# ALASKA WORKERS' COMPENSATION BOARD

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

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| JAMES E. HOLT,<br><br>Employee,<br>Petitioner,<br><br>v.<br><br>THE HOME DEPOT, INC.,<br><br>Employer,<br>and<br><br>NEW HAMPSHIRE INSURANCE COMPANY,<br><br>Insurer,<br>Respondents. | INTERLOCUTORY DECISION AND ORDER<br><br>AWCB Case No. 201410153<br><br>AWCB Decision No. 18-0102<br><br>Filed with AWCB Fairbanks, Alaska on October 12, 2018 |

James Holt's (Petitioner) August 14, 2018 petition was heard on the written record on October 11, 2018, in Fairbanks, Alaska, a date selected on September 27, 2018. Attorney John Franich represents Petitioner. Attorney Stacey Stone represents The Home Depot, Inc. (Respondent) and its workers' compensation insurer. As this hearing was on the written record pursuant to AS 23.30.108(c), there were no witnesses. The record closed at the hearing's conclusion on October 11, 2018.

## ISSUE

Petitioner contends a recent Alaska Supreme Court decision limiting *ex parte* contact between the defendant's representative and the plaintiff's treating physician in a civil action also applies

in workers' compensation cases. The designee at a prehearing conference denied his petition for a related protective order and he appeals.

Respondent contends the Alaska Supreme Court decision in question is a civil case, does not address workers' compensation cases, and the federal law forming the basis for that decision is not applicable to cases arising under the Alaska Workers' Compensation Act (Act).

**Did the designee abuse his discretion by denying a petition for a protective order that would limit an employer's right to *ex parte* contacts with attending physicians?**

## FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On June 22, 2018, the Alaska Supreme Court issued *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018), discussed in the Principles of Law section, below. (Official notice).

2) On June 27, 2018, Franich wrote to Stone stating while his client had no objection to "disclosure of existing health records," he objected to the "common practice of seeking additional information through *ex parte* contact, such as by asking treating physicians to answer questions in the letters that are commonly used in workers' compensation cases." Franich contended such practices violate the Health Insurance Portability and Accountability Act (HIPAA) and are "no longer permissible without the patient's consent." Franich revoked previous releases in Petitioner's case "to the extent that they may be interpreted to authorize *ex parte* communication." Franich specifically stated Respondent could continue to use current releases to obtain medical and related financial records, but could not engage in any other *ex parte* communication with medical providers. (Letter, July 27, 2018).

3) On June 28, 2018, Stone replied to Franich's letter and contended HIPAA did not apply to workers' compensation cases and consequently, *Harrold-Jones* was distinguishable from this case and did not support Petitioner's interpretation of the law regarding *ex parte* communication with an injured worker's attending physicians. (Letter, July 28, 2018).

4) On July 3, 2018, Petitioner asked for a protective order based on his understanding of the holding in *Harrold-Jones* and its effect on workers' compensation cases. He also contended HIPAA does not completely exempt workers' compensation cases and it extends only to disclosure of protected health information "that already exists." He further contended HIPAA

does not authorize providers to engage in *ex parte* communication with an employer's representatives. Petitioner set forth the above-referenced procedural facts and contended Respondent's releases were overbroad based on *Harrold-Jones*. (Petition for Protective Order, July 3, 2018).

5) On July 23, 2018, Respondent opposed the petition for a protective order restating its position from its previous correspondence with Petitioner's lawyer. Respondent also cited an employer's duty to furnish medical treatment for the period which the nature of the injury or the process of recovery requires under applicable statutes. It further contended, "When an employer contacts an employee's treating physician, the employer is gathering health information from the provider in order to meet with its duty set forth in the Act." Respondent noted that, unlike a defendant in a civil personal injury case, employers under the Act are required to continue to provide medical care and, must be able to thoroughly investigate an injured worker's claim to verify information, properly administer claims, effectively litigate disputed claims and detect any fraud. In other words, Respondent contended discovery is "generally continuous and ongoing." It further contended this requires *ex parte* contact by an employer with an employee's treating physician "to obtain updates regarding an employee's condition and need for ongoing treatment." Respondent suggests proper claim investigation and administration requires the ability to "contact" an employee's medical providers "directly regarding their findings and recommendations." It asked for a ruling denying the requested protective order. (Opposition to Employee's Petition for a Protective Order, July 23, 2018).

6) On August 1, 2018, the parties presented their evidence and arguments on the protective order petition to the designee at a prehearing conference. The designee in his prehearing conference summary referenced Petitioner's July 3, 2018 petition and Respondent's July 23, 2018 answer. The designee carefully recorded the parties' respective written and prehearing conference arguments addressing *Harrold-Jones*' applicability or inapplicability to this case. The designee cited freely from HIPAA regulations and from *Harrold-Jones,* and analyzed HIPAA's application to Alaska workers' compensation cases, including the "authorization exception" and the "litigation exception." The designee addressed these factors in summary sections "A" through "B," and briefly discussed existing Alaska statutes applicable to this issue in section "C." The designee also cited from other Alaska Supreme Court decisions as well as decisions from other jurisdictions. Based on these arguments, the evidence presented and his analysis of

Alaska statutes, case law and decisions from other states, the designee found, citing in particular AS 23.30.107(a) that Petitioner was not entitled to a protective order based on *Harrold-Jones*. However, the designee acknowledged Petitioner's concerns regarding *ex parte* communications and found them "well taken." Designee cited the recent *Hays* decision where an employer's nurse case manager presented an employee's treating physicians with "choice evidence to steer their opinions," which caused a denial of medical benefits to a claimant who, years later, was found entitled to them. The designee noted the Alaska Supreme Court might apply *Harrold-Jones* to workers' compensation cases given the "cultural shift emphasizing medical privacy." Nevertheless, the designee determined any such change should be legislative rather than administrative. (Prehearing Conference Summary, August 1, 2018).

