee's anxiety successfully modulated after she returned to full-time employment. Employee reported vomiting the first day as school nurse for a primary school. Dr. O'Leary said this was "reminiscent obviously of Kenneth." He encouraged "forward looking discussions" as they planned Employee's treatment discharge around May 20, 2015, the school year's end. (Chart Note, Dr. O'Leary, March 4, 2015.)

17) On March 4, 2015, Employer controverted Employee's claim, citing:

- Employee has no physical condition or injury as a result of the claimed work injury.
- Employer's IME concluded that Employee does not have a psychiatric or psychological disorder caused by her employment as a school nurse.
- The work incident of 09/23/2014 is not the substantial cause of employee's time loss. IME physician Dr. Glass opined that psychosocial factors including personality psychodynamics and her prior psychiatric issues along with dissatisfaction with elementary school nursing are the reason for employee remaining off work.
- The work incident of 09/23/2014 is not the substantial cause of employee's need for further medical treatment after 12/09/2014.
- Employer's IME deemed employee medically stable on 12/09/2014 and opined that employee is capable of returning to work. No TTD or TPD is payable after the date of medical stability and / or released to return to work. AS 23.30.185; AS 23.30.200.
- Employee's treating physician, Dr. Odland, released her to part-time work effective 02/22/2015. He released her to full-time work effective 02/27/2015.
- Employee's treating physician, Dr. O'Leary, stated that "once the pt is able to successfully return to work, the first course of psychotherapy should presumably be financed by Ms. Patterson and her insurance company."
- All physicians now agree that the 09/23/2014 work incident is not the substantial cause of any disability or any further need for medical / psychiatric treatment.
- All controversions are made in good faith and supported by medical and factual evidence in the possession of the employer at the time of controversion.
- Employer properly calculated employee's weekly compensation rate.
- All benefits have been timely paid or controverted, no penalty or interest are owed.
- There is no ongoing medical dispute warranting a Board SIME.

(Controversion Notice, March 4, 2015.)

18) On March 4, 2015, Employee filed a petition for a protective order. Employee contended releases were too broad. (Petition, March 4, 2015.)

19) On March 11, 2015, the parties confirmed lines of communication were open and discovery was moving forward. Employee was back to work full-time and the parties expressed interest in discussing settlement possibilities. Employee's petition for a protective order was granted in part and denied in part. The designee ordered Employee to sign medical releases going back to 1995 based upon mental health records indicating she had a mental health condition in 1997. The designee ordered Employer to table its employment and union records release until reemployment benefits became an issue. (Prehearing Conference Summary, March 16, 2015.)

20) On March 11, 2015, Employee amended her claim for TTD benefits from January 5, 2015 through February 6, 2015; TPD benefits from February 9, 2015 through February 27, 2015; medical costs of $1,351.15; $373.00 in transportation costs, a compensation rate adjustment; penalty; interest; a finding of unfair or frivolous controversion; and an SIME. (Workers' Compensation Claim, March 11, 2015.)

21) On March 24, 2015, reemployment benefits administrator (RBA) designee Deborah Torgerson found Employee not eligible for reemployment benefits based on Ms. Sakata's March 10, 2015 report. (Letter to Employee from RBA Designee Torgerson, March 24, 2015.)

22) On April 15, 2015, Employee continued to exhibit significant anxiety. Dr. O'Leary described the cause as:

> [A] complicated constellation of symptoms and dynamics, perhaps partially residual from the original trauma last September regarding Kenneth, but also reportedly highly related to current work stress stemming from reports of very unclear communication from the school district, and specifically HR, union unresponsiveness, potentially unpaid worker's comp claims, and significant anxiety related to future work security lack of clarity. Given all this a working diagnosis of anxiety continues to make this therapy valid and medically necessary and indicated.

(Chart Note, Dr. O'Leary, April 15, 2015.)

