ALASKA WORKERS' COMPENSATION BOARD

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

ESTATE OF ANTHONY DOZIER, Employee, Decedent, VELINDA DOZIER, Claimant, v. E.C. PHILLIPS AND SON INC., Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201616155 AWCB Decision No. 19-0046 Filed with AWCB Juneau, Alaska On April 9, 2019

Velinda Dozier's (Claimant) November 6, 2018 petition requesting clarification of the December 11, 2018 discovery order was heard on March 5, 2019 in Juneau, Alaska, a date selected on December 11, 2018. A November 29, 2018 affidavit of readiness for hearing (ARH) gave rise to this hearing. Attorney Tasha Porcello appeared telephonically and represented Claimant, who also appeared telephonically. Attorney Rebecca Holdiman Miller appeared telephonically and represented E.C. Phillips and Son Inc. and Liberty Mutual Fire Insurance Company (Employer). There were no witnesses. Oral orders issued denying Claimant's request for additional time for opening and closing arguments and granting Employer's petition to quash Claimant's subpoena

of Tara Michaels. This decision examines the oral orders and addresses Claimant's petition. The record closed at the hearing's conclusion on March 5, 2019.

ISSUES

Claimant contended Employer untimely filed its brief and Employer had her brief an entire day before it filed its brief. She withdrew her request to strike Employer's brief as the panel received the brief and instead requested additional time for opening and closing statements.

Employer contends its brief was timely. It opposes additional time for opening and closing arguments as there are no unusual or extenuating circumstances to justify additional time.

1) Was the oral order denying Claimant's request for additional time for opening and closing statements correct?

Claimant contends she subpoenaed Ms. Michaels to question her about her notes and notes' general content, the privilege claimed by Employer, and Ms. Michaels' authority to initiate investigations in this case and generally. She contends Employer's amended privilege log indicates all of Ms. Michaels' notes were withheld because Employer asserts they are privileged and not reasonably calculated to lead to admissible evidence. Claimant sought to ask questions about whether the investigation Ms. Michaels conducted was under Employer's attorney's control. She contends subpoenas should be sought after getting the opposing party's brief and witness list because that is when the party knows what testimony will be needed. Claimant contends Employer was not surprised by the subpoena because she brought up subpoenaing Ms. Michaels in a January 2019 prehearing conference. She requested an order denying Employer's petition to quash her subpoena, granting her petition for the subpoena and directing Ms. Michaels' testimony be taken on another hearing date should her testimony be necessary.

Employer contended Claimant's February 28, 2019 subpoena of Ms. Michaels for the March 5, 2019 hearing provided inadequate notice. It contends the issue set for hearing is whether Employer complied with the December 11, 2018 designee discovery order and Ms. Michaels' testimony is not relevant. Employer contends Claimant's petition for a subpoena was untimely

and should not be decided. Alternatively, Employer requested an order granting its petition to quash Claimant's subpoena of Ms. Michael.

2) Was the oral order quashing Claimant's subpoena of Tara Michaels correct?

Claimant contends Employer failed to fully respond to her June 4, 2018 informal discovery request and to the designee's December 11, 2018 discovery order. Specifically, she contends Employer failed to answer the questions in her June 4, 2018 informal discovery request and failed to provide all unprivileged information in the adjuster's file, investigative reports and written and recorded witness statements as ordered by the December 11, 2018 designee discovery order. Claimant contends Employer's claims adjuster, investigator and paralegal have spoken with her family and friends and Employer has not produced statements taken from those witnesses and has not provided Ms. Michaels' adjuster notes. She requests an order finding Employer failed to fully respond to her June 4, 2018 informal discovery request and discovery orders, compelling Employer to produce Ms. Michaels' adjuster notes and witness statements and precluding Employer from raising at hearing, or in any other pleadings, any defense to her claim based on information it failed to produce under 8 AAC 45.054(d). Claimant also requests an in camera review of any information that may be privileged.

Employer contends Employee's June 15, 2018 petition is not an issue for this hearing. It contends the only issue at hearing is whether Employer complied with the December 11, 2018 discovery order. Employer contends its September 26, 2018 discovery response including 120 pages of discovery material and January 10, 2019 discovery log is a full response to the December 11, 2018 discovery order. It contends it provided a full response to Employee's June 4, 2018 informal discovery request and provided all non-privileged discovery materials. Employer requests an order finding it provided a full response to Employee's June 4, 2018 informal discovery request and the December 11, 2018 discovery orders and denying Claimant's November 6, 2018 petition.

3) Did Employer fully respond to Employee's informal discovery request and to discovery orders?

FINDINGS OF FACT

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

1) On November 1, 2016, Employee was pinned between a mechanical ice rake and a wall. (Report of Occupational Injury, November 3, 2016).

2) On November 2, 2016, Employee died from anoxic brain injury and compressional asphyxia. (Death Certificate, November 14, 2016).

