ALASKA WORKERS' COMPENSATION BOARD

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

JAMES A. "DREW" FREEMAN, Employee, Claimant, v. ASRC ENERGY SERVICES, self-insured, & UDELHOVEN OIL FIELD SYSTEM SERVICES, and its insurer ACE FIRE UNDERWRITERS INSURANCE CO., Employers, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200127952, 201003705M AWCB Decision No. 16-0013 Filed with AWCB Anchorage, Alaska on February 25, 2016

Udelhoven Oilfield System Services' (Udelhoven) (1) appeal from the designee's January 11, 2016 order striking Udelhoven's March 16, 2015 request for cross-examination, (2) January 8, 2016 petition to exclude records authored by Employee's allegedly unauthorized medical providers, (3) December 30, 2015 petition to exclude a physician's deposition transcript, and (4) Udelhoven's and ASRC Energy Services' (ASRC) joint prehearing request for clarification of which unlawfully obtained medical records will be excluded from the merits hearing under *Freeman v. ASRC Energy Services & Udelhoven Oil Field System Services*, AWCB Decision No. 15-0073 (June 26, 2015) (*Freeman I*) were heard on February 4, 2016, in Anchorage, Alaska, a date selected on January 11, 2016. Attorneys Steve Constantino and Hollis French appeared and represented James A. "Drew" Freeman (Employee). Attorney Nora Barlow appeared and represented ASRC. Attorney Timothy McKeever appeared and represented Udelhoven. There were no witnesses. The record closed at the hearing's conclusion on February 4, 2016.

ISSUES

Udelhoven appeals a January 11, 2016 prehearing conference "discovery order," which granted Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination. Udelhoven contends the "Smallwooded" medical records are hearsay and consequently Udelhoven has a right to cross-examine the records' authors before the medical evidence may be considered. As Employee has never produced the records' authors for cross-examination, Udelhoven contends the records are not admissible at hearing.

ASRC joins in Udelhoven's contentions and requested relief.

Employee contends his petition was properly granted because routine medical chart notes are trustworthy evidence upon which reasonable persons rely in conducting serious affairs. Employee contends the reports are not inadmissible hearsay. Alternately, if the statements are hearsay the records are nonetheless admissible as "statements for purposes of medical diagnosis or treatment" and as "business records." Lastly, Employee contends Udelhoven failed to state a specific reason why it wanted to cross-examine the records' authors. Employee contends the designee's discovery order was correct and should be affirmed.

1) **Should the January 11, 2016 order granting Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination be affirmed?**

Udelhoven contends Employee made numerous unlawful changes in his choice of attending physicians in the Udelhoven case. Udelhoven contends physician choices Employee made in his ASRC claim apply to his Udelhoven case. However, Udelhoven contends *Freeman I*'s holdings against ASRC on this issue apply only between Employee and ASRC and do not affect Udelhoven's right to raise a similar issue because Udelhoven played no role in ASRC's selections. Udelhoven requests an order excluding medical reports resulting from unlawful changes in physicians, including those medical reports referenced in its March 16, 2015 cross-examination request, under AS 23.30.095(a) and 8 AAC 45.082(c).

ASRC expressed no position regarding Udelhoven's contentions and requested relief.

Employee contends ASRC raised and argued this identical issue at the May 13, 2015 hearing, which gave rise to *Freeman I*. He contends Udelhoven supported ASRC's petition and argued it at the prior hearing. Consequently, Employee contends this issue is *res judicata*, Udelhoven is collaterally estopped from rearguing it and Udelhoven is not allowed "another bite at the apple." He further contends Udelhoven's affirmative defense is not timely. Employee contends he has the right to change doctors in respect to his "injury," and to date he has only changed attending physicians in his 2010 injury with ASRC. He contends 8 AAC 45.082(c) is invalid because it exceeds its statutory authority. Lastly, Employee contends Udelhoven's requested relief would create a confusing and complicated evidentiary trail contrary to the legislative mandate that workers' compensation cases be quick, fair and efficient under AS 23.30.001(1).

2) Should Udelhoven's January 8, 2016 petition to exclude medical reports resulting from unauthorized changes in Employee's physicians be granted?

Udelhoven contends the April 11, 2014 deposition of Kristen Jessen, M.D., should be excluded as evidence because it was taken before Udelhoven was a party to this case. Since Udelhoven was not a party, it did not receive a deposition notice and did not participate. Udelhoven further contends Dr. Jessen was an unlawful change in physician, so her deposition is not admissible. Udelhoven contends Dr. Jessen's deposition is also not admissible under Civil Rule 32. Lastly, it contends Employee failed to give Udelhoven notice the deposition had been filed at least two days prior to the hearing. Accordingly, Udelhoven contends its due process rights will be violated unless Dr. Jessen's deposition is excluded from consideration at a merits hearing.

ASRC joins in Udelhoven's contentions and requested relief. Further, ASRC contends Dr. Jessen's deposition is hearsay, does not fall within the "business records" exception, violates Udelhoven's "right to confrontation" and therefore should be excluded.

Employee contends the applicable regulations are designed to prevent surprise. Since Udelhoven has had Dr. Jessen's deposition transcript for nearly two years, Employee contends there is no surprise, and no prejudice to Udelhoven. Employee contends if Dr. Jessen testifies at hearing, Udelhoven's objection will become moot. He contends evidence rules generally do not apply in workers' compensation cases. Employee further contends Udelhoven has never requested cross-

examination of Dr. Jessen's deposition testimony. He contends the court reporter filed the deposition and Employee served a copy on Udelhoven, satisfying the two-day regulation. Lastly, Employee contends Udelhoven can depose Dr. Jessen at any mutually agreeable time. Thus, Employee seeks an order denying Udelhoven's request to exclude Dr. Jessen's deposition.

3) Should Dr. Jessen's April 11, 2014 deposition be admitted as evidence against Udelhoven?

ASRC and Udelhoven contend *Freeman I* made factual findings and drew legal conclusions concerning Employee's unlawful changes in attending physicians in the ASRC case. They seek an order clarifying which medical records will be excluded at a merits hearing under *Freeman I*, AS 23.30.095(a) and 8 AAC 45.082(c).

At hearing, Employee, ASRC and Udelhoven stipulated that medical records attached to ASRC's hearing brief, Exhibit B, are those records excluded pursuant to *Freeman I*, AS 23.30.095(a) and 8 AAC 45.082(c) in the ASRC case. Employee reserved his right to argue *Freeman I* decided this issue incorrectly, and 8 AAC 45.082(c) exceeds its statutory authority and is too broad.

4) Should the parties' stipulation concerning medical records to be excluded as evidence under *Freeman I* be approved as an order?

FINDINGS OF FACT

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

1) On October 22, 2001, Employee injured his head and neck and had a pinched nerve "on the right" in case 200127952, while working for Udelhoven. Employee reported he was climbing a ladder and rammed his head into overhead pipes, pushing his hardhat, head and neck down. Employee explained, "Pain shot up back of head, felt like fire." (Report of Occupational Injury or Illness, October 26, 2001).

2) On October 29, 2001, Employee saw Jim Sanders, D.O., for medical care for his Udelhoven injury. Employee reported a then-recent problem at work when he hit his head and experienced numbness and tingling in unspecified fingers. The injury reminded Employee he had sustained a head injury in his junior year in high school during football practice. Employee reported Udelhoven fired him because he had not put the head injury from football 18 years earlier on his

pre-employment job application. Employee did not remember the football incident until his head injury at Udelhoven. Dr. Sanders examined Employee, diagnosed a pinched C-5 nerve and prescribed Vioxx. (Sanders report, October 29, 2001; Physician's Report, November 13, 2001).

3) Dr. Sanders was Employee's first choice of attending physician for his 2001 Udelhoven injury. (Experience, observations, judgment and inferences drawn from the above).

4) On November 6, 2001, Employee returned to Dr. Sanders, who noted Employee wore a light-weight hardhat while at work and had decreased range of motion with a "smallish" lesion on the right at C5-6. Dr. Sanders diagnosed muscle spasms, released Employee to work and thought it was a good possibility the lesion would resolve with time. (Sanders report, November 6, 2001).

5) On November 26, 2002, Employee saw Dr. Sanders and stated both his hands had numbness, which had begun approximately three weeks earlier when he was "sleeping wrong." Employee had been doing heavy work for the last month at Veco. Dr. Sanders ordered cervical x-rays and prescribed medication. This report does not mention Employee's 2001 Udelhoven injury. (Sanders report, November 26, 2002).

6) On November 26, 2002, Employee had cervical x-rays performed at Central Peninsula General Hospital on Dr. Sanders' referral. The x-rays revealed "moderate to prominent" reversal of the lordotic curve. On the left at C3-4, x-rays showed moderate to prominent bony foraminal stenosis. On the right at C5-6, x-rays showed mild to moderate bony foraminal stenosis due to uncovertebral hypertrophy. This report does not mention Employee's 2001 Udelhoven injury. (Diagnostic Imaging, November 26, 2002).

7) On December 4, 2002, Employee returned to Dr. Sanders to review Employee's cervical x-rays and to discuss nasal congestion and similar symptoms. Dr. Sanders discussed Employee's neck situation and Employee expressed his understanding. Employee reported the medication was very helpful in relieving his cervical symptoms and he now needed a doctor's release to return to work. Employee reported, "Neck now asymptomatic." This report does not mention Employee's 2001 Udelhoven injury. (Sanders report, December 4, 2002).

8) Employee's 2002 visits with Dr. Sanders, and related testing, were not related to his 2001 Udelhoven injury but rather, were related to Employee's sleeping in an awkward position. (Experience, judgment and inferences drawn from all the above).

9) On November 8, 2007, the Alaska Workers' Compensation Appeals Commission Issued *Guys With Tools v. Thurston*, AWCAC Decision No. 062 (November 8, 2008), which declined to

exclude relevant medical evidence at hearings notwithstanding how this evidence was obtained. (Official notice).

10) On March 30, 2010, while working for ASRC at Kaparuk on Alaska's North Slope, Employee reported to David Decker, PA-C, the following:

> Going upstair[] to break, looked behind me over left sholder [sic] to see if someone was behind me. Stumbled, had a hold w/right hand of the hand rail, caught self with left hand on stair. Thumb caught the edge of stair w/most weit [sic] on thumb, felt a pop in right shoulder.

PA-C Decker told Employee to return in the morning for reevaluation. Employee's supervisor and safety personnel had escorted him to the Conoco Phillips medical facility. (Initial Report of Injury/Illness, March 30, 2010; Decker prescription, March 30, 2010; Patient Disposition Recommendation, March 30, 2010).

11) On April 12, 2010, Employee saw his primary care provider Dr. McIntosh and saw Margaret Scrimger, ANP, at Peninsula Community Health Services, formerly known as Cottonwood Health Center. Employee wondered if he needed shoulder surgery and if it could be done locally. ANP Scrimger referred Employee to Peter Ross, M.D., at Kenai Peninsula Orthopaedics. (Scrimger report, April 12, 2010; Physician's Report, April 14, 2010).

12) Though it uses April 10, 2010 for this April 12, 2010 visit, Udelhoven contends this visit was Employee's first change in his attending physician (from Dr. Sanders) for the 2001 injury. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

13) Employee's April 12, 2010 visit to Dr. McIntosh was for the 2010 ASRC injury and not for the 2001 Udelhoven injury. (Scrimger report, April 12, 2010; Physician's Report, April 14, 2010; experience, judgment and inferences drawn from the above).

14) On August 8, 2011, Employee saw Robert Hall, M.D., at Orthopedic Physicians Alaska (OPA). Dr. Hall's report says in part:

> The patient is a 45-year-old male, established patient of this practice. . . .
> . . . .
>
> The patient was seen by Dr. Mills in April 2010 for a work-related injury involving his right shoulder. . . . The patient was treated by Dr. Ross in Soldotna as the patient lives in the area. . . .
> . . . .