23) On April 29, 2015, Employee reported she had a "bad day." Dr. O'Leary noted it was related to Employee's "job's unknowns" and related frustrations with Employee's perceived "very unclear communication in the workplace." (Chart Note, Dr. O'Leary, April 29, 2015; Chart Note, Dr. O'Leary, May 20, 2015.)

24) On May 6, 2015, Employee was safe, stable and continued to prepare for treatment termination with Dr. O'Leary. He noted, "most sxs reduced, but some nightmares remain, maintain Rx, future career plan focus as well as self-care." (Chart Note, Dr. O'Leary, May 6, 2015.)

25) On May 20, 2015, Employee had ongoing frustration; she perceived a lack of clear communication from Employer. A recent performance evaluation and resultant remediation plan spiked Employee's emotional reactions. Dr. O'Leary advised Employee to consider carefully human resource and union policies, specifically focusing on the need for clear communication and measurable job expectations. He suggested doing so might hold her in good stead. This was

Employee's last session with Dr. O'Leary; however, follow-up was available at Employee's request. (Chart Note, Dr. O'Leary, May 20, 2015; Email from Patterson to Dr. O'Leary, May 20, 2015.)

26) On June 2, 2015, Employee told Dr. O'Leary she received a contract from Employer for full time employment for the 2015 / 2016 school year. She would start her school nurse position with Sherrod Elementary School in the fall. "I will fulfill that 188 days to make it to my vestment in the State Retirement system after all!" (Email from Patterson to Dr. O'Leary, June 2, 2015.)

27) On September 21, 2015, Employee requested assessment to see if she still had PTSD. Dr. O'Leary said, "review of DSM sxs appeared to reveal that pt continues to suffer with chronic PTSD." (Employee's Hearing Exhibit 6: Progress Note, Dr. O'Leary, September 21, 2015.)

28) On November 11, 2015, Dr. O'Leary determined Employee was safe and stable. He gave Employee the diagnoses adjustment disorder with mixed anxiety and depressed mood, and posttraumatic stress disorder, unspecified. Dr. O'Leary reviewed with Employee "professional/psychic boundaries for 'not taking the bait' for drama and contention with principal, coupled with hopefully anxiety reducing self-validation strategies to reduce agitation and self-doubt." (Progress Note, Dr. O'Leary, November 11, 2015.)

29) On February 22, 2016, Dr. O'Leary explored with Employee coping strategies for her "feeling of secondary trauma from lack of school district emotional support." (Progress Note, Dr. O'Leary, February 22, 2016.)

30) On April 19, 2016, Dr. O'Leary determined Employee was safe and stable. He reviewed coping strategies and encouraged Employee to use them as she waited out the remaining 25 days of her employment contract with Employer. (Progress Note, Dr. O'Leary, April 19, 2016.)

31) On May 16, 2016, the Estate of Kenneth Terrance Hayes filed a complaint for damages against Employer, Lenore Zupko, and John Does 1-10 in Alaska Superior Court. The complaint alleges Student's death occurred as the direct and proximate result of Employer's negligence by and through its staff. Paragraph 17 states:

> Shannon Patterson, at all times relevant herein was the school nurse for the Iditarod Elementary School. Shannon Patterson, may be one of the John Doe 1-10 defendants should the discovery in this matter disclose that Shannon Patterson was, in some manner negligently and proximately responsible for the events and happenings alleged in this complaint and for plaintiffs' damages.

(Employee's Hearing Exhibit 1, Complaint for Damages, May 16, 2016.)

32) On May 17, 2016, after Employer offered Employee a contract for the 2017 school year, Employee gave notice she resigned from her position with the school district effective the last working day of the 2016 school year. (Email from Patterson to Daniel Michael, May 17, 2016; Email from Patterson to Dr. O'Leary, May 17, 2016.)

33) On June 21, 2016, Employee filed an amended workers' compensation claim now describing how the injury happened as, "Child choked at school and died 10 days later." Body part injured was amended and states psyche. Employee amended her "nature of injury" to include PTSD, anxiety, and depression. Employee's amended claim did not include a compensation rate adjustment or a request for a finding of unfair or frivolous controversion. She amended her TTD claim to include benefits from May 24, 2016 and continuing. Her TPD claim did not change. She continued to claim medical and transportation costs, which had both increased from her March 11, 2015 claim. (Workers' Compensation Claim, June 29, 2016.)

