ALASKA WORKERS' COMPENSATION BOARD

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

ERIC McDONALD,	)	
Employee,	)	
Claimant,	)	FINAL DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201410268
	)	
ROCK & DIRT ENVIRONMENTAL, INC.,	)	AWCB Decision No. 18-0109
Employer,	)	
	)	Filed with AWCB Anchorage, Alaska
and	)	on October 23, 2018
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA,	)	
Insurer,	)	
Defendants.	)	

Eric McDonald's August 17, 2018 petition for reconsideration of *McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0076 (August 2, 2018) (*McDonald II*) was heard on the written record on September 20, 2018 in Anchorage, Alaska. This hearing date was set by *McDonald v. Rock & Dirt Environmental,* AWCB Decision No. 18-0089 (August 30, 2018) (*McDonald III*) Eric McDonald (Employee) represented himself. Attorney Colby Smith represented Rock & Dirt Environmental, Inc. and Insurance Company of the State of Pennsylvania (Employer). The record closed at the hearing's conclusion on September 20, 2018.

HISTORY OF THE CASE

McDonald v. Rock & Dirt Environmental, AWCB Decision No. 18-0039 (April 17, 2018) (*McDonald I*) determined Employer was entitled to releases for psychiatric and substance abuse records, ordered Employee to appear for a deposition within 45 days, and quashed Employee's subpoena *duces tecum* to Employer's nurse case manager.

McDonald v. Rock & Dirt Environmental, AWCB Decision No. 18-0076 (August 2, 2018) (*McDonald II*) denied Employee's oral request to continue the hearing, granted Employer's petition for a second independent medical evaluation (SIME), denied Employee's petition to exclude the law firm Delaney Wiles from the case and to exclude a letter from Alaska Heart & Vascular Institute, and granted Exam Works' request for clarification of *McDonald I*.

McDonald v. Rock & Dirt Environmental, AWCB Decision No. 18-0089 (August 30, 2018) (*McDonald III*) granted Employee's request for reconsideration and modification of *McDonald II*, allowed the parties to file additional briefing, and set this hearing.

ISSUES

Employee contends *McDonald II*'s denial of his request for a continuance should be reconsidered for two reasons: first, he contends the hearing was improperly set in that the Board designee did not provide his approved ADA accommodations, and, second, he contends he was not provided the required notice of the hearing. Although Employer filed a brief in response to Employee's petition for reconsideration, it did not address the continuance issue, but it will be assumed Employer is opposed.

1. Should McDonald II's denial of Employee's request for a continuance be reconsidered?

Employee contends *McDonald II*'s order for an SIME should be reconsidered because it erred in ordering the SIME based on the parties' stipulation when the parties had later stipulated to delay the SIME. Employee further contends other evidentiary disputes should be resolved before an SIME is done. Employer contends stipulations are binding on the parties, and *McDonald II* did not err in ordering an SIME.

2. Should McDonald II's order for an SIME be reconsidered?

Employee contends *McDonald II* should have granted his petition to strike a letter from Alaska Heart and Vascular Institute. He points out that it is not a medical record, and is factually unsubstantiated. Employer contends the letter is relevant to Employee's allegation that

Employer interfered in his medical care, and *McDonald II*'s determination that the letter not be stricken was correct.

3. Should McDonald II's order denying Employee's petition to strike the letter from Alaska Heart and Vascular Institute be reconsidered?

Employee contends *McDonald II* erred in denying his petition to exclude the law firm of Delaney Wiles from representing Exam Works in the case and should be reconsidered. Employer did not address this contention, but it will be assumed to be opposed to reconsideration.

4. Should McDonald II's order denying Employee's petition to exclude Delaney Wiles be reconsidered?

Employee contends *McDonald II*'s order clarifying *McDonald I* and quashing his subpoena to Exam Works should be reconsidered because he contends Employer has refused to produce the specific medical records provided to Exam Works, and the records need to be clarified for an accurate SIME. Again, Employer did not address this contention, but it will be assumed to be opposed.

