ALASKA WORKERS' COMPENSATION BOARD

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

CHARLES G. MANLEY, Employee, Claimant, v. MUNICIPALITY OF ANCHORAGE, Self-insured Employer, Defendant.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201200402 AWCB Decision No. 15-0009 Filed with AWCB Anchorage, Alaska on January 15, 2015

The Municipality of Anchorage's (Employer) November 25, 2014 Petition to Compel Charles G. Manley (Employee) to provide discovery was heard on December 17, 2014 in Anchorage, Alaska, a date selected on December 4, 2014. Attorney Eric Croft appeared and represented Employee. Attorney Shelby Nuenke-Davison appeared and represented Employer. There were no witnesses. The record closed at the hearing's conclusion on December 17, 2014.

ISSUE

Employer contends it is entitled to comprehensive discovery of Employee's electronic, telephonic, photographic, video and hard-copy data and documents for the past three years, as well as an inspection of Employee's premises. Employer has found website listings it believes indicate Employee is not credible, and is running a business buying and selling on the Internet. Employer believes extensive discovery of electronically stored information (ESI) will confirm its allegations. Because Employee has claimed permanent total disability (PTD) benefits, Employer contends any of Employee's activities that portray him as employed or employable are relevant and discoverable. Employer contends civil courts commonly allow ESI discovery and all that is

required is that the discovery request must lead to some relevant information. Employer further contends its discovery request is reasonable and necessary, not overly broad or burdensome.

Employee is willing to allow Employer limited access to Employee's premises, but contends the remainder of Employer's discovery request constitutes a massive, untargeted invasion of privacy, unprecedented in breadth and scope, based on flimsy or unfounded allegations. Employee denies running an online business for profit. Employee contends it is outrageous for Employer to call him a liar, but in any case, credibility is an unripe issue in a procedural hearing, and should not serve as a touchstone for determining proper discovery limits. Employee contends the discovery request is also untimely because Employer could have asked Employee questions regarding his online activities at either of his depositions, and still has the opportunity to do so at a hearing on the merits.

Should Employer's November 25, 2014 Petition to Compel Employee to provide discovery be granted?

FINDINGS OF FACT

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

1) On January 10, 2012, Employee injured his spine while working for Employer, who described the injury: "While moving a very heavy patient on a gurney, an unexpected movement caused [Employee] to suddenly take a heavy load when he was not properly positioned or prepared. The sudden loading caused bilateral lumbar pain with any movement and significant muscle spasms." (Report of Injury, January 10, 2012.)

2) Employee filed three worker's compensation claims:

- On October 16, 2012, for reclassification of permanent partial impairment (PPI) and §041 benefits to temporary total disability (TTD), reimbursement for out-of-pocket expenses, penalty on PPI and §041 benefits, and attorney's fees and costs;
- On January 17, 2014, for reclassification of §041 benefits to TTD, penalty and interest, and attorney's fees and costs;

- On July 21, 2014, for permanent total disability (PTD), reclassification of § 041 benefits to TTD/PTD, penalty, interest, and attorney's fees and costs. (Claims, October 16, 2012; January 17, 2014; July 18, 2014.)

3) Employer filed six controversions:

- On December 10, 2012, for experimental stem cell injections and related treatment as well any complications from experimental stem cell treatment;
- On December 31, 2013, for TTD as of January 22, 2013;
- On February 18, 2014, for TTD, penalties, interest, and attorney's fees and costs;
- On July 9, 2014, for PTD as of June 23, 2014;
- On July 17, 2014, for referral to Dr. Edward Cupler;
- On October 13, 2014, for all benefits after October 13, 2014; (Controversions, December 6, 2012; December 30, 2013; February 13, 2014; July 8, 2014; July 16, 2014; October 13, 2014.)

4) Employee signed all releases sent to him by Employer. (ICERS database; Croft hearing argument.)

5) Employer's filed evidence includes the transcript of Employee's recorded statement (January 24, 2012, 50 pages); two Employee depositions (May 21, 2014 and October 9, 2014, totaling 258 pages); a deposition of Employee's live-in girlfriend (October 14, 2014, 46 pages); surveillance tapes, land and aerial photographs, videos and investigator logs from May 21, 2014 through November 11, 2014; and 64 website classified ad printouts dating from July 29, 2014 through October 3, 2014. (ICERS database.)