34) On October 18, 2016, Dr. Odland said he was treating Employee for medication management for a mental health disorder. "She maintains adequate compliance with follow-up and her mental health issues in no way impact her ability to practice nursing." (Letter To Whom It May Concern, Dr. Odland, October 18, 2016.)

35) On November 30, 2016, Mr. Harren sent Ms. Livsey notice of Employee's videotaped deposition scheduled for December 8, 2016. (Notice of Videotape Deposition of Shannon K. Patterson, November 30, 2016.)

36) On December 8, 2016, court reporter Nathaniel Hile took a statement in lieu of deposition. He stated, "This is the video deposition of Shannon Patterson, taken pursuant to notice by Mr. Harren. The case is in the Alaska . . . Workers' Compensation Board. . . . case number is 201416158." Ms. Livsey introduced herself and said she is Employer's counsel. She further stated:

> With me is William Wuestenfeld, representative for the employer school district. And I would note for the record that although this is the date, time, and place noticed for the deposition of Ms. Patterson, Ms. Patterson is not present in the room.

Mr. Harren replied:

> Deposition notice was sent to Ms. Livsey. She's the attorney for the school district. Yesterday I contacted Megan Sandone, an attorney who had interviewed my client in connection with litigation that has risen out of the event that brings us here today. Apparently, the firm that Megan Sandone works for represented my client on two occasions - once a legal assistant and then once Ms. Sandone. My purpose in contacting her was to obtain any statements which may be evidentiary in the form of a prior consistent or a prior inconsistent statement. Ms. Sandone and I discussed the fact that she was not aware of any statements my client had given. And she said she had interviewed my client. Had made notes of the conversation. And she declined to share those notes with me. She then indicated an interest to come to today's deposition and I politely told her that she was not invited on account of my client's situation and circumstances and on account of my desire to keep this a very low key, stress-free environment and presentation of my client's claim. So that was - we parted. Now, this morning at about ten minutes to 10:00 - and Mr. Wuestenfeld showing up along with Ms. Livsey and - to appear here at the deposition. He said that he represented the school district in related litigation. I advised him that I was not going to allow him to be in there - in the deposition unless he were to enter an appearance to - as a representative of the school district in this case. That would allow Ms. Livsey to appear as the insurance company's representative and Mr. Wuestenfeld to appear as the representative of the school district; however, it is my understanding that Ms. Livsey is representing both of those entities. At that point decided to consult my client to see what she wanted to do given the situation. And so with that introduction I'm going to ask the attorneys if they wish to go forward with both of them present in the deposition given that preamble.

Mr. Wuestenfeld said he was not capable of entering an appearance in the workers' compensation case but that he had entered an appearance in *Kenneth Hayes v. Matanuska Susitna Borough School District* and others to include John Does. Ms. Livsey said Employer and Northern Adjusters were present to defend against the claim brought by Employee and asserted she intended to depose Employee either on December 8, 2016, or at some other time and "the district – my client – is entitled to have whichever representative or representatives present it wishes." Mr. Wuestenfeld then asked Mr. Harren, "Are we going forward or not?" Mr. Harren proposed going forward with the deposition with Ms. Livsey present and then she could cross-examine Employee afterwards or defer cross-examination. He said, "I think that it would be harmful to my client for Mr. Wuestenfeld to be present." Ms. Livsey replied:

> Well, your client initiated litigation. If she doesn't like the stress of litigation, she should probably reconsider her decision. But you are in no capacity, legal or

> otherwise, to dictate to me or my clients who they will have is a representative at any proceeding in this matter.

Mr. Harren notified Ms. Livsey and Mr. Wuestenfeld he was going to "suspend the deposition" and retain the court reporter so Mr. Harren could examine Employee.

