ALASKA WORKERS' COMPENSATION BOARD

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

SHANNON K. PATTERSON, Employee, Petitioner, v. MATANUSKA-SUSITNA BOROUGH SCHOOL DISTRICT, Self Insured Employer, Respondent.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201416158 AWCB Decision No. 17-0055 Filed with AWCB Anchorage, Alaska on May 16, 2017

Shannon Patterson's (Employee) February 2, 2017 petition for an order her requests for admission be deemed admitted and for an order compelling Matanuska-Susitna Borough School District (Employer) to produce documents requested on December 23, 2016, was heard in Anchorage, Alaska, on April 26, 2017, a date selected on March 28, 2017. Attorney Richard Harren appeared and represented Employee. Attorney Constance Livsey appeared and represented Employer. There were no witnesses. On March 16, 2017, *Patterson v. Matanuska-Susitna Borough School District*, AWCB Decision No. 17-0029 (*Patterson I*) made comprehensive factual findings. As preliminary matters, the panel accepted Employer's late-filed hearing brief as timely filed over Employee's objection. Employee withdrew her petition regarding her requests for admission. An oral order remanded to a board designee Employee's requests for production three through six. This decision examines the oral orders, remands some issues and decides some issues on their merits. The record closed at the hearing's conclusion on April 26, 2017.

ISSUES

Employee contended Employer's brief should be stricken from the record because it was filed one day late and she did not have the advantage of reviewing Employer's brief before writing and filing her brief.

Employer contended it filed its brief before receiving or reviewing Employee's brief and its brief should be accepted and not be stricken from the record.

1) **Was the order accepting Employer's late filed brief correct?**

Employee contends Employer should be compelled to provide the information she seeks in her requests for production numbers two and three because, although Employer provided documents to her on February 6, 2015, she is uncertain if she retained them all or if she gave them all to her attorney. Employee contends the records are relevant because they reveal the medical records and the adjuster's description of her provided to employer medical evaluator (EME) S. David Glass, M.D., and form the basis for his opinion. Employee contends taking Dr. Glass's deposition is prohibitively expensive.

Employer contends Employee already has all the requested documents. It contends, in some instances, Employee has had the documents since February 6, 2015. Employer contends there is nothing more to provide and if Employee wants to probe the basis for Dr. Glass's opinion, she can depose him.

2) **Is Employee entitled to a duplicate copy of documents already produced?**

3) **Is Employee entitled to all correspondence or evidence of correspondence exchanged between Dr. Glass and Employer?**

Employee contends the attorney-client privilege and work-product doctrine do not protect disclosures in a wrongful death lawsuit. Since a wrongful death lawsuit arose from this same incident, she contends Employer should be compelled to produce the documents requested in her production requests four through six seeking the wrongful death lawsuit's disclosures. Employee contends she will not file the documents in her workers' compensation claim and will

"keep them private" and not disseminate them except to her attorney and treating physicians "if relevant or helpful."

Employer contends the discovery process does not require it to produce irrelevant materials from unrelated litigation to which Employee is not a party. It contends discovery exchanged by the parties to the wrongful death action has no likelihood to lead to the discovery of evidence admissible in Employee's workers' compensation claim. Employer also contends the discovery process does not require Employer to provide documents Employee already possesses or can independently obtain. Employer seeks an order denying Employee's requests for production.

4) Was the order remanding the parties' disputes over Employee's requests for production four through six correct?

FINDINGS OF FACT

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

1) *Patterson I* granted Employer's petition for sanctions for Employee's failure to attend and participate at her December 8, 2016 deposition, which she noticed. *Patterson I* also granted Employee's petition for a protective order and established the terms, conditions, and restrictions for Employee's future depositions. *Patterson I* ordered Employee to reimburse Employer for three hours of Employer's attorney fees and costs associated with Ms. Livsey attending the December 8, 2016 deposition. This decision incorporates *Patterson I*'s relevant factual findings by reference. (*Patterson I*.)

2) 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.)