7) On August 14, 2018, Petitioner timely appealed the designee's August 1, 2018 discovery order to the board. Petitioner stated:

> Employee appeals the discovery order contained in the 8/13/18 Prehearing Conference Summary on the ground that the designee erred in denying the employee's request for a protective order regarding *ex parte* communication with treating physicians. This appeal is authorized by 8 AAC 45.065(h). (Petition, August 14, 2018).

8) On September 11, 2018, Respondent opposed the appeal for the reasons stated in its July 23, 2018 opposition to the petition for a protective order. (Opposition to Petition Appealing Discovery Order, September 11, 2018).

9) On September 27, 2018, the division mailed the parties a hearing notice for a hearing on the written record for October 9, 2018, indicating the hearing would occur in Anchorage. (Hearing Notice, September 27, 2018).

10) On October 1, 2018, the division sent a "corrected" hearing notice stating the hearing was set in Fairbanks on October 11, 2018. (Corrected Hearing Notice, October 1, 2018).

11) On October 2, 2018, Petitioner offered supplemental briefing addressing his appeal. (Supplemental Briefing on Employee's Petition for Protective Order, October 2, 2018).

12) On October 3, 2018, Respondent objected to the September 27, 2018 hearing notice scheduling an October 9, 2018 hearing on the written record on Petitioner's appeal. Respondent objected to what it perceived to be a short briefing time as well as a venue change from Fairbanks to Anchorage. (Objection to September 27, 2018 Hearing Notice).

13) The venue in this case has never changed from Fairbanks to Anchorage and the first hearing notice scheduling a hearing in Anchorage was sent in error. (Observations).

14) The issue in this case is one of first impression. The Chief of Adjudications, located in Anchorage, typically chairs hearings involving issues of first impression. (Official notice).

15) On October 4, 2018, Respondent offered supplemental briefing addressing the appeal. (Employer's Supplemental Hearing Memorandum regarding the Employee's Petition for a Protective Order, October 4, 2018).

16) To the extent Petitioner and Respondent offered arguments or evidence in their supplemental briefings that was not presented to the designee at the August 1, 2018 prehearing conference, this decision did not consider those arguments or evidence. (Judgment).

17) Injured workers routinely complain about their employer's representatives having private conversations with the injured workers' attending physicians. Many injured workers are convinced there is a "conspiracy" of sorts among insurance adjusters, defense attorneys and others in the workers' compensation community designed to deprive them of their benefits. This repeated theme causes considerable unnecessary litigation. (Experience, judgment and observations).

18) Employers and insurers do not routinely allow injured workers to have *ex parte* conferences or communications with the employer's medical evaluators (EME). (*Id*.).

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

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

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .

> (i) Interference by a person with the selection by an injured employee of an authorized physician to treat the employee, or the improper influencing or attempt by a person to influence a medical opinion of a physician was treated or examined an injured employee, is a misdemeanor.

AS 23.30.107 in effect in 1987:

> **AS 23.30.107. Release of information**. Upon request, an employee shall provide written authority to the employer, carrier, rehabilitation provider, or rehabilitation administrator to obtain medical and rehabilitation information relative to the employee's injury.

Current AS 23.30.107:

> **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.
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> (b) Medical or rehabilitation records, and the employee's name, address, social security number, electronic mail address, and telephone number contained on any record, in an employee's file maintained by the division or held by the board or the commission are not public records subject to public inspection and copying under AS 40.25.100-40.25.295. This subsection does not prohibit
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> > (1) the reemployment benefits administrator, the division, the board, the commission, or the department from releasing medical or rehabilitation records in an employee's file, without the employee's consent, to a physician providing medical services under AS 23.30.095(k) or 23.30.110(g), a party to a claim filed by the employee, or a governmental agency; or
> >
> > (2) the quoting or discussing of medical or rehabilitation records contained in an employee's file during a hearing on a claim for compensation or in a decision or order of the board or commission.
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> (c) The division may not assemble, or provide information respecting, individual records for commercial purposes that are outside the scope of this chapter.

> (d) An employee may elect to authorize the disclosure of the employee's name, address, social security number, electronic mail address, and telephone number contained in a record described in (b) of this section by signing a declaration on a form provided by the division.

The legislature added a version of subsection (b) effective September 4, 1995. It added subsection (c) effective November 7, 2005. The legislature inserted "and the employee's name, address, social security number, electronic mail address, and telephone number contained on any record" in the first sentence of subsection (b) and added subsection (d) effective September 2, 2008.

In *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987), a personal injury action, civil defendants moved for an order compelling plaintiffs to sign a medical record release, which would allow defense counsel to engage in informal, *ex parte* interviews with the plaintiff's treating physician. The superior court granted the motion stating "plaintiffs shall provide defendants with an executed medical waiver. Said waiver may specifically note that physicians are free to confer with defense counsel but are not compelled to do so." The plaintiffs petitioned for review. The Alaska Supreme Court reviewed its lengthy history of similar cases noting that the filing of a personal injury lawsuit results in a waiver of the physician-patient privilege, and its desire to facilitate informal discovery to reduce costs and preserve judicial economy. *Langdon* affirmed the trial court's ruling and concluded defense counsel are authorized to engage in informal, *ex parte* contacts with a plaintiff's treating physician but:

> We emphasize, however, that it is within the discretion of treating physicians whether they wish to engage in such *ex parte* contacts. Accordingly, physicians may not be compelled to engage in informal *ex parte* contacts with defense counsel and likewise plaintiffs cannot prevent them from doing so. *Langdon*, 745 P.2d at 1375.

