ALASKA WORKERS' COMPENSATION BOARD

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

ALLISON LEIGH, Employee, Respondent, v. ALASKA CHILDREN'S SERVICES, Employer, and REPUBLIC INDEMNITY CO. OF AMERICA (RIG), Insurer, Petitioners.	INTERLOCUTORY DECISION AND ORDER ON RECONSIDERATION AWCB Case No. 201503591 AWCB Decision No. 19-0022 Filed with AWCB Anchorage, Alaska on February 21, 2019

Allison Leigh's (Employee) February 15, 2019 petition for reconsideration was heard on the written record on February 20, 2019, a date selected on February 19, 2019. Employee's February 15, 2019 petition gave rise to this hearing. On July 26, 2018, *Leigh v. Alaska Children's Service*, AWCB Decision No. 18-0074 (July 26, 2018) (*Leigh I*) ordered Employee to sign releases for her mental health records. Employee petitioned for review and the Alaska Workers' Compensation Appeals Commission denied her request. The commission's order is now before the Alaska Supreme Court on Petition for Review. On February 1, 2019, *Leigh v. Alaska Children's Service*, AWCB Decision No. 19-0012 (February 1, 2019) (*Leigh II*) granted Alaska Children's Service's (Employer) petition to continue Employee's merits hearing on her claim until the court resolves the pending petition. Employee represents herself. Attorney Vicki

Paddock represents Employer. The record closed at the hearing's conclusion on February 20, 2019.

ISSUE

Employee contends *Leigh II* should be reconsidered for a variety of reasons. Her primary concern is her ability to meet her financial obligations while her merits claim is on hold.

The time for Employer's response to the petition has not yet passed so its position is not known. However, this decision assumes Employer opposes the petition for reconsideration.

Should *Leigh II* be reconsidered?

FINDINGS OF FACT

All factual findings from *Leigh I* and *II* are incorporated here by reference and some are repeated below. A preponderance of the evidence establishes additional facts and factual conclusions:

1) On February 20, 2015, Employee slipped and fell while walking in a parking lot at work, reporting injuries to her right ankle, knee and shoulder. (First Report of Injury, March 4, 2015; Claim for Workers' Compensation Benefits, January 11, 2017).

2) On June 23, 2015, Employer sent releases for Employee's signature that would enable it to obtain her "psychological, psychiatric, mental health/counseling records" along with records for alcohol, drug or other substance abuse. (Letter, June 23, 2015).

3) On July 8, 2015, Employee *pro se* sought a protective order for release of these records. Employee's reason for this request was:

> While holding my position at AK Child and Family I witnessed bad business practices as well as neglect within the company. I brought the issues to the attention of my employer and have since experienced retaliation and harassment. The information that can be obtained from my records has the potential to lead to further retaliation, not only myself but current employees as well. I wish to protect and ensure the names and privacy of current and past employees. (Petition, July 8, 2015).

4) On July 23, 2015, the board's designee heard and ruled on Employee's petition for a protective order. Employee contended a few mental health records and bills had been sent to Employer's adjuster in error. She further contended her work injury was to her right ankle, knee

and shoulder only and requested protection from signing a release enabling Employer to obtain mental health records. The designee granted the petition for a protective order and ordered Employer to remove language requesting medical and rehabilitation records relating to Employee's psychiatric condition as well as records related to alcohol, drug or other substance abuse, from the releases. The designee also explained how a party could request a hearing by filing an Affidavit of Readiness for Hearing. (Prehearing Conference Summary, July 23, 2015).

5) Employer did not appeal the July 23, 2015 discovery order. (Agency file).

6) On November 9, 2015, Employer denied Employee's right to temporary total and temporary partial disability benefits. Employer based its denial on opinions from Employee's treating orthopedist Bret Mason, D.O. (Controversion Notice, November 6, 2015).

7) Employee did not file a post-controversion claim for 431 days. (Agency file).

8) On January 13, 2017, Employee claimed temporary total disability, temporary partial disability, permanent total disability, permanent partial impairment, an unfair or frivolous controversion, penalty and interest and requested her "retraining program" be revisited. (Claim for Workers' Compensation Benefits, January 11, 2017).

9) On April 24, 2017, attorney Eric Croft entered his appearance as counsel for Employee. (Entry of Appearance, April 24, 2017).

10) On June 1, 2017, Employee requested a second independent medical evaluation (SIME). (Petition, June 1, 2017).

11) On July 18, 2017, the parties stipulated to an SIME. (Prehearing Conference Summary, July 18, 2017).