3) Employee treated with Kevin O'Leary, Psy.D., to cope with the aftermath of witnessing Kenneth Terrance Hayes' (Student) medical struggle and performing cardiopulmonary resuscitation (CPR) on Student who had lost consciousness when he choked on food. Employee

was anxious, upset, sad, and had "residual undifferentiated feelings of shock, etc." Dr. O'Leary diagnosed Employee with adjustment disorder with mixed anxiety and depression, and wanted to rule out posttraumatic stress disorder (PTSD). (Initial Intake Interview, Dr. O'Leary, October 3, 2014.)

4) On October 22, 2014, Dr. O'Leary told Employee she had PTSD 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.)

5) 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.)

6) On December 1, 2014, to prepare Dr. Glass for Employee's upcoming examination, Claims Adjuster Tamara Burrell's letter sent to Dr. Glass via e-mail provided the following information regarding Employee:

> By way of history, 44 year-old elementary school nurse. On 9/23/14 she was called into the school hallway to assist in the resuscitation of a student who was choking, non-responsive and without a pulse. She and the school principal performed CPR on the student until the EMTs arrived and the student was med evacuated to Anchorage. While performing the CPR she was exposed to pathogens/secretions from vomit and blood from the student. Ms. Patterson initially saw Dr. Odland on 9/23/14 for the exposure to bodily fluids. She saw him again on 9/30/14 for blood work to rule out any HIV or Hepatitis C exposure. She was given a prescription for Xanax and Wellbutrin. Dr. Odland provided a note for her to be off of work for 4 – 7 days. She started seeing Dr. O'Leary, a clinical psychologist, on 10/3/14 for her mental health. He diagnosed anxiety disorder with mixed anxiety and depression. Dr. O'Leary felt she needed to take some time off to improve her mental status in the aftermath of the critical incident. She continues to treat with Dr. O'Leary one time per week. Ms. Patterson has not worked since 10/1/14.
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> The student, who was placed in a medically induced coma, was withdrawn from life support approximately 10 days after the incident, and passed away.
>
> It should be noted that Ms. Patterson has a lengthy history of prior treatment for psychological issues. Those records are included for your review.

Ms. Burrell informed Dr. Glass, "In Alaska, mental injury claims have a different standard to be met in order to be compensable. Under the Alaska Workers' Compensation Act, compensable mental injuries caused by mental stress are quite limited." Ms. Burrell quoted AS 23.30.010(b) and posed 13 questions for Dr. Glass to answer. Ms. Burrell provided Dr. Glass Employee's report of injury, medical records, and job description. (Letter to Dr. Glass from Ms. Burrell, December 1, 2014.)

7) On December 9, 2014, Dr. Glass administered a Minnesota Multiphasic Inventory (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 Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) illness 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, had discontinued that work in 2007 and returned to elementary school duties in 2014. 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 event's emotionally traumatic nature, 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 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.)

9) On January 27, 2015, Ms. Burrell provided records to assist Forooz Sakata evaluate Employee for reemployment benefits eligibility. The records included: (1) the Matanuska-Susitna Borough School District Certified Teaching Staff, Nurse job description; (2) Employer Report of Occupational Injury or Illness to Division of Workers' Compensation; (3) Employee Report of Occupational Injury or Illness to Employer; (4) Supervisor's Incident/Injury Report, Risk Management, Mat-Su Borough School District; (5) Exposure Incident Report Form (Confidential), Risk Management, Mat-Su Borough School District; (6) Compensation Report, MTC Report No. S1 Suspension, RTW, Suspension Effective Date: 1/4/15; (7) Controversion Notice, January 13, 2015; and (8) 135 pages of medical records.

10) On February 6, 2015, pursuant to Employee's request, Ms. Burrell provided Employee the December 1, 2014 letter to Dr. Glass, medical records provided to Dr. Glass, Employee's job description and injury report. She also gave Employee Dr. Glass's EME report with attachments. (Letter to Shannon Patterson from Ms. Burrell, February 6, 2015.)

11) On February 10, 2015, Employee filed a workers' compensation claim (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. Employee also filed a three page medical summary. (Workers' Compensation Claim, February 9, 2015; Medical Summary, February 9, 2015.)