5. Should McDonald II's order clarifying McDonald I and quashing Employee's subpoena to Exam Works be reconsidered?

FINDINGS OF FACT

All findings of fact in *McDonald I*, *McDonald II*, and *McDonald III* are incorporated by reference. The following additional facts and factual conclusions are undisputed or established by a preponderance of the evidence:

Additional Findings Related to the Denial of the Continuance:

1. On August 22, 2017, the Division Director responded to an email from Employee requesting accommodations under the Americans with Disabilities Act (ADA). Employee made 21 requests, of which the Director granted two. One of Employee's requests was that his request be kept private from Employer; the Director granted this request, and stated that neither Employee's request not the Division's response would be made part of his workers' compensation case file. The other accommodation that was granted was that Employee be allowed to record conversations with Division staff. One of the requests not specifically

granted was that the Division allow Employee a break to calm down if stressed. The Director responded that the Division would make every effort to accommodate Employee's need for a break as necessary. (M. Marx, Letter to Employee, August 22, 2017).

2. Although Employee's request to keep his ADA accommodation requests private from Employer was granted, he filed the Director's August 22, 2017 letter as evidence supporting his petition for reconsideration. (Record).
3. Employee participated in the April 24, 2014 prehearing conference by telephone. When the Board designee added Exam Works as a party and indicated he would not preclude Delaney Wiles from representing Exam Works, Employee began yelling that the Employer and designee were "ganging up on him." He stated he had contacted every attorney on the list, and none would take his case. The designee pointed out that he could contact the attorneys again, as sometimes they would accept a case they had earlier declined, depending on their workload and the status of the case. Employee stated "I oppose everything that has happened in these proceedings," and hung up. The designee asked the Division staff to call Employee and ask him to rejoin the prehearing, which he did. Later, Employer's attorney noted *McDonald I* had ordered Employee to appear for a deposition within 45 days and asked if they could arrange a date. Having earlier stated that he was "absolutely" going to appeal *McDonald I*, Employee asked if he needed to abide by the order before an appeal. The designee explained that unless the Commission granted a stay he would have to abide by the order, and the designee suggested he include a motion for a stay with his appeal. Employer's attorney then asked when Employee would be available in May. He stated he would be "unavailable," and when pressed he stated he would "be out of state." Employer's attorney asked where he would be, as it was possible he could fly to wherever Employee was for the deposition. Employee said he "would rather not say." Employee did not respond to Employer's question asking why he would be out of state. After addressing a number of outstanding petitions, the designee asked what issues remained to be set for hearing. Employer asked that its petition for an SIME be set, noting it had filed an ARH that Employee opposed. Employee got exited saying he was still opposed, and a lot of issues needed to be worked out before an SIME. He told the designee "don't be biased toward them with everything," and asked the designee to "help me out," and "why don't you listen to me?" The designee explained that under the Act when a party opposes an ARH, he is

required to set a hearing. Employee stated: "I oppose. Don't call me back," and hung up. The designee proceeded to set the hearing, and Employer's attorney specifically asked that it be set after May given Employee's statement he would be out of state. The hearing was set for June 5, 2018. At no time during the prehearing did Employee ask for or say he needed a break. (Recording, April 24, 2018 Prehearing Conference).

4. On May 8, 2015, notice of the June 5, 2018 hearing and notice of a May 29, 2018 prehearing conference were mailed to Employee. (Corrected Hearing Notice, Prehearing Notice, May 8, 2018).
5. On May 15, 2018, Employee sent an email to the Division stating that he would not be available nor would he be replying to any communications until after June 10, 2018. He stated he had not received mail after April 26, 2018. (Employee, Email, May 15, 2018).
6. At the May 29, 2018 prehearing conference, Employee did not appear or respond to the designee's voicemail message. The designee took no action on the ten petitions Employee had filed since the April 24, 2018 prehearing conference, but treated Employee's May 15, 2018 email as a request to continue the June 5, 2018 hearing which was rescheduled to June 19, 2018 with the agreement of Employer and Exam Works. Exam Works noted that it was not clear whether *McDonald I* had quashed the petition *duces tecum* Employee had served on Exam Works, and asked that the issue be added to the June 19, 2018 hearing. The designee added the issue, and, noting that the issues were procedural rather than factual, extended the deadlines for the filing of evidence, witness lists, and hearing memoranda to June 12, 2018. (Prehearing Conference Summary, May 29, 2018).
7. On May 29, 2018, after the prehearing had concluded, Employee called the Board's office and spoke to a workers' compensation technician for 25 minutes. He was extremely upset because the prehearing had occurred in his absence, and he objected to fact the hearing had been set. The technician told Employee that the prehearing had been set prior to his May 15, 2018 email, but he could file a petition to continue the hearing. Employee declined to do so. (ICERS Case Note, May 29, 2018).
8. On June 5, 2018, notice of the June 19, 2018 hearing was sent to Employee by certified mail, return receipt requested. (Hearing Notice, (June 5, 2018).
9. On June 9, 2018, Employee signed the return receipt for the June 19, 2018 hearing notice. (Return Receipt, June 9, 2018).