6) On November 25, 2014, Employer petitioned for an order to compel Employee to provide "access to his computers and cell/smartphones for inspection for relevant data outlined herein and in the attached discovery letter (Ex. 1), an order to compel employee to provide access to his premises as outlined below for purposes of inspection and photographing and to compel the employee to produce a copy of all bank, debit/credit card and/or PayPal statements from 1/10/12 onward." Employer requested an order allowing Digital Securus, LLC, forensic "Information Security Consultants," access to:

> any computing device of [Employee] and cell/smart phone, including data stored in machine-readable format on magnetic, optical or other storage media (internal or external to device), including hard drives, floppy disks, or flash memory used by the employee to their backup media (e.g., other hard drives, backup tapes, floppies, USB drives, flash drives, JAZ cartridges, DVD/CD-ROMS), or stored online or with hosted storage vendors such as, Dropbox, iCloud, box.net and SkyDrive . . . at [Employer's] expense. . . .

Employer stated the goal of the requested ESI search is "to identify, collect and cull responsive information from a large data universe and then search for and retrieve all relevant documents or data." Employer stated the computer forensic experts would sign a confidentiality agreement and would turn over to the parties only such discovery as the parties agreed was relevant or was ordered produced by the board. (Petition to Compel, November 25, 2014).

7) On November 25, 2014, Employer also filed a Notice of Intent to Rely including 64 website printouts purportedly demonstrating Employee:

> - blatantly lied under oath since his last deposition of October 9, 2014, of not posting any items on the internet for sale over $500.00, not posting any items on any other social media, online classified ads, forums or blogs besides [C]raigslist, and of not buying, selling or trading of any goods or services on the internet, at auctions, salvage businesses or though [sic] insurance companies since his first deposition of May 21, 2014. . . .
>
> - has been buying, building, re-building items and selling or trading items and has offered his services via numerous online classified ads like Craigslist, forums, and websites etc., on his computer. . . .
>
> - may be in the business of buying vehicles, trailers and/or items for parts or to fix up to sell for profit. . . . (Petition to Compel, November 25, 2014; Notice of Intent to Rely, Bates Nos. 000072-000160, 000186-000208, and 000218-235, November 25, 2014.)

8) Employer's November 25, 2014 petition contended "it is highly likely that there are many more postings made by the employee since his date of injury that the employee has made on websites or other on line [sic] classifieds that [Employer] has not been able to uncover as they may need a password to retrieve more information or no longer exist due to expiring or being deleted." A footnote adds, "The employer only started researching the internet for postings in approximately June, 2014. Hence, who knows what was posted from January 2012 onward." (Petition to Compel, November 25, 2014.)

9) Employer contended that, due to Employee's alleged untruthfulness at his depositions,

> access to [Employee's] computer or smart phone to review all websites, forums, social media, Apps, blogs, forums etc., that [Employee] has been on to review or post for his buying, selling or trading goods or services or for his pursuit of recreational activities, travel and medical research is essential to [Employer] to defend this PTD claim. . . .
>
> Because of [Employee's] lack of veracity the only way for the employer to adequately obtain electronically stored information is by having [Employee's] computer, cell phone or other devices forensically examined as outlined below and that [Employee] be ordered to disclose any necessary passwords to access any computers, cell phones or other devices and to access any websites, blogs, forums, websites or other relevant information.

Employer stated the breadth and scope of its discovery request was justified because Employer has a duty to zealously investigate and defend against a claim that "could cost the tax payers of Anchorage close to $1.8 million in indemnity benefits alone." (*Id.*).

10) On November 25, 2014, Employer also wrote Employee a discovery letter requesting him to preserve all documents, tangible things, and electronically stored information:

> . . . As you know, since [Employee's] claim has broadened to a claim for PTD, this requires me to get more detailed information from [him]. As such, this is an updated discovery letter that I ask you to reply to pursuant to Civil Rule 26 and 34. [Employer] requests that [Employee] preserve all documents, tangible things, and electronically stored information. Additionally, because this case is scheduled for hearing in January, I have filed a Petition to Compel some of the discovery requested herein in case you object to any of the requested information.
>
> 1. Please provide a list by make, model, location and owner, of all computers and removable media (e.g. CDs, DVDs, thumb drives and flash drives), laptops, desktops, I-pads, tablet computers, cell phones, smart phones, GPS devices and cameras the employed has used at home or other locations since his injury of 1/10/12?
>
> 2. List all operating systems installed on all devices with operating systems outlined in Answer to question one above, including but not limited to, Microsoft Windows, Linux, Unix, DOS, etc.
>
> 3. Please provide a list of all land line or cell phone numbers, Mr. Manley has used since his injury date of 1/10/12 and provide the names of his cell or landline service providers/phone companies he has used since 1/10/12 onward.

