ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau,**

Alaska 99811-5512

DANIEL SCHWAB, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201506048
COSTCO WHOLESALE, Employer, and COSTCO WHOLESALE CORPORATION, Insurer, Defendants.	)	AWCB Decision No. 16-0091
	)	Filed with AWCB Anchorage, Alaska on November 2, 2016

Daniel Schwab's (Employee) August 26, 2016 petition for protective order was heard on October 19, 2016, in Anchorage, Alaska. The hearing date was selected on September 8, 2016. Employee appeared and testified. Attorney Michelle Meshke appeared and represented Costco Wholesale (Employer). There were no witnesses. The record closed at the hearing's conclusion on October 19, 2016.

ISSUE

Employee contends he should not be required to sign medical, employment, insurance, pharmacy, Division of Workers' Compensation, or Social Security Administration records releases for any period before the date of the work injury. Employee by implication contends the August 10, 2016 discovery order requiring him to sign and return all releases sought by Employer is an abuse of discretion. Employee seeks an order granting his petition for a protective order.

Employer contends the releases sent to Employee seek information which is relevant, narrowly-tailored in time and scope, and discoverable. Employer seeks an order affirming the August 10, 2016 denial of Employee's petition for protective order, and the order compelling Employee to sign and return all releases.

Was the order requiring Employee to sign all releases as set forth in the August 10, 2016 prehearing conference summary an abuse of discretion?

FINDINGS OF FACT

The following facts are either undisputed or are established by a preponderance of the evidence:

1) On April 14, 2016, Employee filed a claim for ongoing medical costs and unfair and frivolous controversion. The claim states Employee was injured when helping some co-workers load a sink into a customer's car, when Employee suddenly experienced severe pain in his lower back and spine. The claim lists the date of injury as April 14, 2015. (Workers' Compensation Claim, April 14, 2016).

2) On July 29, 2016, Employee filed a petition for a protective order. The petition states Employee seeks "to protect all of my medical records that do not pertain to my back injury on 4/14/15." (Petition, July 29, 2016).

3) On August 10, 2016, a prehearing conference was attended by all parties. The Board designee reviewed Employee's July 29, 2016 petition for a protective order. The prehearing conference summary states:

> Designee reviewed the releases and explained to Mr. Schwab that she found the releases in question to be standard, relevant and likely to lead to discoverable information and for that reason, the Petition for Protective order is DENIED.
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> Employee has 10 days from the service of this prehearing conference summary to sign, date, and return the unaltered releases provided to him at prehearing or file a Petition for Reconsideration with the [Board].
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> A petition for reconsideration of a board designee's discovery order under AS 23.30.108 must set out the specific grounds for reconsideration and be filed with the board in accordance with 8 AAC 45.050 no later than 10 days after the date of service of the prehearing summary and discovery order from which reconsideration is sought. . . . (Prehearing Conference Summary, August 10, 2016).

4) On August 22, 2016, Employer filed an answer to Employee's July 29, 2016 petition for a protective order. Employer's answer attached the medical, pharmacy, insurance, Division of Workers' Compensation, and Social Security Administration releases in question as exhibits. (Answer, August 22, 2016). The foregoing releases seek information starting from April 14, 2013. (Observations).

5) The employment records release seeks information related to employment held ten years prior to the date of injury. (Release).

6) Employee has not made a claim for time loss, nor has he been found eligible for vocational rehabilitation. (Record).

7) On September 8, 2016, a prehearing conference was attended by all parties. The prehearing conference summary states:

> The parties agreed to a procedural hearing before the board on October 19, 2016. The hearing will be limited to the question of whether the designee's decision made at the 8/10/16 prehearing, to deny Employee's petition for a protective order and require Employee to sign releases, was correct. (Prehearing Conference Summary, September 8, 2016).