> I discussed with the patient as far as the shoulder, I would be concerned about his acromioclavicular joint whether that is contributing to some of his persistent pain. We discussed the utility of a diagnostic injection in that joint. If that does not relieve any of his pain, the next thing I would probably recommend would be an MRI arthrogram of the shoulder to evaluate the rotator cuff as well as the glenoid labrum.
>
> As far as the left shoulder, he has had no other evaluation to date. I would recommend at some point along the way, he should get an MRI of the left shoulder as well.
>
> For the left hand, I am unable to come up with a specific diagnosis today; but with his persistent symptoms and the CT abnormality, I think it would be worthwhile having him evaluated by Dr. Kornmesser. We will arrange that appointment. . . . (Hall report, August 8, 2011).

15) Though it uses September 8, 2011 for this August 8, 2011 visit, Udelhoven contends this visit to Dr. Hall at OPA was Employee's second change in his attending physician (from Dr. McIntosh) for the 2001 injury. It contends this was, therefore, Employee's first unlawful change in his attending physician choice for his 2001 Udelhoven injury. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

16) Employee's August 8, 2011 visit to Dr. Hall was for the 2010 ASRC injury and not for the 2001 Udelhoven injury. (Hall report, August 8, 2011; experience, judgment and inferences drawn from the above).

17) Effective July 9, 2011, the board overruled the *Guys with Tools* holding, which had refused to exclude records and opinions from unlawfully changed physicians, when the board amended 8 AAC 45.082(c) to its current language. (*Id.*).

18) This amendment to 8 AAC 45.082(c) was primarily "legislative." (Experience, judgment).

19) On November 1, 2011, Employee saw Dr. McNamara, as a "new patient" for his shoulder and thumb injuries. Dr. McNamara's report says the "Referring Provider" is "Tracy Davis, RN." Dr. McNamara's report states in pertinent part:

> HISTORY: James is here today as a Workman's Comp. referral from Tracy Davis, RN for a second opinion. . . . He was seen at Beacon initially in Anchorage, subsequently referred to Bill Mills at OPA, was told he probably had a labral injury. He chose to go see Dr. Ross in Soldotna since he was local. . . . The patient states he did not get any better with his shoulder, and he then saw RJ Hall at OPA. . . . (McNamara report, November 1, 2011).

Dr. McNamara recommended arthroscopic surgery including a Mumford procedure. As for the left shoulder and thumb, Dr. McNamara wanted to review Employee's x-rays and MRI before evaluating those conditions. Dr. McNamara also wanted nerve conduction and velocity studies for Employee's right upper extremity to rule out cubital or carpal tunnel components to his symptoms. This was "all discussed in detail with Tracy his case manager." (*Id.*).

20) Udelhoven contends Employee's November 1, 2011 visit with Dr. McNamara was his third change (from Dr. Hall) in Employee's 2001 Udelhoven injury and his second unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

21) Davis, ASRC's agent, arranged the November 1, 2011 appointment with Dr. McNamara, who specializes in "Hand-Elbow-Shoulder" surgery. Dr. McNamara's report and associated documents expressly refer only to Employee's March 2010 ASRC injury. There is no reference to Employee's 2001 Udelhoven neck injury. Employee's November 1, 2011 visit to Dr. McNamara was for the 2010 ASRC injury and not for the 2001 Udelhoven injury. (McNamara report, November 1, 2011; experience, judgment and inferences drawn from the above).

22) On March 30, 2012, Employee saw Peter Hansen, M.D., at Kenai Medical Center for a State of Alaska "interim disability exam" and discussed Employee's March 30, 2010 neck and shoulder injuries. Dr. Hansen's report states, "PRELIMINARY EXAM FOR INTERIM ASSISTANCE FILLED OUT FOR STATE OF ALASKA." (Hansen reports, March 30, 2012).

23) Udelhoven contends Employee's March 30, 2012 visit with Dr. Hansen was his fourth change (from Dr. McNamara) in Employee's 2001 Udelhoven injury and his third unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

24) Employee's March 30, 2012 visit with Dr. Hansen was not for his 2001 Udelhoven injury or for his 2010 ASRC injury, but rather, was to obtain medical evidence for government assistance. His visit with Dr. Hansen was neither a designation of, nor change in, attending physician for either injury. (Experience, judgment and inferences drawn from the above).

25) On January 18, 2013, Employee saw Dr. McIntosh for follow-up on medication and lab tests, a lesion on his back and "snorting." Employee's main concern was depression. Among other things, Employee mentioned his shoulders, neck, thumb and "joint pain," which in his "medical history" he related to his March 2010 work injury. After reviewing his medications,

Dr. McIntosh told Employee to stop taking some medications and start taking hydrocodone for his "joint pain." (McIntosh chart note, January 18, 2013).

26) Udelhoven contends Employee's January 18, 2013 visit with Dr. McIntosh was his fifth change (from Dr. Hansen) in Employee's 2001 Udelhoven injury and his fourth unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

27) On January 18, 2013, Employee got treatment, advice, an opinion and medical services for his 2010 ASRC neck, shoulder and hand injuries from Dr. McIntosh. Dr. McIntosh became Employee's first post-regulation attending physician in his 2010 ASRC case. Employee did not see Dr. McIntosh on this occasion for his 2001 Udelhoven neck injury. (Experience, observations, judgment and inferences from the above).

28) On July 29, 2013, Employee completed a questionnaire for Dr. McNamara's office. He stated Dr. McIntosh and "Dr. Carleson" [sic] had referred him. (Intake sheet, July 29, 2013).

29) On July 29, 2013, Dr. McNamara examined Employee and wrote Dr. Jessen referring Employee to her so she could "continue work up" on his neck and obtain an MRI as needed. Dr. McNamara's letter also noted he had examined Employee for his left shoulder and thumb, "which [were] controverted initially and apparently [have] been reversed." (McNamara chart note, July 29, 2013; McNamara letter, July 29, 2013).

30) Udelhoven contends Employee's July 29, 2013 visit with Dr. McNamara was his sixth change (from Dr. McIntosh) in Employee's 2001 Udelhoven injury and his fifth unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

31) Employee's July 29, 2013 visit with Dr. McNamara was on referral from Dr. McIntosh, his first designated attending physician post-regulation in his 2010 ASRC case. Employee did not see Dr. McNamara on this occasion for his 2001 Udelhoven neck injury. (Experience, observations, judgment and inferences from the above).

32) Udelhoven contends Employee saw Dr. McIntosh on October 4, 2013, and contends this visit was his seventh change (from Dr. McNamara) in Employee's 2001 Udelhoven injury and his sixth unlawful change in attending physician in the 2001 case. However, the board's files contain no medical record from Dr. McIntosh dated October 4, 2013, so no factual conclusions

can be drawn regarding this record. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1; observations).

33) On November 5, 2013, Dr. Macintosh completed a document entitled "Multiple Impairment Questionnaire" for the Binder & Binder law firm, also known as "The National Social Security Disability Advocates, LLC," located in Seattle, Washington. Dr. McIntosh responded to 18 questions regarding Employee's medical conditions, symptoms, physical limitations, medications, treatments and physical capacities. (Multiple Impairment Questionnaire, November 5, 2013).

34) Dr. McIntosh's November 5, 2013 questionnaire was completed for Social Security Disability purposes at Binder & Binder's request. It was not completed for Employee's 2001 or 2010 injuries. (*Id.*; experience, judgment and inferences drawn from the above).

35) On December 11, 2013, Dr. McNamara performed surgery on Employee's left thumb. (Operative Report, December 11, 2013).

36) Udelhoven contends Employee's December 11, 2013 surgery with Dr. McNamara was his eighth change (from Dr. McIntosh) in Employee's 2001 Udelhoven injury and his seventh unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

37) Employee's December 11, 2013 surgery with Dr. McNamara was for his thumb and had no connection to his 2001 Udelhoven injury. Dr. McNamara performed thumb surgery to address an injury resulting from Employee's 2010 ASRC accident. (Operative Report, December 11, 2013; experience, judgment and inferences drawn from the above).

38) On April 11, 2014, ASRC deposed Dr. Jessen, who stated in her deposition:

> Q. . . . you had indicated that you thought that perhaps there was -- he had injured his neck in the fall in 2010?
>
> A. Yes.
>
> Q. And can you tell me why?
>
> A. Just because of the mechanism of the injury. If he has his hand up and he's falling down, obviously the right shoulder torque would be because of the hand being on the hand rail, it's going to be pulled back and rotated out.

But if he's coming down on his left side enough where he's damaging his thumb and his shoulder, the natural instinct is to jerk your head back so your face doesn't hit, and that's just going to be reflex.

And so basically I've seen a lot of people do that kind of fall and they give themselves whiplash simply because they are jerking back so fast to prevent their face from hitting. (Jessen deposition, April 11, 2014, at 45-46).

. . . .

Q. . . . So as we sit here -- and, you know, you are a scientist -- looking at this, can you say that on a more probable than not basis that that [2010] work injury caused injury to his neck or caused those symptoms?

A. Since the -- the radic [radiculopathy] on the one side was acute, generally that has to come from a current or recent trauma. (*Id*. at 65).

. . . .

Q. . . . Do you think the 2001 injury accelerated any pre-existing degeneration Mr. Freeman had before that injury?

A. Yes.

Q. And you've previously testified that that degeneration was probably progressive?

A. Yes.

Q. And if I understand your testimony right now, it progressed more fast because of the 2001 injury than it probably would have had he not had the 2001 injury?

A. Yes.

. . . .

Q. Okay. Was the accelerated degeneration he had in March 29, 2010, the day before, that progression of degeneration, was that a substantial factor that combined with the forces that went to work on his neck when he fell to bring about the symptoms -- and right now we're just talking about the symptoms -- the symptoms that he described beginning March 16, 2010?

A. In the physical therapy notes, yes.

Q. Okay. So but for the 2001 injury, it's probable that he would not be as symptomatic or having the neck problems that he did to the degree that he did in 2010?

A. Yes. The injury would have been -- would have been less if he had one, yes.

. . . .

Q. Was the cervical injury, the injury Mr. Freeman had in 2001, his neck injury in 2001 and the degeneration that it accelerated, was that a substantial factor in the extent of the pathology that was revealed by your EMG studies in November 2011?

A. The contribution of injury in 2001, you mean?

Q. Yes.

A. Yes.

Q. You have testified earlier that you've recommended physical therapy for Mr. Freeman's neck. Was the injury in 2001 and the accelerated degeneration that it caused, in combination with 2010 injury, was the 2001 injury a substantial factor in the need for treatment that you've recommended?

A. More than likely, yes.

Q. More probable than not?

A. More probable than not, yeah. (*Id*. at 116-18).

. . . .

Q. . . . Would I be correct in understanding that the evidence suggests to you on a more probable than not basis to a reasonable degree of medical probability that Mr. Freeman had a neck injury 2001?

A. Yes.

Q. Is it -- using -- applying those same standards, is it your opinion that the neck injury in 2001 was a substantial factor in accelerating cervical degeneration?

A. Yes.

Q. Is it your opinion that the accelerated cervical degeneration, combined with the forces acting on Mr. Freeman's neck in the fall that took place in March of 2010, that the accelerated degeneration was a substantial factor in the onset of the symptoms, his neck symptoms and neurological upper extremity symptoms, after that date?

A. Yes.

Q. Is it your opinion that even though the accelerated degeneration that pre-existed March 2010, that it was the fall, the forces acting on his neck in the fall, . .

> . was the substantial cause in relation to all other causes for the onset of symptoms that he experienced in his neck and his upper right extremity after March of 2010?
>
> A. Yes.
> . . . .
>
> Q. . . . did the symptoms that were caused by the March 2010 injury, have those symptoms, perhaps somewhat worse, but basically the same symptoms, neck pain, arm numbness and tingling, have those symptoms basically continued to the last time you saw him?
>
> A. Yes.
>
> Q. And are those symptoms the substantial cause for the treatment that you recommended, the physical therapy that you recommended?
>
> A. Yes. (*Id*. at 127-29).