12) Dr. Glass's December 9, 2014 EME report contains summaries of all medical records listed on Employee's February 9, 2015 medical summary prior to December 9, 2014, except September 25, 2014 reports from Dr. Odland and Dr. Johnson, October 13 and 20, 2014 reports from Dr. Odland, and November 3, 2014 and December 1, 2014 reports from Dr. O'Leary. Dr. Glass's EME report summarizes 43 of Employee's medical records prior to the September 23, 2014 work incident from November 19, 2004 through June 3, 2010. These past medical records are not contained on Employee's Medical Summary. (EME Report, Dr. Glass, December 9, 2014; Medical Summary, February 9, 2015.)

13) Dr. Glass's December 9, 2014 EME report summarizes most medical records listed on Employer's February 25, 2015 medical summary. Dr. Glass's "Review of Past Medical Records" section includes these summaries. (EME Report, Dr. Glass, December 9, 2014; Medical Summary, February 25, 2015.)

14) On March 4, 2015, Employer disputed all Employee's February 9, 2015 claims, based upon Dr. Glass's opinions. (Answer, March 4, 2015.)

15) 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.)

16) 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.)

17) 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, and that Employee may be one of the John Doe 1-10 defendants if discovery revealed she was negligently and proximately responsible for Student's death and plaintiffs' damages. (Complaint for Damages, May 16, 2016.)

18) 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.)

19) On December 27, 2016, Employee served Employer with "Informal Discovery Requests to Employer Matanuska-Susitna Borough Dated December 23, 2016." The discovery request

contained two requests for admission and six requests for production. The requests for production are the following:

> REQUEST FOR PRODUCTION NO. 1: Please produce the cover letter of December 1, 2014 to which Dr. Glass responded in his report dated December 9 of 2014.
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> REQUEST FOR PRODUCTION NO. 2: Please produce all documents and things provided to Oregon medical evaluations, Inc. (OME) and/or Dr. Glass, related to Shannon Patterson, whether before, together with or after the December 1, 2014 letter, and, up until the receipt of his report on January 5, 2015 by Northern adjusters. Please provide these documents in the same form as they were provided to that company and/or Dr. Glass.
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> REQUEST FOR PRODUCTION NO. 3: Please produce all correspondence (electronic, telephonic, snail mail, etc.) and/or evidence of correspondence exchanged between OME/Dr. Glass and Northern Adjusters (or other representatives of the Mat-Su Borough school District/Northern Adjusters such as attorneys).
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> REQUEST FOR PRODUCTION NO. 4: The initial disclosures provided by all parties in the lawsuit filed against the Matanuska-Susitna School District, Case No. 3PA-14-02684CI.
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> REQUEST FOR PRODUCTION NO. 5: Any supplemental disclosures made by the Matanuska-Susitna Borough School District in Case No. 3PA-14-02684CI.
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> REQUEST FOR PRODUCTION NO. 6: Any other discovery requests or responses exchanged in Case No. 3PA-14-02684CI that refers to Shannon Patterson or her conduct.

(Employee Shannon K Patterson's Informal Discovery Request to Employer Matanuska-Susitna Borough dated December 23, 2016.)

20) On February 2, 2017, Employee petitioned for a ruling stating Employer admits, by its failure to deny, informal requests for admission; and for a ruling compelling Employer to produce documents requested in her requests for production one through six. (Petition, February 1, 2017.)

21) On March 28, 2017, a hearing was set on Employee's February 2, 2017 petition. The designee directed the parties to file and serve evidence and hearing briefs on or before April 18, 2017. The prehearing conference summary states:

> EE also asked that ER be compelled to produce those documents that were the subject of the EE's 12/23/2016 Informal Requests for Production ("RFP"). ER

> stated that on or before March 31, 2017 it will produce the cover letter that was the subject of EE's RFP #1 and that ER has already produced all relevant documents that are the subject of the remaining RFP's. The Board will hold this portion of the Petition in abeyance pending further briefing from EE as to its entitlement to any further production of documents and ER's opposition thereto. The parties are encouraged to settle this issue without the intervention of the Board.