4. Please provide a complete list by make, model, year, location and ownership of any and all hardware /physical devices that are capable of sending and receiving email, texts or voice messages through that Mr. Manley has used from 1/10/12 onward.

5. Please provide a detailed description of any and all email systems used by Manley including but not limited to, servers, workstations and storage devices, from 1/10/12 ongoing.

6. Please provide a list by the title, and version number of any and all software programs that is or was contained on any of the devices listed in answer to question one above, since the employee's date of injury of 1/10/12 onward.

7. Please provide a list of all online storage, cloud storage or other Internet related storage system used by or in the control of Mr. Manley form 1/10/12 to present day.

8. Please provide copies of all communications Mr. Manley has, sent or received, including but limited to e-mails, texts, postings or voice messages (including deleted or archived items) since 1/10/12 to the present, where the selling, trading, purchasing of goods or services, travel, navigation or recreational activities (as defined in question 6), were at issue/discussed or his claimed injury, medical condition or inability to work was discussed except any attorney/client communications.

9. Please produce copies of Mr. Manley's cell phone or land line phone bills/records, showing all phone numbers or texts from which calls or texts were received or transmitted from 1/10/12 through the current date.

10. Please produce copies of all notes, photos or video recordings using any camera or device or apps the employee has taken or received, uploaded or downloaded, regarding any work or recreational activities or any item he designed, sold, traded or purchased from 1/10/12 to the current date.

11. Please produce any designs for any boats, boat or aircraft parts or other items prepared from 1/10/12 to the current date.

12. Please indicate what days in December or January Mr. Manley will produce his computers, smart phone or other devices outlined in the attached Petition to Compel, to a computer forensic expert under the terms outlined in the attached Petition to Compel.

13. Please indicate what days I may be able to have access to Mr. Manley's shop, basement, backyard, connex, trailer and truck and camper pursuant to Alaska Civil Rule 34(a).

14. Please provide copies of all of Manley's bank, credit/debit card, PayPal and/or other financial institutions statements from 1/10/12 on ward.

15. Please provide the following information on Mr. Manley's PayPal account:

a. User account information, including initial set up.

b. All account activity from the date of injury to the current date.

c. All correspondence into or out of account from the date of injury to current date.

d. All bank and credit card information for the history of the account.

e. All user account activity, including but not limited, to accounts payable and accounts receivable from date of injury to the current date.

16. Please state with specifics the date Manley returned from his scheduled trip for his SIME of November 17, 2014, and indicate if Manley added on a vacation, trip or other visits after the SIME of November 17, 2014. If so when did he come back to Alaska after the SIME? Please indicate all of the places (i.e. Cities and states and/or names and addresses) he visited and indicate all of the places he stayed and with whom (please state names, addresses and phone numbers of all people he stayed with or hotels he stayed at). Please indicate what mode of transportation Manley used to get to and from each destination (i.e. by airplane or vehicle and if he used a vehicle please supply whose vehicle it was and the make and model) Please state when the airplane tickets were changed, who changed the tickets, who paid for the change in tickets, and how the tickets were paid for (.e. Credit card etc.) and provide the name of the person on the card, type of card and number.

17. Please produce copies of all credit card/debit card receipts, hotel receipts or cancelled checks showing payment of hotel, airfare, gas, food or other expenses for Mr. Manley and/or Sonni Woitel for their extended trips for the EME dated September 15 and 16, 2014 and the SIME of November 14, 2014.

> I know ESI discovery may not be used that much in workers' compensation cases. However, in the civil arena it is used all of the time as ESI can provide vital information. All that is required is that the discovery requests must lead to some relevant information.
>
> We are desirous of working with you to make this electronic discovery and other discovery not to be too burdensome or too general. That is why in this current request, I am only asking for information on devices, software, etc., from which relevant information may exist from the date of injury onward and have tailored a lot of my requests to areas of inquiry that are reasonable for a PTD claim. **However, to not have this electronic discovery be too burdensome or costly if some of the information from the devices outlined in question number 1 can be obtained by a forensic expert's search of the devices and you agree to my request contained in question 13, then please identify that in your responses to my questions and the forensic expert can gather that information.**
>
> Please make sure Mr. Manley does not delete any items on any of his devices outlined in paragraph 1 or posted on any forums, social media, apps, classifieds, blogs and have Mr. Manley preserve all e-mails with attachments, including messages in his "in-box", "sent items", "deleted items folders", in any personal folders, and/or "archives", from all e-mail accounts he may have used including messages on Facebook, as well as any documents, designs, spreadsheets, photos or video recordings and other items stored in his "My Documents", or any text and/or voice messages, contained in any of the devices outlined in questions 1 and 6 from January 10, 2012 onward.
>
> You are obliged to preserve potentially relevant evidence from both these sources of ESI, even if you do not anticipate producing such ESI.
>
> The request that you preserve both accessible and inaccessible ESI is reasonable and necessary. Pursuant to amendments to the Federal Rules of Civil Procedure that have been approved by the United States Supreme Court (eff. 12/1/06), you must identify all sources of ESI you decline to produce and demonstrate to the Board why such sources are not reasonably accessible. Accordingly, even ESI that you deem reasonably inaccessible must be preserved in the interim so as not to deprive the employer of its right to secure the evidence. . . . (Employer letter, November 25, 2014; emphasis and typographical errors original.)

