ALASKA WORKERS' COMPENSATION BOARD

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

DONNA M. HICKLE, Employee, Respondent, v. MATANUSKA SUSITNA BOROUGH SCHOOL DISTRICT, Self-Insured Employer, Petitioner.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201324463 AWCB Decision No. 18-0123 Filed with AWCB Anchorage, Alaska on November 20, 2018

Matanuska Susitna Borough School District's (Employer) petition for review of the board designee's September 4, 2018 discovery order was heard on the written record in Anchorage, Alaska, on October 31, 2018. Upon the Board's own motion, this date was selected on October 16, 2018. Attorney Robert Bredesen represented Donna Hickle (Employee). Attorney Michelle Meshke represented Employer. The record closed on October 31, 2018.

ISSUES

Employer contends notes relating to conversations between Attorney Saul Friedman and Aron Wolf, M.D., are protected by the work product doctrine. It contends the designee abused his discretion when he ordered Employer to produce the notes.

Employee contends SIME psychiatrist Ronald Early, M.D., noted *ex parte* discussions between Mr. Friedman and Dr. Wolf are significant and, besides Employer's production of Attorney

Friedman's notes, there is no other source for the information. Employee contends the designee's order to compel production of the notes should be affirmed.

Did the designee abuse his discretion when he ordered Employer to produce any notes of conversations between Attorney Friedman and Dr. Wolf?

FINDINGS OF FACT

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

1) On August 26, 2013, Employer was represented by Attorney Friedman to address a personnel matter with Employee and, at Employer's request, Dr. Wolf interviewed Employee as part of an independent medical evaluation unrelated to her workers' compensation injury. He also had several conversations with Attorney Friedman and teleconferences with Employer staff members Katherine Gardner, human resources, and Amy Spargo, principal. He also reviewed documents provided by Attorney Friedman, including a February 8, 2005 "fitness evaluation report" authored by Phillip Baker, Ed.D. (Report of Psychiatric Evaluation, Dr. Wolf, August 26, 2013; Observations.)

2) Dr. Wolf noted Employee took family medical leave in 2005 for a "serious health condition," which included, in part, suicidal thoughts. He reported, Dr. Baker's February 8, 2005 fitness evaluation report indicates Ms. Hickle became "upset" after an interaction between herself, a fellow teacher, and school officials. Dr. Wolf stated:

> The data in all of the material that I have reviewed show that Ms. Hickle has had similar incidents over the years. She has increasingly felt that her peers, the administration, and even the students are plotting in various ways against her. In 2009, she was almost terminated for making threatening remarks to the students in her class. This termination was halted when the case was taken to arbitration. It is my understanding that Ms. Hickle continually focuses on someone in the school setting who is attempting to harm her or get her fired. Ms. Hickle returned to Wasilla High School after the 2009 issues, and taught there until the latest incident in May 2013. In this incident, Ms. Hickle let the administration know that she felt that one of her students had "laced" her coffee with a "drug" and that ingestion of the substance caused her to become agitated and ill for a 2 day period. She was adamant that she had been drugged and could have died.

Dr. Wolf acknowledged the only medical record he reviewed was "the note by Dr. Baker in 2005" and a 2008 release from work. He said neither gave any information regarding

Employee's diagnosis or prognosis. Dr. Wolf opined Employee's history continually involves "issues where she feels 'unsafe' in the school situation." He diagnosed her under the DSM 5 with paranoid personality disorder and stated:

> In the discussions I had with HR and the Principal, it is clear that the situations are almost continuous in nature. Because of Ms. Hickle's diagnosis which is long-standing and pervasive, and the need to have both Ms. Hickle and the other individuals at Wasilla high school feel safe, I do not feel that Ms. Hickle is fit to return to employment in the Mat-Su School District.

(*Id.*)

3) On October 3, 2013, Employee reported that on May 2, 2013, she believes a student she was having trouble with put a drug or poison in her coffee and she felt "high" towards the day's end. (Report of Occupational Injury or Illness, October 3, 2013.)

4) On May 3, 2017, at Employer's request, Ronald Turco, M.D., psychiatrically examined Employee. Dr. Turco said:

> It is important to note that I have studied, a great many medical records regarding this woman, including a report that was prepared by Aron S. Wolf, a comprehensive neuropsychological examination that was done by Paul Craig, who authored a report dated November 13 and November 19, 2013. In addition, there are numerous administrative reports, other psychiatric comments, and a report prepared by Grace M. Long, Ph.D., a clinical psychologist.