Employee did not brief her entitlement to production of documents requested in her requests for production, nor did Employer brief its objections. The parties attended no further prehearing conferences on this issue and the board designee has not made a ruling on Employee's discovery request. The parties were unable to resolve the discovery issue amongst themselves. (Prehearing Conference Summary, March 28, 2017; Record.)

22) On April 2, 2017, Ms. Livsey provided Mr. Harren with a copy of the cover letter Ms. Burrell sent to Dr. Glass. Ms. Livsey told Mr. Harren, "This letter was provided to Ms. Patterson, along with a copy of all medicals sent to Dr. Glass, and Dr. Glass's IME report, over two years ago, in February 2015." (Email from Ms. Livsey to Mr. Harren, April 2, 2017.)

23) All medical records summarized in Dr. Glass's December 7, 2014 EME report have been filed on medical summaries, attached to Employer's January 27, 2015 letter to Forooz Sakata, or produced on February 6, 2015 in response to Employee informal production request. Employer produced Employee's injury report and job description on February 6, 2015 in response to Employee informal production request. Employer also attached these records to the January 27, 2015 letter to Forooz Sakata, which was served upon Employee. (Record; judgment, observations.)

24) The Alaska Workers' Compensation Division's (division) electronic date stamp logged Employee's brief as received on April 19, 2017. Mr. Harren faxed the brief and exhibits to the division on April 18, 2017. The facsimile transmittal started at 4:59 p.m. and ended at 5:11 p.m. The service certificate states Mr. Harren served the brief by e-mail upon Ms. Livsey on April 28, 2017. (Employee's April 26, 2017 Hearing Brief, April 18, 2017, division date stamped April 19, 2017.)

25) The division's electronic date stamp logged Employer's brief as received on April 19, 2017. The service certificate states Ms. Livsey served the brief by e-mail upon Mr. Harren on April 19, 2017. (Employer's Hearing Brief Opposing Employee's Petition to Compel, April 19, 2017, division date stamped April 19, 2017.)

26) On April 26, 2017, Employer confirmed it denies Employee's requests for admissions numbers one and two and will not change its position and admit them. Employer further argued the discovery process does not require it to deny matters already explicitly denied in pleadings. Employer objected to the requests for admission because they are not an informal discovery method, and not a valid exercise in obtaining relevant information, but rather seek to have Employer admit or deny material elements of the statutory definition of a mental stress injury contained in AS 23.30.010(b). Employer stated it had long ago stated its denial and to state it again was unnecessary. (Record.)

27) On April 26, 2017, Employee accepted Employer's confirmation it denies the substantial cause of Employee's PTSD, depression and/or anxiety, which requires her present use of prescription medications, is a combination of related events which occurred between Student's initial choking on September 23, 2014, and the present time (Request for Admission Number 1). She accepted Employer's confirmation it denies the combination of events including, Employee's perception of the emergency, efforts to assess and/or abate Student's choking; Employee's struggle to resuscitate Student, Employee's exposure to multiple bodily fluids; Student's evacuation, hospitalization and death; and Employee's persisting memories, dreams and flashbacks, are an extraordinary and unusual exposure for an elementary school nurse. (Request for Admission Number 2). Employee withdrew her request for an order stating Employer admitted her requests by its silence. (Record.)

28) Employee contended Employer resists her requests for production two and three because it cannot sanitize what it provided Dr. Glass. Employee contended the email to which Ms. Burrell attached the December 1, 2014 letter to Dr. Glass, report of injury, medical records and job description could have provided information that influenced Dr. Glass's opinions. Employee contended the "cover" email to Dr. Glass is relevant and requests an order directing Employer to produce it. Employee contended her requests for production four, five, and six seek information "per se relevant to the resolution of a disputed wrongful death lawsuit." She contended this information is "reasonably calculated" to lead to discovery of admissible evidence in her claim. Employee contended the panel should order disclosures in the wrongful death suit so she can disseminate them to her attorney and treating physicians "if relevant or helpful." (Record; Employee's hearing arguments.)