11) On December 11, 2014, Employee filed an opposition to Employer's November 25, 2014 Petition to Compel. Employee contended the discovery request was "unprecedented in its breadth and scope" and "a massive invasion of employee privacy based on flimsy or unfounded allegations," and it encompassed "a tremendous amount of sensitive and private information." Employee denied he was running an online business for profit, contending the website "for sale" printouts in the November 25, 2014 Notice of Intent to Rely were attempts (many of them

repetitive) to liquidate assets from failed business ventures, and to sell Employee's and his son's personal items. (Opposition to Petition to Compel, December 11, 2014.)

12) At hearing on December 17, 2014, Employer was unable to cite any workers' compensation cases in which a similar discovery request was granted, and stated the only authority to compel discovery of computer hard drives it could find was *Playboy Enterprises, Inc. v. Welles,* 60 F. Supp. 2d 1050 (S.D. Cal. 1999). (Record.)

13) After the hearing officer noted the board often sees people who start selling things after they become disabled to bring in extra cash, Employer was asked, "What makes [Employee] different from the casual online seller?" Employer responded, "Well first of all, I don't know the answer to that because I haven't completed my discovery." ER then asserted that Employee's online postings provided "ample evidence" he is doing more activities than he says he is, and that he was involved in internet commerce. But, Employer reiterated, "I can't answer that question, that's why I need discovery." (*Id.*)

14) At hearing Employer was asked a hypothetical question as to whether an individual who sells stocks at a profit is in the business of selling stocks. Employer responded by referring to Employee's Craigslist posting to sell a "trailer to work on cars" that Employee said he had built; Employer stated, "to me it sounds a little bit more like a business." (*Id.*)

15) At hearing Employer reiterated the point it made in its November 25, 2014 Petition to Compel: that the online classifieds presented as evidence represented only a short period of time, not the entire period since the work injury. Employer stated it had produced only a few examples to show why its discovery request was not far-fetched: "This is why I need discovery." (*Id.*)

16) At hearing on December 17, 2014, Employee agreed to allow Employer to walk through and videotape his house, shop and backyard, for a limited time and in the presence of Employee's counsel. (*Id.*)

PRINCIPLES OF LAW

> **The Constitution of the State of Alaska §22. Right of Privacy**. The right of the people to privacy is recognized and shall not be infringed. . . .

In 1972 Alaska citizens, "with their strong emphasis on individual liberty," enacted an amendment to the Alaska Constitution expressly providing for a right to privacy broader in scope

than that found in the United States Constitution. *Ravin v. State*, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring). Neither the state nor the federal right to privacy is absolute, but infringements of the right must be supported by sufficient justification. *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469, 476 (Alaska 1977). Conflicting rights and interests must be balanced. *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980).

In *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990) (quoting *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980)), the Alaska Supreme Court adopted a three-part test for applying Alaska's constitutional right to confidentiality:

1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?
2) Is disclosure nonetheless required to serve a compelling state interest?
3) If so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality?

In *Falcon*, the Alaska Supreme Court described records falling within the legitimate expectation of privacy as "sensitive information" which a person desires to keep private, and which if disseminated would tend to cause substantial concern, anxiety, or embarrassment to a reasonable person. *Falcon* at 479.