> Mr. Wuestenfeld: Without lawyers present?
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> Ms. Livsey: No. You are not.
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> Mr. Wuestenfeld: No. Well, you . . . .
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> Ms. Livsey: We are either going to do a deposition. . . .
>
> Mr. Wuestenfeld: Hey, you can do anything you want.
>
> Ms. Livsey: . . . or we're not going to do a deposition.
>
> Mr. Wuestenfeld: You – you – actually, you can int . . . .
>
> Ms. Livsey: You get your choice.
>
> Mr. Wuestenfeld: You can interview your client under videotape as often as you want.
>
> Mr. Harren: Thank you.
>
> Mr. Wuestenfeld: It's going to be entirely discoverable and without counsel cross-examining is a most peculiar state of affairs. But whatever works for you. You can videotape any conversation you ever have – want to with your client.
>
> Ms. Livsey: It's either a deposition or it's not, Dick. Your choice.
>
> Mr. Harren: Well, it's going to be a – a video – statement of my client then under oath. And . . . .
>
> Mr. Wuestenfeld: No.
>
> Mr. Harren: . . . you're welcome to attend.
>
> Ms. Livsey: We both will.
>
> Mr. Harren: No. I said you are welcome to attend.

> Ms. Livsey: You are in no position to dictate to me who my client has as a representative at this or any other proceeding in this matter.

Mr. Harren suspended the deposition "until we get some guidance from the board." (Statement in Lieu of Deposition - Patterson, December 8, 2016.)

37) The December 8, 2016 statement in lieu of deposition reveals numerous occasions when Mr. Wuestenfeld interrupted and cut off both Mr. Harren and Ms. Livsey; Mr. Harren three times and Ms. Livsey once. Mr. Wuestenfeld interjected comments and questions freely. (*Id.*)

38) On December 8, 2016, Employer petitioned for sanctions against Mr. Harren or Employee, and requested an order Mr. Harren or Employee pay Employer's costs and fees incurred because Employee failed to attend and participate in her own deposition, noticed by her counsel for December 8, 2016. (Petition, December 8, 2016.)

39) On December 8, 2016, Employer served Mr. Harren notice it would be taking Employee's video deposition on December 14, 2016. (Notice of Taking Employee's Video Deposition, December 8, 2016.)

40) On December 14, 2016, Employer cancelled Employee's December 14, 2016 video deposition because Mr. Harren was not available. (Notice of Cancellation of Employee's Video Deposition Scheduled for 12/14/16, December 14, 2016.)

41) Mr. Wuestenfeld is Employer's general counsel. The firm employing Mr. Wuestenfeld, Jermain, Dunnagan & Owens, represents Employer in the litigation brought by Student's estate. Mr. Wuestenfeld does not handle workers' compensation disputes for Employer and is not familiar with the nuances of workers' compensation law. He does not know nor has he ever met Employee. On December 8, 2016, Mr. Wuestenfeld accompanied Ms. Livsey to Employee's deposition as Employer's counsel, but was not there to represent Employer, in a legal sense, or serve as Employer's attorney in the workers' compensation matter. He was not there to practice law. He did not have an opportunity to meet Employee because she did not enter the room reserved for the deposition. Employee is not a party to the estate's wrongful death action. The only two named defendants are Employer and Lenore Zupko. Ms. Zupko, as Employer's employee named in the estate's lawsuit, is treated under the civil rules as an employee and, therefore, inquiries to her in the estate's lawsuit may be directed to Jermain, Dunnagan & Owens. On September 23, 2014, Employee was Employer's agent. If Employee was a named party, in the normal course, Jermain, Dunnagan & Owens would represent her. In her particular

instance, due to her workers' compensation claim against Employer, Mr. Wuestenfeld can imagine discussing with Employee if she wished to have independent counsel. It would be Employee's choice. Because Employee was Employer's employee, if ever named as a defendant in the wrongful death case, she shall have the benefit of representation and Employer would defend her because it is liable vicariously for the actions and inactions of its agent employees. When Employer affords an employee a defense, it controls the defense. Jermain, Dunnagan & Owens has not entered an appearance on Employee's behalf because she is not a named defendant in the estate's litigation. Mr. Wuestenfeld understands Employee filed her workers' compensation claim for a PTSD work related injury. (Wuestenfeld.)