10. On June 18, 2018, Division staff called Employee to inform him of the approximate time of the hearing the next day. He became agitated and said he had not been told about a hearing. He stated he would not be participating in the hearing. (ICERS Case Note, June 18, 2018).
11. At the June 19, 2018 hearing, Employee asked for a continuance saying he had not received notice and was not properly prepared. He stated he had had been out of state for medical care and had sent the Board notice that he would be unavailable. He stated he "wasn't contacted", and "wasn't let know in any way there was a hearing in any way at all," and he "didn't know about any of this." He contended he had not been allowed to file evidence 20 days before the hearing. (Employee).
12. After deliberations, the hearing panel denied Employee's request for a continuance. (*McDonald II*).
13. Employee's statement at the June 19, 2018 hearing that he had been out of state for medical care was the first time he had given a reason for being out of state. (Observation). As exhibits to his brief on reconsideration, Employee filed an airline itinerary which showed flights on May 22, June 2, and June 8, 2018, but the departure and arrival cities as well as the flight numbers had been redacted. (Record). On August 6, 2018, Employee filed medical records showing he had received MRIs or CT scans at Stanford Hospital on May 24, 2018, May 30, 2018 and May 31, 2018. (Medical Summary, August 5, 2018). From April 26, 2018 to June 10, 2018 is 45 days. (Observation). Employee has provided no explanation of where he was or what he was doing the other 42 days he claims he was unavailable. (Record).

Additional Facts Related to the Order for an SIME:

14. On March 7, 2016, Employee filed a petition requesting an SIME. He stated the issues in dispute were:

> Lumbar, thoracic & cervical spine, R. shoulder, adjustable bed, adrenal insufficiency, central sleep apnea, PTSD, Dizziness, Spinocerebellar disease, counseling, anxiety, brain injury, R. clavicle fracture, personal care attendant services, Time loss benefits for anything other than the left shoulder, Autonomic nervous system abnormalities, heat intolerance, difficulty swallowing, ringing in ears, sensitivity to heat, sound, and light, left hip, right hip pain, improperly healed first rib fracture, heart, sacroiliac joint dysfunction, pelvis fractures, ratings on all body parts injured in accident and conditions as a result. (Petition, March 7, 2016).

15. On March 25, 2016, Employer filed its answer to Employee's petition for an SIME. Employer agreed to the SIME, but noted Employee had included body parts or injuries that were not in dispute and had not identified the specialties of the physicians for the evaluations. (Answer, March 25, 2018).
16. At the April 6, 2016 prehearing conference, the parties stipulated to an SIME and set deadlines. (Prehearing Conference Summary, April 6, 2016). At the July 19, 2016 prehearing conference, the parties again agreed to proceed with the SIME, and new deadlines were set. (Prehearing Conference Summary, July 19, 2016). On July 25, 2016, Employee filed a petition seeking to stay the SIME due to inaccuracies in the medical records. (Petition, July 25, 2016). At the January 12, 2017 prehearing conference, the parties agreed they would hold the SIME in abeyance until an EME panel had reexamined Employee. (Prehearing Conference Summary, January 12, 2017). At the March 16, 2017 prehearing conference, Employee was ordered to attend the panel EME. (Prehearing Conference Summary, March 16, 2017). On May 2, 2017, Employee informed Employer that he would not be attending the EMEs. (Employee, Letter to Employer, May 2, 2017). On May 8, 2017, Employer cancelled the EMEs. (Employer, Letter to Employee, May 8, 2017). On July 14, 2017, Employer filed a petition asking that the Board order an SIME as agreed by the parties at the April 6, 2016 prehearing conference. (Petition, July 14, 2018).
17. At the June 19, 2018 hearing, Employer stated the issues were whether Employee has PTSD or other psychological issues, and, if so, the cause of those conditions, whether Employee's lumbar, cervical, and hip issue are related to the work injury, and Employer's request for an SIME panel with an orthopedic specialist as one of the doctors. (Employer Hearing Statements).