The Alaska Workers' Compensation Act does not expressly address whether the board has the power to protect against disclosure of information based on an employee's constitutional right to privacy. However, by expressly authorizing the board to order the release of private records in AS 23.30.107, the legislature necessarily also granted both the implied power and a duty to balance an injured employee's right to privacy against an employer's right and duty to discover information related or relevant to the employee's claims. *Thoeni v. Consumer Electronic Services*, AWCB 02-0092 (May 22, 2002). The Act and administrative regulations must be construed with this balancing principle in mind. *See, e.g., Stojanovich v. NANA Regional Corp.*, AWCB Decision No. 11-0019 (February 22, 2011); *Adkins v. Alaska Job Corp. Center*, AWCB Decision No. 07-0128 (May 16, 2007); *Austin v. Tatonduk Outfitters*, AWCB Decision No. 98-0201 (August 5, 1998).

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

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.005. Alaska Workers' Compensation Board.** . . .
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter 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. . . .

AS 23.30.005(h) has long been interpreted as empowering the board to order a party to release and produce records "that relate to questions in dispute." *See, e.g., Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987). Additional authority to order a party to release information is set forth not only in specific statutes, but in broad powers given to best ascertain and protect the rights of the parties under AS 23.30.135(a) and AS 23.30.155(h). *See, e.g., McDonald v. Municipality of Anchorage*, AWCB Decision No. 94-0090 (April 15, 1994).

> **AS 23.30.107. Release of information.** (a) Upon written request, an employee shall provide written authority to the employer, carrier . . . to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.

The Alaska Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab* at 4, n. 2 (December 11, 1987); *citing United Services Automobile Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974); *see also*, *Venables v. Alaska Builders Cache*, AWCB Decision No. 94-0115 (May 12, 1994). Employers must be able to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. Medical and other releases are important means of doing so. *See, e.g., Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Under AS 23.30.107(a), an employee must, upon written request, release medical and rehabilitation information "relative" to the employee's injury. Evidence is "relative" to the claim where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

The burden of demonstrating the relevancy of the information being sought rests with the proponent of the release or discovery request. *See, e.g., Wariner v. Chugach Services, Inc.*, AWCB Decision No. 10-0075 (April 29, 2010). A party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence that will later be admissible at hearing. *Smart v. Aleutian Constructors*, AWCB Decision No. 98-0289 (November 23, 1998). Based on the policy favoring liberal discovery, "calculated" to "lead to admissible evidence" means more than a mere possibility, but not necessarily a probability, the information sought will lead to admissible evidence. For a discovery request to be "reasonably calculated," it must be based on a deliberate and purposeful design to lead to admissible evidence, and that design must be both reasonable and articulable. The proponent of a release must be able to articulate a reasonable nexus, or connection, between the information sought and evidence relevant to a material issue in the case. *In the Matter of Mendel*, 897 P.2d 68, 93 (Alaska 1995); *Chapman v. Tom Thumb Montessori Schools*, AWCB Decision No. 09-0209 (December 30, 2009); *Granus*. To be "reasonably calculated" to lead to admissible evidence, both the scope of information sought and the time periods it covers must be reasonable. *Chapman; Granus*.

Referring to the need to strike an appropriate balance between the employer's right to discovery and the employee's right to privacy for unrelated, irrelevant, and confidential information, *Granus* noted:

> Compelling state interests in prompt, fair, and equitable disposition of claims, in ensuring the integrity of the workers' compensation system, and in providing employers with due process of law, necessarily requires that employers be permitted to secure private and irrelevant information that is reasonably calculated to lead to discovery of admissible evidence. . . . It is foreseeable that reasonable discovery may entail release to a party of private information that is ultimately irrelevant to the issues in [an employee's] case. To protect [an employee's] legitimate privacy interests, it is incumbent on us to ensure that discovery takes place in the least intrusive manner possible. *Granus* at 23-24 (citation omitted).

With regard to releases, "if the information sought appears to be 'relative,' the appropriate means to protect an employee's right of privacy is to exclude irrelevant evidence from the hearing and the record, rather than to limit the employer's ability to discover information that may be relative to the injury." *Smith v. Cal Worthington Ford, Inc.,* AWCB Decision No. 94-0091 (April 15, 1994). The *Granus* principle that discovery must be tailored to be no more bothersome or burdensome than necessary has become standard in workers' compensation cases. *See, e.g., Jackson v. Food Ex Corp.,* AWCB Decision No. 14-0019 (February 18, 2014); *Wariner*; *Thoeni*.

> **AS 23.30.108. Prehearings On Discovery Matters; Objections to Requests For Release of Information; Sanctions For Noncompliance.**
> . . . .
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present ***releases or documents that are likely to lead to admissible evidence relative to an employee's injury***. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a 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. (Emphasis added.)