39) Prior to Dr. Jessen's 2014 deposition testimony, Employee did not know, and in the exercise of reasonable diligence would not have come to know, the nature of his neck disability and its possible relation to his 2001 Udelhoven employment. (Experience, judgment and inference drawn from all the above).

40) On April 18, 2014, based on Dr. Jessen's testimony, Employee filed claims against Udelhoven in cases 200127952 and 200128040 for an October 22, 2001 "head and neck" injury. Employee listed Dr. Jessen as his attending physician for the Udelhoven cases and sought temporary total disability from March 8, 2012 and continuing, permanent partial impairment when rated, medical and related transportation costs, interest, attorney's fees, costs and a second independent medical evaluation (SIME). The division had inadvertently assigned two case numbers to the same 2001 injury, which accounts for the two 2001 case numbers. (Workers' Compensation Claims, April 18, 2014; observations, and inferences from the above).

41) On April 28, 2014, Employee filed a petition in case 201003705, the ASRC injury, seeking to join Udelhoven as a party. (Petition, April 25, 2014).

42) On May 14, 2014, Employee served five compact discs on Udelhoven's attorney in case 200128040. Included were pleadings, medical records, discovery, reemployment documents, correspondence and depositions in case 201003705. Dr. Jessen's April 11, 2014 deposition was among the documents served on Udelhoven's lawyer. (Veatch letter, May 14, 2014).

43) On May 15, 2014, Dr. McNamara examined Employee's left thumb. Finding Employee's thumb medically stable, Dr. McNamara referred him to Alaska Spine Institute (ASI) for a left thumb permanent partial impairment rating. Employee also had right and left shoulder symptoms and asked if Dr. McNamara would see him under Medicaid for his left shoulder. Dr. McNamara told Employee he could schedule separate appointments for his right and left shoulders. (McNamara chart note, May 15, 2014).

44) On May 15, 2014, Dr. McNamara also responded to a check-the-block form letter stating Employee's left thumb was medically stable. The form letter's author is not identified. (Statement of Michael McNamara, M.D., May 15, 2014).

45) Udelhoven contends Employee's May 15, 2014 visit with Dr. McNamara was his ninth change (from an unspecified physician) in Employee's 2001 Udelhoven injury and his eighth unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

46) Employee's May 15, 2014 visit with Dr. McNamara involved only Employee's thumb and shoulders, was for his 2010 ASRC injury and made no reference to his 2001 Udelhoven injury. There is no evidence Employee requested Dr. McNamara's check-the-box statement at this visit. Dr. McNamara's statement was expressly limited to Employee's left thumb, injured in his 2010 ASRC accident. (Experience, judgment and inferences drawn from the above).

47) On June 24, 2014, court reporting service Peninsula Reporting filed Dr. Jessen's deposition transcript with the board. Peninsula Reporting served copies of the transmittal letter on attorneys Barlow and Constantino, but not on attorney McKeever. (DiPaolo letter, June 24, 2014).

48) On July 9, 2014, Dr. Macintosh wrote a letter stating she had been treating Employee approximately once per month since September 26, 2012. She listed his diagnoses which included his shoulders, thumb and cervical spine. Dr. McIntosh listed Employee's physical restrictions and stated they were expected to persist for at least 12 months. It referenced a multiple impairment questionnaire Dr. Macintosh had completed in November 2013. (McIntosh letter, July 9, 2014).

49) Udelhoven contends Dr. McIntosh's July 9, 2014 letter was Employee's 10th change (from an unspecified physician) in his 2001 Udelhoven injury and his ninth unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

50) Dr. McIntosh's July 9, 2014 letter was written for Social Security disability purposes and not for either the 2001 Udelhoven or 2010 ASRC injuries. (McIntosh letter, July 9, 2014; experience, judgment, observations and inferences drawn from the above).

51) On September 29, 2014, Employee returned to Dr. Hall for a "second opinion involving right shoulder pain." Dr. Hall reviewed the recent right shoulder MRI and advised Employee, "after two surgeries on the shoulder," further surgery had a "very low likelihood" of improving his situation. However, Dr. Hall opined a Mumford procedure might help resolve pain from Employee's acromioclavicular joint. "Radiculopathy" or a brachial plexus injury from his surgical blocks could account for shoulder numbness. Dr. Hall recommended electrodiagnostic testing to evaluate these possibilities, and said he would find a physician who could perform testing closer to Employee's home. (Hall chart note, September 29, 2014).

52) Effective September 29, 2014, Dr. Hall became Employee's "one change" in his "choice of attending physician" in the ASRC case. (Observations, judgment).

53) Udelhoven contends Dr. Hall's September 29, 2014 visit was Employee's 11th change (from Dr. McIntosh) in his 2001 Udelhoven injury and his 10th unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

54) Employee's September 29, 2014 visit with Dr. Hall was for his 2010 ASRC injury. He changed to Dr. Hall because he was disillusioned with Dr. McNamara who had been treating him solely for the 2010 injury. Employee did not see Dr. Hall on this date for his 2001 Udelhoven injury. (Employee; experience, judgment, observations and inferences drawn from the above).

55) On September 30, 2014 and October 1, 2014, respectively, Steven Stauber, LCSW, and Dr. McIntosh signed a letter stating they had been treating Employee for depression since September 26, 2012. Among other things, they said "depression increases his shoulder and hand pain." (Stauber and McIntosh letter, September 30, 2014 and October 1, 2014, respectively).

56) Udelhoven contends this letter is Employee's 12th change (from Dr. Hall) in his 2001 Udelhoven injury and his 11th unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

57) The Stauber and McIntosh letter was for Social Security and not for the 2001 Udelhoven or 2010 ASRC injuries. (Experience, judgment and inferences drawn from the above).

58) On October 1, 2014, Dr. Hall completed a written referral to Dr. Jessen for additional electrodiagnostic testing for the 2010 ASRC injury. (Hall Referral Request, October 1, 2014).

59) On October 20, 2014, Employee saw Dr. Jessen for his right shoulder and right cervical radiculopathy and "possible head injury problems," on referral from Dr. Hall. Dr. Jessen performed electrodiagnostic and cervical x-ray studies, which were abnormal. (Jessen report, October 20, 2014).

60) Employee's visit with Dr. Jessen on October 20, 2014, was a referral by his attending physician Dr. Hall in the 2010 ASRC case to a specialist in the 2010 ASRC case. It was not a change in Employee's attending physician in the 2010 ASRC case. (Experience, judgment and inferences drawn from the above).

61) By the time Employee saw Dr. Jessen on October 20, 2014, he had knowledge of the nature of his disability and its relationship to his Udelhoven employment in respect to his cervical spine, given Dr. Jessen's April 11, 2014 deposition, as reflected by Employee's April 18, 2014 claims against Udelhoven. On October 20, 2014, Employee obtained medical services from Dr. Jessen for his 2001 Udelhoven injury. Effective October 20, 2014, Dr. Jessen became Employee's "one change" in his "choice of attending physician" in the 2001 Udelhoven case. (Experience, judgment and inferences drawn from the above).

62) On October 20, 2014, Employee saw Dr. McIntosh solely for a testosterone shot. (McIntosh Progress Note, October 20, 2014).

63) Udelhoven contends Employee's October 20, 2014 visit with Dr. McIntosh was Employee's 13th change (from an unspecified physician) in his 2001 Udelhoven injury and his 12th unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

64) Employee's October 20, 2014 visit with Dr. McIntosh for a testosterone shot was not for either his 2001 Udelhoven or his 2010 ASRC injuries. (Experience, judgment and inferences drawn from the above).

65) On October 27, 2014, Employee called Dr. Hall's office to "follow up right shoulder pain." Dr. Hall said he had obtained Dr. Jessen's electrodiagnostic test records, which demonstrated changes consistent with the right C5-6 radiculopathy. Dr. Jessen's notes also mentioned a November 2013 MRI that showed evidence of disc pathology at the same level. Dr. Hall said he

would be “hesitant” to recommend further shoulder surgery but would refer Employee to a spine surgeon in the Kenai area for his neck. (Hall chart note, October 27, 2014).

66) Udelhoven contends Employee’s October 27, 2014 call to Dr. Hall and resultant referral was Employee’s 14th change (from an unspecified physician) in his 2001 Udelhoven injury and his 13th unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

67) Employee’s October 27, 2014 call to Dr. Hall was to follow-up with Dr. Hall after Dr. Jessen’s electrodiagnostic testing performed for the 2010 ASRC claim. Given Dr. Jessen’s test results and MRI findings, Dr. Hall referred Employee to a cervical specialist near Employee’s home to evaluate his neck in the 2010 ASRC case. This telephone call with Dr. Hall, and Dr. Hall’s resulting referral to a local spine specialist, was not an unlawful change in Employee’s attending physician choice in his 2001 Udelhoven claim. (Hall chart note, October 27, 2014; experience, judgment and inferences drawn from the above).

68) On November 13, 2014, Employee saw Dr. McIntosh again for chronic pain follow-up related to his neck and shoulders. Dr. McIntosh opined Employee’s opioid therapy benefits, including pain relief, outweighed any risks. This visit also addressed several non-work-related medical conditions. (McIntosh chart note, November 13, 2014).

69) Udelhoven contends Employee’s November 13, 2014 visit with Dr. McIntosh was Employee’s 15th change (from an unspecified physician) in his 2001 Udelhoven injury and his 14th unlawful change in attending physician in the 2001 case. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, Exhibit 1).

70) On November 13, 2014, because Dr. McIntosh provided medical services related to Employee’s neck and shoulders, and because Employee’s neck problems could result from either injury, it was an unlawful physician change in both cases. (Experience, judgment).

71) Table I from *Freeman I* found various facts and effective dates related to ASRC’s physician change petition in respect to his 2010 ASRC injury. The *Freeman I* Table I is reproduced below with revisions to reflect Employee’s physician selections and changes in both his 2001 Udelhoven case and in his 2010 ASRC case:

Table I

Case:	Date:	Provider:	Selected/Referred by:
2001	October 29, 2001	Sanders	Selected-Employee
2010	March 30, 2010	Conoco Phillips Clinic	Selected-ASRC
2010	March 31, 2010	Beacon -Marlow, PA-C	Selected-ASRC
2010	April 1, 2010	Beacon -Marlow, PA-C	Referred-Beacon
2010	April 1, 2010	OPA-Sturley, PA-C	Referred-Beacon
2010	April 1, 2010	OPA-Eule	Referred-OPA
2010	April 1, 2010	OPA-Mills	Referred-OPA
2010	April 1, 2010	Alaska Innovative Imaging	Referred-Beacon
2010	April 5, 2010	OPA-Mills	Referred-OPA
2010	April 8, 2010	Frontier PT	Referred-OPA
2010	April 10, 2010	McIntosh/Scrimger	Selected-Employee
2010	April 28, 2010	KPO-Ross	Referred-Scrimger
2010	August 25, 2010	KPO Rehab & Sports Medicine PT	Referred-Ross
N/A	July 9, 2011	8 AAC 45.082(c) effective	*Guys with Tools* overruled
2010	August 8, 2011	OPA-Hall	Selected-ASRC
2010	August 8, 2011	OPA-Botson	Referred-Hall
2010	October 5, 2011	OPA-Kornmesser	Referred-Hall
2010	November 1, 2011	McNamara	Selected-Davis/ASRC
2010	November 28, 2011	Jessen	Referred-McNamara
2010	December 9, 2011	MediCenter	Referred-McNamara
2010	December 13, 2011	First Choice Home Healthcare	Referred-McNamara
2010	February 2, 2012	EME-Marble	Selected-ASRC
N/A	March 30, 2012	Kenai Medical Center-Hansen	State of Alaska
2010	January 18, 2013	McIntosh	Selected-Employee
2010	July 29, 2013	McNamara	Referred-McIntosh
N/A	November 5, 2013	McIntosh	Social Security Disability
2010	November 7, 2013	Jessen	Referred-McNamara
2010	April 11, 2014	Jessen deposition	Referred-McNamara
2010	April 29, 2014	Bock	Referred-McIntosh
2010	May 15, 2014	McNamara	Referred-McIntosh
2010	July 9, 2014	McIntosh	Social Security Disability
2010	August 18, 2014	ASI-Levine	Referred-McNamara
2010	September 29, 2014	OPA-Hall	Selected-Employee
N/A	September 30, 2014	Stauber LCSW/McIntosh	Social Security Disability
2010	October 20, 2014	Jessen	Referred-Hall
2001	October 20, 2014	Jessen	Selected-Employee
N/A	October 20, 2014	McIntosh	Testosterone shot
2010	October 27, 2014	Hall	Prior Selected-Employee
2001	November 13, 2014	McIntosh	Selected-Employee
2010	November 13, 2014	McIntosh	Selected-Employee
2010	December 15, 2014	Kenai Spine-Winter, PA-C	Referral-Hall
2010	January 5, 2015	Weeks LCSW	Referral-McIntosh
2010	February 10, 2015	Kenai Spine-Bote	Referral-Hall

72) Table I from *Freeman I* did not include Employee's attending physician choices or changes for his 2001 Udelhoven case because that issue was not previously before the board. (Petition to Exclude, February 3, 2015; Employee Answer to ASRC Petition to Exclude, February 23, 2015; Employer's Hearing Brief, May 6, 2015; Employee's Memorandum, May 6, 2015; observations).