Additional Facts Related to the Letter from Alaska Heart & Vascular Institute:

18. On February 13, 2017, Robert Craig, CEO of Alaska Heart & Vascular Institute (AHVI) wrote a letter to Employee discharging him from AHVI care and prohibiting him from being on any of its premises. The letter explained the actions were taken in response to Employee's "unbridled aggression" against David Chambers, M.D., when Dr. Chambers refused to agree with Employee's claim that his heart condition was related to his work

injury, as well as unfounded allegations Employee subsequently made against Dr. Chambers. (Robert Craig, Letter to Employee, February 13, 2017).

19. Employee strongly disagrees with the facts alleged in the AHVI letter. (Observation).
20. On February 23, 2018, Employee filed a petition to strike Dr. Craig's letter, but his petition did not include a reason for doing so. (Petition, February 23, 2018).
21. Employee's petition to strike Dr. Craig's letter was addressed at the April 24, 2018 prehearing. Employer stated the letter was offered to rebut Employee's contention that Employer had interfered with his care at AHVI. The Board designee did not rule on Employee's petition but added the issue to the hearing that was set for June 5, 2018. (Prehearing Conference Summary, April 24, 2018).

Additional Facts Related to Delaney Wiles Participation in the Case:

22. On February 10, 2017, an attorney with Delaney Wiles wrote to Employee on behalf of AHVI. The letter warned Employee of potential legal action if he continued to make defamatory statements about Dr. Chambers and notified Employee that he was no longer allowed to enter AHVI premises and he would be reported to the police if he did so. (Delaney Wiles, Letter to Employee, February 10, 2017).
23. On August 2, 2017, at Employee's request, a subpoena *duces tecum* was issued to Exam Works. (Subpoena, August 2, 2017).
24. On August 9, 2017, Employer filed a petition seeking to quash the subpoena to Exam Works. The petition states: "The employer is filing this petition . . . ." (Petition, August 8, 2017).
25. On January 10, 2018, Donna Meyers, an attorney with Delaney Wiles filed an entry of appearance on behalf of Exam Works. (Entry of Appearance, January 10, 2018).
26. On February 23, 2018, Employee filed a petition seeking to strike Delaney Wiles' entry of appearance on behalf of Exam Works. (Petition, February 22, 2018).
27. Employee's February 22, 2018 petition was addressed at the April 24, 2018 prehearing. Employee opposed Delaney Wiles representation of Exam Works on two grounds. First, Employee contends Employer's attorney was Exam Works' attorney because he filed the August 8, 2017 petition to strike the subpoena. Second, Employee contends Delaney Wiles should be precluded from participating in the case because it would allow them access to his

records which could be used in the "outstanding lawsuit" with AHVI. (Prehearing Conference Recording, February 24, 2018).

28. There is no evidence either Employee or AVHI have initiated a lawsuit. (Record).

Additional Facts Related to Clarification of McDonald I:

29. On August 4, 2017, Employer filed a petition seeking to quash Employee's subpoena *duces tecum* to its nurse case manager. (Petition, August 3, 2017).
30. On August 9, 2017, Employer filed its petition to quash the subpoena to Exam Works. (Petition, August 8, 2017).
31. On March 15, 2018, an emergency prehearing conference was held to address Employee's request to continue the March 20, 2018 hearing (the *McDonald I* hearing). The prehearing conference summary lists both Employer's August 4, 2017 and August 8, 2017 petitions as issues for the hearing. In the discussion section, the summary specifically states that Employer's petition to quash the subpoena to Exam Works is a subject for the hearing. (Prehearing Conference Summary, March 15, 2018).
32. At the beginning of the March 20, 2018 hearing, the Designated Chair listed both Employer's August 4 and August 8 petitions as issues for the hearing. As a preliminary matter, Employer and Exam Works pointed out that Employee's petition to prohibit Delaney Wiles' participation in the case was not set for hearing, and that issue needed to be addressed before the petition to quash the subpoena to Exam Works could be heard. The parties agreed the issue of the Exam Works subpoena would not be addressed at the March 20, 2018 hearing. In its analysis of whether Employee's subpoena *duces tecum* should be quashed, *McDonald I* addressed the subpoena to the nurse case manager, concluded the subpoena should be quashed and granted Employer's August 4, 2017 petition. *McDonald I* did not address Employer's August 8, 2017 petition. (*McDonald I* Recording; *McDonald I*).
33. At the March 20, 2018 hearing, Employer's attorney handed Employee a disc containing all of the medical records that had been sent to the EME doctors. (*McDonald I* Recording).
34. On April 24, 2018, Delaney Wiles, on behalf of Exam Works, filed a petition noting that the same rationale for granting the petition to quash the subpoena applied equally as well to the subpoena to Exam Works and asked that *McDonald I* be clarified to also quash the subpoena to Exam Works. (Petition, April 24, 2018).

35. In the May 29, 2018 prehearing conference summary, Exam Works' April 24, 2018 petition was added as an issue for the June 19, 2018 hearing. (Prehearing Conference Summary, May 29, 2018).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> (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).

In *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court instructed the board of its duty with respect to an unrepresented claimant:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

The board owes a duty to inform an unrepresented claimant how to preserve his claim for benefits. *Bohlmann v. Alaska Const. & Engineering, Inc.*, 205 P.3d 316 (Alaska 2009).

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
> . . . .

(c). . . If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense.

AS 23.30.110. Procedure on claims.
. . . .
(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing except for good cause as determined by the board.

AS 23.30.130. Modification of awards.
(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

AS 44.62.540. Reconsideration.
(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced

before the agency, an agency member may not vote unless that member has heard the evidence.

8 AAC 45.050. Pleadings

. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . . .

(4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

8 AAC 45.060. Service

. . . .

(b) . . . Service must be done personally, by facsimile, by electronic mail, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

. . . .

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties.

(f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.

In *Peter Pan Seafoods, Inc. v. Stepanoff*, 650 P.2d 375 (Alaska 1982), a civil case, the Supreme Court held the Superior Court had erred in refusing to enter a default judgment when the defendant had taken affirmative action to avoid service.

In *Jones v. Colaska, Inc.*, AWCB Decision No. 18-0031 (March 28, 2018), the employee called the Board's office day before a scheduled hearing and said she would not be attending the hearing as she was leaving for sea duty as a merchant marine. The hearing panel proceeded with the hearing in the employee's absence and ordered the employee to attend an SIME.

It has long been recognized that employees are obligated to actively participate in workers' compensation cases. Although the case dealt with medical treatment, in *Phillips Petroleum Co. v. Alaska Industrial Board*, 17 Alaska 658, 663 (Territory of Alaska, 1958), the court stated "The law contemplates that the injured workman will do everything humanly possible to resort himself to his normal strength so as to minimize his damages. . . ."

In *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 12-0044 (March 6, 2012), an employee's son was home for thirty days leave before he was deployed to the middle east. The employer had scheduled a panel EME during the time the employee's son was home, and explained the evaluation could not be easily rescheduled because the doctors would not be in Alaska again for several months. The employee did not attend the EME, but stayed home for a "family celebration." The Board found the employee had unreasonably refused to attend the EME.

> **8 AAC 45.065. Prehearings**
> . . . .
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> (e) The board or designee may set a hearing date at the time of the prehearing. The board or designee will set the hearing for the first possible date on the board's hearing calendar unless good cause exists to set a later date. The primary considerations in setting a later hearing date will be whether a speedy remedy is assured and if the board's hearing calendar can accommodate a later date.
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> **8 AAC 45.074. Continuances and cancellations**
> (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

> (C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

The failure of a party to appear due to medical reasons constitutes good cause to continue a hearing. *Wangari v. Unisea, Inc.*, AWCB Decision No. 15-0014 (January 29, 2015).