Although the first sentence of AS 23.30.108(c) specifically refers to "releases" and "written documents," the subsection repeatedly uses the broader term "discovery dispute" as the subject matter of the prehearing conference. AS 23.30.108 has long been interpreted to apply to discovery generally, including disputes concerning any examination, interrogatories, depositions, medical reports or other records held by the parties. *See, e.g., Bowles v. Inlet Towers Suites*, AWCB Decision No. 08-0051 (March 20, 2008); *Palmer v. Air Cargo Express*, AWCB Decision No. 05 - 0222 (August 30, 2005); *Logan v. Klawock Heeny Corp.*, AWCB Decision No. 02-0078 (May 2, 2002). It is well settled that if a party unreasonably or willfully refuses to cooperate in the discovery process, AS 23.30.108(c) and AS 23.30.135 confer broad discretionary authority to make orders to assure parties obtain the relevant evidence necessary to litigate or resolve their claims. *Bathony v. State of Alaska, D.E.C.*, AWCB Decision No. 98-0053 (March 18, 1998).

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter. . .

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wein Air Alaska v. Kramer*, 807 P.2d 471, 473-74 (Alaska 1991). If an employer rebuts the presumption of compensability, at the third step of the analysis the burden shifts to the employee to prove his claim by a preponderance of the evidence. *McGahuey* at 621; *Smith* at 788. Witness credibility determinations are made at the third stage. *McGahuey* at 621; *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 691 (Alaska 2000).

> **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 scope of evidence admissible in administrative hearings is generally broader than is allowed in civil courts, because AS 23.30.135 makes most civil rules of procedure and evidence inapplicable. Information that would be inadmissible at a civil trial may nonetheless be discoverable in a worker's compensation claim if it is reasonably calculated to lead to admissible evidence. *See, e.g., Granus; Cooper*. Under relaxed evidence rules, discovery should be at least as liberal as in a civil action and relevancy standards should be at least as broad. *Schwab*.

> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds. . . . (Emphasis added.)

The "relevant" and "reliable" admission standard gives the board discretion to exclude untrustworthy evidence. *Granus* at 10, n.34, citing *Whaley v. Alaska Workers Compensation Board*, 648 P.2d 955, 958 (Alaska 1982). However, the trustworthiness of relevant evidence is an issue properly addressed at the time of its admission at hearing, and does not impose an additional requirement for discovering information. *Granus* at 11, n.34.

> **AS 23.30.155. Payment of compensation.** . . .
> . . . .
>
> (h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will

properly protect the rights of all parties.

> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
>
> (2) area of last employment;
>
> (3) the state of residence; and
>
> (4) the State of Alaska.
>
> (b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

An employee is not entitled to permanent total disability benefits "if there is regularly and continuously available work in the area suited to the claimant's capabilities." *Summerville v. Denali Center*, 811 P.2d 1047, 1051 (Alaska 1991).

> **Civ. R. 26. General Provisions Governing Discovery; Duty of Disclosure**. . . . . .
>
> **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement

> concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.
> . . . .
>
> (5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

> **Civ. R. 34. Production of Documents, Electronically Stored Information, and Things, and Entry Upon Land for Inspection and Other Purposes.** (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained) translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

The Rules of Civil Procedure may be consulted for guidance in interpreting workers' compensation procedural statutes and regulations. *See, e.g., Granus.* However AS 23.30.135(a) explicitly states "the board is not bound by common law or statutory rules of evidence . . . 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. . . ."

In *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999), a former Playmate of the Month and Playmate of the Year in *Playboy* magazine was accused of the unauthorized use of plaintiff's "Playboy" and "Playmate" trademarks on her personal website. Invoking Federal Civil Rules 26(b) and 34, the District Court held that information stored in computer format is discoverable, so long as the producing party is protected against undue burden and expense and/or invasion of privileged matter. *Welles* at 1053. After weighing the benefit and burden of the discovery request, and taking into consideration the needs of the case, the amount in controversy, the importance of the issues at stake, the potential for finding relevant material, and the importance of the proposed discovery in resolving the issues, the Court concluded Playboy Enterprises was entitled to discovery of deleted e-mails contained on the defendant's computer hard drive, subject to defense counsel's determination that each document to be disclosed was relevant, responsive and non-privileged. *Id.* at 1053-1054.

> **Fishing expedition.** An attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found; esp., such an attempt that exceeds the scope of discovery allowed by procedural rules. *Black's Law Dictionary*, Eighth Edition, 2004.

ANALYSIS

Should Employer's November 25, 2014 Petition to Compel Employee to provide discovery be granted?