*Baker v. Anglo Alaska Construction, Inc*., AWCB Decision No. 88-0013 (January 29, 1988), heard the same *ex parte* contact issue. The employer wanted a medical authorization permitting it to consult with the employee's medical providers without the presence of the employee's attorney. In granting the employer's request and adopting *Langdon*, *Baker* said, implying it was a first-impression decision on the *ex parte* contact issue:

> Accordingly, because there is no language in AS 23.30.107 limiting the written authority to release medical information to only written documents, because employers need full access to medical information to investigate claims, because

> employees' rights to privacy can be protected by the exclusion of irrelevant information from the record, because discovery and relevancy standards are liberal for the purpose of getting to the merits of claims, because complete access to medical information enhances the general goal of the workers' compensation system to produce a fast and efficient remedy, and because we believe employees' rights are adequately protected under AS 23.30.095(i), we conclude that under AS 23.30.107 employees are required to give written medical authorization for the release of all relevant medical information, including the permission to consult with medical care providers without the employee's or his attorney's presence.
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> We note that the Alaska Supreme Court has reached a similar conclusion in the area of tort law in *Langdon v. Champion*, No. 3249, slip op. at 11 (November 27, 1987). However, the court also permitted the written authorization to specify that the physician could, but was not required to consult with the defense. (*Id*. at 10.) While we obviously cannot compel physicians to consult with employers in workers' compensation cases, we certainly encourage them to do so. We are concerned that compensation benefits be paid and disputes be resolved as quickly as possible. As stated above, we believe that a free flow of medical information can only speed the delivery of benefits and resolution of disputes.

In *Kruesi v. Norm Aubuchon, Inc*., AWCB decision No. 92-0158 (June 23, 1992), an employer requested an order allowing its lawyer to meet privately with the employee's treating physicians. The employer, citing *Langdon* at hearing argued "the law in Alaska is that defense counsel may engage in informal, *ex parte* communications with the plaintiff's treating physician." *Kruesi* agreed with the employer's position and, "in accord with" *Langdon* and other opinions cited, held the employer could meet privately with the employee's physicians and held the injured worker's request was "contrary to the law."

In *Fletcher v. Pacific Rim Geological Consulting, Inc.*, AWCB Decision No. 12-0021 (January 30, 2012), an employee signed releases for medical records, then told her provider not to send the records and later withdrew the releases. When sent a new release, the employee altered it by adding "patient must be contacted prior to the release of any records." *Fletcher* found the employee's revocation and restrictions to be contrary to *Langdon*.

In *Miller v. Municipality of Anchorage*, AWCB Decision No. 13-0006 (January 14, 2013), an injured worker wrote to her treating doctors requesting only that she be notified of any conference with defense counsel's representatives, and asking that she be allowed to attend. Citing *Baker* and *Langdon*, *Miller* noted the employee was not demanding that she or her

attorney be present at such conferences, she did not tell her doctors they may not confer with the employer's representatives until she is present, she did not require that she be notified before any conference and did not ask that the conferences be recorded. *Miller* found the injured worker who was simply asking to be notified if the employer requested a conference and allowed to attend did not run afoul of *Langdon*.

*Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), provided guidance in discovery scope, and defined the term "relative" as set forth in AS 23.30.107(a), as follows:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

AS 23.30.108 in effect in 1987: None; this statute did not exist in 1987.

Current AS 23.30.108:

> **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 the 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 present releases or documents that are likely to lead to

> admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.
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> (d) If the employee files a petition seeking a protective order to recover medical and rehabilitation information that has been provided but is not related to the employee's injury, and the board or the board's designee grants the protective order, the board or the board's designee granting the protective order shall direct the division, the board, the commission, and the parties to return to the employee, as soon as practicable following the issuance of the protective order, all medical and rehabilitation information, including copies, in their possession that is unrelated to the employee's injury under the protective order.
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> (e) If the board or the board's designee limits the medical or rehabilitation information that may be used by the parties to a claim, either by an order on the record or by issuing a written order, the division, the board, the commission, and a party to the claim may request and an employee shall provide or authorize the production of medical or rehabilitation information only to the extent of the limitations of the order. If information has been produced that is outside of the limits designated in the order, the board or the board's designee shall direct the party in possession of the information to return the information to the employee as soon as practicable following the issuance of the order.

Effective June 16, 2010, the legislature added subsections (d) and (e), above.

*Hall v. LeBaron Enterprises, Inc.*, AWCB Decision No. 96-0003 (January 4, 1996), recognized some influencing by an employer to an injured worker's attending physician would not be improper or inappropriate. *Hall* also noted, "For example, any time an employer sends a medical report to a physician, its purpose is usually to persuade the doctor to change his or her opinion."

*Duncan v. City of Fairbanks*, AWCB Decision No. 97-0109 (May 16, 1997), addressed the employee's assertion that his employer was trying to improperly influence his attending physician. *Duncan* recognized:

> Consistently, however, we have found that employers and insurers may contact employee doctors for the purpose of exchanging information.

*Hays v. Arctec Alaska*, AWCB decision No. 18-0068 (July 11, 2018), addressed a situation where an attending physician met with a medical case manager for a "care conference" which *Hays* said "ironically did not include Employee." During that conference, the medical case manager "pointed out medical evidence she thought showed Employee was doing 'very well' following his shoulder surgery until he tripped and fell over a log." The nurse case manager asked the physician for his opinion on causation and he, "not surprisingly," opined the work injury was not the substantial cause of the employee's disability or current need for right shoulder surgery but rather "the trip and fall over the log was." However, in his subsequent deposition the treating physician repeatedly denied the employee had reinjured his right shoulder when he tripped and fell over the log. Still later in his deposition, the physician flip-flopped and said he thought the trip and fall was the larger of the two causes for the employee's need for a second right shoulder surgery. Ultimately, the attending physician said he "could not opine on . . . shoulder causation."

In *Piasini-Branchflower v. Anchorage School District*, AWCB decision No. 17-0041 (April 11, 2017), the employee observed that the employer's nurse case manager regularly met with her attending physician both before and after the employee's scheduled medical appointments. This *ex parte* contact and subsequent fluctuations in her doctor's opinions led the employee to think "he was not my doctor," and to infer the nurse case manager was interfering with her medical care.