3) On October 19, 2017, Claimant, the mother of Employee, filed a claim seeking death benefits, a compensation rate adjustment, interest, and attorney fees and costs contending she was dependent upon her son for support at the time of his death. (Workers' Compensation Claim, October 19, 2017).

4) On November 8, 2017, Employer's attorney entered her appearance. (Entry of Appearance, November 8, 2017).

5) On November 15, 2017, Employer denied Claimant's October 19, 2017 claim contending, "There is no beneficiary entitled to benefits under AS 23.30.215. Furthermore, while the employer does not agree dependency creates the right to benefits, no dependency has been established." (Controversion Notice, November 15, 2017)

6) On November 20, 2017, Employer filed an amended controversion. (Amended Controversion Notice, November 20, 2017).

7) On December 4, 2017, Employer requested Claimant's claim as untimely under AS 23.30.215(c). (Petition, December 4, 2017).

8) On March 2, 2018, Employer filed its response to Claimant's first set of interrogatories and requests for production. (Answer, March 2, 2018). When asked to "list each and every fact known to E.C. Phillips and/or Liberty Mutual relevant to the decision to file" Employer's December 4, 2017 petition, Employer responded, "No evidence of dependency was provided at the time of death and no evidence of dependency has been provided to date." Employer stated, "There is no evidence of dependency under AS 23.30.215" when asked to list each and every fact supporting the assertion in its November 15, 2017 controversion. When asked to list the name of the officer, agent, employee or subcontractor best qualified to respond to the discovery requests, Employer answered Paul Cyr, Employer's General Manager, as he assisted in the compilation of responses to discovery requests. It also stated Paul Cyr and Jeff Green, Employer's Operations Manager, consulted or communicated with Liberty about the

investigation into Employee's death and the decision to file the November 15, 2017 controversion. Employer stated it provided 61 pages of discovery in response to Claimant's request for a full and complete copy of all adjuster notes relevant to Employee's death, "including but not limited to any attempts and/or other efforts to determine" if Employee had any beneficiaries under AS 23.30.215 and her request for all documentation reviewed and relied upon for Employer's responses. There were no attachments or documents filed with Employer's response. (Response, March 2, 2018; Observation).

9) On April 27, 2018, Claimant's attorney emailed Employer's attorney stating:

> I received a phone call today from [Claimant]. She was contacted by Julie Thayer. [Claimant] thought the phone call was about severance pay for [Employee]. I called Ms. Thayer and identified myself as [Claimant's] attorney in the work comp claim. Ms. Thayer said she was not calling about severance pay but proceeded to talk to me. Ms. Thayer said she was asked by Tara Michaels of Liberty Mutual to find [Claimant], determine her correct address, and ask about employment status. I told Ms. Thayer that I would contact you.
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> I cannot stop Liberty nor do I intend to stop Liberty from doing an investigation. That said, they cannot attempt to talk to [Claimant] or engage in any communication with her. . . . (Email, April 27, 2018).

10) On April 30, 2018, Claimant's attorney emailed Employer's attorney stating she expected a return email or phone call regarding her April 27, 2018 email. (Claimant Email, April 30, 2018).

11) On April 30, 2018, Employer's attorney emailed Claimant's attorney and stated, "I was not aware of this…they called her???? When? I will email adjuster to inquire." (Employer Email, April 30, 2018).

12) On April 30, 2018, Employee's attorney emailed Claimant's attorney stating, "No, the investigator went to where they thought she was living and knocked on the door. The investigator talked to a relative and asked that Ms. Dozier call about "severance pay." [Claimant] called her back and then called me. The investigator denied it was about severance pay when I spoke with her. . . ." (Claimant Email, April 30, 2018).

13) On April 30, 2018, Employer's attorney emailed Claimant's attorney stating, "I have not yet heard anything from my client on this but will continue to follow up." (Employer Email, April 30, 2018).

14) On June 4, 2018, Claimant sent Employer's attorney an informal discovery request seeking the following:

1) Please list all facts known to any owner, manager, supervisor, or employee of E.C. Phillips & Co relevant (as the Board defines relevancy) to whether Mr. Dozier's mother Velinda (Williams) Dozier was financially dependent upon her son, Anthony Dozier, at the time of his death.

2) Please provide any writings of any type in the possession of E.C. Phillips and/or Liberty Mutual, including but not limited to notes, faxes, letters, information in Mr. Dozier's personnel file not previously produced, or other written documentation which is or may be relevant to the issue of financial dependency by Velinda (Williams) Dozier on her son Anthony in 2016.

3) With respect to the above, please address the comments in adjuster notes (journal entries) by:

a) Jeffrey Ostmann on 11/8/2016 – "customer is not sure on dependents."

b) Rhonda L. Gannon on 11/8/2016 – "Customer is not sure on dependents."

b) Specifically, I need to know from whom Mr. Ostmann and Ms. Gannon obtained this information, exactly what information was provided to them, and whether any attempts were made by anyone at EC Phillips and or Liberty Mutual to determine whether any family member of Mr. Dozier, specifically including but not limited to parents, were financially dependent upon Mr. Dozier at the time of his death.