12) On February 6, 2018, Thomas Gritzka, M.D., whom the board selected as the examiner, issued his SIME report. In his subsequent deposition, Dr. Gritzka explained how mental health diagnoses such as posttraumatic stress disorder and other psychiatric or psychological issues could affect how Employee reacts to her work injury and how she recovers from it. He recommended a tertiary clinic to evaluate and treat Employee's injury and said it was "mandatory" for a clinic to have all her old medical records "plus whatever her treating mental health provider has." (Gritzka report, February 6, 2018; Deposition of Thomas Gritzka, M.D., June 18, 2018, at 26-27).

13) On February 12, 2018, Employee through her former counsel requested a hearing on her claim. (Affidavit of Readiness for Hearing, February 12, 2018).

14) On February 23, 2018, Employer sent Employee releases for "psychological, psychiatric, mental health/counseling records." (Letter, February 23, 2018).

15) On February 28, 2018, Employee sought a protective order against Employer's releases again requesting mental health records. Employee's petition did not raise collateral estoppel vis-à-vis the 2015 order as a reason to grant the requested relief. (Petition, February 28, 2017 [sic]).

16) On March 13, 2018, the designee considered the February 28, 2018 petition for a protective order. Given Dr. Gritzka's comments and opinions from its employer's medical evaluator (EME), Employer had submitted new releases to Employee seeking to obtain release of her mental health counseling records. Employee contended releasing these records would be burdensome and obtrusive and said she is not seeking any benefits related to a mental health condition. Consequently, the designee granted Employee's February 28, 2018 petition for protective order. Attorney Croft appearing on Employee's behalf did not mention or argue collateral estoppel as a basis for granting the requested 2018 protective order. (Prehearing Conference Summary, March 13, 2018; prehearing conference recording).

17) On March 20, 2018, Employer petitioned for reconsideration of the designee's March 13, 2018 discovery order, which was treated as an appeal to the board. (Petition, March 20, 2018).

18) On April 24, 2018, attorney Croft withdrew as Employee's lawyer. (Withdrawal of Attorney, April 23, 2018).

19) On May 14, 2018, attorney Patricia Huna entered her appearance for Employee. (Entry of Appearance, May 14, 2018).

20) On July 18, 2018, Employee's hearing brief on Employer's discovery appeal mentioned the 2015 discovery order but did not argue or even mention collateral estoppel as a basis to affirm the designee's March 13, 2018 discovery order. (Brief Opposing Employer's Appeal regarding a Protective Order, July 17, 2018).

21) On July 24, 2018, the parties appeared for a hearing on Employer's March 20, 2018 appeal of the designee's 2018 protective order. As a preliminary matter, Employee objected to any party relying on any evidence created after March 13, 2018, except Dr. Gritzka's deposition, or making any argument not raised at the March 13, 2018 prehearing conference at which the designee entered his discovery order. During her presentation at hearing, Employee did not mention collateral estoppel as a basis for affirming the designee's decision granting the protective order. (Record).

22) On July 26, 2018, *Leigh I* decided Employer was entitled to discover Employee's psychological, psychiatric and mental health counseling records for the reasons stated. (*Leigh I*).

23) On August 10, 2018, Employee petitioned the Alaska Workers' Compensation Appeals Commission for relief, contending *Leigh I* improperly allowed Employer to discover her mental health counseling records. (Petition for Review, August 10, 2018).

24) On September 20, 2018, the commission denied Employee's petition for review. (Order on Petition for Review, September 20, 2018).

25) On October 1, 2018, Employee petitioned the Alaska Supreme Court for review of the commission's decision. (Petition for Review, October 1, 2018).

26) On November 2, 2018, Employer asked for a continuance of the merits hearing based on its contention that the designee was without jurisdiction to schedule a hearing while employee's petition for review was pending at the Supreme Court. (Petition, November 2, 2018).

27) On December 4, 2018, the Alaska Supreme Court granted Employee's petition. (Order, December 4, 2018).

28) On December 12, 2018, the designee set a hearing for January 29 and 30, 2019, on the merits of Employee's claim and on Employer's petition to continue that hearing. (Prehearing Conference Summary, December 12, 2018).

29) On December 19, 2018, the designee shortened the two-day hearing to one day on January 29, 2019, and limited the issue to Employer's petition to continue the merits hearing. (Prehearing Conference Summary, December 19, 2018).

30) On January 22, 2019, Employee for the first time in this case, in its hearing brief for the January 29, 2019 continuance hearing, raised "collateral estoppel" as a basis for the designee's second protective order shielding her from releasing mental health records. (Employee's Opposition to Employer's Petition for Continuance, January 22, 2019).