The court in *Church's Fried Chicken v Hanson*, 845 P.2d 824 (N.M. Ct. App. 1992), a workers' compensation case, reviewed the applicable state statute and decisional law from numerous jurisdictions. The injured worker in *Hanson* objected to the insurance adjuster having *ex parte* contact with her treating physician; she did not object to communications between the adjuster and her doctor when her attorney was present. The lower court granted the requested order. The insurer appealed based on "issues of statutory interpretation, public-policy considerations and jurisdictional arguments." (*Id*. at 826). The statute in question included a requirement for an injured worker to sign an authorization for release of "all medical records, medical bills and other information concerning any health care or healthcare service provider to the worker. . . ." (*Id*. at 827). The insurer contended the statute permitted it to contact Hanson's physician to inquire about her

"physical or emotional condition, prospects for improvement, restrictions on activities and other matters."

*Hanson* noted the statute authorizes release of medical records, bills and "other information." It found the statute does not, however, absent the injured worker's consent, authorize *ex parte* oral discussion by an employer or insurer with a worker's treating physician. *Hanson* cited the general disagreement among jurisdictions addressing this issue, with some holding the physician-patient waiver extends to *ex parte* communications, while others holding it does not. *Hanson* reasoned that some courts deny *ex parte* interviews because of privacy interests underlying the physician-patient relationship "and concern that adversarial parties may seek to improperly influence a plaintiff's physician." (*Id*. at 828). It further said some courts have held *ex parte* interviews eliminate "any safeguards against revelation of matters irrelevant to the action and gives rise to situations permitting breaches in confidentiality between the patient and his treating physician." (*Id*.).

*Hanson* cited a New Mexico Supreme Court opinion in a personal injury case, which noted "we find it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." (*Id*. at 829). Agreeing with the New Mexico Supreme Court, *Hanson* noted:

> While the court in *Smith* dealt with the privacy right of a plaintiff in a personal injury action, we think the rationale and public-policy factors cited by the court apply equally in workers' compensation actions. (*Id.* at 829).

*Hanson* considered the insurer's other arguments, which included the statutory requirement for employers and insurers to provide continuing medical care to an injured worker, unlike personal injury cases where, following entry of judgment, obligations to provide ongoing medical care and other benefits are concluded. The insurer contended workers' compensation systems are designed to minimize litigation costs and delay and encourage informal discovery in dispute resolution. *Hanson* agreed these factors were important but insufficient to negate the public-policy principles recognized in *Smith*. Lastly, *Hanson* found no evidence the insurer's access to relevant information will be materially restricted by not having *ex parte* interviews with attending physicians or that preventing such contacts would cause a significant delay or cost increase in workers' compensation cases. *Hanson* affirmed the trial court's order.

A dissenting justice quoting from New Mexico statutes opined workers' compensation cases are different because the associated statutes should be "interpreted to ensure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost" to employers. He found the "quick and efficient" goals "preeminent" under New Mexico's workers' compensation system. The dissent also noted the attending physician is "usually the only witness in a workers' compensation suit," and therefore occupies a unique role as both a treating physician and an expert. He also reasoned that New Mexico statutes allows for not only disclosure by a physician of medical records but also allows release of "other information" relevant to the case. The dissent contended "other information" could include oral opinions from a physician. (*Id*. at 832).

*Garner v. Ford Motor Co*., 61 F.R.D. 22 (D. Alaska 1973), addressed the question of defense attorneys meeting privately with the plaintiff's attending physicians. Plaintiff contended *ex parte* communication was not appropriate, while the defendant argued once the plaintiff sued, there was a "complete waiver of the privilege," allowing defense counsel to confer privately with all attending physicians. Citing federal Rules of Civil Procedure, *Garner* held the defendants had many conventional discovery devices it may use to obtain the desired information from an attending physician. The court further noticed "that in none of them is provision made for the discovery of information by means of private conversations between the defendant's attorneys and a plaintiff's attending physician." (*Id*. at 24). *Garner* denied the defense motion to waive the physician-patient privilege to the extent defense attorneys may informally meet with plaintiff's attending physicians.

In *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018), a plaintiff in a civil action brought in Superior Court sued a physician for medical malpractice. The defendants requested a release authorizing *ex parte* contact with the plaintiff's new doctor. She refused to sign the release and sought a protective order prohibiting the defendants from having *ex parte* contact with her new physician. The court denied her motion and granted the defendant's request for a release, relying on *Langdon*. On the plaintiff's petition for review, the Alaska Supreme Court decided:

> But we also conclude that we should overrule our case law because its foundations have been eroded by a cultural shift in views on medical privacy and new federal procedural requirements undermining the use of *ex parte* contact as an informal discovery measure. We therefore hold that -- absent voluntary agreement -- a defendant may not make *ex parte* contact with the plaintiff's treating physicians

> without a court order, which generally should not be issued absent extraordinary circumstances. We believe that formal discovery methods are more likely to comply with the federal law and promote justice and that such court orders rarely, if ever, be necessary. (*Id*. at 569).

*Harrold-Jones* reviewed in great detail how HIPAA requirements contributed to undermining *Langdon*'s prior practice of allowing *ex parte* contacts as informal discovery measures. Among other things, *Harrold-Jones* overruled *Langdon* based on its analysis that *Langdon*'s rule was no longer sound because of "changed conditions" and that "more good than harm would result from a departure from precedent." (*Id*. at 577). *Harrold-Jones* expressly overruled *Langdon*.

The designee's decision on releases and other discovery matters must be upheld, absent "an abuse of discretion." The Alaska Supreme Court 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 apply properly the controlling law may also be considered an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884 (Alaska 1962).

A substantial evidence standard is applied to review of the board designee's discovery determination. *Augustyniak v. Safeway Stores, Inc*., AWCB No. 06-0086 (April 20, 2006). When applying a substantial evidence standard, a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . the order . . . must be upheld" under this test. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978).

> **AS 44.62.570. Scope of review**. . . .
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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. . . .

**8 AAC 45.065. Prehearings**. . . .

. . . .

(c) After a prehearing the board or designee will issue a summary of the action taken at the prehearing. . . . Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. . . .

. . . .

(h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition . . . that sets out the grounds for the appeal. Unless a petition is filed under this subsection no later than 10 days after service of a board designee's discovery order, a board designee's discovery order is final.