42) Mr. Wuestenfeld testified when called as Employer's witness. During cross-examination, Mr. Wuestenfeld asserted objections. The designated chair admonished Mr. Wuestenfeld it was not his role to object, but rather Ms. Livsey must assert objections on Employer's behalf. After this admonishment, Mr. Wuestenfeld made another objection and the designated chair reminded him it was Ms. Livsey's role to assert objections. (Wuestenfeld; observations.)

43) Employee went into Mr. Harren's office when Ms. Livsey and Mr. Wuestenfeld arrived for her deposition on December 8, 2016. She did not go into the conference room reserved for Employee's the deposition. Mr. Harren told Employee to wait in his office, which she did until Ms. Livsey and Mr. Wuestenfeld left. Mr. Harren then took Employee's statement. Thinking about the estate's lawsuit bothers Employee. It is upsetting to Employee one of her students died. (Patterson.)

44) There is no medical opinion stating Employee will suffer harm by participating in a deposition at which Employer's chosen representative, its general counsel, is present. (Record.)

45) At hearing, Employee withdrew her objection to Mr. Wuestenfeld attending her deposition. (Record.)

46) The *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5), identifies eight diagnostic criteria for PTSD. Five of the eight criteria require an individual meet additional criteria to receive a PTSD diagnosis. (DSM-5, Posttraumatic Stress Disorder Diagnostic Criteria, 271-272.)

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 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision on not only 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, 533-34 (Alaska 1987).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

Employers have a constitutional right to defend against claims. *Granus v. Fell*, AWCB Decision No. 99-0016 at 6 (January 20, 1999), citing Alaska Const., art. I sec. 7. Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Granus* at 5, citing AS 21.36.120 and 3 AAC 26.010-300. A thorough investigation of workers' compensation claims allows employers to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect fraud. *Granus* at 6, citing *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). The scope of admissible evidence in workers' compensation 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. *See also, Rambo v. Veco, Inc.*, AWCB Decision No. 14-0107 (August 5, 2014.)

> **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. . . .
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> (b) Upon the petition of a party, the board will, in its discretion, order other means of discovery. . . .
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> **Alaska Rules of Civil Procedure.**
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> **Rule 26. General Provisions Governing Discovery; Duty of Disclosure.**
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> (c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.
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> **Rule 30. Depositions Upon Oral Examination.**
> . . . .

> (d) **Schedule and Duration; Motion to Terminate or Limit Examination.**
> . . . .
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> 3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the judicial district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.
>
> (g) **Failure to Attend or to Serve Subpoena; Expenses.**
>
> (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.
> . . . .

Where a deposition has commenced, a deponent may receive appropriate relief by court order, upon showing the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent. Upon the objecting party or deponent's request, the deposition is suspended for the time necessary to make a motion for an order. The suspension remedy has no application to a motion for relief prior to the deposition's commencement under Civil Rule 30(b). *Jefferson v. Greater Anchorage Area Borough*, 451 P.2d 730 (Alaska 1969).

ANALYSIS

1) Shall sanctions for Employee's failure to attend and participate at her deposition be ordered?

Employee has pending February 10, 2015, March 11, 2015, and June 16, 2016 claims requesting indemnity benefits, medical benefits, a compensation rate adjustment, penalties, interest, an SIME, attorney's fees and costs. This is a litigated case. Claims are to be decided quickly,

efficiently, fairly and predictably at a reasonable cost to employers. AS 23.30.001(1). Discovery depositions, particularly of a party, are an important part of the claim process because they allow a party to obtain evidence with which to prosecute or defend a claim. *Granus*. Employer has a right to depose Employee for discovery. AS 23.30.115; 8 AAC 45.054; *Granus*.