29) Employer contended it provided all information Employee seeks in her requests for admission one, two, and three, and there is nothing more to provide than what it produced at Employee's request in February 2015. Employer contended it should not be compelled to provide multiple copies of the same documents and it would be very difficult to recreate the record sent to Dr. Glass because the record has grown since he evaluated Employee. Employer sought an order denying Employee's requests for production two and three. Employer contended it has no obligation to provide documents through the discovery process that are not relevant to Employee's claim, or that Employee already has or can independently obtain. Employer contended Employee's attorney already has disclosures from Student's wrongful death lawsuit and failed to articulate how the documents requested in Employee's requests for production four, five, and six are relevant. It seeks an order denying her requests for production four, five and six. (Record; Employer's Hearing Arguments.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .

A major purpose of the Alaska Workers' Compensation Act (Act) is to provide a simple, speedy remedy for injured workers. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (November 9, 1978).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
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> (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 department, the board . . . may . . . subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. . . .

Under AS 23.30.005(h) a party can be ordered to release and produce records that "relate to questions in dispute." *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11,

1987); *See also* 8 AAC 45.054(b). Additional authority to order a party to release information is set forth in broad powers given to best ascertain and protect all parties' rights. AS 23.30.135(a).

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).

Granus v. Fell, AWCB Decision No. 99-0016 (January 20, 1999), provided guidance in discovery matters by defining the term "relevant" as follows:

> 'Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'
>
> . . . Information which would be inadmissible at trial, may nonetheless be discoverable if it is reasonably calculated to lead to admissible evidence. Under our relaxed rules of evidence, discovery should be at least as liberal as in a civil action and the relevancy standards should be at least as broad.
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> To be admissible at hearing, evidence must be 'relevant.' However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing. *Smart v. Aleutian Constructors*, AWCB Decision No. 98-0289 (November 23, 1998).

Granus used by analogy the legal concept "relevancy" in its determinations about the scope of discoverable information. Relevancy describes a logical relationship between a fact and a question at issue in a case. Thus, relevancy (and discoverability) of a fact is its tendency to establish a material proposition. *Granus* utilized a two-step process to determine the relevance of information sought. The first step is to identify matters in dispute. The second step is to decide whether the information sought is relevant as it is "reasonably calculated" to lead to facts that will have a tendency to make a disputed issue, identified in step one, more or less likely.

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . . .
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> (h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.
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> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**.
> . . . .
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.
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> **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 in 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. . . .

The board has broad statutory authority in conducting its hearings. *De Rosario v. Chenega Lodging,* AWCB Decision No. 10-0123 (July 16, 2010).

> **8 AAC 45.052. Medical Summary.**
> . . . .
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> (d) After a claim or petition is filed, all parties with the board days after getting additional medical report. A copy of the medical summary form, together with

> copies of the medical reports listed on the form, be served upon all parties at the time the medical summary is filed with the board.

> **8 AAC 45.054. Discovery.**
> . . . .
>
> (d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at hearing the evidence which is the subject of the discovery request.

Development of an inclusive medical record to assess an employee's entitlement to workers' compensation benefits is favored. *Hyder v. Jayne Fortson, M.D.*, AWCB Decision No. 04-0185 (July 29, 2004); *Adeipoju v. Fred Meyer of Alaska*, AWCB Decision No. 04-0055 (March 3, 2004).

It is expected parties informally request and provide information to avoid the time consuming process of seeking a board order. *Doryland v. Northern Landscaping & Construction*, AWCB Decision No. 86-0278 (October 21, 1986). Parties' mutual knowledge of all relevant facts gathered by both parties is essential to the proper litigation of workers' compensation cases. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
> . . . .
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> (6) the relevance of information under AS 23.30.107(a) and AS 23.30.108;
> . . . .
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> (10) discovery requests;
> . . . .
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> (15) other matters that may aid in the disposition of the case.

> **8 AAC 45.114. Legal Memoranda.** Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must:

> (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established. . . .