Dr. Turco recognized the importance of the care and medication management Employee was receiving from Ellen J. Halverson, M.D., who noted Employee "has been making good choices, has been constructive with regard to her personal life, and working very hard with regard to her occupational endeavors." Dr. Turco found Employee's stepbrother subjected her to sexual abuse for about three years and stated "this is noted throughout the records." Dr. Turco found Dr. Halverson was effective in assisting Employee "with what appears to have been a mood disorder and possible posttraumatic stress disorder related to a disruptive childhood." Employee shared:

> [H]er main issues began in 2003 with the vice-principal, who was her supervisor, was intrusive with regard to her life and she implied a degree of sexual intrusiveness. She states that he grabbed her at one time, was quite upset with her,

> and he later was dismissed. She indicated there were 15 allegations against him by other teachers.
>
> Donna also states she herself was accused of sexually abusing a minor, was investigated by the police and interviewed in front of her son who was 7 years of age at that time, but she indicated these were just rumors and she was exonerated of all charges.
>
> Donna states that the children at the school will comment about her clothes and many of these comments are sexual in nature. She also notes that she has been asked to be a prom date from time to time. She tried to transfer to the technical school, but indicates someone else was given the job.
>
> Eventually, this woman states that there were a variety of things that happened such as scratching her car and throwing eggs on her car and she essentially became sad and depressed over her perspective of harassment. She was also written up by someone with regard to a parent complaint and she believes that one man in particular took a dislike to her. He was a fellow teacher and she finally has convinced him to leave her alone.

Employee told Dr. Turco that the principal, Mr. Winters, "accused her of being 'bad' and 'bad mouthed' to the staff, but he is gone." She noted most people who gave her a "bad time" are no longer employed at the school. Dr. Turco said Employee had "a great many complaints with regard to her school situation and many of these complaints have not been substantiated on any realistic basis." Dr. Turco found this meets the criteria for paranoid personality disorder, although an MMPI-2 would help clarify if the criteria are met. Dr. Turco did not find Employee possessed "any immediate or direct indication of paranoia, except as it relates to her multiple past complaints." He further opined Employee did "not have a psychiatrically diagnosed condition, which would be immediately recognizable" but stated:

> It is possible that, as Dr. Aron Wolf diagnosed in August of 2013, she has a paranoid personality disorder, which is part of the Diagnostic and Statistical Manual 5. Paranoid ideation was not present today, but certainly, if what she has experienced cannot be substantiated, then this would be an adequate diagnosis to consider.
>
> In other words, it is difficult to know whether she has, in many respects, simply imagined what has been going on or whether she has been delusional. I am aware of the fact that teaching can be difficult and situations and circumstances with regard to the students can be problematic and students do tend to have a tendency to retaliate against teachers and to do a variety of odd things.

Dr. Turco considered AS 23.30.010(b) including whether Employee was exposed to extraordinary and unusual stress at work and whether either the work incident of May 2, 2013, or her self-described work stressors were "the predominant cause" of her disability or need for medical treatment and opined:

> [T]here is a reasonable medical probability that Ms. Hickle was not exposed to unusual stress for her position as a teacher either on May 2, 2013, which is the transient situation, or while employed by the school district. This, however, is an issue that should be tried in the context of fact by an independent investigator. Her experiences with teachers and other individuals appear to have been magnified by her personality. Thus, I did not find that she was directly exposed to extraordinary and unusual stress at work, unless there are some individuals who would come forth and provide testimony on her behalf in this regard. Her work stressors appear to be "self-described" as the predominant cause.
>
> In my opinion, Ms. Hickle does not have a mental injury or disability for work as the predominant cause. She may have a mental injury for which work is not the predominant cause. Such stressors would be related to childhood sexual abuse and some aspect of genetic contributions.
>
> With regard to my understanding and examination of this woman, which was quite extensive, and an extensive study of the records, it is my opinion that this woman would have had problems, psychiatric and personal, regardless of the work incident of May 2, 2013. A number of examiners have commented on her overall emotional behavior, her "highs and lows," the fact that she tends to veer off tasks when communicating, and also the pre-occupation with flooding of external stimuli and providing a myriad of details which are essentially tangential to any particular episode. All of these issues are likely to create psychosocial problems. She would have them regardless of the work circumstances and certainly regardless of the incident of May 2, 2013.