**8 AAC 45.092. Second independent medical evaluation . . . .**

. . . .

(i) . . . Until the parties receive the second independent medical examiner's written report, communications by and with the second independent medical examiner are limited, as follows:

(1) a party or a party's representative and the examiner may communicate as needed to schedule or change the scheduling of the examination;

(2) the employee and the examiner may communicate as necessary to complete the examination;

(3) the examiner's communications with a physician who has examined, treated, or evaluated the employee must be in writing, and a copy of the written communication must be sent to the board and the parties; the examiner must request the physician report in writing and request that the physician not communicate in any other manner with the examiner about the employee's condition, treatment, or claim.

(j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to

(1) submit interrogatories or depose the examiner, the party must

> (A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves interrogatories; and
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> (B) initially pay the examiner's charges to respond to the interrogatories or for being deposed; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the charges may be awarded as costs to the prevailing party;
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> (2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or
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> (3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.
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> (k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing and may not consider it in connection with an agreed settlement.

## ANALYSIS

**Did the designee abuse his discretion by denying a petition for a protective order that would limit an employer's right to *ex parte* contacts with attending physicians?**

*Langdon* had been the law in Alaska since 1987. A civil case, *Langdon* held defense counsel are authorized to engage in *ex parte* contacts with a civil plaintiff's physicians. It also held it was within the discretion of physicians whether they wanted to engage in such contacts. *Langdon* emphasized physicians may not be compelled to engage in *ex parte* contacts with defense counsel and likewise plaintiffs cannot prevent them from doing so. In short, under *Langdon*, civil plaintiffs were routinely required to sign an appropriate release allowing *ex parte* contacts.

Not long after the Alaska Supreme Court issued *Langdon*, an employer in a workers' compensation case wanted a medical authorization from an injured worker to permit it to consult

with the injured worker's medical providers without the presence of the employee's attorney. In other words, the employer in *Baker* wanted the same right for *ex parte* contacts with a workers' compensation claimant's physicians as civil litigants had under *Langdon* in personal injury cases filed in Superior Court. *Baker* granted the employer's request based on the following considerations and analysis, which are discussed in greater detail later in this decision:

- There is no language in AS 23.30.107 limiting the written authority to release medical information to only written documents.
- Employers need full access to medical information to investigate claims.
- Employee's rights to privacy can be protected by excluding irrelevant information from the record.
- Discovery and relevancy standards are liberal for purposes of getting to claim merits.
- Complete access to medical information enhances the general goal of the Act to produce a fast and efficient remedy.
- Employee's rights are otherwise adequately protected under AS 23.30.095(i).
- The Alaska Supreme Court in *Langdon* reached a similar conclusion with certain limitations.
- Compensation benefits should be paid and disputes be resolved as quickly as possible.
- The free flow of medical information will speed the delivery of benefits and resolution of disputes.

Subsequent workers' compensation decisions expressly adopted *Langdon* as support to either grant an employer's request to allow its attorney to meet privately with the employee's treating physicians, or to deny an injured worker's effort to prevent such contacts. *Kruesi*; *Fletcher*. Another decision relied on *Langdon* to hold that an injured worker's request to be notified of a hearing and allowed to attend did not violate "the rule" set forth in *Langdon*. *Miller*. These sample cases make it clear the *ex parte* contact rule in *Langdon*, a civil case, became the law in workers' compensation claims as well beginning in 1988 and continuing to the present.

Much has changed since *Langdon* issued in 1987 and *Baker* applied *Langdon*'s relevant holding to workers' compensation cases in 1988. Most notably, the Alaska Supreme Court in *Harrold-*

*Jones* a civil medical malpractice case overruled *Langdon* on this relevant holding in June 2018. While *Baker* did not exclusively rely upon *Langdon* to reach its conclusion in 1988, it relied on *Langdon* to support its decision, and subsequent workers' compensation decisions have relied exclusively on *Langdon*'s holding allowing defense counsel to hold *ex parte* communications with an injured worker's treating physicians. Now the Alaska Supreme Court precedent upon which these cases relied is overruled and no longer exists to support this *ex parte* practice.

Petitioner, in his July 3, 2018 petition for protective order, contends *Harrold-Jones* should apply to workers' compensation cases. He contends the court in *Harrold-Jones* found releases allowing *ex parte* contacts do not reflect the "cultural shift" in medical privacy, they violate HIPAA and are no longer permissible absent the injured worker's consent. While Petitioner does not object to Respondent using current releases to obtain existing medical records, he objects to Respondent engaging in *ex parte* communication with his medical providers. Petitioner contends HIPAA's exemption for workers' compensation cases extends only to "disclosing" protected health information such as billing and health records that already exist. He contends HIPAA does not authorize medical providers to engage in *ex parte* communications with defense counsel or with other representatives. Petitioner does not object to an adjuster telephoning a doctor's office to inquire about a surgery date, for example, and the doctor's office consulting an existing record to ascertain and provide the date. He further contends, however, adjusters and other representatives should not create "new information" during *ex parte* contacts. Rather, Petitioner contends employers can obtain information about medical stability and return to work status easily without *ex parte* communication because such information is provided on physician's reports.

By contrast, Respondent opposes the request for a protective order and contends Petitioner's reliance on *Harrold-Jones* is misplaced because it is a medical malpractice, personal injury civil lawsuit and not a workers' compensation claim. It contends workers' compensation cases are different from personal injury litigation because employers in the latter litigation are not required to continue to furnish medical and other treatment for the period which the nature of the injury or the process of recovery requires under the Act. By contrast, in civil cases such as *Harrold-Jones*, once a judgment is entered, the defendant's liability to the plaintiff is ended.

Consequently, Respondent contends discovery in workers' compensation cases is ongoing and employers "must be able to thoroughly investigate claims to verify information the claimant provides, administer the claim, effectively litigate disputed claims and detect any possible fraud. It contends the statute requiring injured workers to sign medical record releases evidences this fact. Respondent further contends ongoing discovery in workers' compensation cases "requires" *ex parte* contact with an employee's treating physicians to obtain updates and need for any ongoing treatments. It contends this decision has authority to order Petitioner to allow *ex parte* contact between his physicians and Respondent's representatives.

