

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JEFFREY L. KOLLMAN,)	
Employee,)	INTERLOCUTORY
Claimant,)	DECISION AND ORDER
)	
v.)	AWCB Case No. 201007169
)	
ASRC ENERGY SERVICES,)	AWCB Decision No. 15-0089
Employer,)	
)	Filed with AWCB Fairbanks, Alaska
and)	On July 27, 2015.
)	
ARCTIC SLOPE REGIONAL CORP.,)	
Insurer,)	
Defendants.)	
)	

Jeffrey Kollman's (Employee) October 13, 2014 petition to compel discovery related to neuropsychologist Russell Cherry, M.D. was heard on May 21, 2015 in Fairbanks, Alaska, a hearing date selected on March 4, 2015. Attorney Michael Jensen appeared telephonically and represented Employee. Attorney Robert Bredesen appeared in person and represented ASRC Energy Services, Inc. and Arctic Slope Regional Corporation (Employer). Herbert Schwager, Ph.D. appeared telephonically, testified, and was the only witness. The record closed at the hearing's conclusion on May 21, 2015.

ISSUES

Employee contends Employer has not fully responded to its discovery requests relating to Dr. Cherry. Employee requests a board order directing Employer to provide him or Dr. Schwager notes, dictations, calculations, computer entries, e-mails, MMPI raw data or other documents

prepared by Dr. Cherry, his associates, employees of his office or Alaska Neuro Associates pertaining to Employee. Employer contends it has provided all discovery it is aware of, except for the raw test data associated with Dr. Cherry's neuropsychological examination of Employee. Employer contends Dr. Cherry's policy is to release raw test data only to a licensed neuropsychologist.

1) Should the board order Employer to provide additional discovery to Employee or Dr. Schwager?

Employee contends Employer has failed to cooperate with discovery and requests sanctions be imposed against Employer. Employer contends it has provided all discovery it is aware of, except for the raw test data in dispute. Employer contends no sanctions are warranted.

2) Should the board order discovery sanctions against Employer?

FINDINGS OF FACT

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

1) On January 7, 2015, *Kollman v. ASRC Energy Services, Inc.*, AWCB Decision No. 15-0004 (January 7, 2015) (*Kollman III*), was issued and ordered Employer to respond to Employee's July 28, 2014 discovery requests related to Lynne Bell, M.D. *Kollman III* did not address discovery requests relating to Dr. Cherry. It also did not address whether Employer must provide to Employee raw test data associated with any neuropsychological examination of Employee. (*Kollman III* at 17).

2) On April 27, 2010, Employee injured his neck, back, right shoulder, nose and head when the tow strap of a dozer he was operating failed and struck him on the right side of his face. (Report of Occupational Injury or Illness, undated; Employee's Claim, November 5, 2012).

3) On December 1, 2011, Employee saw Paul Craig, Ph.D., for a neuropsychological evaluation, on referral from Employee's treating physician Sean Johnston, M.D. Dr. Craig conducted psychometric tests as part of his evaluation. (Dr. Craig report, December 1, 2011).

4) On August 7, 2014, Employer scheduled an evaluation with Dr. Cherry. (Employee Hearing brief at 2, dated November 7, 2014).

5) On August 13, 2014, Employee signed Alaska Neuro's HIPAA acknowledgement which stated:

HIPAA ACKNOWLEDGEMENT

NOTICE OF PRIVACY PRACTICES

By my signature below I acknowledge I was offered a copy of the Alaska Neuro Associates, LLC notice of Privacy Practices. I acknowledge that pursuant to **Ethical Standard 9.04 “Release of Test Data”** the, “Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law.” Alaska Neuro Associates, LLC will not release raw test data to anyone other than a licensed Neuropsychologist qualified to interpret the data.

(Alaska Neuro HIPAA Acknowledgement, August 13, 2014).

6) On September 2, 2014 and September 3, 2014, Employee underwent a neuropsychological evaluation with EME Dr. Cherry. Dr. Cherry conducted psychometric tests as part of his evaluation. (Dr. Cherry report, September 2, 2014).

7) On September 3, 2014, Employee mailed discovery requests to Employer. This included the following request:

Please provide any reports, notes, dictations, calculations, computer entries, e-mails, MMPI raw data or other documents prepared by Russell Cherry, MD, his associates, employees of his office or Alaska Neuro Associates pertaining to the employee. (Please instruct Russell Cherry, MD and/or Alaska Neuro Associates not to destroy the notes, calculations, computer entries, dictations or computer entries. It is requested that Russell Cherry, MD produce his notes, raw data testing scores, calculations, computer entries, dictations, and/or e-mails pertaining to the evaluations of the employee).