4) Please provide the legal basis for deleting a portion of the second line (see question 5 below) in Rhonda Gannon's 11/4/2016 journal entry and supporting factual information which will be sufficient to allow determination of whether the claimed privilege applies.

5) Please state whether any individual, employee, contractor, or subcontractor (including but not limited to investigators) employed by, under contact with, or having any other connection with Liberty Mutual ever followed upon the 11/4/2016 journal entry by Rhonda Gannon

"LRU needs to understand if dependent benefits will be issued, or any benefits other than death…."

6) If the response to number 5 is yes, please provide all correspondence and other written documentation relevant to responding to LRU's "need to understand" if dependent benefits would be issued.

7) Please admit or deny the following:

Liberty Mutual took no action prior to 10/19/2017 to determine if Mr. Dozier had a parent who was financially dependent upon him at the time of his death.

> If you deny the admission, please provide a detailed summary of all such actions and the results obtained. (Claimant Informal Discovery letter, June 4, 2018).

15) On June 15, 2018, Claimant requested Employer be compelled to respond to the April 27, 2018 email to Employer's attorney concerning retention of Julie Thayer, an investigator, by Ms. Michaels to contact relatives of Employee in an attempt to interview Claimant "possibly using a pretext of severance pay, without my knowledge or consent." She attached an addendum which stated:

> The sixty one pages of discovery were devoid of any reference to adjusting or other discovery/notes of Tara Michaels, an employee of Liberty Mutual. In April 2018, Julie Thayer, an investigator who admitted she was hired by Ms. Michaels, made direct contact with [Claimant] to ask questions. There is a factual dispute whether Ms. Thayer told Patricia Young, a relative of [Claimant], that Ms. Thayer needed to speak with [Claimant] regarding severance pay by E.C. Phillips (following the death of [Employee]). Ms. Thayer denied having mentioned severance pay, while Ms. Young and [Claimant] contend Ms. Thayer specifically referred to "severance pay." This dispute goes only to whether the contact was based on false "pretext," as there is no dispute Ms. Thayer was working on behalf of Liberty and that she successfully made contact with [Claimant]. This situation presents a blatant violation of ethics and law by Liberty, which has continued to deny [Claimant's] statutory claim for death benefits. . .
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> [Claimant] requests that Liberty be ordered to respond to reply [sic] to the email and update its March 2, 2018 Discovery Responses to include all information relevant to discovery and evidence in this case, with emphasis on what investigation has been done by Ms. Michaels, Ms. Thayer and any other investigator or department which has had any involvement in the claim filed by [Employee's] mother and copies of all documentation. This request for discovery includes any discovery or activity by Liberty's subrogation department and/or any entity with whom Liberty contacted to obtain information relevant to subrogation. [Employer's attorney] denied any knowledge of the investigation; thus attorney client privilege cannot apply. (Petition, June 15, 2018).

16) On July 5, 2018, Employer responded to Claimant's June 15, 2018 petition to compel discovery and strongly disputed the allegation that its attorney practiced a blatant legal and ethical violation. It contends its March 2, 2018 response was detailed and appropriate and it provided Claimant all unprivileged documents. (Answer, July 5, 2018).

17) On August 3, 2018, Claimant filed an affidavit by Claimant stating she received a phone call from Patricia Young on April 27, 2018. Ms. Young told her "a woman contacted her, attempting to reach me. I was told that the woman wanted to speak to me about my son Anthony,

specifically severance pay from Anthony's last job. I contacted the woman, who began asking me questions about Anthony, including whether I was his mother and if Anthony has provided financial support to me prior to his death." (Claimant Affidavit, August 3, 2018).

18) On August 17, 2018, Claimant filed a request for cross-examination seeking to cross examine Paul Cyr and Jeff Green to "determine their knowledge and input and necessity of personal attendance at hearing on merits" and Rhonda Cannon, Jeffrey Ostmann, and Sharon Hlavinka to "determine their efforts and knowledge regarding dependency of Employee mother, investigation and decisions." (Request for Cross-Examination, August 17, 2018).

19) On September 5, 2018, Claimant contended there was a factual dispute whether an investigator, Julie Thayer, hired by Ms. Michaels, made direct contact with her while investigating the case and whether there was a violation of ethics and law. She contended Employer's attorney denied any knowledge of the investigation in the emails and attorney-client privilege cannot apply. Claimant requested an order compelling Employer to respond to the emails and update its March 2, 2018 discovery responses to include all information relevant to discovery and evidence in this case, with emphasis on the investigation by Ms. Michaels, Ms. Thayer and any other investigator or department of Liberty Mutual. Employer contended its July 5, 2017 answer to Claimant's June 15, 2018 petition includes its response to Claimant's June 4, 2018 informal discovery request. It contended the presumption of compensability does not apply to the issue of dependency and Claimant has the burden to prove dependency. Employer contended Claimant failed to provide documentation of dependency. It contended it already answered Claimant's requests for discovery and all relevant and non-privileged discovery has been provided. The designee granted Claimant's June 15, 2018 petition and ordered Employer to produce an updated adjuster file and investigative materials related to Employer' investigation of the claim by September 26, 2018. Employer did not have to re-produce a copy of the same material it already provided but may redact the adjuster file and investigative materials to the extent they are protected by the work-product doctrine or any privilege, including attorney-client privilege. The designee directed Employer to prepare a privilege log if it redacted any material. (Prehearing Conference Summary, September 5, 2018).