(EME Report, Dr. Turco, May 3, 2017.)

5) On January 23, 2018, Ronald Early, Ph.D., M.D., conducted Employee's second independent medical evaluation (SIME). He reviewed Dr. Wolf's report and highlighted:

> [Dr. Wolf] noted that he had discussions with human resources and the principal about ongoing difficulties at school. His report consisted of two and a half pages with the first page listing 14 documents which were provided by Saul Friedman and appear to be documents regarding school issues. They are not available for review today. Dr. Wolf summarized the history of difficulties at school which he apparently obtained from the documents listed on his conversations with the principal and human resources person. The only mental health record documented was from Philip Baker, E.D.D., dated 02/08/2005. Dr. Wolf noted

> that Ms. Hickle objected to having a psychiatric resident present for the evaluation. He asked the psychiatric resident to leave the room. Ms. Hickle then asked him if she could tape the interview and he allowed her to do so. Dr. Wolf concluded that Ms. Hickle had a "paranoid personality disorder." He stated, "I do not feel that Ms. Hickle is fit to return to employment and the Mat-Su School District.

Dr. Early opined Employee's disability ended when she began working full-time. However, he said, "disability from returning to teaching is somewhat more difficult because of the statement by Dr. Wolf that she has paranoid personality disorder and was unfit to teach." Dr. Early noted Dr. Wolf's "opinion did not consider that the events and situation at school may have been genuine and Ms. Hinkle was overwhelmed and did not know how to respond. If she had been given strong administrative guidance and support, the situation might have been much different." Dr. Early opined the May 2, 2013 injury's sequelae would have resolved quickly if not for Dr. Wolf's report, which prevented Employee from returning to teaching. Dr. Early said Employee does not have a diagnosable psychiatric condition; however, in his opinion:

> [T]he work stress Ms. Hickle experienced began in 2003 with the assault that she described. Subsequently the stress she experienced at school with the student mocking and inappropriate behavior, the ongoing rumors that she described and the stresses associated with feeling unsupported by the administration would represent an unusual level of stress that would be considered extraordinary or unusual when compared to expected pressures or tensions in the workplace. The work injury on May 2, 2013 was the reason she was referred to Dr. Wolf and lost her teaching career. Therefore, the conclusions of Dr. Wolf would represent an extension of the work injury in the same manner as a fall in the course of a physical capacity evaluation would be a secondary cause. Dr. Wolf's diagnosis of paranoid personality and the statement that she was unfit to resume teaching was a major psychological trauma that aggravated pre-existing depression and anxiety.

Dr. Early concluded Employee's low level depression and anxiety would have persisted regardless of the work incident on May 2, 2013, but she was coping with those mental health conditions and teaching. (SIME Report, Dr. Early, January 23, 2018.)

6) On May 3, 2018, Employee claimed physical assault and various work related stresses led to her mental conditions, disability and need for medical treatment. (Workers' Compensation Claim, May 3, 2018.)

7) On July 26, 2018, Employee petitioned to compel Employer to produce Ms. Spargo's letter to Mr. Friedman, copies of any notes made during or regarding conversations between Dr. Wolf

and Mr. Friedman, copies of any notes made during or regarding conversations between Dr. Wolf and Ms. Gardner and Ms. Spargo. Employee requested a privilege log if Employer claimed privilege attached to any documents she requested. (Letter to Richard Wagg from Robert Bredesen, April 28, 2018.)

8) On May 21, 2018, Employee reminded Employer of her request for "the IME physician files, including Dr. Wolf's. She requests copies of Employer's physicians' intake forms, questionnaires, notes, and any correspondence with them." (Email from Robert Bredesen to Richard Wagg, May 21, 2018.)

9) On August 15, 2018, Employer answered Employee's petition. Employer agreed to produce Ms. Spargo's May 3, 2013 letter to Mr. Friedman "if and when located." Employer objected to producing notes taken by Attorney. Friedman and Dr. Wolf during or regarding conversations between them and contended the notes, if any were maintained, were irrelevant and privileged by the work product doctrine. Employer also asserted any notes maintained by Dr. Wolf are not in its possession or control and are irrelevant. Notwithstanding its objection, Employer said, "to the extent that such records were maintained in the ordinary course of business, they have been requested." Employer objected to producing notes made during or regarding teleconferences between Dr. Wolf and Ms. Gardner and Ms. Spargo and contended they are irrelevant. Employer added dates Ms. Gardner and Ms. Spargo are available for deposition were provided and the topic could be explored during their depositions. Notwithstanding its objections, Employer said "to the extent that such records were maintained in the ordinary course of business, they have been requested." (Answer, August 15, 2018.)