Discovery is vital to workers' compensation cases; it clarifies issues and assists employers in administering and defending against claims, as well as detecting possible fraud. *Cooper*. Here Employer has accumulated a large mass of evidence regarding Employee's activities. Employee has been forthcoming and cooperative, fulfilling his AS 23.30.107(a) duty to sign all releases sent to him by Employer. Employee participated in two lengthy depositions, totaling 258 pages, and his girlfriend was also deposed. Employer procured additional evidence in the form of tapes, photographs, videos and investigator logs gleaned from land and drone surveillance of Employee, undertaken during nearly six months in 2014. Moreover, Employer conducted its own online investigation, beginning "approximately June, 2014" and lasting through at least October 3, 2014, which yielded 64 website classified ad printouts allegedly demonstrating Employee: (1) lied under oath at deposition and (2) was running an online business. On the basis of these two allegations,

Employer petitioned for an order to compel Employee to provide access to his computers and cell/smartphones, his premises, and all bank, debit/credit card and/or PayPal statements from the January 10, 2012 date of injury forward.

Employer's first contention, that it needs more discovery because existing discovery reveals Employee to be untruthful, is misplaced and unripe. Allowing perceived inconsistencies or inaccuracies in discovery to serve as a bootstrap into further discovery would set a dangerous precedent because dispute resolution could conceivably be delayed nearly indefinitely. Such a procedure would contravene the legislative intent for quick, efficient, fair, and predictable delivery of benefits to entitled claimants. AS 23.30.001(1). Moreover, credibility is a substantive issue to be addressed at the third step of the presumption analysis at a merits hearing. *McGahuey*; *Steffey*. Employer will have the opportunity to question Employee's credibility, and Employee will have the opportunity to deny accusations of untruthfulness, at a future hearing on the merits.

Employer's second contention, that more discovery is warranted to prove Employee is running an online business, forms the crux of its argument in favor of far-reaching discovery. AS 23.30.005(h) authorizes the examination of "parts of the books and records of the parties to a proceeding that relate to questions in dispute" and AS 23.30.135(a) and AS 23.30.155(h) confer broad authority to order the release of information to allow the parties' rights to be best ascertained and protected. *Schwab; McDonald*. The burden of demonstrating the relevancy of information being sought rests with the proponent of the discovery request. *Wariner*. Here Employer met this burden. Because Employee would not be entitled to PTD benefits "if there is regularly and continuously available work in the area suited to the claimant's capabilities," any of Employee's activities that portray him as employed or employable would be relevant to the disputed PTD claim. *Summerville.*

However the party seeking to discover information must also show the information appears reasonably calculated to lead to the discovery of evidence that will later be admissible at hearing. *Granus*; *Smart*; *Chapman.* A discovery request must be based on a deliberate, purposeful and reasonable design to lead to admissible evidence. Moreover, the scope of information sought must be reasonable, and discovery must be tailored to be no more bothersome or burdensome than necessary. *Jennings; Mendel; Jackson; Chapman; Granus*. Here Employer failed to meet the

reasonability standards. Logic dictates that if Employee is running an online business, Employer could establish this by simple internet searches, with no need to access virtually every conceivable record of Employee's activities in the past three years. Employer's request seems particularly unreasonable because it is based on classified ads that Employee contended did not represent a business endeavor, but instead were merely attempts (many of them repetitive) to liquidate assets from failed business ventures, and to sell Employee's and his son's personal items.

Employer's arguments repeatedly revealed it viewed the discovery request not as a targeted search for specific pertinent information, but rather as an extensive inquiry it hoped would upturn evidence to support its hypotheses. First, Employer stated the goal of its ESI search is "to identify, collect and cull responsive information from a large data universe and then search for and retrieve all relevant documents or data." Second, when asked what makes Employee different from the casual online seller, Employer responded it did not know because it had not completed discovery. Employer contended Employee's online postings provided "ample evidence" he is doing more activities than he says he is and indicated he was involved in internet commerce. But, Employer reiterated, "I can't answer that question, that's why I need discovery." Third, in reference to a Craigslist posting in which Employee sought to sell a trailer he said he had built, Employer argued, "to me it sounds a little bit more like a business." Fourth, Employer stated the 64 classified ads were only a few examples showing why more discovery was needed. These assertions and responses epitomize the dictionary definition of a "fishing expedition."