When a party gives notice a deposition will be taken and fails to attend and proceed with the deposition, and the party to whom notice was given attends, the party who gave notice may be ordered to pay the other party's reasonable expenses incurred in attending the deposition. Civil Rule 30(g)(1). Expenses include the attending party's reasonable attorney fees and costs. *Id.*

On November 30, 2016, Mr. Harren served Ms. Livsey notice of Employee's videotaped deposition scheduled for December 8, 2016. Ms. Livsey, as counsel for Employer in the workers' compensation matter, appeared on December 8, 2016, to participate in Employee's deposition at the time and place noticed. Mr. Wuestenfeld, Employer's general counsel, accompanied Ms. Livsey to the noticed deposition. Mr. Harren directed Employee to remain in his office. She did not appear in the room in which the deposition would occur. Employee testified attending her deposition with Mr. Wuestenfeld present reminded her of the estate's lawsuit, which bothers and upsets her. Employee did not attend or proceed with the deposition her counsel noticed.

Ms. Livsey appeared at the time and place noticed by Employee for her deposition and Employer incurred related expenses. Ms. Livsey expended three hours preparing for and attending Employee's deposition Employee's counsel noticed but Employee did not attend.

When the party giving a deposition notice fails to attend, the applicable rules provide for an order requiring "the party giving notice" to pay reasonable expenses incurred by the attending party. *Id.* The rule does not require the noticing party's attorney to pay the attending party's reasonable expenses. Therefore, an appropriate sanction here is an order requiring Employee to reimburse Employer three hours for Ms. Livsey's attorney fees and costs associated attending the December 8, 2016 deposition.

2) Are any terms or restrictions for future depositions of Employee appropriate?

Prior to a deposition's commencement, the deposition's scope and manner may be limited and a protective order issued to protect a party from annoyance, embarrassment, or oppression. Civil Rule 26(c). A protective order can state a deposition may take place only on specified terms and conditions, including a time and place designation. Such order may also limit who may be present at the deposition. Civil Rule 26(c)(2) and (5). The recorded statement in lieu of deposition shows Mr. Harren conferred with Ms. Livsey and attempted to resolve the dispute surrounding who could attend Employee's deposition. Civil Rule 26(c). Mr. Harren suspended the deposition pending "guidance from the board." At prehearing, Mr. Harren requested a protective order setting out terms and restrictions, if any, for Employee's future depositions, including whom may attend.

Dr. O'Leary opines Employee has PTSD. His records do not document he considered DSM-5 diagnostic criteria for PTSD in arriving at Employee's diagnosis. Nor do the medical records disclose an opinion from Employee's physician or psychologist that "physical reminders" or "visual stimuli" of the estate's lawsuit, such as Employer's general counsel Mr. Wuestenfeld or Ms. Sandone, cause her to feel she is under siege and exacerbate her PTSD, or that Employer's representative would annoy, embarrass, or oppress Employee. The medical record does not support Employee's contention an Employer's representative attendance at Employee's deposition will harm her. Employer may have a representative of its choice other than legal counsel attend Employee's future deposition.

Quickly arranging for Employee's deposition will move her workers' compensation claim forward to resolution more efficiently and fairly. Avoiding further litigation over Employee's deposition reduces Employer's costs. AS 23.30.001(1).

Burr, Pease & Kurtz is the only firm that has entered an appearance to represent Employer in this matter. Ms. Livsey is the attorney handling this matter for Employer. Mr. Wuestenfeld serves as Employer's general counsel. He does not practice workers' compensation law and is not serving as Employer's legal counsel to defend Employer against Employee's claim.