73) On March 16, 2015, Udelhoven filed a *Smallwood* objection to the following medical records: Herbert Bote, M.D., February 10, 2015 progress report filed on ASRC's March 4, 2015 medical summary; Dr. Bote February 26, 2015 progress report filed on ASRC's March 4, 2015 medical summary; Dr. Jessen October 20, 2014 progress note filed on Employee's March 9, 2015 medical summary; and Dr. Jessen October 20, 2014 note and testing filed on Employee's March 9, 2015 medical summary. (Request For Cross-Examination, March 16, 2015).

74) The four medical records subject to Udelhoven's March 16, 2015 request for cross-examination contain statements by Employee and by the examining physicians made for purposes of medical diagnosis or treatment. They describe Employee's medical history, past or present symptoms, pain, sensations and the inception or general character of the cause or external source of Employee's reported symptoms for purposes of diagnosis and treatment. Each report is also a record of acts, events, conditions, opinions, and diagnoses made at or near the time the records were created. These records are from physicians who have regularly conducted business activities. Physicians routinely make and keep medical records noting the patients' complaints and the physicians' related diagnoses. (Dr. Bote's February 10, 2015 and February 26, 2015 reports; Dr. Jessen's February 20, 2014 reports; experience, observations, judgment and inferences drawn from all the above).

75) Based upon the above factual findings and related Table I, the four medical records subject to Udelhoven's March 16, 2015 request for cross-examination did not result from unlawful changes in Employee's attending physician in the 2001 Udelhoven case. (Experience, judgment, and inferences drawn from all the above).

76) On January 11, 2016, the parties attended a prehearing conference and set six issues for hearing on February 4, 2016. At this prehearing conference, the designee addressed Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination of certain medical records. The designee determined this "was a discovery issue the designee could address under AS 23.30.108." Citing to Alaska Supreme Court precedent, the designee

said medical records admissible as exceptions to the hearsay rule could be considered at hearing without the person offering the records bearing the cost of making the authors available for cross-examination. The designee granted Employee's petition to quash and treated Udelhoven's subsequent objections as an oral petition for review of the designee's decision and included it as one of the six issues set for hearing. (Prehearing Conference Summary, January 11, 2016).

77) On January 13, 2016, Employee filed an opposition to Udelhoven's December 30, 2015 petition to exclude Dr. Jessen's April 11, 2014 deposition from evidence at a merits hearing. Employee's opposition briefly summarized the facts and emphasized Dr. Jessen had "unexpectedly testified" in her deposition that Employee's October 2001 neck injury with Udelhoven was "a substantial factor" in his need for neck treatment after March 2010. Consequently, "based on Dr. Jessen's testimony," Employee filed a claim against Udelhoven alleging its "contingent liability" for Employee's neck injury. Employee contended Udelhoven had filed a request for cross-examination on Dr. Jessen's October 20, 2004 report, but not on her April 11, 2014 deposition transcript. Employee's opposition contended Udelhoven was required to file a request for cross-examination of Dr. Jessen's medical opinions expressed in her April 11, 2014 deposition within 10 days of a then-recent affidavit of readiness for hearing he had filed on October 2, 2015, but did not. Employee contended Udelhoven waited 18 months to object to Dr. Freeman's deposition testimony and did nothing in the interim to secure either its exclusion or to re-depose Dr. Jessen. Consequently, Employee contended Udelhoven was free to re-depose Dr. Jessen at its expense and the existing deposition transcript should not be excluded. Employee further contended formal evidentiary and discovery rules do not apply in workers' compensation cases and all requirements to admit and consider Dr. Jessen's deposition transcript had been met. Lastly, Employee contended even should Dr. Jessen's deposition transcript be excluded against Udelhoven, it was still admissible against ASRC. Employee sought an order denying Udelhoven's petition to exclude Dr. Jessen's deposition transcript. (Employee's Opposition to Udelhoven's 12/30/2015 Petition, January 13, 2016).

78) In its January 28, 2016 hearing brief, ASRC identified the issues set for hearing and contended it was interested only in identifying the medical records excluded under *Freeman I*. ASRC attached to its hearing brief as "Exhibit B" records it said should be excluded in conformance with *Freeman I*, consisting of records from Drs. Macintosh and Kahn dated after

September 29, 2014. (Employer ASRC Energy Services' Hearing Brief for 2/4/16 Hearing, January 28, 2016).

79) In its January 28, 2016 hearing brief, Udelhoven summarized the facts and addressed the issues set for hearing. It argued the designee incorrectly quashed its *Smallwood* objection to various medical records and inappropriately applied Alaska Supreme Court precedent. Further, Udelhoven contended the subject records should not be considered at hearing in any event because they resulted from Employee's unlawful change in his attending physicians in the 2001 case. Udelhoven summarized what it believed were Employee's multiple, excessive, unlawful changes in his attending physician for the 2001 injury. Udelhoven provided its own attending physician chart to correct what it perceived as an "incomplete" Table I from *Freeman I*. Udelhoven distinguished its request for an order excluding Employee's unlawful changes in his attending physicians from ASRC's previous petition seeking similar relief. Udelhoven maintained it had simply joined in ASRC's petition, but facts specific to ASRC and its agents, which voided some of Employee's attending physician changes, did not apply to Udelhoven, and it had an independent right to seek the same relief in the 2001 case. Udelhoven contended the board could not rely on Dr. Jessen's deposition in deciding the Udelhoven case because it was not a party and did not attend, Dr. Jessen was an unlawful referral from a physician to which Udelhoven never consented, because the deposition did not comply with Alaska Civil Rule 32, and because Employee did not comply with the procedural requirement to file Dr. Jessen's deposition and give notice of the filing at least two days prior to the hearing. Udelhoven noted Employee and ASRC had agreed the divorce transcript issue was premature and should be deferred until the merits hearing, and joined in this stipulation. Lastly, Udelhoven reiterated its request and joined with ASRC's request to identify medical records excluded under *Freeman I*, and sought exclusion of additional medical records pursuant to Udelhoven's petition. (Hearing Brief of Udelhoven and ACE/ESIS for Hearing on February 4, 2016, January 28, 2016).

80) In his February 1, 2016 hearing brief, Employee reiterated he was surprised when Dr. Jessen testified in April 2014 that, in her opinion, the 2001 Udelhoven injury was "a substantial factor" in the need for Employee's neck treatment following the 2010 ASRC injury. He contended it was with "great reluctance" he agreed to cancel a previously scheduled hearing and join Udelhoven as a party to his claim. Employee conceded Udelhoven has no responsibility for Employee's shoulder or thumb injuries. He further contended Udelhoven's liability for

Employee's neck "would be secondary to ASRC under the last injurious exposure rule." Employee contended the designee properly granted his petition to quash Udelhoven's *Smallwood* objection pursuant to Alaska Supreme Court precedent. He contended Udelhoven's petition to exclude medical records resulting from unlawful changes in his physician choices should be denied because it was untimely, it did not differentiate between the two work injuries, the controlling regulation is invalid and inconsistent with the statute, the petition was *res judicata* from *Freeman I* and Udelhoven was collaterally estopped from raising the issue again. Employee contended Dr. Jessen's deposition should be admissible at hearing and Udelhoven was free to depose her at its expense. Though Employee contended 8 AAC 45.082(c) exceeded its statutory authority, he agreed *Freeman I* was the "law of the case," and stipulated along with ASRC and Udelhoven that Dr. McIntosh's medical records after September 29, 2014, and all reports from those to whom Dr. Macintosh referred Employee should also be excluded as evidence at hearing. Lastly, Employee contended *Freeman I* had denied ASRC's request to file a transcript from Employee's divorce proceeding and the transcript should be stricken from the record. (Employee's Memorandum, February 1, 2016).

81) At hearing on February 4, 2016, ASRC and Udelhoven agreed Employee could properly file a petition to exclude either employers' medical experts' reports, alleging a violation in the employers' choices of physician under AS 23.30.095(e) and 8 AAC 45.082(c). However, both employers denied making an unlawful change in physician. (Parties' statements at hearing).

82) At hearing, neither ASRC nor Udelhoven contended the board's designee had improperly characterized Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination as a "discovery issue." (Record).

83) At hearing, all parties stipulated Employee's July 13, 2015 petition to exclude the divorce proceeding transcript and his request for attorney's fees and cost would be held in abeyance. (Parties' hearing statements).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and . . . parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department 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. . . .

In *McKean v. Municipality of Anchorage*, 783 P.2d 1169 (Alaska 1989), an injured worker litigated her temporary total disability rate before the board, which issued a final decision. When her employer changed her disability status to permanent total disability, the injured worker attempted to adjudicate a new disability rate in a subsequent claim. The board held the latter claim was *res judicata*, used in its broad sense to include collateral estoppel. On appeal, *McKean* held *res judicata* is applied to workers' compensation cases but not always as rigidly as it is in judicial proceedings. *McKean* listed prerequisites to applying *res judicata* and its subset collateral estoppel in a workers' compensation case: (1) the defense must be asserted against a party or one in privity with a party to the first action; (2) the issue to be precluded from relitigation must be identical to that decided in the first action; and (3) the issue in the first action must have been resolved by a final judgment on the merits. *McKean* found element (2) was not met. The first board proceeding involved the claimant's compensation rate for temporary disability. The second claim involved her request for a permanent disability rate. *McKean* noted factors for determining a temporary versus a permanent disability rate differed. *McKean* reversed and remanded and held the board had erred by applying *res judicata* and collateral estoppel to the second claim. (*Id*. at 1172-73).

In *Robertson v. American Mechanical, Inc*., 54 P.3d 777 (Alaska 2002), the Alaska Supreme Court addressed a situation where an injured worker claimed a low back injury on October 26, 1994. The board heard and denied his claim. The injured worker filed an amended injury report identical to his original report, but stating his injury may have occurred on September 1, 1994. The board dismissed Robertson's amended claim on grounds it was barred by *res judicata* and collateral estoppel. *Robertson* explained that *res judicata* precludes a subsequent suit between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit. *Robertson* determined the injured worker's two separate claims were identical for the same back injury, and "claim splitting," which is "a conventional application of the doctrine of *res judicata*" barred his claim. *Robertson* further noted when analyzing claim splitting, "the relevant inquiry is not whether the two claims are grounded in different theories, but whether they arise out of the same transaction or core set of facts." Since he could have argued in his original claim that he was injured either on September 1, 1994 or on October 26, 1994, and both claims were based on the same injury and "core set of facts," Robertson's claims should have been brought together. Because they were not, his amended claim was appropriately barred. (*Id*. at 779-80).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .

In an unlawful-change-of-physician case decided before the current regulation addressing AS 23.30.095(a) became effective, *Witbeck v. Superstructures, Inc*., AWCAC decision No. 014 (July 13, 2006) said before the board determines whether the injured worker is "doctor shopping," it should determine whether "the employee and his attending physician have complied with the statute and regulation." Motive for a change is irrelevant. But, if the statute and regulation have not been followed, "the change is excessive as a matter of law." *Id*. at 10.

> **AS 23.30.108. Prehearings On Discovery Matters; Objections to Requests For Release of Information; Sanctions For Noncompliance.**
> . . . .
>
> (c) . . . 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. . . . The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

Several definitions of "abuse of discretion" appear in Alaska law although none appears in the Act. The Alaska Supreme Court has stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan* v. *University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey* v. *Collier 361* P.2d 884 (Alaska 1962).

> **AS 23.30.115. Attendance and fees of witnesses**. (a) . . . the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. . . .

> **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. . . .

> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
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> (19) 'employee' means an employee employed by an employer as defined in (20) of this section;
>
> (20) 'employer' means . . . a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;
> . . . .
>
> (24) 'injury' means accidental injury or death arising out of and in the course of employment. . . .

"[A]n injury is latent so long as the claimant does not know, and in the exercise of reasonable diligence (taking into account his education, intelligence, and experience) would not have come to know, the nature of his disability and its relation to his employment." *Dafermo v. Municipality of Anchorage*, 941 P.2d 114 (Alaska 1997).

> **8 AAC 45.050. Pleadings**.
> . . . .
>
> (c) **Answers**.
>
> (1) An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be serve upon all parties. . . .
> . . . .
>
> (3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that a lay person knows what proof will be required at the hearing. . . .
> . . . .
>
> (e) **Amendments**. A pleading may be amended at any time before award upon such terms as the board or its designee directs. . . .
>
> (f) **Stipulations**.
> . . . .
>
> (2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing. . . .
>
> **8 AAC 45.054. Discovery.** (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition. . . .

Miller v. Nana Regional Corp., AWCB Decision No. 13-0169 (December 26, 2013), addressed "extraordinarily unique facts" and the majority held the employer's otherwise unlawful "change" would be "excused through the waiver process." In *Miller*, the employer's supervisory employee told the injured worker shortly after her injury that she had a medical appointment, which she attended. But no one knew who chose the medical provider at issue, or why he was even

examining the employee, and there was no resultant medical record other than a referral for diagnostic imaging. Further, the employer had expended large sums on additional employer medical evaluation (EME) evidence and the *Miller* majority determined it would be "extremely unfair and unreasonable" to strike these EME reports given this "confounded evidence." *Miller* held the initial, supervisory direction for medical care, though technically the employer's first "selection," would be excused making this first medical provider not an EME. *Miller* at 18-22.

In *Guys With Tools, LTD v. Thurston*, AWCAC Decision No. 062 (November 8, 2007), the commission reviewed a case where the board had applied an "exclusionary rule" and refused to consider medical evidence offered by the injured employee, finding the evidence resulted from an unlawful change in physician under AS 23.30.095(a). *Guys With Tools* held, notwithstanding AS 23.30.095(a), (e) and decades of contrary board decisions, the board lacked legal authority to form a medical record "exclusionary" sanction against parties who made an unlawful changes in physicians. *Guys With Tools* held an existing sanction prevented an employer from paying for medical services rendered by an employee's unlawfully changed provider. Rather than exclude such evidence, *Guys With Tools* held the board should consider "any relevant evidence" in making its decision. *Id*. at 22.

> **8 AAC 45.052. Medical summary**.
> . . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary . . . if any new medical reports have been obtained since the last medical summary was filed.
>
> (1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination. . . .
>
> (2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.

> (3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,
>
> > (A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and
> >
> > (B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.
>
> (4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.
>
> (5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties. . . .
>
> **8 AAC 45.082. Medical treatment**. . . .
>
> (b) A physician may be changed as follows:
> . . . .
>
> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician. . . .

Effective July 9, 2011, amended 8 AAC 45.082(c), addressing a party's unlawful change in its physician choice, states:

> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a), or (e) or this section, the board will not

consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. . . .

8 AAC 45.120. Evidence. (a) . . . Except as provided in this subsection and 8 AAC 45.112, a party who wants to present a witness's testimony by deposition must file a transcript of the deposition with the board at least two working days before the hearing. . . . If a party fails to file a transcript of a witness's deposition at least two days before the hearing and if the board or its designee determines that neither unusual and extenuating circumstances exists nor is the party extremely indigent, the witness's deposition testimony will be excluded from the hearing, except for impeachment purposes, and will not be relied upon by the board in reaching its decision. . . .
. . . .

(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. . . . Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

(g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.

(h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that

(1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible;

> (2) the document is not hearsay under the Alaska Rules of Evidence; or
>
> (3) the document is a report of an examination performed by a physician chosen by the board under AS 23.30.095(k) or AS 23.30.110(g).
>
> (i) If a hearing is scheduled on less than 20 days' notice or if a document is received by the board less than 20 days before hearing, the board will rely upon that document only if the parties expressly waive the right to cross-examination or if the board determines the document is admissible under a hearsay exception of the Alaska Rules of Evidence.

In *Baker v. Reed-Dowd Co.*, 836 P.2d 916 (Alaska 1992), the parties had deposed a medical witness but had never filed the deposition transcript. At hearing, both parties referred to the physician's deposition but the board refused to consider the deposition as evidence because it had not been properly filed. On appeal, Baker contended the board had erred by failing to consider the deposition. The Alaska Supreme Court agreed and stated in refusing to consider the missing deposition, "the Board erred." *Baker* directed the board to "obtain a copy this deposition and give it due consideration" on remand. (*Id*. at 920).

> **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.

> **8 AAC 45.900. Definition**s. (a) In this chapter
> . . . .
>
> (11) 'Smallwood objection' means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976). . . .

In *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976), the Alaska Supreme Court found "the statutory right to cross-examine is absolute and applicable to the board." *Id.* at 1265. *Smallwood* recommended the board adopt procedures to "fill the present procedural void relating to medical reports and the right of cross-examination." *Id.* at 1267. In a previous case, the court had suggested four procedures the board could adopt to ensure parties are afforded the right to cross-examination. The first suggestion was a process for medical reports

similar to the one the board uses for submission and cross-examination of testimony provided in affidavit form, in former 8 AAC 45.120(d). The second was for the board to pay cross-examination costs. The third was to apportion cross-examination costs to the losing party. The last suggestion was to have cross-examination testimony presented by deposition, which could substitute for the right to cross-examine at the hearing. *Id.* at 1267-68. In response, the board amended 8 AAC 45.052(c) and 120(f)-(j) to provide for notice and an opportunity for cross-examination. The board did not shift examination costs to the party seeking to introduce evidence.

> **Rule 801. Definitions.** The following definitions apply under this article:
> . . . .
>
> (d) **Statements which are not hearsay.** A statement is not hearsay if
> . . . .
>
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in his truth. . . .

Some medical reports are admitted over objection, as "non-hearsay," in workers' compensation cases under Alaska Evidence Rule 801(d)(2). In *Frazier v. H.C. Price/CIRI Const. JV*, 794 P.2d 103 (Alaska 1990), the Alaska Supreme Court reversed and remanded the board's ruling requiring an injured worker to initially pay costs of providing an employer an opportunity to cross-examine the employer's medical expert because the expert was a party opponent. Given this result, *Frazier* did not need to re-examine *Smallwood* and expressed no view on the position taken by concurring justices. Chief Justice Matthews, joined by Justice Rabinowitz in a concurring opinion in *Frazier* stated, referring to *Smallwood*:

> For future cases we strongly recommended that 'the Board adopt procedures which will fill the present procedural void relating to medical reports and the right of cross-examination' (citation omitted). We suggested four alternatives. Notably, none of these alternatives required the opponent to the party seeking cross-examination to pay for the initial cost thereof. . . . Thus a strict reading of *Smallwood* does not compel a conclusion that the Board must construe its regulations governing the admission of documentary evidence to require a party relying on the documentary evidence to pay the initial cost of cross-examination by the opponent. This narrow interpretation of *Smallwood* limits the language that the 'right of cross-examination does not carry a price tag' to the pre-regulation 'procedural void' which existed when *Smallwood* was decided. . . . *Frazier*, 794 P.2d at 108.

> **Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial**.
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) **Statements for purposes of medical diagnosis or treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> . . . .
>
> (6) **Business records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, options, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of the preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. . . .

In *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000), a personal injury case, the Alaska Supreme Court held "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule," unless there is some reason to doubt the records' authenticity. *Id.* at 1027. Ingersoll asked Dobos to admit that Ingersoll's medical records were genuine under the Alaska Civil Rules. Dobos refused, arguing the evidence was hearsay. He wanted Ingersoll to put the witnesses on the stand at her expense so he could question them. During trial, Ingersoll called her doctors to testify and lay a foundation for the records. On appeal, the Alaska Supreme Court noted medical records are exceptions to the hearsay rule under Evidence Rule 803(6) and imposed sanctions against Dobos for failing to admit the genuineness of Ingersoll's medical records. The court reasoned, "Requiring testimony that medical records were made and kept in the regular course of business is a waste of time unless there is some reason to believe that the records are not genuine or trustworthy." *Id.* at 1028. Further, the Court said Dobos could have called Ingersoll's doctors to the stand himself after he denied Ingersoll's request to admit their records. *Dobos,* 9 P.3d at 1028.

In *Noffke v. Perez*, 178 P.3d 1141 (Alaska 2008), another personal injury case, the Alaska Supreme Court said evidence of the plaintiff's medical treatment and diagnosis, even in the form of a doctor's letter to the Social Security Disability Determination Unit, could be admissible under *Dobos* provided litigants established "it was the regular practice" of the doctor to prepare and send such reports. *Id*. at 1146.

Parker v. Power Constructors, AWCB Decision No. 91-0150 (May, 17, 1991), addressing the "trustworthiness" requirement under Alaska Rule of Evidence 803(6), noted:

> Statements by professionals, such as doctors, expressing their opinion on a relevant matter, should be excluded only in rare circumstances, particularly if the expert is independent of any party, and especially if the reports have been made available to the other side through discovery so that rebuttal evidence can be prepared. (*Id*. at 7, *citing* 4 Weinstein's Evidence Rule 803 at 803-211 (1990)).

In *Parker,* an insurer petitioned the board to admit three documents, contending they fell within exceptions to the hearsay rule. The employee contended the documents should not be admitted over his cross-examination request. The three documents pertaining to the employee included: (1) a discharge summary from a nursing home; (2) a physical examination report prepared during the employee's residence at the nursing home; and (3) a letter written to the employee's attorney from the employee's attending physician giving an opinion on compensability. After discussing the history of the *Smallwood* objection, the board reviewed relevant Alaska Supreme Court cases and relied heavily upon *Frazier*. *Parker* noted Alaska Supreme Court precedent, including *Frazier*, represented an "extension rather than a limitation of our regulation permitting admission of certain documents over *Smallwood* objections." *Parker* determined the three documents in question had long been in the employee's possession and were trustworthy enough to permit admission under exceptions to the hearsay rule. *Parker* also noted while *Frazier* did not agree to "re-examine *Smallwood*," it also did not overrule or refuse to apply the board's regulations permitting certain documents to be admitted over *Smallwood* objections. (*Id*. at 11).

Jensen v. Dames & Moore, AWCB Decision No. 00-0198 (September 14, 2000), and *Brown-Kinard v. Key Services Corp. and Arctic Slope Telephone Assn. & Cooperative,* AWCB Decision

No. 00-0190 (August 31, 2000), determined a treating physician's medical records were admissible over objection under the business records exception to the hearsay rule, Evidence Rule 803(6).

Alaska Civil Rule 30 sets forth in detail how depositions upon oral examination may be taken and focusses on notice requirements. Alaska Civil Rule 30.1 addresses how audio and audio-visual depositions are taken and sets forth specific procedures. Alaska Civil Rule 31 deals with procedures for depositions upon written questions. By contrast, Alaska Civil Rule 32 addresses how depositions are used in court proceedings, in conformance with evidence rules. It also focusses on objections to the manner in which a deposition was taken.