8) Employee testified: At the time of his injury, he worked for Employer for 18 years. He has already obtained doctor's opinions supporting his contention he was hurt while working for Employer on April 14, 2015. He believes Employer's request for his medical history prior to the work injury is an attempt to shift the cause of his need for medical treatment away from Employer. He just wants Employer to pay his medical costs so that he can "get back on his feet" after the work injury. (Employee).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
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> (3) this chapter may not be construed by the courts in favor of a party;

> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all 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, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

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

It is important for employers to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Medical and other releases are important means of doing so. Under AS 23.30.107(a), an employee must release all evidence "relative" to the injury. This facilitates the legislative directive that the Act be interpreted to ensure the "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers." AS 23.30.001. In *Russell v. University of Alaska*, AWCB Decision No. 88-0241 (September 16, 1988), *affirmed as modified, Russell v. University of Alaska*, 3AN-88-10313 CI (October 5, 1990), the employee voluntarily signed a general medical release going back two years prior to the alleged carbon monoxide exposure injury. The court reversed the Board's order compelling the employee to execute a general medical release unlimited in time. Instead, the court ordered the employee to sign a release unlimited in time, but limited to medical records relating to carbon monoxide exposure, the physical complaints the employee attributed to his exposure, and specific mental disorders that may cause similar symptoms.

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.** (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
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> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide written authority.
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties presents releases that are likely to lead to or documents admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee ... [t]he board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

AS 23.30.108(c) gives the Board's designee responsibility to decide all discovery issues at the prehearing conference level, with a right of both parties to seek board review. *Smith v. CSK Auto, Inc.*, AWCAC Decision No. 002 (January 27, 2006).

If a party unreasonably refuses to provide information, AS 23.30.108(c) and AS 23.30.135 grant the Board broad, discretionary authority to make orders assuring parties obtain the relevant evidence necessary to litigate or resolve their claims. *Bathony v. State of Alaska, D.E.C.*, AWCB Decision No. 98-0053 (March 18, 1998). AS 23.30.108(c) and AS 23.30.135 allow for claim dismissal if an employee willfully obstructs discovery, although this sanction "is disfavored in all

but the most egregious circumstances." *McKenzie v. Assets, Inc.*, AWCB Decision No. 08-0109 (June 11, 2008).

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).

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

The Alaska Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987); *citing United Services Automobile Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974); *see also*, *Venables v. Alaska Builders Cache*, AWCB Decision No. 94-0115 (May 12, 1994). Employers must be able to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. Medical and other releases are important means of doing so. *See, e.g., Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Under AS 23.30.107(a), an employee must, upon written request, release medical and rehabilitation information "relative" to the employee's injury. Evidence is "relative" to the claim where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell*, AWCB Decision No. 99- 0016 (January 20, 1999). Based on the policy favoring liberal discovery, "calculated" to "lead to admissible evidence" means more than a mere possibility, but not necessarily a probability, that the information sought by the release will lead to admissible evidence. *Teel v. Thornton Gen'l Contracting*, AWCB Decision No. 09-0091 (May 12, 2009).

Employers have a constitutional right to defend against claims. *Rambo v. VECO, Inc.*, AWCB Decision No. 14-0107 (August 5, 2014), at 8 (citing *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), at 6, which cited Alaska Const., Art. I Sec. 7). Employers also have a

statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Granus* at 5, citing AS 21.36.120 and 3 AAC 26.010-300.

> **AS 23.30.225. Social security and pension or profit sharing plan offsets.** (a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.
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> (b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury. . . .
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> **AS 44.62.570. Scope of review.** . . .
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> (b) . . . . Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
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> (c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by
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> (1) the weight of the evidence; or
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> (2) substantial evidence in the light of the whole record. . . .
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> **Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure**. . . .
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> **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of

> persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

ANALYSIS

Was the order requiring Employee to sign all releases as set forth in the August 10, 2016 prehearing conference summary an abuse of discretion?