20) On September 14, 2018, Employer filed a letter objecting to the September 5, 2018 prehearing conference summary stating it asserts the presumption of compensability does not apply to the issue of dependency and Claimant has not provided proof of dependency. It

requested the designee make a determination on Claimant's burden to prove dependency as part of the discovery order. (Employer letter, September 14, 2018).

21) On September 19, 2018, Claimant opposed Employer's September 14, 2018 letter contending the burden of proof, what type of evidence constitutes proof and whether Claimant provided sufficient evidence to raise the presumption is a legal issue that cannot be ruled upon in a prehearing. (Claimant Opposition, September 19, 2018).

22) On September 27, 2018, Claimant filed an amended claim seeking death benefits, a compensation rate adjustment, interest, a finding of unfair or frivolous controversion, penalty for late paid compensation and attorney fees and costs. She requested a referral to the Division of Insurance. (Amended Claim for Workers' Compensation Benefits, September 27, 2018).

23) On September 27, 2018, Employer filed a letter addressed to Claimant's attorney stating it attached its response to the designee's discovery order, including a privilege log and 120 pages of discovery. There were no attachments or documents filed with the letter. (Employer letter, September 27, 2018; Observation).

24) On October 11, 2018, Claimant filed Employer's one page privilege log and 21 pages from Employer's response, including an Unlimited Investigative Services Report dated May 1, 2018. The Unlimited Investigative Services Report included the following under "Overall Findings":

> We then drove to the address on file for Patricia Young . . . . We knocked. . . . Patricia is close with [Claimant] and said she was the one who took care of [Employee's] funeral arrangements. She stated [Claimant] does not work and is disabled and in a wheel chair. . . . She is on disability is provided with a caregiver through the state.
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> We asked Patricia if [Claimant] lived with [Employee] and when. Patricia stated [Employee] was taking care of [Claimant] and went to Alaska to save some money to get them a place. She stated in June 2016 they lived together in an apartment in Lakewood. She stated [Claimant] ended up in a shelter after her son was killed until June/July of last year. She now lives in an apartment. . . . (Notice of Intent to Rely, October 11, 2018).

25) On October 12, 2018, Claimant contended Employer's privilege log was insufficient for her to tell whether the attorney-client privilege and work-product doctrine applied and Employer failed to provide all adjuster notes. The designee noted there was no petition filed requesting the board or its designee take a particular action regarding Employer's alleged failure to provide complete discovery and a sufficient privilege log. The designee requested a party file a petition

requesting the board to take a particular action should a party contend a discovery response is incomplete, inadequate or insufficient to enable the board or its designee to take an action and understand a party's request. (Prehearing Conference Summary, October 12, 2018).

26) On October 22, 2018, Employer denied Claimant's amended claim. (Controversion, October 22, 2018).

27) On October 23, 2018, Employer answered Claimant's amended claim denying death benefits, a compensation rate adjustment, a referral to the Division of Insurance, interest, penalty, a finding of unfair or frivolous controversion and attorney fees and costs. (Answer, October 23, 2018).

28) On November 6, 2018, Claimant filed a "request for clarification of discovery" produced by Employer. She contends Employer has not provided all relevant discovery in its September 27, 2018 discovery response. Claimant contends Employer's privilege log is insufficient to allow any determination regarding whether privilege applied to the withheld or redacted discovery material. She contends Employer failed to fully respond to its June 4, 2018 informal discovery letter. Claimant contends Employer provided no additional information to her first interrogatory question from the June 4, 2018 informal discovery request. She requested an order precluding Employer from raising at hearing, or in any other pleadings, any defense to Claimant's claim based on information it failed to produce under 8 AAC 45.054(d) to her June 4, 2018 informal discovery request. Claimant contends Employer never responded to her third and fourth questions in her June 4, 2018 informal discovery request. She contended disclosure of the redacted material in Rhonda Gannon's November 4, 2016 journal entry is relevant to the issue of Employer's good faith obligation to inquire into dependency issues once raised as the "inquiry" by family "should have been sufficient to result in a response and documentation of what the family was told." Claimant requested an order precluding Employer from raising at hearing or in any other pleadings, any defense that Employer conducted an investigation in November 2016, which included an inquiry into whether Employee provided financial assistance to Claimant or the results of such an inquiry under 8 AAC 45.054(d). She contends Ms. Michael's notes should be produced because the Unlimited Investigation Services report yielded relevant information verifying her claim and Ms. Michael's adjuster notes may have other relevant information. Claimant requests Employer admit or deny it took no action prior to October 2017 to determine if Employee had a parent who was financially dependent upon him and to provide a detailed

summary of actions, if taken, and the result. She contends Employer never responded to her seventh question in her June 4, 2018 informal discovery request and a response would clarify issues and allow her to "hone in on the relevant and appropriate issues for hearing." Claimant included her June 4, 2018 informal discovery letter as Exhibit 1. This is the first time Claimant's June 4, 2018 informal discovery letter was filed. (Request for Clarification, November 6, 2018; Observation).