ANALYSIS

1) Should the designee's January 11, 2016 discovery order granting Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination be affirmed?

At a prehearing conference on January 11, 2016, the designee addressed Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination as a "discovery issue" he could decide pursuant to AS 23.30.108(c). The designee granted Employee's petition and quashed Udelhoven's *Smallwood* objection to certain medical records. 8 AAC 45.900(11). Udelhoven objected to this result, but no party objected to the designee's decision he could decide the matter as a "discovery issue." The designee treated Udelhoven's objection to the resultant prehearing conference order as its "oral petition for review" and included the objection as an issue for the February 4, 2016 hearing. In their hearing briefs and at hearing, again no party argued the designee erred in treating this issue as a discovery matter. The parties have treated the issue as Udelhoven's appeal of the designee's order granting the petition. Though Employee's petition to quash Udelhoven's *Smallwood* objection does not appear to be a "discovery matter," since no party objected to the process followed, this decision will review the designee's order for "abuse of discretion." AS 23.30.108(c).

It is undisputed that on March 4, 2015, Employee filed and served on all parties a medical summary with the four subject medical records attached. The records include progress notes from Dr. Bote and a progress note and testing results from Dr. Jessen. It is undisputed Udelhoven on March 16, 2015, filed a *Smallwood* objection on these records. 8 AAC 45.900(11). In its cross-examination

request, Udelhoven objected to the documents' admissibility at hearing and asserted its right to cross-examine the records' authors regarding the basis for their assertions, opinions and conclusions. While Udelhoven may disagree with the opinions set forth in the documents, Udelhoven has never contended they are not genuine records or are untrustworthy in their origin. *Dobos.* Similarly, it has not suggested the designee acted with an improper motive. *Sheehan.* Udelhoven contends Employee waited too long to raise his request to quash Udelhoven's *Smallwood* objection, and contends the records are from an unlawfully changed physician.

(a) The petition to quash was not untimely.

Udelhoven has cited no law to support its contention Employee's petition to quash Udelhoven's *Smallwood* objection was "untimely." Had Employee's petition to quash and Udelhoven's *Smallwood* objection not been resolved as preliminary matters at a prehearing conference and reviewed in a preliminary hearing, they would necessarily have been resolved as a preliminary matter at a subsequent hearing. Absent a legal basis to find Employee's petition was untimely, the designee did not abuse his discretion by addressing it as a preliminary matter. *Manthey.*

(b) The subject medical reports are "business records."

It is undisputed Udelhoven has not waived its right to cross-examine the authors of the subject medical records. The procedure for submitting medical reports as evidence and requesting the opportunity to cross-examine the author of a medical report is outlined in 8 AAC 45.052(c), as clarified in decisional law. This regulation and interpretive decisions allow for admission of medical reports without the offering party paying for the requesting party's opportunity for cross-examination if the documents are admissible because they are not hearsay or because they are admissible under a hearsay exception in the Alaska Rules of Evidence. *Frazier*; *Parker.* Udelhoven attempts to distinguish this case from *Frazier* because, unlike the objecting party in *Frazier,* Udelhoven did not select the physicians in question. Documents admitted in *Frazier* were offered by the injured worker's attending physicians for whom he had "vouched." But *Frazier* considered these documents admissible as admissions by a party opponent, and thus not hearsay. Evidence Rule 801(d)(2). As a practical matter, it makes little difference whether the documents are admissible because they are not hearsay or are admissible because they are exceptions to the hearsay rule. Evidence Rule 803(4), (6).

The medical reports in dispute here are routine records of the type medical providers prepare for and submit in workers' compensation cases on a daily basis. *Smallwood* was issued before the current regulations were in effect. Current regulations were in part a response to the court's invitation in *Smallwood* to create procedures. *Frazier* and subsequent decisions have not abrogated the *Smallwood* doctrine. But they have also not overruled subsequent regulations allowing admission of medical records as exceptions to the hearsay rule. *Parker*; *Jensen*; *Brown-Kinard*.

The disputed medical records are not written to an attorney in response to a question, or prepared for litigation purposes. They are standard medical records. Each document in question fits as an exception to the hearsay rule under Evidence Rules 803(4) and (6). The medical records contain statements made for purposes of medical diagnosis or treatment, describe medical history or past or present symptoms, pain, or sensations, all of which are reasonably pertinent to diagnosis or treatment. Evidence Rule 803(4). Each medical record is a report of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regular conducted business activity. Evidence Rule 803(6). Udelhoven did not raise any foundational objections to these records, and it cannot be seriously contended these medical providers do not keep records as a matter of course. The Alaska Supreme Court said such foundational objections, absent a reason to doubt the records' authenticity, are a waste of time and result in sanctions in civil cases. *Dobos*. Even letters written by a physician to the Social Security Administration are admissible as business records if writing such letters was a regular part of the physician's practice. *Noffke*.

Procedures in workers' compensation cases are supposed to be as summary and simple as possible. AS 23.30.005(h). The law is supposed to provide quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). The Act and its regulations are not intended to be more complicated than rules accorded litigants in civil actions. To the contrary, the workers' compensation system is intended to be less complicated. Accordingly, current Alaska Supreme Court case law, agency decisions, and workers' compensation regulations do not require the party seeking admission as evidence of routine medical records, *i.e.*, "statements for purposes of medical diagnosis or treatment" or "business records," to pay for the costs of cross-examination by an opposing party. *Frazier*; *Parker*; 8 AAC 45.052(c).

Current law also still protects parties' rights to cross-examination. In other words, admitting the subject records as evidence at hearing does not abrogate Udelhoven's absolute right to cross-examine the authors, at its expense. *Smallwood.* The designee's January 11, 2016 order conforms to current law and does not prevent Udelhoven from deposing the records' authors. *Manthey*; *Smallwood*. Therefore, the designee's January 11, 2016 order granting Employee's petition to quash Udelhoven's *Smallwood* objection was not an abuse of discretion. AS 23.30.108(c).

(c) Whether the subject medical records resulted from an unlawful change in physician remains to be determined.

As a secondary argument, Udelhoven claims the disputed records are not admissible anyway because they resulted from Employee's unlawful change in his attending physicians. AS 23.30.095(a); 8 AAC 45.082(c). The designee did not address Udelhoven's January 8, 2016 petition to exclude medical records resulting from Employee's alleged unlawful changes in physicians. Therefore, the designee could not have abused his discretion and this issue will be decided separately in the next section. *Manthey*.

In summary, the designee did not abuse his discretion by granting Employee's petition to quash Udelhoven's *Smallwood* objection on timeliness grounds or under applicable administrative regulations or evidence rules as interpreted in agency and Alaska Supreme Court decisional law.

2) Should Udelhoven's January 8, 2016 petition to exclude medical reports resulting from unauthorized changes in physicians be granted?

Freeman I already determined Employee's lawful and unlawful changes in his attending physicians in the ASRC case. Udelhoven contends Employee similarly made unlawful changes in his attending physicians in the Udelhoven case and resultant records and opinions should similarly be excluded at hearing. ASRC offered no position on this issue. Employee contends Udelhoven's petition is barred as *res judicata* or barred by collateral estoppel. *McKean.* He bases his argument on the fact Udelhoven argued the record exclusion issue at the May 13, 2015 hearing along with ASRC. *Robertson.* Employee also contends Udelhoven's petition was untimely. Lastly, he contends the applicable regulation, 8 AAC 45.082(c), exceeds its statutory authority and is invalid. These contentions will be addressed in reverse order.

(a) This decision cannot invalidate 8 AAC 45.082(c).

Employee conceded at hearing he made this argument simply to preserve his right to an appeal. This decision has no authority to invalidate an administrative regulation. Therefore, Udelhoven's petition will not be dismissed on this basis.

(b) Udelhoven's petition is not untimely.

Answers must be filed within 20 days of the date the claim is served. 8 AAC 45.050(c)(1). Employee's timeliness contention concerns Udelhoven's duty to briefly and clearly state "disputed claims" in its answer. 8 AAC 45.050(c)(3). He contends Udelhoven should have raised the unlawful change in physician issue as an "affirmative defense." As a practical matter, given the convoluted medical evidence in this case, it is not surprising Udelhoven did not immediately allege Employee had made an unlawful change in his attending physicians in the Udelhoven case. Since the merits hearing has not yet occurred, Employee has not shown he has been prejudiced by the timing of Udelhoven's petition. Assuming for argument's sake, Udelhoven had an affirmative duty to state in its answer to Employee's claim that Employee had made an unlawful change in his attending physician choices, this decision will treat Udelhoven's petition as an amended answer. 8 AAC 45.050(e). Udelhoven's petition will not be dismissed on timeliness grounds.

(c) Udelhoven's exclusion petition is not barred by *res judicata* or collateral estoppel.

This is Employee's primary argument against Udelhoven's petition. *Res judicata* and its subset collateral estoppel require three findings to create a bar: (1) The defense must be asserted against a party in privity with the party in the first action. Employee meets this element because Udelhoven was undeniably a party in privity with him and with ASRC in the May 13, 2015 hearing. (2) The issue to be precluded from relitigation must be identical to the issue decided in *Freeman I.* Employee does not meet this element because *Freeman I* did not reach the record exclusion issue in respect to Udelhoven because it was never raised. The issue decided in *Freeman I* was ASRC's February 3, 2015 petition to exclude medical records in ASRC's case. Udelhoven simply joined in supporting ASRC's petition to exclude unlawfully obtained medical reports in ASRC's case. The issue decided here is Udelhoven's January 8, 2016 petition seeking

to exclude unlawfully obtained records in Udelhoven's case. Finally, (3) the issue in the first action must have been resolved by a final judgment on the merits. Employee does not meet this element either, as *Freeman I* was not a final decision on the merits, but rather, was an interlocutory decision resolving only ASRC's exclusion petition. *McKean.*

Employee has two separate injuries and two separate claims, against two separate employers and insurers, one involving essentially one body part (his neck) and the other involving the same body part (his neck) and additional body parts (his shoulders and left thumb). Employee's 2001 Udelhoven injury happened when he was climbing a ladder and hit his hardhat on an overhead object. He claims it involved his head and primarily his neck. Employee's 2010 ASRC injury occurred when he was walking up stairs and fell forward. He claims it involved his neck, both shoulders and his left thumb. Employee's two claims do not arise out of the same transaction or "core set of facts." Excluding the neck injury allegation, the accidents and injuries are completely different. *Robertson*. Therefore, Udelhoven's record exclusion petition is not *res judicata* or collaterally estopped, and *Freeman I* does not bar it under either doctrine. *McKean*; *Robertson*. Udelhoven's petition will be decided on its merits.

(d) Employee has the right to parallel attending physician designations and changes.

The Act allows Employee to obtain from his "employer" medical, surgical, and other attendance or treatment and related medical services for the period which the nature of "the injury" or the process of recovery requires. AS 23.30.095(a). Further, when medical care is required, Employee may designate a licensed physician to provide all medical and related benefits. Employee may not make more than one change in his choice of attending physician without written consent of "the employer." *Id*. This statute expressly refers to "the injury" and to "the employer." But it is undisputed this case involves the same "employee," with two "injuries" and two "employers." AS 23.30.395(19), (20), (24). The law does not state or imply that Employee must use the same physicians in each case even if the injured body parts are the same or similar. Likewise, ASRC is not required to use the same EME physicians as Udelhoven, or vice versa. In short, a reasonable reading of the applicable statute shows Employee has the right to designate a physician to provide all medical and related benefits in his 2001 Udelhoven case and has a

parallel right to designate the same or a different physician to provide all medical and related benefits in his 2010 ASRC case. Nothing in the law suggests otherwise.