> **8 AAC 45.120. Evidence**
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> . . . .
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> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

Wilson v. Eastside Carpet Co., AWCB Decision No 09-0029 (February 10, 2009), addressed the definition of "medical records:"

> Cognizant of our authority "to formulate [our] policy [and] interpret [our] regulations," and in order to clarify our policy, we conclude that "medical records," as that term is intended under 8 AAC 45.092(h), are those records maintained in the regular course of business by a physician or other medical provider which the medical provider has prepared, or which has been generated at the direction of the physician or other medical provider, for the purpose of providing medical diagnosis or treatment on behalf of the patient. We include in the definition of "medical records" the reports of physicians prepared at the employer's direction in accordance with AS 23.30.095(e). (footnote omitted).

> **8 AAC 45.178. Appearances and withdrawals**
>
> (a) A person who seeks to represent a party in a matter pending before the board shall file a written notice of appearance with the board, and shall serve a copy of the notice upon all parties. The notice of appearance must include the representative's name, address, and phone number and must specify whether the representative is an attorney licensed to practice law within the State of Alaska

ANALYSIS

1. Should McDonald II's denial of Employee's request for a continuance be reconsidered?

Employee contends the June 19, 2018 hearing should have been cancelled or continued for two reasons: first, because he was not provided ADA accommodations at the April 24, 2018 prehearing at which the hearing was initially set, and second, because he did not receive adequate notice of the hearing.

Employee does not explain how he was deprived of the ADA accommodations the Director had granted at the April 24, 2018 prehearing, and nothing in the recording of the prehearing suggests that he was. The issue of whether Employee could have recorded or was recording the prehearing was never raised. Similarly, Employee's request for accommodations was not discussed or disclosed to Employer.

Employee contends the June 19, 2018 hearing should have been cancelled because he was not provided breaks to calm down during the April 24, 2018 prehearing. Breaks in proceedings are not an ADA accommodation, as the Division freely allows any party to take breaks, consistent with the conduct of prehearings or hearings. Nevertheless, the recording of the prehearing shows Employee did not request, or indicate that he needed a break. What he said before hanging up was "I oppose. Don't call me back." Employee was not denied ADA accommodations at the April 24, 2018 prehearing, and the hearing should not have been cancelled on that basis.

Employee makes several arguments to support his contention that he did not receive proper notice of the June 19, 2018 hearing. He contends he was not present at the April 24, 2018 prehearing when the hearing was set or at the May 29, 2018 prehearing when it was rescheduled. He contends he did not receive notice of the hearing because he was out of state, and had informed the Board of that fact. He contends the hearing notice he received on June 9, 2018 was not timely mailed and deprived him of the ability to file evidence 20 days before the hearing.

One common thread in Employee's contentions regarding lack of notice is that he was out of state, and did not receive notice. Employee had declined to say where he went or why, and although he later stated he was absent for medical care, he has only shown he received treatment

on three of the 45 days he was gone, meaning he was absent 42 days, or six weeks, without explanation. While an absence, or failure to participate in his case, may be excused for good cause, Employee has provided no reason for his absence. Although an employee's desires or convenience are a consideration in setting hearings and prehearings, *Jones*, *Phillips Petroleum*, and *Freelong* make clear an employee's desires are not controlling. Employee's absence is not good cause to excuse his failure to claim his mail or participate in the May 29, 2018 prehearing.

Employee was present at the April 24, 2018 prehearing. After Employer requested a hearing be set on its petition for an SIME and the Board designee explained AS 23.30.110(c) required him to set a hearing, Employee hung up. At that point, Employee knew a hearing would be set. Parties cannot avoid notice by hiding their heads in the sand like an ostrich. Under AS 23.30.110(c), notice may be given either personally or by certified mail. Employee's voluntarily withdrawal from the proceedings does not negate the fact he was given notice of the hearing.