10) On September 4, 2018, a discovery order was issued on Employee's petition to compel. Employer informed Employee a May 3, 2013 letter from Mr. Friedman to Ms. Spargo does not exist, but May 3, 2013 emails have been produced. Employee accepted this and no longer sought to compel production of a May 3, 2013 letter. Employee also sought any notes regarding telephone conversations between Dr. Wolf and Katherine Gardner or Amy Spargo related to Dr. Wolf's evaluation of Employee. Employer stated no notes have been found documenting any such conversations and Employer did not have access to Mr. Friedman's files. Employee accepted this and no longer sought to compel production of documentation of conversations between Dr. Wolf and Ms. Gardner and Ms. Spargo. Finally, Employee sought any notes regarding conversations between Dr. Wolf and Mr. Friedman regarding Employee's evaluation.

Employee contended Dr. Early's reports noted the importance of this information to Dr. Wolf's report. Employer asserted notes relating to conversations between Mr. Friedman and Dr. Wolf were protected by the work product doctrine. The designee noted:

> [T]he work product doctrine was not an absolute privilege, but could be overcome if necessary. Here, Dr. Early's report notes the significance of those communications in evaluating Dr. Wolf's report. That creates a substantial need for the documents, and there is no other apparent means by which Ms. Hickle could obtain the information. As a result, the designee ordered Employer to inquire as to the existence of the documents and produce them by 9/14/2018 if they exist. If the documents do not exist, Employer shall notify Employee of that fact by the same date.

(Prehearing Conference Summary, September 5, 2018.)

11) On September 4, 2018, Employee amended her May 3, 2018 "claim" to allege the work related stress occurred over the entirety of her employment with Employer, not just on May 2, 2013. Employer opposed Employee's amendment. The designee noted from early in her case, Employee filed evidence of employment events other than the May 2, 2013 incident that she alleged caused stress and those events were mentioned in Dr. Early's report. The designee permitted Employee's claim to be amended and advised Employer to file an amended answer. (*Id.*)

12) On September 7, 2018, Employer appealed the September 4, 2018 discovery order compelling Employer to produce notes of conversations between Dr. Wolf and Attorney Friedman and again asserted these documents are protected by the attorney work product doctrine and / or attorney-client privilege. (Petition, September 7, 2018.)

13) Employer did not argue Mr. Friedman's notes were protected by the attorney-client privilege at the September 4, 2018 prehearing. If Employer asserted the notes cannot be compelled under the attorney-client privilege and the designee failed to address Employer's contention, Employer did not request the prehearing conference summary be modified or amended pursuant to 8 AAC 45.065(d). (Prehearing Conference Summary, September 5, 2018; Record.)

14) On September 14, 2018, Employer provided notice Dr. Wolf did not keep notes of conversations between himself and Attorney Friedman. Dr. Wolf informed Employer he called human resource manager Ms. Gardner and Employee's direct supervisor principal Ms. Spargo when he was drafting his report but kept no notes of those conversations. Neither did

Ms. Gardner or Ms. Spargo have notes of their conversations with Dr. Wolf. Employer had no knowledge of a letter written to Dr. Wolf summarizing "background or asking specific questions to Dr. Wolf." Employer stated it maintained its objection that Mr. Friedman's notes are protected by the attorney-client privilege and / or work product doctrine. (Notice Regarding Discovery, September 14, 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;
> . . . .
>
> (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 general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

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

The designee's decision on releases must be upheld, absent "an abuse of discretion." An abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985).

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

The scope of evidence admissible in administrative hearings is broader than is allowed in civil courts generally, because AS 23.30.135 makes most civil rules of procedure and evidence inapplicable. Under relaxed evidence rules, discovery should be at least as liberal as in a civil action and relevancy standards should be at least as broad. *Schwab v. Hooper Electric*, AWCB Decision No. 87-322 (December 11, 1987).