With this background in mind, Udelhoven's petition can be analyzed on its merits. It is undisputed Employee saw Dr. Sanders for his 2001 Udelhoven injury on October 29, 2001. By selecting Dr. Sanders and obtaining medical services from him, Employee designated Dr. Sanders as his attending physician in the 2001 Udelhoven case. 8 AAC 45.082(b)(2). Employee subsequently saw Dr. Sanders for neck evaluation and treatment in 2002, but the records show these visits were necessitated by Employee sleeping in an awkward position. Employee's 2001 Udelhoven injury was not mentioned in these 2002 records. Udelhoven's physician change chart concedes Employee received no additional medical care for his neck as a result of his Udelhoven injury until after his 2010 ASRC injury. Udelhoven essentially contends that every physician Employee saw after his 2010 ASRC injury, to which he made reference to his neck, was a change in attending physician for his 2001 Udelhoven injury.

Udelhoven further contends Employee's unlawful changes in attending physician as determined in *Freeman I* also apply to his Udelhoven injury because Employee now claims he injured his neck both in 2001 while working for Udelhoven and in 2010 while under ASRC's Employee. In other words, in Udelhoven's view since the current need for medical care and any disability or impairment related to the neck injury may have been legally caused by either event, since Employee made unlawful changes as determined in *Freeman I* in the ASRC case, he necessarily made the same, and perhaps more, unlawful changes in the Udelhoven matter. Udelhoven provides no legal authority for this proposition.

Furthermore, Udelhoven's position is belied by the fact Employee has the statutory right to parallel treatment courses and resultant physician choices in each of his two separate cases. AS 23.30.095(a). Additionally, as is seen by the first column from the left in revised Table I, above, beginning March 30, 2010, Employee saw relevant medical providers solely for his 2010 ASRC injury through April 11, 2014, when Dr. Jessen for the first time opined Employee's 2001 Udelhoven injury was a substantial factor in his current need for medical treatment for his neck. At this point, the analysis becomes more difficult. Before Dr. Jessen's deposition on April 11,

2014, Employee knew he had a previous neck injury with Udelhoven in 2001. However, before Dr. Jessen's 2014 deposition Employee had no medical evidence suggesting his then-current need for medical treatment for his neck was connected in any way to his 2001 Udelhoven injury.

Udelhoven and ASRC contend there is no "discovery rule" for Employee's allegedly unlawful changes in his attending physicians. Therefore, they contend the fact Employee did not know his 2010 and subsequent neck symptoms might derive from his 2001 Udelhoven injury did not prevent him from making unlawful changes in his choice of attending physicians for that injury. Udelhoven and ASRC are correct in stating there is no statute or regulation specifically directed toward this aspect of this issue. However, the Act must be construed to ensure quick, efficient, fair and predictable delivery of indemnity and medical benefits to Employee, if he is entitled to them, at a reasonable cost to Udelhoven and ASRC. AS 23.30.001(1). This issue must be analyzed with the overarching principle in mind. AS 23.30.095(a) states if the condition requiring treatment is "latent," the two-year period for the liable employer to provide medical care begins "from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment." Thus, a "discovery rule" is built into the medical care statute. The fact Employee's 2001 Udelhoven injury could, in 2014, be considered a causative factor in his now-current need for medical treatment for his neck will be considered "latent" as the notion was concealed until Dr. Jessen's deposition revealed it. *Dafermo*.

Employee may not make more than one change in his "choice of attending physician" without Udelhoven's consent. AS 23.30.095(a). But "choice" implies a volitional selection. Interpreting the Act to ensure quick, efficient, fair and predictable delivery of benefits to Employee, if he is entitled to them, supports the notion that Employee cannot be held to have made a conscious change in his choice of attending physician for the 2001 Udelhoven injury, at least until Dr. Jessen opined on April 11, 2014, that the 2001 Udelhoven injury had some relevance to his case. In other words, all available medical evidence demonstrates Employee was seeing physicians for his 2010 ASRC injury at least through April 11, 2014. Therefore, given the medical evidence, Employee could not have knowingly chosen or designated his second attending physician in the 2001 Udelhoven case before Dr. Jessen's deposition, at the earliest. Even if it could be said Employee knowingly changed physicians in his 2001 Udelhoven case prior to Dr. Jessen's

deposition, given the convoluted facts in this case, fairness would require any such findings to be modified or waived to prevent manifest injustice to Employee. *Miller*; 8 AAC 45.195.

Physicians Employee saw, after Dr. Jessen's April 11, 2014 deposition, require closer scrutiny. Once Employee filed his April 18, 2014 claim against Udelhoven, he was aware physicians addressing his neck symptoms could be seeing him for the 2001 Udelhoven injury, the 2010 ASRC injury, neither, or both. Though what he stated on his claim forms is not dispositive as a matter of law because it is only a required listing to identify physicians Employee had seen, Employee listed Dr. Jessen on his claims against Udelhoven as his "attending physician." Thus, when he filed his claims Employee expressly stated Dr. Jessen is his attending physician for his 2001 Udelhoven injury, implying a conscious decision on his part. Though this finding is probative, it is not dispositive if Employee otherwise violated the law. *Witbeck.*

On May 15, 2014, Dr. McNamara completed a check-the-block form letter addressing Employee's thumb, examined his thumb and referred him to ASI for a thumb impairment rating. As this was all limited to Employee's thumb, and there is no evidence or argument he injured his thumb in the 2001 injury, these opinions and services from Dr. McNamara are not associated with the 2001 Udelhoven injury and do not count as a physician change in the Udelhoven case.

On July 9, 2014, Dr. Macintosh wrote a letter mentioning Employee's cervical spine. But this letter was written for Social Security disability purposes and not for either the 2001 Udelhoven or 2010 ASRC injuries. Further, Udelhoven has provided no legal support for the notion that if a work-injured body part is mentioned in a medical history, the authoring physician becomes an "attending physician" as a matter of law. Logic dictates they do not. Therefore, this too is not considered a change in Employee's attending physician in either case.

On September 29, 2014, Employee saw Dr. Hall again for a second opinion about his shoulder. During this appointment, Dr. Hall gave opinions concerning possible additional shoulder surgery and recommended electrodiagnostic testing to eliminate radiculopathy as a cause of Employee's symptoms. Radiculopathy is associated with the cervical spine. *Rogers & Babler*. As found in *Freeman I*, this visit was Employee's "one change" in his "choice of attending physician" in the

ASRC case. There is no evidence this visit with Dr. Hall was made in conjunction with his 2001 Udelhoven injury and thus it will not be counted as a change from Dr. Sanders. Similarly, LCSW Stauber and Dr. McIntosh's opinion letters on September 30, 2014 and October 1, 2014, respectively, address depression and its relationship to Employee's shoulder and hand pain. Employee makes no claim against Udelhoven for his shoulder or hand symptoms or for depression. Thus, these providers were also seen solely in respect to the 2010 ASRC injury.

On October 1, 2014, Dr. Hall completed a written referral to Dr. Jessen for additional electrodiagnostic testing. These tests potentially address cervical spine symptoms, which may result from the 2001 Udelhoven injury, the 2010 ASRC injury, neither, or both of them. *Rogers & Babler*. Most notably, on October 20, 2014, Employee saw Dr. Jessen for his shoulder, neck and "possible head injury problems." The only documents suggesting Employee had a "head injury" relate to the 2001 Udelhoven injury.

Dr. Jessen on referral performed electrodiagnostic studies and obtained cervical x-rays. Dr. Hall was seeing Employee for the 2010 ASRC case, primarily to address his shoulder symptoms. While Dr. Hall's referral to Dr. Jessen came in the 2010 ASRC case, and was therefore not a change in that case, by the time Employee saw Dr. Jessen on October 20, 2014, he had filed a claim against Udelhoven in the 2001 case for his neck symptoms. On October 20, 2014 Employee knowingly obtained medical services from Dr. Jessen for his 2001 Udelhoven injury, which along with his neck, also concerned in general a "head injury." Arguably, Employee's October 20, 2014 visit with Dr. Jessen could equally be construed as a referral in the 2010 ASRC claim. But, interpreting the Act to be quick, fair, efficient and predictable at a reasonable cost to both employers, this visit with Dr. Jessen will be considered Employee's first change from Dr. Sanders in the 2001 Udelhoven case. AS 23.30.001(1). It remains to be seen following a merits hearing whether the 2001 Udelhoven injury, the 2010 ASRC injury, both, or neither played any role in Employee's cervical symptoms. Given this legal conclusion, Udelhoven's petition can be further analyzed.

This decision found Dr. Jessen to be Employee's "one change in the employee's choice of attending physician" in his 2001 Udelhoven case. AS 23.30.095(a). Therefore, as a legal matter,

anyone to whom Dr. Jessen referred Employee for his head or neck thereafter was not a change in his attending physician choice, but was a lawful referral from his attending physician in the 2001 Udelhoven claim. *Id*. But Udelhoven contends Employee made numerous other changes in his attending physician in the 2001 Udelhoven case.

Employee saw Dr. McIntosh on October 20, 2014, solely for a testosterone shot. This visit was not for his 2001 Udelhoven or for his 2010 ASRC injuries and is irrelevant to this issue. On October 27, 2014, Employee called Dr. Hall's office to follow-up on his right shoulder pain. Dr. Hall told Employee he had reviewed Dr. Jessen's electrodiagnostic testing, which demonstrated a right C5-6 radiculopathy, and mentioned a November 2013 MRI that showed disc pathology at the same level. Dr. Hall explained he was hesitant to recommend further shoulder surgery and wanted to refer Employee to a spine surgeon for his neck. While Udelhoven contends this visit was a change to Dr. Hall in the 2001 Udelhoven case, the record shows Employee called Dr. Hall to follow-up on his shoulder pain, which to this point had been treated under his 2010 ASRC injury. It is not unusual for a physician treating one body part to decide another body part may be contributing to symptoms and refer the patient to a specialist. *Rogers & Babler*. That is what happened with Dr. Hall at this visit. Therefore, Employee's call to Dr. Hall and Dr. Hall's subsequent comments and referral came in the 2010 ASRC case and are not a change in attending physician in Employee's 2001 Udelhoven claim.

However, on November 13, 2014, Employee saw Dr. McIntosh for chronic pain related to both his neck and shoulders. While this visit addressed several non-work-related medical conditions, it also addressed Employee's opioid therapy for his work-related injuries. Udelhoven contends this visit with Dr. McIntosh was yet another unlawful change by Employee. On this point, Udelhoven's contention has merit. By this time, Employee had knowingly changed from Dr. Sanders to Dr. Jessen in his 2001 Udelhoven case. Therefore, by seeking an opinion or obtaining services for his neck from someone other than Dr. Jessen in his 2001 Udelhoven case, Employee made an unlawful change in physician. AS 23.30.095(a). Thus, beginning November 13, 2014, Dr. Macintosh's medical records and opinions will not be considered as evidence in Employee's claims against Udelhoven. 8 AAC 45.082(c). Further, records from any physicians to whom Dr. Macintosh referred Employee specifically for his 2001 Udelhoven injury on or after November

13, 2014, will likewise not be considered. *Id*. Udelhoven's January 8, 2016 petition to exclude medical records will be denied in part and granted in part in accordance with this decision.

3) Should Dr. Jessen's April 11, 2014 deposition be excluded as evidence against Udelhoven?

It is undisputed Dr. Jessen's April 11, 2014 deposition was noticed and conducted only in the ASRC case. At the time Dr. Jessen's deposition occurred, there was no medical evidence suggesting Employee had a right to claim benefits for his neck against Udelhoven. In her deposition, Dr. Jessen for the first time suggested the 2001 Udelhoven injury was a substantial factor in Employee's need for medical care for his neck following the 2010 ASRC injury. Employee contends Dr. Jessen's deposition is admissible against Udelhoven because Udelhoven has had the deposition for well over a year, Udelhoven has not been prejudiced in its ability to cross-examine Dr. Jessen at its option and Udelhoven has never requested cross-examination of Dr. Jessen's deposition and has done nothing until now to exclude Dr. Jessen's deposition testimony. He contends Dr. Jessen's deposition is trustworthy because she was under oath, and it is the type of evidence that reasonable people are accustomed to relying upon in conducting serious affairs. ASRC contends Dr. Jessen's testimony is hearsay in respect to Udelhoven and Udelhoven has an absolute right to confront the witness. Udelhoven objects to Dr. Jessen's deposition being offered as evidence against it for several reasons, including its primary contention that it would not be fair to allow Dr. Jensen's deposition testimony to be used against a non-party that did not participate in the examination. Each contention is addressed as follows:

(a) Dr. Jessen was not an illegal referral from an unlawful change in Employee's physician choice.