The designee at the August 1, 2018 prehearing conference considered Petitioner's July 3, 2018 petition seeking a protective order, Respondent's July 23, 2018 answer to the petition and the parties' arguments at the prehearing conference. The designee did extensive research into the HIPAA aspects of *Harrold-Jones*. He reviewed the "authorization exception" the "litigation exception" and the relevant statute applicable to this issue, AS 23.30.107(a). The designee concluded based mainly on his HIPAA analysis that *Harrold-Jones* should not extend to workers' compensation cases. The designee noted Petitioner's concerns about *ex parte* communications were "well taken." He cited *Hays*, where an employer's case manager who presented an injured worker's treating physicians with "choice evidence" to "steer their opinions." Nevertheless, the designee decided any solution to problems with *ex parte* communication should be resolved by the legislature. He denied the July 3, 2018 petition and Petitioner appealed timely. 8 AAC 45.065(h).

In an appeal from a designee's discovery order made at a prehearing conference, the parties on appeal are limited to evidence and argument presented to the designee at the prehearing conference. This decision may not consider any other evidence or argument. AS 23.30.108(c). Neither party sought to have the August 1, 2018 prehearing conference summary amended or modified. 8 AAC 45.065(c), (d). Thus, the summary and pleadings are the basis for this appeal.

Petitioner does not suggest the designee at the prehearing conference issued an order that was arbitrary, capricious, manifestly unreasonable, or which stemmed from an improper motive. *Sheehan*. Those factors for an "abuse of discretion" review are, therefore, eliminated. Similarly,

he is not suggesting the designee's order involves an abuse of discretion because of any issue concerning substantial evidence. AS 44.62.570; *Augustyniak*; *Miller*. The substantial evidence test for abuse of discretion does not apply in this instance. *Rogers & Babler*. Rather, Petitioner simply makes a legal argument that *Harrold-Jones*' holding on *ex parte* communication should apply to workers' compensation cases. Stated differently, he contends the designee abused his discretion by failing to grant his July 3, 2018 petition for a protective order against signing releases that would allow Respondent's agents to hold *ex parte* a discussions with his physicians, based on new Alaska Supreme Court law, set forth in *Harrold-Jones*. In short, Petitioner contends the designee failed to apply what Petitioner perceives to be the controlling law on this *ex parte* contact issue, thereby abusing his discretion. *Manthey*.

The designee's August 1, 2018 prehearing conference summary analysis is insightful and thorough. However, it primarily addressed, in sections "A" and "B," the HIPAA aspects discussed in *Harrold-Jones* to distinguish it from this workers' compensation case. The designee did not expressly address the fact that *Harrold-Jones*, by overruling *Langdon*, eliminated the primary legal precedent relied upon for decades in workers' compensation decisions. With *Langdon* gone, it can no longer form the basis of an employer's right to participate in *ex parte* communications with an injured worker's physicians. Consequently, Petitioner's request for a protective order must rest on something besides *Langdon*. The real question in this appeal is not whether HIPAA applies in workers' compensation cases, but rather, it is whether the Act as currently written supports an employer's right to *ex parte* communications with an injured worker's physicians and whether *Harrold-Jones*'s holding on this issue fits into the current discovery scheme set forth in the Act.

To answer this question, the instant decision need not determine whether or not HIPAA applies to workers' compensation cases. The inquiry is whether *Harrold-Jones*' relevant holding applies to workers' compensation cases notwithstanding any HIPAA implications. The designee touched on this point in his summary section "C" by noting AS 23.30.107(a) requires Petitioner to release more than just medical "records." Petitioner must also release "information" without limit to the method used, in the designee's view. However, the designee failed to address why Respondent should be allowed to obtain this "information" *ex parte*, and whether *Harrold-Jones*'

holding should apply in workers' compensation cases under current workers' compensation law to limit *ex parte* means to obtain this information. To this legal question this decision now turns.

This decision first notes the employer in *Baker* successfully applied *Langdon*, a civil case, to a workers' compensation claim to obtain the right to *ex parte* communication with an injured worker's doctors. *Baker* concluded a civil case and a workers' compensation claim were not that different in 1988. Since *Baker*, employers have repeatedly, successfully applied the *Langdon ex parte* communication rule. *Kruesi*; *Fletcher*. It seems anomalous that Respondent now objects to applying another civil case, *Harrold-Jones*, which took away the right to *ex parte* communications with a plaintiff's physician, to another workers' compensation case.

Next, the statute upon which both parties rely supports Petitioner's position on appeal. The first line in AS 23.30.107(a) requires an employee to provide written authority to the defense "to obtain" medical and other information relative to the injury. Petitioner does not contend Respondent does not have the right to "obtain" information. "Obtaining" medical information from attending physicians is not his objection. Petitioner's objection is that the employer's representatives may not just "obtain" information, they may create "new information" through their *ex parte* contacts. In other words, *ex parte* communications provide a means for an employer's representatives to "give" information -- correct or incorrect, relevant or irrelevant, complete or incomplete -- to an attending physician outside the employee's presence. The employee has no opportunity to object, provide an explanation or offer additional evidence before his physician may change his opinion. Read plainly, AS 23.30.107(a) does not allow a party "to give" an attending physician anything other than a release "to obtain" records. Nothing in this statute allows *ex parte* visits by an employer's representatives to an attending physician.