In *Granus v. Fell,* AWCB Decision No. 99-0016 (January 20, 1999) at 11-15, in addition to guidance in determining admissibility, established a two-step analysis to determine whether information is properly discoverable:

> Information which would be inadmissible at trial, may nonetheless be discoverable if it is reasonably calculated to lead to admissible evidence. Under our relaxed rules of evidence, discovery should be at least as liberal as in a civil action and the relevancy standards should be at least as broad.
>
> To be admissible at hearing, evidence must be 'relevant.' However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing. *Smart v. Aleutian Constructors*, AWCB Decision No. 98-0289 (November 23, 1998).

> The first step in determining whether information sought to be released is relevant, is to analyze what matters are "at issue" or in dispute in the case. . . . In the second step we must decide whether the information sought by employer is relevant for discovery purposes, that is, whether it is reasonably "calculated" to lead to facts that will have any tendency to make a question at issue in the case more or less likely. . . . .
>
> The proponent of a release must be able to articulate a reasonable nexus between the information sought to be released and evidence that would be relevant to a material issue in the case.
>
> To be "reasonably" calculated to lead to admissible evidence, both the scope of information within the release terms and the time periods it covers must be reasonable. The nature of employee's injury, the evidence thus far developed, and the specific disputed issues in the case determine whether the scope of information sought and period of time covered by a release are reasonable.

Information is relevant for discovery purposes if it is reasonably calculated to lead to facts that will have any tendency to make a question at issue in the case more or less likely. *Granus*. Information that may have a "historical or causal connection to the injuries" is generally discoverable. *Id*.

The Alaska Workers' Compensation Appeals Commission stressed the importance of making decisions based on a complete record:

> The exclusion of evidence, whether offered by the employee or the employer, does not serve the interest of the board in obtaining the best and most thorough record on which to base its decision . . . .
>
> Proceedings before the board are to be "as summary and simple as possible." AS 23.30.005(h). The board is not bound by "common law or statutory rules of evidence or by technical or formal rules of procedure." AS 23.30.135(a). The fundamental rule is that "any relevant evidence is admissible." 8 AAC 45.120(e). The result of an exclusionary rule is inherently contrary to the open access to all relevant information regarding the claimant's injury that the workers' compensation statutes are designed to promote. . . .

Guys with Tools v. Thurston, AWCAC Decision No. 062 (November 8, 2007).

8 AAC 45.065. Prehearings.

. . . .

(d) Within 10 days after service of a prehearing summary . . . 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. . . . If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

Alaska Rules of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure.

. . .

(b) Discovery, Scope and Limits. . . .

(1) *In general*. Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

. . . .

(3) Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

The board will frequently look to the Alaska Rules of Civil Procedure for guidance in interpreting its procedural statutes and regulations. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). In *Langdon v. Champion*, 752 P.2d 999, 1007 (Alaska 1988), the Alaska Supreme Court addressed production of an adjuster's file in civil litigation. The court stated:

> Under Civil Rule 26(b)(3), (footnote omitted) a party must show substantial need and undue hardship in order to obtain documents prepared in anticipation of litigation by another party or that party's representative, 'including his attorney, consultant, surety, indemnitor, insurer or agent.' Even where a showing of

> substantial need and undue hardship is made, the trial court is still required to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of the party's attorney or other representative concerning the litigation. *Id.*

Langdon added in Footnote 14:

> We note, however, that such materials remain subject to other applicable discovery provisions. Thus, for example, while the mental impressions, conclusions, opinions, or legal theories contained in an adjustor's files may not be protected under the work product doctrine, they may nonetheless be subject to challenge under Rule 26(b)(1) in appropriate cases. *See Smedley v. Traveler's Insurance*, 53 F.R.D. 591, 592, (D. N.H. 1971) (insurance company's inter-office memoranda containing expressions of opinion as to liability and settlement value of case were neither admissible at trial nor reasonably calculated to lead to discovery of admissible evidence); *see also Tronitech, Inc. v. NCR Corp.*, 108 F.R.D. 655, 655-56 (S.D. Ind. 1985).

The Supreme Court recognized in *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197 (Alaska 1986) that a party cannot be permitted to put discussions with counsel in issue, and then deny to the opposing party the evidence which is most probative on the question.