29) On November 19, 2018, Claimant's November 6, 2018 request for clarification of discovery was treated as a petition to compel discovery responses from Employer to her June 4, 2018 letter with interrogatories and disclosure of redacted sections of discovery previously provided by Employer and case notes from Ms. Michaels and a petition to impose sanctions. The designee noted Employer had 20 days after Employee's petition to file an answer. (Prehearing Conference Summary, November 19, 2018).

30) On November 27, 2018, Employer responded to Claimant's November 6, 2018 petition contending any information regarding Employer's or its adjuster's internal claim management of the claim is irrelevant to the matter's disputed issues in the matter and it provided all discoverable information. It contends confidential attorney work product doctrine and attorney-client privilege protected materials it withheld or redacted from disclosure and the materials are not reasonably calculated to lead to admissible evidence. Employer contends the facts and writings Claimant requested in the June 4, 2018 letter are contained in the documents previously provided and no additional documents or facts not previously disclosed exist. It contends there is no information or documentation in Employer's possession not already produced that Employer intends to rely on so there is no information or documentation to be excluded under 8 AAC 45.054(d). Employer contends its redaction in the November 4, 2016 journal entry was appropriate because it related to the adjuster's internal management of the claim and not to any factual issues in the case. It contends the information redacted was not relevant or reasonably calculated to lead to admissible evidence. Employer contends the information in Ms. Michaels' case notes is not reasonably calculated to lead to admissible evidence, as the notes do not contain any information regarding Ms. Williams' dependency on Mr. Dozier "as the employer was unable to verify that the claimant was actually dependent on Mr. Dozier." It attached an updated privilege log which also contended the attorney-client privilege and work product doctrine

protected documents contained in the adjuster's file or log notes in document pages RFP 00121-00138. (Employer Response, November 27, 2018).

31) On November 29, 2018, Claimant requested a hearing on its November 6, 2018 petition. (ARH, November 29, 2018).

32) On November 29, 2018, Claimant requested cross-examination of Rhonda Gannon, Jeffrey Ostmann and Sharona Hlavinka to "determine their knowledge regarding issues of dependency and internal communication." (Request for Cross-Examination, November 29, 2018).

33) On December 11, 2018, Claimant filed a complete copy of Employer's September 26, 2018 second response to her request for discovery, including 120 pages of discovery and Employer's September 26, 2018 privilege log. The 120 pages of discovery included 23 pages of partially redacted adjuster notes from RFP 00036-00057; an Unlimited Investigative Services report dated May 2, 2018; five pages completely redacted under RFP 00074-00078; and copies of several checks including one check issued to Claimant for $2,889.00 on November 9, 2016 by Employer. The pages of partially redacted adjuster notes include entries from November 2, 2016 through November 29, 2016, including:

- On November 2, 2016, Sharona Hlavinka entered a journal entry containing an email from her to Jeff Green asking for "Information regarding next of kin and/or marital/dependency status for [Employee]."
- On November 3, 2016, Ms. Hlavinka entered a journal entry containing an email from Jeff Green to her stating, "Do have a question, are there funeral benefits? Tough question to ask but the family is asking. . . ." and her reply back stating, "There is a funeral benefit. If you know of the funeral home name, we can get payment set up to them. It's a max of $10,000."
- On November 3, 2016 Ms. Hlavinka entered a journal entry titled "Customer Contact" stating, "SW Paul. He will email me the invoice for the funeral home. EE did not have children or a wife. We discussed benefits available."
- On November 4, 2016, Samantha Houle entered a journal entry titled "LRU – Triage Referral" stating, "Clmt [sic] had no dependents" and "Insured contact: Jeff Green."
- On November 4, 2016, Rhonda Gannon entered a journal entry stating, "EE age is 41 – apparently 'family' has made some inquiry to WC about claim – LRU needs to understand if dependent benefits will be issued, or any other benefits other than death" with a portion redacted after.
- On November 8, 2016, Rhonda Gannon entered a journal entry titled "LRU-Questions by WC/ER Response" stating, "EE [sic] was Not married, Customer is not sure on dependents."
- On November 8, 2016, Ms. Hlavinka entered a journal entry entitled "Customer Response" which included an email from Jeff Green in reply to her

> November 3, 2016 email stating, "Not married, not sure on dependents. Have included his emergency contact document."
> - On November 8, 2016, Jeffrey Ostmann entered a journal entry titled "Early Examiner Intervention 1" stating, "EE was Not married, Customer is not sure on dependents."
> - On November 8, 2016, Jeffrey Ostmann entered a journal entry titled "Early Examiner Intervention 2" stating, "confirm if any dependents. . . ."