(Letter from Michael Jensen to Robert Bredesen, September 3, 2014).

8) On October 8, 2014, Employer responded to Employee’s discovery requests. Its response included the following objection to the release of Dr. Cherry’s records:

RESPONSE: Objection to the extent that the request purports to demand that the employer and adjuster “instruct” Dr. Cherry regarding the handling of notes, papers, and other documents related to Dr. Cherry’s professional services. Dr. Cherry’s report will be timely filed on a AWCB medical summary upon receipt.

(Letter from Robert Bredesen to Michael Jensen, October 8, 2014).

9) On October 16, 2014, Employee filed a Petition to Compel discovery contending Employer’s October 8, 2014 responses related to Dr. Cherry were not fully responsive. (Petition to Compel, October 13, 2014).

10) On February 25, 2015, Employer provided supplemental documents in response to Employee's discovery request for "any reports, notes, dictations, calculations, computer entries, e-mails, MMPI raw data or other documents prepared by Russell Cherry, MD, his associates, employees of his office or Alaska Neuro Associates pertaining to the employee." (Letter from Robert Bredesen to Michael Jensen, February 25, 2015).

11) At a March 4, 2015 prehearing conference, Employee's October 13, 2014 petition to compel was scheduled to be heard on May 21, 2015. The prehearing conference summary stated, "EE's atty requested that a hearing be set to strike Dr. Cherry's IME report because of his failure to comply with EE's discovery request of September 3, 2014. In the alternative, EE's atty will ask that the board order Dr. Cherry to comply with the discovery request." (Prehearing Conference Summary, March 4, 2015).

12) On April 6, 2015, Employee wrote Employer a letter which included the following:

As for Dr. Cherry who was retained by the employer back in September 2014 he has not yet indicated if he will release the information which the employee has requested including the raw data upon which he partially based his \$55,000.00 report. As you know, a retained expert cannot refuse to disclose the information upon which the expert based his opinion. You will advise me if Dr. Cherry still demands a subpoena or will he choose to comply with his obligations to fully disclose the basis for his opinions?

(Letter from Michael Jensen to Robert Bredesen, April 6, 2015).

13) On April 24, 2015, Employer wrote Dr. Cherry and stated:

Dr. Cherry:

You have recently performed a neuropsychological examination of Mr. Jeffrey Kollman in connection with the above captioned workers' compensation claim. Mr. Kollman's attorney is requesting a copy of the raw test data associated with your examination. Enclosed is a copy of Dr. Paul Craig's 03/30/15 response to my inquiry regarding raw test data.

In the event you have a policy to only release raw test data to a licensed Neuropsychologist or other type of medical provider, please briefly explain why you have the policy.

(Letter from Robert Bredesen to Dr. Cherry, April 24, 2015).

14) Sometime prior to April 28, 2015, Dr. Craig released to licensed professional counselor Dr. Schwager the raw test data associated with Dr. Craig's neuropsychological examination of Employee. (Letter from Dr. Schwager to Michael Jensen, April 28, 2015).

15) On April 29, 2015, Employee wrote Employer a letter which included the following:

You seem to excuse Dr. Cherry's refusal to provide the raw data scores for the reasons given by Dr. Craig in his letter to you. I do not understand why Dr. Craig wrote this letter to you. After receiving Dr. Craig's letter, Mr. Kollman asked Dr. Craig to send the raw data scores to Dr. Schwager. Dr. Craig had no problems sending them to Dr. Schwager...

...

As you know, Dr. Cherry has our permission to provide the raw data information directly to Dr. Schwager. Dr. Cherry as the selected defense medical expert is obligated to respond to the employee's discovery request. He does not enjoy the shelter of the doctor-patient privilege or any other privilege that I am aware of. The American Psychological Association's Ethics Code does not apply to defense medical experts. But, even if it did, the Ethical Code regarding Release of Test Data effective June 1, 2002 requires psychologists to disclose test data pursuant to a client release. The code favors release unless a specified exception is present. Pursuant to the code, these exceptions are permissive rather than mandatory.

Pursuant to 8 AAC 45.054(d) Dr. Cherry's defense medical evaluation should be stricken. If not stricken, the evaluation report and any testimony by Dr. Cherry must be given less weight due to Dr. Cherry's non-compliance...

(Letter from Michael Jensen to Robert Bredesen, April 29, 2015).