Employee was not present at the May 29, 2018 prehearing when the hearing was rescheduled to June 19, 2018. However, notice of the prehearing was mailed to him on May 8, 2018, well before his May 15, 2018 email to the Division stating he would not be receiving mail from April 26, 2018 to June 10, 2018. Notice of the prehearing was sent to Employee in accordance with the regulations. Nevertheless, Employee called the Board's office shortly after the prehearing objecting to the fact the prehearing had proceeded without him and objecting to the hearing being set. Employee was provided notice of the May 29, 2018 prehearing as required by the regulations, and he clearly knew that a hearing had been set.

Employee contends he did not receive the required notice of the June 19, 2018 hearing because the three days required to be added to a time period when a document is served by mail under 8 AAC 45.060(b) were not included. Employee signed the return receipt for the hearing notice on June 9, 2018, which is 10 days before the hearing. However Employee misconstrues the regulation. Under 8 AAC 45.060(a), service by mail is complete when deposited in the mail. Notice of the June 19, 2018 hearing was mailed to Employee on June 5, 2018, fourteen days before the hearing. Employee received proper notice of the June 19, 2018 hearing.

Finally, Employee contends the setting of the hearing on only 10 days' notice deprived him of the opportunity to file evidence 20 days before the hearing under 8 AAC 45.120(f). Employee misconstrues the regulation; the regulation states only that the Board will rely on documents filed 20 days or more before the hearing unless a timely request for cross-examination was filed. It does not preclude the setting of a hearing on less than 20 days' notice. The Act, specifically AS 23.30.110(c), requires 10 days' notice. Employee received the required notice.

Because Employee was not denied any ADA accommodations and was given proper notice of the June 19, 2018 hearing, *McDonald II*'s denial of a continuance will not be reconsidered.

2. Should McDonald II's order for an SIME be reconsidered?

Employee contends *McDonald II* erred in ordering an SIME because it did not consider events that occurred between the parties' April 6, 2016 stipulation and Employer's July 14, 2017 petition to enforce the stipulation. The parties stipulated to an SIME at both the April 6, 2016 and July 19, 2016 prehearing conferences. At the January 2017 prehearing, they agreed to hold the SIME in abeyance until an EME panel examined Employee. Employee is correct that this is also a stipulation. However, despite his earlier agreement and the fact that Employee was ordered to attend the EME at the March 16, 2017 prehearing conference, he did not do so. Under 8 AAC 45.050(f)(3), stipulations are binding on the parties, unless relieved by the Board for good cause. Given that Employee failed to comply with the subsequent stipulation staying the SIME, *McDonald II* did not err in enforcing the April 6, 2016 stipulation, and it will not be reconsidered.

Employee also contends a variety of alleged inaccuracies in the medical records must be resolved before an SIME is conducted. However, the reverse is true; as the Board's medical expert, SIME opinions can significantly aid the Board in evaluating other medical reports. *McDonald II*'s order for an SIME will not be reconsidered.

3. Should McDonald II's order denying Employee's petition to strike the letter from Alaska Heart and Vascular Institute be reconsidered?

Employee contends *McDonald II*'s decision not to strike the February 13, 2017 letter from AHVI should be reconsidered. He argues the letter is not a medical record and contains unproven and unsubstantiated facts. Employee is correct that the letter is not a medical record. To be a medical record under *Wilson*, a document must be generated for the purpose of providing medical diagnosis or treatment on behalf of a patient. The February 13, 2017 AHVI letter was not created for that purpose, so it is not a medical record. However, the fact the letter is not a medical record does not preclude its admissibility. As *McDonald II* explained, the letter is relevant to Employee's claim that Employer has meddled in his medical care, and the decision not to strike it will not be reconsidered.

In addition, as *McDonald II* explained, the fact that the letter will not be stricken does not automatically mean it will be admissible at a hearing on the merits of Employee's claim. If Employee requests cross-examination of Mr. Craig, the letter cannot be admitted at a hearing on the merits unless Employee is provided an opportunity to cross-examine Mr. Craig.