Employer's releases seek Employee's medical, pharmacy, and employment history, as well as insurance, Division of Workers' Compensation, and Social Security Administration records. The Board designee ordered Employee to sign and return all these releases at the August 10, 2016 prehearing conference, an order which Employee now contests.

A Board designee's discovery order will be upheld absent an abuse of discretion. AS 23.30.108(c). An abuse of discretion consists of issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive. *Sheehan*. An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Id*. In the Administrative Procedure Act, the legislature provided another definition to be used by courts in considering appeals of administrative agency decisions. AS 44.62.570. It contains terms similar to those noted above, but expressly includes reference to a "substantial evidence" standard. *Id.*

Employers have a constitutional right to defend against claims, including the right to thoroughly investigate and gather evidence concerning claims for benefits under the Act for which they ultimately may be responsible. *Granus*; *Schwab*; *Cooper*; AS 23.30.001. Within this bundle of rights is the right to obtain relevant records concerning medical history, previous employment, and other types of benefits sought or collected by an injured worker which may be relevant to the claim or to affirmative defenses. *Id*; AS 23.30.107; AS 23.30.108; Alaska R. Civ. P. 26.

The first step in determining whether information sought is relevant is to analyze what matters are "at issue" or in dispute. AS 23.30.001; AS 23.30.135; *Granus*; *Schwab*; *Cooper*. The parties' pleadings and the prehearing conference summaries assist in ascertaining the specific benefits Employee is claiming, and Employer's defenses to these claims. *Id.*; *Rogers & Babler*.

Next, it must be decided whether the information an employer seeks is relevant for discovery purposes; *i .e.*, whether it is reasonably "calculated" to lead to facts that will have any tendency to make a question at issue in the case more or less likely, or support a defense. Alaska R. Civ. P. 26. In interpreting what "relevant" means in the discovery context, it has been held the word should not be construed as imposing a burden on the party seeking the information to prove beforehand that the information sought in its claim investigation is relevant evidence which meets a court's admissibility test. *Schwab.* In many cases the party seeking information has no way to know what evidence will be until an opportunity to review it has been provided. *Id.*

Based on the policy favoring liberal discovery, "calculated" to "lead to admissible evidence" means more than a mere possibility, but not necessarily a probability, the information sought by the release will lead to admissible evidence. *Teel.* For a discovery request to be "reasonably calculated," it must be based on a deliberate and purposeful design to lead to admissible evidence, and that design must be both reasonable and articulable. The proponent of a release must be able to articulate a reasonable nexus between the information sought and evidence relevant to a material issue in the case. *Id.* To be "reasonably calculated" to lead to admissible evidence, both the scope of information within the release terms and the time periods it covers must be reasonable. *Russell*. The nature of Employee's injury, the evidence thus far developed, and the specific disputed issues in the case all combine to determine whether the scope of information sought and period of time covered by a release are "reasonable." *Id*.

a. Medical and pharmacy records.

Employee's April 14, 2016 claim seeks ongoing medical costs and a finding of unfair and frivolous controversion. Employee's medical history is therefore directly "at issue" in this case. AS 23.30.001; AS 23.30.135; *Rogers & Babler*. Employers are generally permitted to seek releases covering medical history two years prior to an alleged work injury. AS 23.30.001; AS 23.30.135; *Granus*; *Schwab*; *Cooper*. Part of the rationale for this limit is to allow an employer to investigate possible causes or aggravating factors in the alleged disability or need for medical treatment, while placing reasonable constraints on what information may be obtained. *Id*.; *Rogers & Babler*. The medical and pharmacy releases in this case fall within this general limit, as they seek information after April 14, 2013, or two years prior to the injury date

listed on Employee's April 14, 2016 claim. *Id*. Medical records are generally reliable histories of an employee's work-related injuries, other possible related conditions, or any aggravating factors. *Id*. The medical and pharmacy releases in this case are therefore relevant, narrowly-tailored in time and scope, and discoverable. *Id.*; AS 23.30.107; AS 23.30.108; Alaska R. Civ. P. 26; *Rogers & Babler*. The order requiring Employee to sign the medical and pharmacy releases is not an abuse of discretion, and is supported by substantial evidence. *Id*. Employee will be ordered to sign and return the medical and pharmacy releases or face possible dismissal of his April 14, 2016 claim. *Id*; *McKenzie*; *Bathony*.

b. Insurance records.