Employer's September 26, 2018 privilege log did not reference documents RFP 00121-00138 were withheld or the basis for the withholding. (Employer Second Response, September 26, 2018).

34) On December 11, 2018, the designee noted Claimant's November 6, 2019 petition requested an order compelling Employer to respond to Employee's June 4, 2018 letter, disclosure of redacted sections of discovery previously provided by Employer, and production of case notes from Ms. Michaels and a finding Employer's privilege log was insufficient. She requested an order precluding Employer from introducing at hearing or in any other pleadings the evidence she requested in the June 4, 2018 letter, raising any defense that Employer conducted an investigation in November 2016 which included any inquiry into whether Claimant was dependent upon Employee; and introducing at hearing or in any other pleadings any results of any such investigation that Employer has refused to provide. The designee stated sanctions cannot be ordered in a prehearing conference and a hearing would have to be scheduled. Employer contended Claimant could depose witnesses to discover information or knowledge the witnesses have regarding the dependency issue. Claimant contended deposing witnesses would pose an undue financial hardship. Employer requested the designee decide whether the presumption of compensability applies to the dependency issue. The designee stated she cannot not make such a determination because it is a legal issue and must be determined at a hearing. The designee determined the two main disputes are whether the presumption of compensability applies to death benefits sought under AS 23.30.215(a)(4) and whether Claimant was dependent upon Employee at the time of his death. The designee stated Claimant was entitled to unprivileged information reasonably calculated to lead to facts that will have any tendency to prove or disprove whether Claimant was dependent upon Employee at the time of his death, whether Employer intends to rely on the discovery at hearing or not, which included investigative reports, written or recorded witness statements, and claims adjuster notes that have any tendency to prove or disprove whether Claimant was dependent upon Employee. The

designee found Employer's privilege log was insufficient to assess the applicability of the privileges it relied upon for redacting and withholding material and to determine whether specific items redacted or withheld were not admissible evidence. The designee found it unclear whether Employer included claims adjuster notes or information from Ms. Michaels in the redacted or withheld discovery it provided and, if so, the basis of the redaction or withholding. Claimant's November 6, 2018 petition was granted in part. Employer was ordered to (1) provide all unprivileged information in the adjuster's file, investigative reports, and written or recorded witness statements having any tendency to prove or disprove whether Claimant was dependent upon Employee, (2) to redact or withhold information regarding insurer reserves information or information regarding the investigation of the ice machine malfunction; (3) to redact the mental impressions, conclusions, opinions, and legal theories of Employer's attorney or other representative's and confidential communications made for the purpose of facilitating the rendition of professional legal services between Employer's attorney and its client and produce to Claimant the redacted versions; and (4) to amend its privilege log to provide the type of each document (email, letter, etc.), the title of the document, its author, date of creation, general subject matter, and type of privilege claimed. The designee informed Claimant she may petition for an in camera review of the redacted or withheld discovery if she further objected to Employer's withheld or redacted discovery. The parties agreed to schedule a hearing on March 5, 2019 to hear the remaining issues in Claimant's November 6, 2018 petition. The designee directed parties to serve and file hearing briefs in accordance with 8 AAC 45.114. (Prehearing Conference Summary, December 11, 2018).

35) On December 17, 2018, the December 11, 2018 prehearing conference summary was served on the parties. (Prehearing Conference Summary Served, December 17, 2018).

36) On December 28, 2018, Claimant filed a "request for clarification or appeal of the designee discovery order served December 17, 2018." She contends she is "entitled to all information of any type, not covered by privilege and supported by a detailed privilege log, which has any tendency to prove or disprove whether [Claimant] was dependent upon [Employee]." Claimant also contends she is entitled to answers to the June 4, 2018 information discovery letter, to which Employer has never responded other than to assert Employer has provided all non-privileged information. (Request for Clarification or Appeal, December 28, 2018).