In 1972, decades before cybersecurity and theft identity became common concerns, Alaska citizens enacted an amendment to the state's Constitution expressly providing for a "right to privacy" broader in scope than found in the United States Constitution. *Ravin.* The Act and administrative regulations must be construed in the context of striking an appropriate balance between liberal discovery and an injured workers' constitutional right to privacy. *Falcon*; *Messerli; Thoeni; Stojanovich; Adkins; Austin.* The Alaska Supreme Court described records falling within the legitimate expectation of privacy as "sensitive information" which a person desires to keep private, and which if disseminated would tend to cause substantial concern, anxiety, or embarrassment to a reasonable person. *Falcon.* Here Employee expressed reasonable concerns about divulging "a tremendous amount of sensitive and private information" to strangers and opposing counsel.

Employer's proposal to lessen the burden of its electronic discovery request by engaging the services of a forensic expert, sworn to confidentiality, is insufficient to justify the scope of information sought. Indeed, the discovery request is so vast and unfocused that, if granted, it could have a chilling effect on future proceedings: it is foreseeable that reasonable injured workers would decide to forego filing claims, if they believed they would be required to divulge all the details of their private lives in order to be awarded benefits.

Employer asked Employee to respond to its petition and updated discovery letter pursuant to Civil Rules 26 and 34. While these rules are occasionally consulted for guidance in workers' compensation matters, they are not binding, because AS 23.30.135 makes most civil rules of procedure and evidence inapplicable. Similarly, at hearing Employer contended ESI was used all the time in civil courts, but Employer was unable to cite any workers' compensation cases in which a similar discovery request was granted. Employer stated the only authority to compel discovery of computer hard drives it could find was *Playboy Enterprises, Inc. v. Welles*, which has no precedential value in this proceeding and, moreover, is inapposite.

In *Welles*, after weighing the benefit and burden of the discovery request, and taking into consideration the needs of the case, the amount in controversy, the importance of the issues at stake, the potential for finding relevant material, and the importance of the proposed discovery in resolving the issues, the District Court invoked Civil Rules 26 and 34 to permit discovery of deleted e-mails contained on the defendant's computer hard drive, subject to defense counsel's determination that each document to be disclosed was relevant, responsive and non-privileged. However *Welles* is distinguishable because its central issue was computer content itself (specifically the alleged unauthorized use of trademarks on a personal website), not computer content that may or may not be relevant to a disputed PTD claim. Employer has not produced a quantum of evidence that would lead a reasonable person to conclude Employee's computer and other personal records contain enough related or relevant information to justify the immense invasion of privacy sought. *Falcon; Messerli; Thoeni; Stojanovich; Adkins; Austin.*

Employer cited *Smith v. Cal Worthington Ford, Inc.* in support of its contention "the appropriate means to protect an employee's right of privacy is to exclude irrelevant evidence from the hearing and the record, rather than to limit the employer's ability to discover information that may be relative to the injury." However this case is also inapposite. The statement was made in the context of what to do when fair and liberal discovery yields irrelevant evidence; it was not intended to serve as justification for overly broad releases or discovery. Here Employer has not met the *Granus* standard for relativity; the information sought is far too comprehensive and unfocused to be considered "reasonably calculated" to lead to facts having any tendency to make an issue in a case more or less likely.

At hearing Employee agreed to allow Employer to walk through and videotape his house, shop and backyard, for a limited time and in the presence of Employee's counsel. That portion of Employer's Petition to Compel is therefore moot. However the remainder of the discovery request is fairly characterized as an attempt to cast an indiscriminate, far-reaching and speculative net with the hopes of ensnaring some relevant information. It therefore falls squarely into definition of a "fishing expedition." As such, the remainder of the Petition to Compel will be denied.

CONCLUSION OF LAW

Employer's November 25, 2014 Petition to Compel Employee to provide discovery will in part be found moot and in part be denied.

ORDER

1) Employer's request for an order to compel Employee to provide access to his premises for purposes of inspection and photographing is rendered moot by Employee's hearing statement he would allow Employer to walk through and videotape his house, shop and backyard, for a limited time and in the presence of Employee's counsel. Parties are ordered to cooperate in the facilitation of a reasonably circumscribed site visit, following the general guidelines Employee agreed to at hearing.

2) The remainder of Employer's November 25, 2014 Petition to Compel is denied.

Dated in Anchorage, Alaska on January 15, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Stacy Allen, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CHARLES G. MANLEY, employee / claimant; v. MUNICIPALITY OF ANCHORAGE, employer; ANCHORAGE, MUNICIPALITY OF, insurer / defendants; Case No. 201200402; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on January 15, 2015.

Elizabeth Pleitez, Office Assistant