> **8 AAC 45.120.**
> . . . .
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> (e) Technical rules relating to evidence and witnesses do not apply in Board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . . The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

The fundamental rule is "any relevant evidence is admissible." *Guys with Tools v. Thurston*, AWCAC Decision No. 62 (November 8, 2007).

> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1) Was the order accepting Employer's late filed brief correct?

An oral decision at hearing overruled Employee's objection to Employer's late filed brief. Parties must file and serve their briefs five working days prior to hearing, unless a prehearing order establishes an earlier date. 8 AAC 45.114. Hearing briefs are encouraged; they are valuable to the panel members whom assess the parties' disputed issues. The March 28, 2017 prehearing conference summary directed parties to file their briefs on or before April 18, 2017, which was six working days prior to the April 26, 2017 hearing. Employer's hearing brief was electronically served upon Employee's counsel and received sooner than it would have been had Employer timely filed and served its brief by mail. Employee suffered no prejudice from Employer's late filed brief. The order accepting Employer's late filed hearing brief was correct.

On April 18, 2017, the division received one page of Employee's brief at 4:59 p.m. and another at 5:00 p.m. The division received the brief's remaining pages and exhibits after 5:00 p.m.; hence, the brief was date stamped as filed on April 19, 2017, because the division received it after the close of business on April 18, 2017. In other words, it too was late. To provide all parties due process, avoid manifest injustice and provide the panel with the parties' briefs, both Employee's and Employer's briefs are accepted. AS 23.30.135; 8 AAC 45.195.

2) Is Employee entitled to a duplicate copy of documents already produced?

Employee's requests for production numbers one, two, and three request documents Employer contends it produced in February 2015. Request for production number one asks Employer to produce the December 1, 2014 letter from Ms. Burrell to Dr. Glass. Employer provided this letter to Ms. Patterson on February 6, 2015, and to Mr. Harren on April 2, 2017. Mr. Harren agreed there is no longer a dispute over request for production one. Disputes remain over Employee's requests for production two and three.

Request for production two requests all documents provided Dr. Glass, related to Employee, whether before, with, or after the December 1, 2014 letter. Attachments to the December 1, 2014 letter were Employee's injury report, medical records, and Employee's job description.

To be consistent with the Act's goal to provide quick, fair, efficient, and predictable remedies at a reasonable cost to employers, the discovery process should be simple and speedy. AS 23.30.001; AS 23.30.005(h); *Hewing*. Parties should informally request and provide information to avoid time consuming and costly litigation over discovery disputes. *Doryland.* After Employer controverted Employee's benefits, she informally requested the information sought in her requests for production one and two. Employer honored her request on February 6, 2015, and additionally provided Employee Dr. Glass's EME report.

Request for production two asks Employer to produce "all other documents" sent to Dr. Glass regarding Employee besides Ms. Burrell's December 1, 2014 letter, "up until the receipt of his report on January 5, 2015." Employee believes Employer shared additional information with Dr. Glass, which it failed to produce. She contends documents she may not been provided could

have influenced Dr. Glass's opinion. Employee requests an order requiring Employer to produce all documents it provided Dr. Glass whether before, together with, or after the December 1, 2014 letter and up until the receipt of his January 5, 2015 report, because such production will enable her to understand the basis for Dr. Glass's opinion. Employer contends it has already provided Employee with everything it provided Dr. Glass upon Employee's informal production request. It contends Employee's recourse is to take Dr. Glass's deposition.

Aside from Employee's report of injury and her job description, documents provided Dr. Glass with the letter were medical records. Whenever a party files a claim or other pleading, all parties are required to immediately and no later than within five days send to the division all medical records relating to the claim or proceedings. The parties must also serve the records on any adverse party. AS 23.30.095(h). This statute imposes a continuing duty on both parties to file and serve medical records obtained. It is further required that updated medical summaries be filed and served upon all parties within five days after getting additional medical records. 8 AAC 45.052(d).