During the February 21, 2017 hearing, Mr. Wuestenfeld testified. During cross-examination, Mr. Wuestenfeld inappropriately asserted objections. The designated chair told Mr. Wuestenfeld it was not his role to object, but rather Ms. Livsey must assert objections on Employer's behalf. After receiving guidance, Mr. Wuestenfeld continued to make objections and was again reminded it was Ms. Livsey's role to assert objections. The December 8, 2016 statement in lieu of deposition reveals a blurring of Mr. Wuestenfeld and Ms. Livsey's roles. Instead of allowing Ms. Livsey to solely represent and speak on Employer's behalf, Mr. Wuestenfeld inserted himself into the proceeding. Mr. Wuestenfeld asked Mr. Harren questions, interrupted and cut off Ms. Livsey, and told Mr. Harren what he could and could not do.

If Mr. Wuestenfeld participated in Employee's deposition as other than a quiet observer, it would be annoying and could potentially be oppressive to Employee and her attorney. When there are interruptions as there were in the December 8, 2016 statement in lieu of deposition, which cut off a speaker's conscious stream of thought, it is difficult for fact finders to follow the speakers' communication. Confusion created when two attorneys are attempting to question a deponent is both annoying and oppressive. To maintain order in Employee's deposition, and protect her and her lawyer from annoyance, a protective order will be granted. Ms. Livsey or another attorney from Burr, Pease & Kurtz may attend the deposition accompanied by Employer's representative. During Employee's future deposition in the workers' compensation matter, only Ms. Livsey or another attorney from her firm may ask questions, make objections, or speak to Ms. Patterson or Mr. Harren. If Employer's representative wishes to ask a question or make a statement or objection, the representative must confer with Ms. Livsey in private and she shall serve as the one and only voice and legal counsel for Employer during Employee's future depositions.

At any time during a deposition, upon showing the examination is being conducted in bad faith or in a way that unreasonably annoys, embarrasses, or oppresses the deponent or a person, the individual conducting the examination can be ordered to cease taking the deposition. Civil Rule 30(d)(3). Upon the objecting party or deponent's request, the deposition is suspended for the time necessary to make a motion for a protective order. *Id.* A suspension has no application to a motion for relief prior to the deposition's commencement. *Jefferson.* To assure efficiency and fairness, and to avoid further litigation over Employee's deposition, the board's offices will be

the designated location for Employee's deposition. AS 23.30.001(1); Civil Rule 26(c). A hearing officer will, therefore, be available to rule immediately on any motion made under Civil Rule 30(d) so the deposition can move forward without further delay and with only minor suspension.

CONCLUSIONS OF LAW

1) Sanctions for Employee's failure to attend and participate at her deposition will be ordered.
2) Terms and restrictions for future depositions of Employee are appropriate.

ORDER

1) Employer's petition for sanctions is granted.
2) Employee is ordered to reimburse Employer for three hours of attorney fees and costs associated with Ms. Livsey attending the December 8, 2016 deposition.
3) Ms. Livsey will serve her invoice on Employee and Mr. Harren within five days of this order's issuance. Within 14 days of service, Employee shall either reimburse Employer or file a petition requesting review of the invoice if she does not believe the fees and costs are reasonable.
4) Employee's request for a protective order is granted.
5) Employee's deposition will be taken at the board's offices at 3301 Eagle Street, Anchorage, Alaska, within 30 days of this order's issuance.
6) Employer may select its representative to accompany Ms. Livsey or another attorney from Burr, Pease & Kurtz to attend Employee's deposition.
7) During Employee's deposition, only Ms. Livsey or another attorney from her firm may ask questions, make objections, or speak to Ms. Patterson or Mr. Harren. If Employer's representative wishes to ask a question or make a statement or objection, the representative must confer with Ms. Livsey in private and she shall serve as the one and only voice and legal counsel for Employer during Employee's deposition.
8) Jurisdiction is maintained until Employee reimburses Employer's reasonable attorney fees and costs and Employee's deposition is concluded.

Dated in Anchorage, Alaska on March 16, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Amy Steele, Member

/s/
Rick Traini, 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 Shannon K. Patterson, employee / respondent v. Matanuska Susitna Borough School District, self-insured employer / petitioner; Case No. 201416158; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March 16, 2017.

/s/
Elizabeth Pleitez, Office Assistant