As already decided above, Dr. Jessen was not an illegal referral or an unlawful change in his physician in Employee's 2001 Udelhoven case. AS 23.30.095(a). Therefore, her deposition transcript will not be excluded on this ground.

(b) Alaska Civil Rule 32 does not apply to this case.

Udelhoven relies on Alaska Civil Rule 32 as support for its request to exclude Dr. Jessen's deposition as evidence against Udelhoven. Udelhoven's argument is not persuasive. Depositions in workers' compensation cases "may be taken by written or oral deposition in

accordance with the Alaska Rules of Civil Procedure." AS 23.30.115; 8 AAC 45.054(a); (emphasis added). But there is a difference between how a deposition is "taken" and how it is used at a hearing. Administrative regulations applying to workers' compensation cases have adopted civil rules related to taking depositions, such as Alaska Civil Rule 30, 30.1 and 31. Alaska Civil Rule 32 applies to court hearings and sets forth specific procedures for "using" depositions. There is a difference between "taking" a deposition and "using" one. Workers' compensation regulations have not adopted Alaska Civil Rule 32's deposition usage rules, but instead include separate regulations applicable to how evidence, including depositions, is filed and admitted in workers' compensation cases. 8 AAC 45.120(a)-(i). Therefore, Alaska Civil Rule 32 is not a valid basis upon which to exclude Dr. Jessen's deposition transcript as evidence against Udelhoven at a merits hearing.

(c) No procedural flaw excludes Dr. Jessen's deposition as evidence against Udelhoven.

Lastly, Udelhoven contends Dr. Jessen's deposition should be excluded from hearing because proper procedures were not followed to file and serve it. 8 AAC 45.120(a). It is undisputed Employee served the deposition transcript on a compact disc on Udelhoven's attorney on May 14, 2014. Is undisputed Peninsula Reporting filed Dr. Jessen's deposition transcript in the ASRC case on June 24, 2014. It is further undisputed Peninsula Reporting's transmittal letter was not cross-copied to Udelhoven's attorney. Udelhoven implies it was unaware the deposition transcript had been filed. Nevertheless, Udelhoven has now had Dr. Jessen's deposition for well over a year and knows it was filed. It matters little who actually filed it. Further, the Alaska Supreme Court has stated it was error to exclude a deposition transcript simply because it was not timely filed in accordance with the administrative regulations. *Baker*. Dr. Jessen's deposition transcript will not be excluded as evidence against Udelhoven on this basis.

(d) It is not fair to allow Employee to use Dr. Jessen's deposition against Udelhoven.

Is undisputed Udelhoven was not a party to this matter at the time Dr. Jessen's deposition was taken and consequently did not get notice of it and did not attend. Udelhoven cites no specific statute, regulation or decisional law to support its assertion that Dr. Jessen's deposition in the ASRC case is inadmissible against Udelhoven for these reasons. Implicit in Udelhoven's

argument is the fact Udelhoven did not get an opportunity to cross-examine Dr. Jessen. ASRC contends Dr. Jessen's deposition is hearsay in respect to Udelhoven. The Act does not expressly address this rather unusual situation. However, the Act is to be interpreted to ensure quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). Admitting Dr. Jessen's deposition against Udelhoven over its objection would make the hearing quicker and more efficient and reduce costs to ASRC, which would not have to pay for its attorney to attend a re-deposition. However, it would not be fair to Udelhoven, which would have to pay for Dr. Jessen's re-deposition if Udelhoven wants to cross-examine her and she does not appear at hearing. Further, hearings must be fair and impartial to all parties and afford all parties due process. AS 23.30.001(4). Admitting the deposition over Udelhoven's objection would be fair to Employee and ASRC, but not so fair to Udelhoven.

Workers' compensation hearings are not bound by common law or statutory evidence rules or by formal procedures. 8 AAC 45.120(e). Investigations and hearings may be conducted in the manner by which the parties' rights may be best ascertained. AS 23.30.135(a). The party seeking to introduce a witness' testimony by deposition shall pay the deposition's initial cost. 8 AAC 45.054(a). In this instance, Udelhoven is not attempting to introduce Dr. Jessen's testimony by deposition. To the contrary, Udelhoven is trying to exclude it. Since Employee is the one offering Dr. Jessen's deposition testimony to support his claim against Udelhoven, it makes sense for him to pay the initial cost of re-deposing her so Udelhoven can exercise its right to cross-examination. 8 AAC 45.054(a); *Smallwood*. If Dr. Jessen testifies at hearing, this issue becomes moot because Udelhoven will have an opportunity to cross-examine her.

Employee correctly notes Udelhoven has not yet filed a request for cross-examination against Dr. Jessen's deposition transcript. However, since the deposition transcript is not a "medical report," it comes under a different procedure for filing and for requesting cross-examination, as compared to procedures for cross-examining a medical report's author. 8 AAC 45.052(c)(2), (3). A medical deposition upon which a party may want to rely at hearing, unlike a medical record, falls into the "any document" evidence category. Accordingly, Udelhoven has until 10 days prior to the eventual merits hearing to file a request for cross-examination of this document's "author." 8 AAC 45.120(f). But Udelhoven wants this issue resolved now rather than delay its resolution

until 10 days before the hearing, when it will undoubtedly file a request for cross-examination on Dr. Jessen's deposition transcript and further delay the merits hearing.

Any relevant evidence is admissible in this proceeding if it is evidence on which reasonable persons would normally rely in conducting serious affairs, even if it would not be admissible in a civil action. 8 AAC 45.120(e). There is no question Dr. Jessen's opinions are relevant. *Rogers & Babler*. Even hearsay evidence is admissible in workers' compensation hearings if it supplements or explains direct evidence. Hearsay is not sufficient by itself to support a factual finding unless it would be admissible over objection in civil actions. 8 AAC 45.120(e). "Hearsay" is defined as a statement, other than one made by the declarant while testifying at hearing, offered in evidence to prove the truth of the matter asserted. Evidence Rule 801(c). Employee seeks to use Dr. Jessen's testimony to support his claim against Udelhoven for his neck injury. He intends to use Dr. Jessen's deposition testimony against Udelhoven at hearing as evidence and proof of the matters Dr. Jessen asserts therein. Otherwise, Employee would not object to Udelhoven's petition to exclude the deposition as evidence against Udelhoven. Dr. Jessen's deposition testimony pertaining to causation opinions includes statements, not made by Dr. Jessen while testifying at a hearing in this case, offered in evidence to prove the truth of the matters asserted. Those statements are hearsay vis-à-vis Udelhoven. *Id.*

Cases, statutes, regulations and arguments Employee cited in its January 13, 2016 opposition to Udelhoven's December 30, 2015 petition are not persuasive. Unlike routine medical records, depositions are made precisely for, and in, litigation. Some statements by Dr. Jessen in her deposition could be considered "not hearsay" because they repeat Employee's "admissions as a party opponent." Evidence Rule 801(d)(2); *Frazier*. Other statements in the deposition transcript made by Employee or by Dr. Jessen reciting Employee's symptoms, diagnoses and so forth could be admissible as "exceptions to the hearsay rule." Evidence Rule 803(4), (6); *Parker*. But Dr. Jessen's causation opinions are hearsay vis-à-vis Udelhoven and do not fit into any hearsay exception.

Even under the relaxed evidentiary rules applied in workers' compensation cases, Dr. Jessen's hearsay causation opinions, though admissible against Udelhoven to supplement "direct

evidence," are not sufficient to support a factual finding against Udelhoven unless they would be admissible over objection in a civil action. 8 AAC 45.120(e). It is difficult to imagine what "direct evidence" in the current record Dr. Jessen's causation opinions regarding Udelhoven would "supplement." Her deposition appears to be the only place in which Dr. Jessen has offered this causation opinion. Further, the entire deposition transcript does not fit under any exception to the hearsay rule. Parsing Dr. Jessen's deposition transcript to allow non-hearsay statements and statements that fit into some hearsay exception is awkward and inefficient, as the causation opinion against Udelhoven is the purpose for which Employee offers the transcript against Udelhoven. That opinion would still not be admissible. Parsing the transcript is not the best way to ascertain all parties' rights. AS 23.30.135.

Therefore, on balance, while there is little statutory, regulatory or decisional law directly supporting Employee's position, there is considerable law supporting Udelhoven's. Accordingly, Udelhoven's December 30, 2015 petition to exclude Dr. Jessen's deposition transcript at a merits hearing against Udelhoven, on grounds Udelhoven was not privy to the deposition and did not participate, will be granted on fairness grounds. AS 23.30.001(1), (4). Dr. Jessen's deposition will not be considered at hearing against Udelhoven unless and until Dr. Jessen is made available to Udelhoven for cross-examination, at another party's expense.

4) Should the parties' stipulation concerning medical records to be excluded as evidence under *Freeman I* be approved as an order?

At hearing, the parties stipulated that all documents attached to ASRC's hearing brief as "Exhibit B" were documents excluded from evidence at a merits hearing under *Freeman I*. The parties have a right to enter into binding stipulations. 8 AAC 45.050(f). Given the above factual findings, the parties' February 6, 2016 stipulation will be approved. All medical records designated as Exhibit B on ASRC's hearing brief for the February 6, 2016 hearing will be excluded as evidence against ASRC at a merits hearing.

CONCLUSIONS OF LAW

1) The designee's January 11, 2016 discovery order granting Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination will be affirmed.
2) Udelhoven's January 8, 2016 petition to exclude medical reports resulting from unauthorized changes in physicians will be granted in part and denied in part.
3) Dr. Jessen's April 11, 2014 deposition will be excluded as evidence against Udelhoven.
4) The parties' stipulation concerning medical records to be excluded as evidence under *Freeman I* will be approved as an order.

ORDER

1) The designee's January 11, 2016 discovery order granting Employee's December 24, 2015 petition to quash Udelhoven's March 16, 2015 request for cross-examination was not an abuse of discretion and is affirmed.
2) The medical records subject to the designee's January 11, 2016 discovery order are admissible over Udelhoven's *Smallwood* objection.
3) Udelhoven is free to depose the records' authors at its option and expense.
4) Udelhoven's January 8, 2016 petition to exclude medical evidence resulting from unauthorized changes in physicians is granted in part and denied in part.
5) Udelhoven's January 8, 2016 petition to exclude medical evidence is granted against Dr. McIntosh beginning November 13, 2014, and against any medical provider to whom Dr. Macintosh referred Employee for his 2001 Udelhoven injury on or after that date. As against any other physician in this case, Udelhoven's petition to exclude medical reports is denied in accordance with this decision and order.
6) Dr. Jessen's April 11, 2014 deposition is excluded as evidence against Udelhoven. If Employee or ASRC want to rely on Dr. Jessen's deposition transcript in the 2001 Udelhoven case, one of them must pay for an opportunity for Udelhoven to cross-examine Dr. Jessen.
7) The parties' stipulation concerning medical records to be excluded as evidence against ASRC under *Freeman I* is approved as an order.
8) Employee's July 13, 2015 petition to exclude a divorce proceeding transcript, and his request for attorney's fees and costs are held in abeyance.

Dated in Anchorage, Alaska on February 25, 2016.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Donna Phillips, 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 James A. "Drew" Freeman, employee / claimant v. ASRC Energy Services, employer; Udelhoven Oil Field System Services, and its insurer Ace Fire Underwriters Insurance Co. insurer / defendants; Case Nos. 200127952, 201003705M; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 25, 2016.

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Pamela Murray, Office Assistant