4. Should McDonald II's order denying Employee's petition to exclude Delaney Wiles be reconsidered?

Employee contends *McDonald II* erred in denying his petition to exclude Delaney Wiles from the case. Employee argues the Board designee committed fraud and created a conflict of interest by allowing Delaney Wiles to represent Exam Works. Employee does not explain how either the joinder of Delaney Wiles or Delaney Wiles' participation in the case would be fraudulent. Employee maintains the fact Delaney Wiles represented AHVI and now represents Exam Works creates a conflict of interest. Employee misunderstands conflict of interest. The fact that an attorney or law firm may represents two clients, both of whom are adverse to a third party does not necessarily create a conflict of interest. In general terms, an attorney or law firm, has a conflict of interest when the representation of one party would be adverse to the interests of another client. No evidence has been presented to suggest that Delaney Wiles' representation of both Exam Works and AHVI would be adverse to either. There is no conflict of interest, and *McDonald II*'s denial of Employee's petition to exclude Delaney Wiles will not be reconsidered.

5. Should McDonald II's order clarifying McDonald I and quashing Employee's subpoena to Exam Works be reconsidered?

Employee contends his subpoena to Exam Works should not have been quashed because Exam Works was not given all the medical records Employer possessed at the time, and demonstrating that fact could allow him to show Employer's subsequent controversion was unfair or frivolous. At the March 20, 2018, hearing, Employer represented it had given Employee every medical document it possessed, but in response to Employee's request for the documents given to the EME doctors, Employer gave Employee a disc containing all documents sent to the EME doctors. Employee does not believe all document have been included, and objects to the way the documents are organized. Nothing in the Board's regulations or in the Civil Rules regarding discovery require both Employer and its expert witnesses to produce the same documents.

Given that the parties agreed that the petition to quash the subpoena to Exam Works would not be addressed at the *McDonald I* hearing, the fact that *McDonald II*'s analysis referred to a clarification of *McDonald I* is confusing. At the *McDonald I* hearing, the parties agreed the petition to quash would not be considered until Employee's petition to exclude Delaney Wiles had been addressed. *McDonald II* denied Employee's petition to exclude Delaney Wiles, and then addressed the petition to quash the subpoena to Exam Works. *McDonald II* held that the rationale for quashing Employee's subpoena to the nurse case manager in *McDonald I* held equally well to the subpoena to Exam Works. While *McDonald II*'s statement that *McDonald I* would be clarified is misleading, *McDonald II* did not err in quashing Employee's subpoena to Exam Works, and it will not be reconsidered.

Under *Bohlmann* and *Richards*, the Board is obligated to inform an unrepresented claimant of the facts which bear upon his right to compensation and how to preserve his claim for benefits. At the March 16, 2017 prehearing conference, the Board designee ordered Employee to attend an EME, but Employee failed to do so. *McDonald I* ordered Employee to attend a deposition within 45 days, but he did not do so. Employee is notified that under AS 23.30.108(c) failure to comply with an order of the Board or a Board designee may result in sanctions, including the dismissal of his claim.

CONCLUSIONS OF LAW

1. *McDonald II*'s denial of Employee's request for a continuance will not be reconsidered.

2. *McDonald II*'s order for an SIME will not be reconsidered.

3. *McDonald II*'s order denying Employee's petition to strike the letter from Alaska Heart and Vascular Institute will not be reconsidered.

4. *McDonald II*'s order denying Employee's petition to exclude Delaney Wiles will not be reconsidered.

5. *McDonald II*'s order clarifying *McDonald I* and quashing Employee's subpoena to Exam Works will not be reconsidered.

ORDER

1. Employee's August 17, 2018 petition for reconsideration of *McDonald II* is denied.

Dated in Anchorage, Alaska on October 23, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Linda Murphy, Member

CONCURRENCE

I concur with the majority's result, but I do not agree with the following statements or findings in the decision:

1. Breaks in the proceedings are not an ADA accommodation.
2. Employee knew, when he disconnected from the April 24, 2018 telephonic prehearing, that a hearing would be set.
3. Parties cannot avoid notice by sticking their heads in the sand.

4. The letter from Alaska Heart and Vascular Institute is relevant to showing that Employer "meddled in his care."

/s/
Nancy Shaw, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of ERIC McDONALD, employee / claimant; v. ROCK & DIRT ENVIRONMENTAL, INC., employer; INSURANCE COMPANY OF THE STATE OF

PENNSYLVANIA, insurer / defendants; Case No. 201410268; 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 October 23, 2018.

/s/
Nenita Farmer, Office Assistant