16) On May 14, 2015, Dr. Schwager noted Employee was scheduled to be evaluated in early July by neuropsychologist Nan Truitt, PhD. (Chart Note, Dr. Schwager, May 14, 2015).

17) On May 15, 2015, Dr. Cherry explained his refusal to produce raw test data associated with his September 2, 2014 neuropsychological evaluation of Employee. Dr. Cherry stated pursuant to Alaska Neuro Associates' policies and the HIPAA Acknowledgment signed by Employee, he will only release test data or materials to a formally trained neuropsychologist who meets the National Academy of Neuropsychology's (NAN) criteria for identifying as such. Dr. Cherry refused to release test data and materials to Dr. Schwager but agreed to release the information to a NAN "qualified" neuropsychologist. (Letter from Dr. Cherry to Robert Bredesen, May 15, 2015).

18) On May 18, 2015, Employee filed his hearing brief and contended Employer's conduct was contrary to *Kollman III*, Alaska Supreme Court decisions *Frazier v. H.C. Price/Ciri Construction JV*, 794 P.2d 103 (Alaska 1990) and *Thompson v. Cooper*, 290 P.3d 393 (Alaska 2012), prior board decisions of *Smith v. CSK Auto, Inc.*, AWCB Decision Nos. 05-0281 (October 28, 2005)

and 06-0005 (January 6, 2006), and decisions made by board designees at prehearing conferences in other cases. Employee also contended that as Employer's chosen expert, the information is relevant to establish whether Dr. Cherry is biased and Employee needs the ability to question the basis of Dr. Cherry's opinions and diagnosis. Employee contends, "The employer cannot vouch for its selected experts and at the same time claim it is under no obligation to provide any response to the employee's requests." (Employee's Hearing Brief, May 18, 2015).

19) On May 18, 2015, Employer filed its hearing brief and contended American Psychological Association Ethics Rule 9.04 grants psychologists discretion to decline to disclose test data to prevent misuse or misrepresentation. (Employer's Hearing Brief, May 18, 2015).

20) At hearing on May 21, 2015, Employee contended it had still not received any notes, dictations, calculations, computer entries, e-mails, MMPI raw data or other documents prepared by Dr. Cherry, his associates, employees of his office or Alaska Neuro Associates pertaining to Employee. Employer contended the only discovery of this nature it was aware of was handwritten entries on test materials. Employee also contended Ethics Rule 9.04 only applies to treating physicians. Employer contended Dr. Cherry's policy to only release raw test data to a licensed neuropsychologist is based on test security concerns, stating if the tests are made readily available to the public, test subjects can learn them and cheat. (Employee Hearing Contentions, Employer Hearing Contentions).

21) At hearing on May 21, 2015, Dr. Schwager testified neuropsychology is identification of brain function and is based on an examinee's performance of a task. An examiner reviews the examinee's raw data, such as how accurate a task is completed and how much time it takes to complete the task, interprets it, and forms an opinion based on the raw data. Dr. Schwager acknowledged he cannot interpret the raw data, but stated he would provide it to a neuropsychologist. (Dr. Schwager Hearing Testimony).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.005. Alaska Workers' Compensation Board

....

(h) ... Process and procedure under this chapter shall be as summary and simple as possible

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

American Psychological Association, Ethical Principles of Psychologists and Code of Conduct

INTRODUCTION AND APPLICABILITY

....

This Ethics Code applies only to psychologists' activities that are part of their scientific, educational, or professional roles as psychologists. Areas covered include but are not limited to the clinical, counseling, and school practice of psychology; research; teaching; supervision of trainees; public service; policy development; social intervention; development of assessment instruments; conducting assessments; educational counseling; organizational consulting; forensic activities; program design and evaluation; and administration. This Ethics Code applies to these activities across a variety of contexts, such as in person, postal, telephone, Internet, and other electronic transmissions. These activities shall be distinguished from the purely private conduct of psychologists, which is not within the purview of the Ethics Code.

....

9.04 Release of Test Data. (a) The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli and psychologists' notes and recordings concerning client/patient statements and behavior during an

examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)

(b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

ANALYSIS

1) Should the board order Employer to provide additional discovery to Employee or Dr. Schwager?