37) On January 10, 2019, Employer filed a seven page amended privilege log which included the type of each redacted or withheld document (email, letter, etc.), the title of the document and the document author and recipient, creation date, general subject matter, and type of claimed privilege for 74 items that were redacted or withheld. Employer withheld discovery material marked RFP 00121-00139 in their entirety. The privilege log described the general subject matter of Rhonda Gannon's partially redacted November 4, 2016 journal entry as "Claim status notes: notes of EE and injury details, ER communications, and instructions re claim handling and internal escalation" and the privilege claimed as "Redacted information is not reasonably calculated to lead to admissible evidence regarding dependency at time of injury." It described the general subject matter of Jeffrey Ostmann's partially redacted November 8, 2016 journal entry as "Claim status notes: Synopsis of EE and injury details, communications re Internal claim handling, coverage information, and summary of reserves" and the privilege claimed as "Redacted information is not reasonably calculated to lead to admissible evidence regarding dependency at time of injury." Employer withheld the entirety of Ms. Michaels' adjuster journals dated April 26, 2018 through May 18, 2018, and claimed the journals are not reasonably calculated to lead to admissible evidence regarding dependency at the time of injury and the work product doctrine and attorney client privilege protected the material. The privilege log indicates an April 26, 2018 surveillance report by Jeff Burch that was provided to Ms. Michaels was in the materials marked RFP 00074-00078 and the materials were fully redacted. The general subject matter for the report described it as "Summary of surveillance efforts to document daily activities and verify residence of Claimant on April 12, 2018 and April 24, 2018, and to provide findings and recommendations drawn from the same in anticipation of litigation" and the privilege claimed as "Redacted information is not reasonably calculated to lead to admissible evidence regarding dependency at time of injury. Confidential communications for the purpose of facilitating the rendition of professional legal services to client. Confidential communications providing mental impressions, conclusions, opinions, and legal theories." (Amended Privilege Log, January 10, 2019).

38) On January 23, 2019, Claimant contended Employer's September 26, 2018 discovery response and January 10, 2019 privilege log is an insufficient response to her June 4, 2018 discovery letter and the December 11, 2018 discovery order. She contended Employer is continuing to investigate the claim and contacting friends and family members regarding the

dependency issue and was not providing information on those communications. Claimant contended a paralegal from Employer's attorney's office investigated the claim by contacting friends and family members regarding the dependency issue. Claimant contended she is entitled to statements or responses made during the contact with family and friends questioned about the dependency issue. Employer contended Claimant is not entitled to information gathered by an investigation directed by its attorney because it is privileged. It contended the persons contacted at Employer's attorney's direction have followed up with Claimant so she was informed of its investigative efforts. Employer contended Claimant can follow up with those persons to receive information on dependency from those persons. Claimant stated she will request an in camera review for the March 5, 2019 hearing. Employer contended it provided full discovery and the updated privilege log is a complete response to Claimant's June 4, 2018 discovery request letter and the designee's orders. Employer contended Claimant can depose witnesses or persons for answers to questions in Claimant's June 4, 2018 letter and Claimant can also depose the family and friends Employer has contacted, obtain affidavits from those persons or call them as witnesses at a hearing on the merits of Claimant's claim. Claimant contended information requested in her June 4, 2018 discovery letter is also relevant to whether Employer unfairly or frivolously controverted benefits. She asked the designee whether she would sign subpoenas for Rhonda Gannon, Jeffrey Ostmann, Sharona Hlavinka, Paul Cyr, and Jeff Green for the March 5, 2019 hearing. Claimant contended she cannot afford to depose witnesses and to require her to do so is a significant burden. Employer stated it would object to the subpoenas because the March 5, 2019 hearing is about discovery and is not a hearing on the merits of Claimant's claims. The designee explained subpoenas are reviewed as they are received and she cannot inform Claimant today whether a subpoena would be signed in the future. (Prehearing Conference Summary, January 23, 2019).

39) On February 8, 2019, Claimant filed a letter in response to the January 23, 2019 prehearing conference summary to clarify her understanding that the March 5, 2019 procedural hearing was scheduled on her June 15, 2018 petition to compel as well as the November 6, 2018 petition. (Claimant letter, February 8, 2019).

40) On February 25, 2019, Claimant filed a witness list which included Ms. Michaels. (Claimant Witness List, February 25, 2019).

41) On February 25, 2019, Claimant emailed her hearing brief at 5:23 p.m. to Employer's attorney and to the workers' compensation email address. (Claimant Email, February 25, 2019).

42) On February 26, 2019, Claimant filed a brief contending Employer should be compelled to respond in full to the June 4, 2018 informal discovery letter and to provide all non-privileged information in Ms. Michael's possession. She requested an order precluding Employer from raising at hearing, or in any other pleadings, any defense to her claim based on information it failed to produce under 8 AAC 45.054(d). Claimant also requested an in camera review of any information that may be privileged. She contends the discovery materials and privilege log contradicts Employer's assertions that it has no further relevant information in its possession. Employer provided duplicative discovery materials. Further, pages 74-78 are blank and the privilege log reveals those pages are a "summary of surveillance efforts to document daily activities and verify residence of Claimant on April 12, 2018 and April 24, 2018" as maintained by Ms. Michaels. However, Claimant contends none of the information possessed by Ms. Michaels except the May 1, 2018 surveillance report was produced. Claimant contends Employer failed to answer her first and second questions in the June 4, 2018 informal discovery letter, as the adjuster notes do not contain any indication whether individuals associated with Employer, other than Jeff Green or Paul Cyr, had any knowledge regarding whether Employee provided financial support to Claimant. She contends Employer either did not attempt to discover whether dependents other than a spouse or children existed or Employer obtained information which affirmatively eliminated any statutory dependents. A check for $2,000 issued by Employer on November 9, 2016 payable to Claimant bolsters the possibility of additional evidence. It raises the question whether any of Employee's co-workers were aware he contributed to his mother's financial and "the question remains how did Liberty progress from not knowing whether there were dependents to concluding there were no statutory dependents. . . ." Claimant contends communications between adjusters and employees and their insureds are not protected from disclosure and Employer should be compelled to answer the fourth and fifth questions in her June 4, 2018 informal discovery letter. She contends the information sought in question six in her June 4, 2018 informal discovery letter is clearly relevant to the issue of what Liberty knew, its investigation's reasonableness and its controversion of Claimant's claim. Claimant contends if Employer took no action to determine if Claimant was dependent upon Employee, its controversion was not supported by any reasonable basis and a response to