To ensure quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers, an inclusive medical record and mutual relevant fact sharing is essential and expected. *Hickman*; *Hyder*; *Adeipoju*. All parties have a continuing duty to exchange medical records. AS 23.30.095(h); 8 AAC 45.052(d). Employer will not be compelled to provide medical records it already provided on February 6, 2015, in response to Employee's informal request. The parties' medical summaries contain all records summarized in Dr. Glass's EME report. *Rogers & Babler*.

Beyond medical records, Employee's request for production two requests documents Employer already provided at least twice. Employee has a copy of her injury report and if she has misplaced it, she can obtain a copy from the division. Ms. Burrell also attached a copy of both Employee's and Employer's injury reports and Employee's job description to the January 27, 2015 letter to rehabilitation specialist Ms. Sakata. Ms. Burrell served the letter and its attachments upon Employee. If Employee has misplaced these documents, she can request a copy from the division.

Neither parties' solution to Employee's request will provide a simple, speedy remedy. AS 23.30.005(h); *Hewing*. Employer's suggested deposition is a costly approach. However, there is no evidence Employee has not received all documents provided Dr. Glass. If she cannot find the letter and attachments provided by Employer, she has received duplicate copies of all those records in her copy of the January 27, 2015 letter to Ms. Sakata or on medical summaries.

If the parties do not produce documents in response to informal production requests, evidence subject to the request will be inadmissible at hearing. 8 AAC 45.054(d). Employee's request for production two is overly burdensome, repetitious, inefficient, and imposes unnecessary expense. *Doryland*. This decision will deny Employee's request for production number two.

3) Is Employee entitled to all correspondence or evidence of correspondence exchanged between Dr. Glass and Employer?

Employee's request for production number three requests Employer produce all correspondence "or evidence of correspondence" exchanged between Dr. Glass and Northern Adjusters, Employer's attorneys or other representatives. Employer did not respond to this request.
Under AS 23.30.108(c), a Workers' Compensation Officer, as a "designee" is authorized to direct parties to produce documents. The designee may order production if the documents are likely to lead to admissible evidence "relative to an employee's injury." Discovery sooner than later is better, as witnesses may forget details and documents may be lost or destroyed. Normally, interlocutory decisions remand these issues to the designee for a prehearing conference so the designee can rule on discovery disputes. However, at this point, a designee will not be as intimately familiar with the record as the panel, which reviewed the extensive record once for *Patterson I* and again for this decision. This decision will address this matter to move this case forward more quickly and efficiently. AS 23.30.001(1); AS 23.30.135.

Employee believes Employer communicated with Dr. Glass before his December 9, 2014 EME report and Employer resists Employee's request for production three because it cannot sanitize its cover email or any other communications. Employer asserts it produced everything to Employee on February 6, 2015, and there is nothing more to produce.

Technical evidence and discovery rules do not apply in workers' compensation cases. 8 AAC 45.120(e). The fundamental rule when determining discovery disputes is "any relevant evidence is admissible." *Guys with Tools*. The directive to ensure proceedings are "as summary and simple as possible" tempers the general rule. AS 23.30.005(h).

Employer retained Dr. Glass to provide mental health diagnoses, causes of each diagnosis and to address whether Employee's work stress was the predominant cause of those diagnoses. He opined on whether Employee needed further care, was medically stable and suffered a permanent partial impairment. Employer also asked Dr. Glass to identify "actual events" that caused Employee's work stress and opine if the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment. Employer also inquired if Employee was able to perform her usual and customary duties as a school nurse now or in the future. Ms. Burrell sent her December 1, 2014 letter to Dr. Glass via e-mail. On February 6, 2015, she produced to Employee the December 1, 2014 letter to Dr. Glass. The only document Employee may be missing from those provided to Dr. Glass is an email communication.

Typically, when individuals send documents via email, they provide an explanation regarding the attachments. *Rogers & Babler*. Employee's claim is for medical and time loss benefits. Employer denies Employee's claim. Ms. Burrell's December 1, 2014 email communication, if any, and any other Employer initiated communication with Dr. Glass is related to the questions in dispute and relevant, or likely to lead to relevant evidence. AS 23.30.108; *Schwab*; *Granus.* Employee's request for production number three will be granted and Employer will be ordered to produce the December 1, 2014 cover email correspondence to Dr. Glass and any other unprivileged correspondence with Dr. Glass prior to his January 5, 2015 EME report.