31) On January 29, 2019, the board heard Employer's November 2, 2018 petition to continue any hearing on the merits of Employee's claim until the Alaska Supreme Court rules on her petition before it. At hearing, Employee argued collateral estoppel prevented Employer from again requesting a release of mental health records since the designee denied the same request in 2015 and Employer had not appealed. She noted, "Something had to have occurred since July 2015 for Employer now to justify requesting those records." Employee recognized the "only new pertinent evidence" were Dr. Gritzka's report and deposition and an EME report from Paul

Craig, PhD, both of whom opined her mental health played a role in her recovery. She contended both physicians, however, were able to make determinations regarding causation, medical stability and disability without additional mental health records. Since Employee had no objection to admissibility of either doctors' records as evidence at a merits hearing, she reasoned discovering her mental health records was unnecessary and irrelevant. (Record, January 29, 2019; Employee's Opposition to Employer's Petition for Continuance, January 22, 2019).).

32) On February 1, 2019, *Leigh II* held the Alaska Supreme Court's decision in *Fischback & Moore* controls this case and, because a decision on past benefits could conflict with the court's jurisdiction, *Fischback & Moore* conferred sole jurisdiction over Employee's claim to the court. Accordingly, relying on *Fischback & Moore* and to prevent possibly inconsistent decisions and the need for a second hearing, *Leigh II* granted Employer's petition to continue Employee's merits hearing until such time as the court rules on her petition for review. (*Leigh II*).

33) On February 7, 2019, attorney Huna withdrew as Employee's lawyer before the board, but still represents her on appellate review. (Withdrawal of Counsel, February 7, 2019).

34) On February 15, 2019, Employee timely requested reconsideration of *Leigh II*. Employee raised the following, summarized points and questions:

- Employer's medical evaluators "contradict each other."
- Does the board know the difference between "psycho social" and "psychological"?
- How many people have access to her medical records because she broke her ankle at work?
- "WC" is supposed to return injured workers to employment as soon as possible but *Leigh II* says she will not even get a hearing on the merits of her claim for another six months to a year. Employee questions how she is supposed to meet her financial obligations in the meantime. She wonders how long "WC expects people to go" without a resolution.
- Employee contends she was ready for hearing when she filed her claim at a time when her medical care was not yet controverted. She further contends a Workers' Compensation Officer told her she needed to get an attorney so her case "would move much quicker."
- The hearing panel questioned Employee's former attorney on "estoppel" when the question should have been directed to Employer's attorney.
- Employee asks if the panel listened to all recordings in this case.

- Employee contends she was a *pro se* litigant when she filed her first protective order, which a designee granted and which Employer did not appeal. She contends this was a final decision.
- Employee has "many issues/concerns regarding facts" she would like addressed and requests a hearing at which she and Employer's attorney could be placed under oath. (Petition, February 15, 2019).

35) The Division of Workers' Compensation has several units or sections. These include the Special Investigations Unit and the adjudications and reemployment sections. (Official Notice).

36) The adjudications section's staff routinely offers injured workers a list of attorneys who represent claimants in workers' compensation cases. (*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 . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
> > . . . .
> >
> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174, 176 (Alaska 1965), *overruled on other grounds by City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 n. 6 (Alaska 1979), stated in respect to an administrative agency's jurisdiction when its decision is appealed:

> It is the general rule that when an order of an administrative agency is appealed to a court, the agency's power and authority in relation to the matter is suspended as to questions raised by the appeal. (Citations omitted). The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

> Operation of the rule is limited to situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court's jurisdiction. If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred upon it by law.
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> **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.
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> (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. . . .

George Easley Co. v. Lindekugel, 117 P.3d 734, 743 n. 36 (Alaska 2005) states a petition for reconsideration has a 15-day time limit for the request and the board's power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied."

ANALYSIS

Should *Leigh II* be reconsidered?

Reconsideration addresses alleged legal errors. *Lindekugel*; AS 44.62.540. Employee raises numerous points in her petition for reconsideration, but only one appears to raise or challenge a legal issue -- her collateral estoppel argument. The grounds she offers are addressed in order:

Employee's contention that Employer's EMEs contradict each other, her question whether the panel understands the difference between "psycho social" and "psychological" and her query about how many people have access to her medical records because she broke her ankle at work, are not relevant to her petition for reconsideration. They do not raise an allegation of a legal error in *Leigh II*, and do not form the basis for reconsideration.