For example, *Hays* astutely noted the unfortunately not uncommon situation where an attending physician met with a medical case manager for a "care conference" which *Hays* noted "ironically did not include Employee." *Hays* found the case manager pointed out select medical evidence and discussed it with the attending physician who changed his initial causation opinion. The goal was to "steer" or otherwise affect the physician's opinions. After various flip-flops, the attending physician ultimately said he could not offer a causation opinion. In *Piasini-*

*Branchflower*, the injured worker noticed her employer's nurse case manager met regularly with her attending physician both before and after her appointments. The doctor's fluctuating opinions caused the employee to think "he was not my doctor" and to infer the nurse case manager was interfering with her medical care. *Hall* recognized that "any time an employer sends a medical report to a physician, its purpose is usually to persuade the doctor to change his or her opinion." *Duncan* addressed an allegation of improper influencing of an attending physician but discounted the injured worker's claim because, relying on the now overruled *Langdon* line of thought, "we have found that employers and insurers may contact employee doctors for the purpose of exchanging information." Disallowing *ex parte* contacts eliminates these troubling, often litigated issues.

The Act's general considerations also support Petitioner's appeal. AS 23.30.001(1) clearly states the legislature's intent. The Act must be interpreted to ensure "quick, efficient, fair, and predictable delivery" of benefits to injured workers "at a reasonable cost" to employers. *Ex parte* communications may arguably be "quick" and "efficient." They are not necessarily fair. Petitioner suggests they are inherently unfair. The designee in his discovery order referenced serious concerns raised in *Hays*. "Fairness" should not be sacrificed on the altar of speed or efficiency. Fairness is critical in workers' compensation cases. Parties are not allowed to make *ex parte* contacts with second independent medical evaluators (SIME). 8 AAC 45.092(i)-(k). There is no good reason to treat SIME physicians differently from attending physicians if in fact as *Baker* said, the goal is to get to the truth and resolve cases on their merits quickly and fairly.

While nothing in the Act expressly prohibits an injured worker from *ex parte* communications with an employer's EME following an EME report, it is unlikely an employer would condone such contacts or a response from its EME physician. *Rogers & Babler*. Respondent may argue it does not enjoy a right to attend Petitioner's routine medical examinations where he can provide unlimited and unbridled *ex parte* information, some or all of which may be untrue or incomplete. While this is true, it is also true nothing in the Act authorizes Respondent's representatives to attend Petitioner's medical visits with his attending physicians.

Next and equally as important, as shown in the Principles of Law section above, notwithstanding HIPAA there has been a "cultural shift" in medical privacy in workers' compensation law over the years, just as in civil law. First, as discussed above, the legislature's intent is preeminently displayed in the Act's first section. When *Baker* was decided, AS 23.30.001(1) did not exist. To the extent it can be argued *Baker* did not "rely" on *Langdon* but cited it in passing, *Baker*'s concern was with the Act's general goal to "produce a fast and efficient remedy." This goal has changed. Now the legislature requires the Act be interpreted to not only ensure "quick, efficient" but also "fair, and predictable" delivery of benefits at a "reasonable cost" to employers. Second, In 1987 and 1988 when *Langdon* and *Baker* were decided, AS 23.30.107 had one line requiring an injured worker to sign releases for an employer to obtain medical and other information relative to the injury. Now, the same statute has several sections including an injured worker's right to file a petition for a protective order; a prohibition against obtaining medical information not applicable to the injury; a section protecting the injured worker's name, address, Social Security number, email address and telephone number from public disclosure; a prohibition against the division assembling or providing personal information for commercial purposes; and a section allowing an employee to disclose private information at his option.

Further, in 1987 and 1988, AS 23.30.108 did not even exist. This statute explains an injured worker's right to request and obtain a protective order against releasing medical information. It requires a prompt prehearing conference at which a designee must issue or deny a request for a protective order. Perhaps most notably, effective June 16, 2010, the legislature added subsections (d) and (e), which allow an employee to "recover medical" information not related to the employee's injury and grants extensive power to recover such information from all parties and even from the Alaska Workers' Compensation Appeals Commission. These statutes show the "cultural shift" evolving in workers' compensation cases paralleling those noted in *Harold-Jones*, as revealed by legislative policy changes to the Act since *Langdon* and *Baker* were issued.

Further addressing *Baker*'s list of concerns apart from is reliance on *Langdon* is instructive:

- AS 23.30.107(a) still does not limit written authority to release medical information to only written documents. However, that statute also does not authorize *ex parte* communication to obtain such medical information.

- Employers still need full access to medical information to investigate claims. But "full access" does not require unfettered, *ex parte* access. *Granus*.
- While an employee's rights to privacy can still be protected by excluding irrelevant information from the record, as demonstrated in *Hays* the information obtained through *ex parte* communications is typically not irrelevant. In other words, if a representative's *ex parte* communication with an attending physician results in a changed causation opinion, the new causation opinion is still relevant to the case. It will not be excluded on relevance grounds even though it may be tainted.
- Discovery and relevancy standards in workers' compensation cases remain liberal to effectuate getting to the merits of a claim. But disallowing *ex parte* discovery does not equate with eliminating or reducing discovery or relevancy. Petitioner is not suggesting a reduction or limitation to Respondent's discovery; he is simply contending discovery should not occur through private meetings with his attending physicians.
- Complete access to medical information still enhances the Act's goal to produce a "fast and efficient remedy," but as stated above, the current law requires the Act to be interpreted to ensure "fair" and "predictable" delivery of benefits at a "reasonable cost" to employers. No single express legislative intent set forth in AS 23.30.001(1) is more important than the others. Disallowing *ex parte* communications will eliminate the uncertainty inherent in private meetings between insurance company representatives and attending physicians and will enhance predictability. Claimants like those in *Piasini-Branchflower*, *Hall* and *Duncan* will no longer have to worry about improper activity during *ex parte* communications. Prohibiting *ex parte* communications may actually result in less cost to employers because there may be less preliminary hearings and discovery disputes over what an employer's representative said or gave to an attending physician and whether the representative was improperly trying to influence the physician's opinion.
- With due respect to *Baker*, it is extremely unlikely AS 23.30.095(i) adequately protects an employee's rights in this situation, because it is highly unlikely an attending physician will admit he or she was affected by irrelevant information given to them by an employer's representative sufficient to alter their medical opinion. *Rogers & Babler*.

> Research disclosed no case in which an employee successfully prosecuted a case under this statute.