4) Was the order remanding the parties' disputes over Employee's requests for production four through six correct?

Employee's requests for production four, five, and six request all parties' initial and supplemental disclosures and any other discovery requests or responses exchanged in *Estate of Kenneth Terrance*

Hayes v. Matanuska Susitna Borough School District, Case No. 3PA-14-02684 CI. Employer did not respond to these requests for production. The parties' actions and inaction created a discovery dispute. At the March 28, 2017 prehearing conference, the designee requested briefing on the parties' discovery disputes. Employee asserted it preferred a full hearing on its discovery requests. The parties did not provide the designee briefs and the dispute was set for hearing.

The prehearing conference designee has statutory authority to resolve disputes concerning discovery. AS 23.30.108(b); 8 AAC 45.065. Further, at a prehearing conference on discovery matters the 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 the employee's injury." AS 23.30.108(c). These provisions make process and procedure in these cases as summary and simple as possible. AS 23.30.005(h). This also encourages quick, efficient, predictable delivery of benefits to injured workers at reasonable cost to employers. AS 23.30.001(1). These statutes allow the division and parties to resolve discovery disputes short of a full-blown hearing, with the right to appeal the designee's discovery decision.

The instant matter has been fraught with discovery disputes. If this panel were to decide this issue and either party appealed the ruling under AS 23.30.108(c), an entirely new panel would have to review the decision for "abuse of discretion," further delaying case resolution.

This decision will remand this issue to the appropriate designee for a prehearing conference so the designee may make rulings on Employee's requests for production four, five, six, and any remaining discovery issues. The parties may appeal the designee's prehearing conference discovery orders in accordance with the Act and applicable regulations. This result interprets the act to ensure the quick, efficient, fair, and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). It also fosters the Act's requirement that process and procedure be as summary and simple as possible. AS 23.30.005(h). The oral order remanding the parties' disputes over Employee's requests for production four through six was correct. This decision retains jurisdiction over Employee's February 2, 2017 petition, to resolve any disputes.

CONCLUSIONS OF LAW

1) The order accepting Employer's late filed brief was correct.

2) Employee is not entitled to a duplicate copy of documents already produced by Employer.

3) Employee is entitled to all correspondence or evidence of correspondence exchanged between Dr. Glass and Employer prior to issuance of the December 9, 2014 EME report.

4) The order remanding the parties' disputes over Employee's requests for production four through six is correct.

ORDER

1) Employer's and Employee's briefs are both accepted as timely filed.

2) Employee's February 2, 2017 petition is granted in part and denied in part.

3) Employee's request for production number two seeking an order compelling Employer to produce all documents Northern Adjusters provided to Dr. Glass related to Shannon Patterson, whether before, together with or after the December 1, 2014 letter and until the receipt of his report on January 5, 2015, is denied.

4) Employee's request for production three is granted. Employer must produce the December 1, 2014 "cover" email correspondence to Dr. Glass and any other unprivileged correspondence with Dr. Glass prior to his January 5, 2015 EME report. Employer shall produce these documents by no later than June 1, 2017.

5) Employee's requests for production four, five and six are remanded to the appropriate designee for a prehearing conference so the designee may make rulings on Employee's requests for production four, five and six, and any remaining discovery issues. The designee shall hold a prehearing conference at the next mutually available time for the parties so the designee may decide any remaining discovery issues. The parties shall call Brian Zematis at 269-4980 to obtain a prehearing conference date.

6) Jurisdiction over Employee's February 2, 2017 petition is retained to resolve any disputes.

Dated in Anchorage, Alaska on May 16, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Stacy Allen, 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 / petitioner v. Matanuska-Susitna Borough School District, self-insured employer / respondent; 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 May 16, 2017.

/s/
Elizabeth Pleitez, Office Assistant