ANALYSIS

Employee was dismissed from her position with Employer based upon an evaluation conducted at Employer's request by Dr. Wolf. He diagnosed Employee with paranoid personality disorder based in part on Employee's history of exaggerated reactions to interactions with students and staff during her employment. Dr. Wolf's evaluation was requested after Employee reported her belief that a student laced her coffee with a drug. Dr. Wolf found Employee was not fit to return to employment with Employer. Dr. Early's SIME evaluation found Dr. Wolf's opinion failed to consider that the school events may have been genuine and Employee did not know how to respond. Dr. Early opined the situation may have been quite different had Employee been given administrative support and guidance and that the work injury's sequelae would have rapidly resolved if not for Dr. Wolf's report. Dr. Early went further and said Dr. Wolf's conclusions were an extension of Employee's work injury because it was the basis for her dismissal and giving Employee a paranoid personality diagnosis and determining she was unfit to be a teacher

was a "major psychological trauma" that aggravated Employee's pre-existing depression and anxiety.

Employee requested Employer be compelled to produce notes of Attorney Friedman's discussions with Dr. Wolf. Employer objected, asserting production of the notes violated the work product doctrine. Employer was ordered to produce any notes regarding conversations between Dr. Wolf and Attorney Friedman regarding Employee's evaluation conducted by Dr. Wolf.

The designee found a substantial need for the notes existed. Dr. Wolf formed his psychiatric opinion based upon whatever communications occurred between him and Attorney Friedman, Employer's human resource staff and principal. There are no records of Dr. Wolf's communications with Employer's human resource staff or principal. Other than notes maintained by Attorney Friedman, if any, there is no other way for Employee to obtain information about what was shared with Dr. Wolf regarding Employee's employment history and conduct.

Employee claims work related stress occurred over the entirety of her employment with Employer and led to mental conditions, disability and the need for medical treatment. To best ascertain the parties' rights, the information provided by Attorney Friedman to Dr. Wolf, whose report Dr. Early opines represents an extension of Employee's work injury, is relevant or may lead to admissible evidence relative to whether Employee's injury as described by Dr. Early is compensable. AS 23.30.108; *Granus*; *Hikita*. Dr. Turco acknowledged whether Employee was exposed to unusual stress for a teacher while employed by Employer "is an issue that should be tried in the context of fact by an impartial investigator." Whether Employee's experiences with other teachers and individuals was magnified by her personality, as Dr. Turco suggests, or can be substantiated otherwise requires additional inquiry. AS 23.30.135; *Thurston*. It was reasonable for the designee to conclude the notes will provide relevant evidence to refute or support Employee's claim a physical assault and various work stressors over the entirety of her employment with Employer led to her mental health injury, disability and need for medical treatment. *Schwab*; *Granus*; *Smart*. The only other way Employee could obtain the information

she seeks is to take the depositions of numerous witnesses, which would pose an undue financial hardship if the witnesses are even available. AS 23.30.001; Alaska Civil Rule 26(b)(3); *Hewing*; *Rogers & Babler*. The board designee did not abuse his discretion in ordering Employer to produce attorney Friedman's notes. AS 23.30.108.

However, the designee did not issue the discovery order so as to protect against disclosure of Attorney Friedman's mental impressions, conclusions, opinions or legal theories. The designee's order should have also included an order permitting Employer to redact Attorney Friedman's mental impressions, conclusions, opinions, and legal theories. Alaska Civil Rule 26(b)(3); *Langdon*.

CONCLUSIONS OF LAW

The designee did not abuse his discretion when he ordered Employer to produce any notes of conversations between Dr. Friedman and Dr. Wolf; however, he did abuse his discretion when his order failed to protect against the disclosure of Attorney Friedman's mental impressions, conclusions, opinions and legal theories.

ORDER

1. Employer's petition is denied in part and granted in part.
2. Employer shall redact the mental impressions, conclusions, opinions, and legal theories of Attorney Friedman and produce to Employee the redacted version of his notes prepared for or during his conversation with Dr. Wolf within 10 days of this decision's issuance.
3. Jurisdiction over this issue is maintained. If Employee objects to Employer's redactions, she may petition for in camera review of the notes and the board or a designee will make redactions to protect against disclosure of Attorney Friedman's mental impressions, conclusions, opinions and legal theories.

Dated in Anchorage, Alaska on November 20, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Bradley Evans, Member

/s/
Nancy Shaw, 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 DONNA M. HICKLE, employee / respondent; v. MATANUSKA-SUSITNA BOROUGH SCHOOL DISTRICT, employer / petitioner; Case No. 201324463; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on November 20, 2018.

/s/
Nenita Farmer, Office Assistant