Other cases have applied a *Harold-Jones*-like rule applicable to civil actions to workers' compensation cases. The New Mexico statute in *Hanson* had a similar provision to Alaska's law, which required authorization for release of "all medical records" and "other information" concerning any healthcare services provided to the injured worker. The insurer in *Hanson* cited the "other information" clause in the statute and used this to support its request for *ex parte* communications with the claimant's attending physicians. *Hanson* noted the split of opinion throughout jurisdictions on this issue and further noted the concern "that adversarial parties may seek to improperly influence the plaintiff's physician." *Hanson* found *ex parte* interviews eliminate safeguards against revelation of irrelevant matters. It also concluded it is "difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." *Piasini-Branchflower*, *Hays*, *Hall* and *Duncan* show the court's concern is well-founded. The insurer in *Hanson* made exactly the same arguments Respondent makes in the instant case. *Hanson* agreed these factors were important but insufficient to negate the public policy principles set forth. *Hanson* found no evidence the insurer's access to relevant information would be materially restricted, delayed or more costly by not having *ex parte* interviews with attending physicians.

A dissenting justice in *Hanson* quoted from New Mexico law which focused on "the quick and efficient" delivery of benefits at a reasonable cost to employers, and he gave "quick and efficient" preeminence under New Mexico's workers' compensation system. However, Alaska's Act adds "fair and predictable" delivery of benefits at "a reasonable cost" to employers to the list. None of these requirements is intended to take precedence over the other. The dissent also pointed out that in New Mexico cases the attending physician is usually the only witness in the case and occupies the unique role as both the treating physician and an expert. Such is not the case in Alaska, where attending, EME and SIME physicians all weigh in on medical issues.

Prohibiting *ex parte* communications between an employer's representative and an injured worker's attending physicians ultimately does not limit, restrict or affect discovery. It simply

brings discovery efforts into the light of day. In the rare circumstance where an injured worker drags his or her feet and affects delays or obfuscates an employer's ability to conduct discovery from attending physicians, employers still have informal and formal means to compel discovery. A federal court in Alaska in *Garner* so stated and noted conventional discovery devices do not contain a provision for the discovery of information "by means of private conversations between the defendant's attorneys and a plaintiff's attending physician."

Nothing in current Alaska law supports the idea that *Harrold-Jones* should not apply in workers' compensation cases. In short, it replaces *Langdon*, which applied in these cases for decades. *Harrold-Jones* notes the "cultural shift" toward increased patient privacy even in litigation, which parallels changes made to the Alaska Workers' Compensation Act over the past four decades. The designee abused his discretion by not focusing on *Langdon*'s overruling, on the cultural shift as described in *Harrold-Jones* reflected in policy change amendments to the Act over the years and on the express language in AS 23.30.107(a), which allows an employer "to obtain" medical information but has no provision allowing it "to give" medical information in an *ex parte* setting. Petitioner's appeal will be granted and a protective order will be issued.

## CONCLUSION OF LAW

The designee abused his discretion by denying a petition for a protective order that would limit an employer's right to *ex parte* contacts with attending physicians.

## ORDER

1) Petitioner's August 14, 2018 appeal is granted.
2) Petitioner's July 3, 2018 petition seeking a protective order on medical releases is granted.
3) Respondent is not entitled to *ex parte* communications, as described in *Harrold-Jones*, with Petitioner's attending physicians absent his written consent.
4) Respondent is directed to provide Petitioner with new medical releases in conformance with this decision.

Dated in Fairbanks, Alaska on October 12, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Jacob Howdeshell, Member

SARAH LEFEBVRE, MEMBER, DISSENTING

The dissent respectfully disagrees with the majority's decision and order. In support of its disagreement, the dissent would make the following additional factual findings and conclusions:

19) Nothing in the current law requires a physician to reply to an employer's inquiries seeking medical opinions or other information concerning an injured worker. (Experience, judgment and observations).

20) Employers and insurers are often frustrated by their inability to obtain medical information from injured workers and from their attending physicians. (*Id*.).

21) Employers and insurers need to know promptly what attending physicians opine concerning injured workers' medical stability, ability to return to lighter duty work and the physicians' plans for further treatment. This information is critical for employers to mitigate their damages and to provide alternative employment at a lighter physical capacity for injured workers. (*Id*.).

22) Attending physicians frequently "drag their feet" in responding to employers' inquiries seeking medical opinions or other information concerning injured workers. (*Id*.).

23) If *ex parte* contacts are eliminated, injured workers may "drag their feet" further limiting employers' ability to promptly investigate claims and formulate return-to-work policies. (*Id*.).

Based on these additional factual findings and conclusions, the dissent would affirm the designee's August 1, 2018 order denying Petitioner's request for a protective order. *Harrold-Jones* is based significantly on HIPAA, which does not apply to workers' compensation cases. Accordingly, *Harrold-Jones* should not apply to workers' compensation cases either.

Employers and their representatives have been able to privately discuss injured workers' medical care with physicians for decades. This well-settled process has served the workers' compensation community well. Eliminating *ex parte* communications between employers' representatives and injured workers' attending physicians will considerably slow down the medical discovery process rendering the legislative mandate for "quick, efficient, fair, and predictable delivery" of benefits to injured workers at "a reasonable cost" to employers a nullity. To the contrary, it will slow down the process, make discovery inefficient and unpredictable and will considerably increase litigation costs to employers, thus raising insurance premiums.

Based on the above analysis, the dissent incorporates the designee's August 1, 2018 prehearing conference summary discovery order in its entirety here by reference. The dissent would affirm the designee's order and deny Petitioner's July 3, 2018 petition seeking a protective order.

Dated in Fairbanks, Alaska on October 12, 2018.

/s/
Sarah Lefebvre, 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 James E. Holt, employee / claimant v. The Home Depot, Inc., employer; New Hampshire Insurance Company, insurer / defendants; Case No. 201410153; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 12, 2018.

/s/
Ron Heselton, Office Assistant II