The crux of the parties' discovery dispute is whether Employer must provide Employee or Dr. Schwager raw test data associated with Dr. Cherry's September 2014 neuropsychological evaluation of Employee. Employee asserts Employer is required to release the raw test data to him or Dr. Schwager, and its failure to do so is contrary to *Kollman III*, Alaska Supreme Court decisions *Frazier v. H.C. Price/Ciri Construction JV*, 794 P.2d 103 (Alaska 1990) and *Thompson v. Cooper*, 290 P.3d 393 (Alaska 2012), prior board decisions of *Smith v. CSK Auto, Inc.*, AWCB Decision Nos. 05-0281 (October 28, 2005) and 06-0005 (January 6, 2006), and decisions made by board designees at prehearing conferences in other cases. Employer does not object to release of the raw test data but contends Dr. Cherry's policy of only releasing the information to a licensed neuropsychologist is within his ethical discretion. Employer contends compelling release of raw test data is a novel issue yet unaddressed under Alaska law.

The APA establishes the ethical guidelines for psychologists. Ethics Rule 9.04 grants psychologists discretion regarding release of test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test. To protect raw test data from misuse, Dr. Cherry's policy is not to release raw test data to anyone other than a licensed neuropsychologist qualified to interpret the data. Dr. Cherry informed Employee of his policy prior to Employee's September 2014 neuropsychological evaluation.

None of the cases or decisions Employee cites address production of raw test data associated with a neuropsychological evaluation. *Kollman III* ordered Employer to respond to Employee's July 28, 2014 discovery requests related to Dr. Bell. *Frazier* involved the issue of which party should bear the costs of an employer's cross-examination of authors of medical reports. *Cooper* addressed whether a *Daubert* analysis was required for the admission of a treating physician's testimony in superior court. The board and board designee decisions Employee cites dealt with other discovery issues and not production of raw test data associated with a neuropsychological evaluation. Employee's contention Employer acted contrary to established case law is not accepted.

Employee also asserts Ethics Rule 9.04 only applies to treating physicians and therefore does not apply to Dr. Cherry. Dr. Cherry is a neuropsychologist, and the Ethical Principles of Psychologists and Code of Conduct "applies ... to psychologists' activities that are part of their scientific, educational, or professional roles as psychologists. Areas covered include but are not limited to... conducting assessments..." Employee's contention the APA Ethics Code only applies to treating psychologists is not accepted.

Dr. Schwager testified neuropsychologists obtain raw test data from tests measuring the accuracy and duration of completed tasks. Dr. Schwager testified he himself cannot interpret the raw data, and if he received it, he would provide it to a neuropsychologist to interpret. Employee's right to, through an expert, review the raw data must be balanced against the importance of preserving the integrity of test materials and evaluative methods employed by Dr. Cherry, as well as his ethical obligations under the APA. Employee's request for an order directing Employer to provide Employee or Dr. Schwager raw test data associated with Dr. Cherry's September 2014 neuropsychological evaluation of Employee is denied. Dr. Cherry's policy of releasing raw test data only to a licensed neuropsychologist, such as Dr. Truitt, sufficiently balances protection against misuse of raw test data with Employee's right to, through an expert, review it. The board encourages the parties to explore this compromise.

Employee also contends he still has not received any notes, dictations, calculations, computer entries, e-mails, MMPI raw data or other documents prepared by Dr. Cherry, his associates,

employees of his office or Alaska Neuro Associates pertaining to Employee. Employer contends the only discovery of this nature it is aware of are handwritten entries on test materials that are the subject of this dispute. Employee provided no testimony or other evidence indicating additional documents may exist. Employee's bare assertion additional documents exist, without more, is insufficient to warrant an order compelling Employer to produce additional documents. On the available record, Employer's representation no other responsive documents exist is accepted.

2) Should the board order discovery sanctions against Employer?

Employer has not violated any discovery order nor failed to cooperate with discovery. Employee's request for discovery sanctions against Employer is denied.

CONCLUSIONS OF LAW

- 1) The board will not order Employer to provide additional discovery to Employee or Dr. Schwager.
- 2) The board will not order discovery sanctions against Employer.

ORDER

- 1) Employee's October 13, 2014 petition to compel is denied.
- 2) Employee's request for discovery sanctions against Employer is denied.

Dated in Fairbanks, Alaska on July 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Amanda Eklund, Designated Chair

/s/ _____
Sarah Lefebvre, Member

/s/ _____
Lake Williams, 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 JEFFREY L. KOLLMAN, employee / claimant; v. ASRC ENERGY SERVICES, employer; ARCTIC SLOPE REGIONAL CORP., insurer / defendants; Case No. 201007169; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 27, 2015.

/s/ _____
Darren Lawson, Workers' Compensation Technician