It is not clear what Employee means by "WC." This decision assumes she means the Division of Workers' Compensation in general. The division has several sections. *Leigh II* comes from the

adjudications section. It is not correct to say the division's adjudications function is to return injured workers to employment as soon as possible. The division's adjudications section's primary function is to hear and decide disputed claims. The legislature's mandate in this regard is set forth in AS 23.30.001(1). Part of this function is to ensure fair hearings for all parties. AS 23.30.001(4). A potentially unfortunate side-effect of this process is inevitable delay when one or both parties exert their right to due process. These allegations provide no basis for reconsidering *Leigh II*.

Employee contends she was "ready for hearing" when she filed her claim on January 13, 2017, and asks how she can meet her financial obligations while waiting for the Alaska Supreme Court's decision on her petition for review. She also faults the designee for suggesting she get an attorney and for implying the case would move along more quickly. However, she did not request a hearing on her January 13, 2017 claim until over a year later on February 12, 2018. Among other things, she claimed temporary total and temporary partial disability benefits. Employer controverted Employee's right to temporary total and temporary partial disability benefits on November 6, 2015. Employee took no action to obtain these controverted benefits, or any other benefits, for 431 days, until January 13, 2017, when she finally filed a claim. The point when an injured worker requests a hearing on her claim is left to the worker's discretion. It is standard practice for division staff to offer a list of workers' compensation attorneys to injured workers. Whether an injured worker selects an attorney, whom they select or whether they choose to proceed *pro se* is entirely up to the injured worker. Disagreements between an injured worker's lawyer and the worker about procedure, tactics or timing and any other issue in the case are matters between the worker and their attorney. Again, Employee's allegations do not provide a basis for reconsidering *Leigh II*.

Employee faults the *Leigh II* panel for questioning Employee's attorney about "estoppel" and suggests the estoppel questions should have been directed to Employer's lawyer. But Employee, is the party that raised the collateral estoppel argument, for the first time in this case, in her hearing brief submitted for the continuance hearing. Employee's attorney never argued or even mentioned collateral estoppel at the March 13, 2018 prehearing conference, in Employee's

hearing brief submitted for the *Leigh I* hearing or at the *Leigh I* hearing. This forms no basis for reconsideration.

Employee questions whether the panel listened to "all recordings" in this case. It is unclear to what recordings she refers. The issue *Leigh II* addressed was Employer's request for a continuance based on Employee's pending petition for review before the Alaska Supreme Court and the associated lack of the panel's jurisdiction over issues in this case that could conflict with the court's jurisdiction. This was a legal issue. Employee fails to explain how any recording in this case could affect the legal outcome set forth in *Leigh II*, which addressed a continuance issue. Consequently, Employee's query does not provide a basis for reconsidering *Leigh II*.

Employee contends she was a *pro se* litigant when she filed and obtained her first protective order in 2015, which Employer never appealed. Her contention suggests reliance on the collateral estoppel argument when she contends the 2015 discovery order was "a final decision." Again, the collateral estoppel issue should have been raised at the March 18, 2018 prehearing conference, or in Employee's briefing for the *Leigh I* hearing or at that hearing. It was not. Arguments regarding collateral estoppel do not apply to *Leigh II*, which simply granted Employer's request for a hearing continuance pending Alaska Supreme Court action on Employee's petition for review. Therefore, this contention does not provide a basis for reconsidering *Leigh II*.

Lastly, Employee says she has many issues, concerns and facts she would like to bring forth and wants to testify under oath and wants Employer's attorney compelled to also so testify. She will have an opportunity to offer relevant testimony and witnesses at a merits hearing once the Alaska Supreme Court rules on the pending petition. However, her statement does not raise any allegation that *Leigh II* made a legal error. Consequently, it does not form the basis for reconsideration.

In short, Employee offers no argument supporting an allegation of a legal error in *Leigh II*. Accordingly, *Fischback & Moore*'s general rule still applies to this issue and that opinion, along with the possibility of inconsistent decisions and numerous hearings, prevents a merits hearing,

even on past benefits, from going forward in this case at this time. Employee's petition for reconsideration will be denied.

CONCLUSION OF LAW

Leigh II will not be reconsidered.

ORDER

Employee's petition for reconsideration is denied.

Dated in Anchorage, Alaska on February 21, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Nancy Shaw, Member

/s/
Linda Murphy, 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 on Reconsideration in the matter of Allison Leigh, employee / respondent v. Alaska Children's Services, employer; Republic Indemnity Co. of America (RIG), insurer / petitioners; Case No. 201503591; 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 February 21, 2019.

/s/
Nenita Farmer, Office Assistant