Employer requests a release allowing it to obtain Employee's insurance records from April 14, 2013 to the present for any benefits provided by any insurance company in reference to his low back and lower extremities. Such information might yield relevant evidence concerning medical care or treatment Employee may have received for these body parts, including pre-existing conditions, if any, and are "reasonably calculated" to lead to admissible evidence. AS 23.30.001; AS 23.30.135; *Rogers & Babler*; *Russell*. Therefore, this release is relevant and reasonably restricted as to the information sought and time periods covered. *Id*. The order requiring Employee to sign it is not an abuse of discretion, and is supported by substantial evidence. *Id.*; AS 23.30.107; AS 23.30.108. Employee will be ordered to sign and return the insurance release or face possible dismissal of his April 14, 2016 claim. *Id*; *McKenzie*; *Bathony*.

c. Division of Workers' Compensation records.

Employer requests Employee sign a release allowing it to obtain Employee's workers' compensation records including medical reports related to his low back or lower extremities. This information is relevant to Employee's current claim for benefits related to symptoms in the same body parts because it may assist Employer in locating other cases or litigation Employee has been involved in, other employers where Employee might have been injured, and possibly other relevant medical records. AS 23.30.001; AS 23.30.135; *Rogers & Babler*; *Russell*. Therefore, this release is reasonably restricted as to the information sought and time periods covered (*i.e.*, all periods). The order requiring Employee to sign it is not an abuse of discretion, and is supported by substantial evidence. *Id*. Employee will be ordered to sign and return the

workers' compensation release or face possible dismissal of his April 14, 2016 claim. *Id*; *McKenzie*; *Bathony*.

d. Employment history and Social Security Administration records.

Employee has no claim for time loss nor has he been found eligible for reemployment or vocational retraining benefits. Employee's work history is therefore not "at issue" and so the employment history release sought by Employer is not relevant. *Id*. Related, employers are entitled to discover evidence of Social Security benefits an employee received, which may be relevant to any amounts owed him under the Act as an "offset" to an employer. AS 23.30.225. But because Employee has no claim for time loss benefits, this information is also not relevant. AS 23.30.001; AS 23.30.107; AS 23.30.108; AS 23.30.135; Alaska R. Civ. P. 26; *Rogers & Babler*; *Granus*. The order directing Employee to sign Employment and Social Security Administration records is not supported by substantial evidence. *Id*. Employee will not be required to sign and return releases concerning his employment history or Social Security Administration benefits. *Id*.

CONCLUSION OF LAW

The order requiring Employee to sign all releases as set forth in the August 10, 2016 prehearing conference summary was an abuse of discretion.

ORDER

1) Employee's August 26, 2016 petition for protective order is granted in part and denied in part.

2) Employee is directed to sign and return to Employer the medical, pharmacy, insurance, and Division of Workers' Compensation releases within ten days from the date he receives this decision.

3) A protective order is issued on the Employment history and Social Security Administration records releases.

4) If Employee does not sign and return the releases identified in paragraph 2, above, to Employer in accord with this decision, Employee's April 14, 2016 claim may be dismissed.

Dated in Anchorage, Alaska on November 2, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Dave Ellis, Member

/s/
Mark Talbert, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Daniel Schwab, employee / claimant v. Costco Wholesale, employer; Costco Wholesale Corporation, insurer / defendants; Case No. 201506048; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on November 2, 2016.

/s/
Elizabeth Pleitez, Office Assistant