question seven in her June 4, 2017 informal discovery letter is relevant to a penalty and referral to the Division of Insurance. She contends Ms. Michaels has relevant information because the May 1, 2018 Unlimited Investigative Services report came from her and contains statements attributed to Claimant's family friend, Patricia Young. She contended a paralegal from Employer's attorney's office was investigating and contacting friends and family members regarding the dependency issue. Claimant contends the paralegal was not assisting professional legal services per se, but rather acting in an investigator capacity and did so to cloak further investigation under the attorney client privilege. She contended the privilege is not meant to shield discoverable evidence but acknowledged any documentation produced by the paralegal should be scrutinized for her thought processes and mental impressions. Claimant contends Employer's contention she can contact the family and friends to obtain testimony or statements for use in a future hearing is not supported by law and should be rejected. (Hearing Brief, February 26, 2018).

43) On February 26, 2019, Employer filed a witness list which included Sharona Hlavinka, Employer's claims adjuster. (Employer Witness List, February 26, 2019).

44) On February 26, 2019, Employer filed a hearing brief contending Claimant's June 15, 2018 petition to compel should not be addressed as the only hearing issue is Claimant's November 6, 2018 petition. It contends it has provided all non-privileged and relevant discovery. Employer cited *Hayes* to argue discovery requests which require an attorney to provide a detailed summary of witnesses' testimony violates the work-product rule because it requires the attorney to reveal mental impressions, strategy, opinion and what evidence she considers significant. Employer contends when and if Employer took action to determine if Claimant was dependent is irrelevant. It contends it is Claimant's burden to prove dependency and she must provide discovery to prove her claim. Employer contends the deleted portion of Ms. Gannon's November 4, 2016 journal entry was related to the adjuster's internal management of the claim and not any factual issues on the claim. It contends none of Ms. Michaels' notes contain any information regarding Claimant's dependency because Employer was unable to verify Claimant was dependent on Employee. Employer also contended the investigative report was prepared at counsel's direction in anticipation of litigation and any notes would reveal mental impressions, strategy, opinion and the evidence Employer's attorney considers significant. It contended Employee has access to all individuals identified in the report and can contact them herself, call them as witnesses or obtain

an affidavit. Employer requests an order denying Claimant's November 6, 2018 petition. (Employer Hearing Brief, February 26, 2019).

45) On February 28, 2019, Claimant filed a petition requesting a subpoena for Ms. Michaels be signed. (Claimant Petition, February 28, 2019).

46) On February 28, 2019, Claimant requested Employer's hearing brief be stricken, contending it was untimely. (Claimant Petition, February 28, 2019).

47) On February 28, 2019, Employer requested Claimant's February 28, 2019 petition and subpoena of Ms. Michaels be quashed. It contended Ms. Michaels could not be ordered to testify prior to a determination at hearing because the hearing was set in part to determine whether Ms. Michaels' work and testimony are discoverable or privileged. (Employer Petition, February 28, 2019).

48) On February 28, 2019, Claimant opposed Employer's February 28, 2019 petition to quash Ms. Michaels subpoena. She contends Employer's assertion Ms. Michaels should be precluded from testifying is disingenuous because Employer's witness list asserted another adjuster, Ms. Hlavinka, could testify. Claimant contends the subpoena's purpose is to require Ms. Michaels' testimony about the general contents of written materials obtained and prepared in the normal course of her work duties, the basis of any claim of privilege, how she conducted her investigation in this case, and how she generally conducts investigations. She contends Ms. Michaels' testimony is reasonably calculated to lead to admissible evidence. Claimant stated,

> Limited questioning should assist the panel in determinations as to whether the redacted materials (the entirety of Ms. Michaels' adjuster case journals and related materials – see pages 3-7 of amended Privilege Log) are reasonably calculated to lead to admissible evidence, are subject to a valid privilege, and/or are confidential communications and whether an in camera review is necessary prior to a decision on production. (Opposition, February 28, 2019).

49) At hearing on March 5, 2019, Claimant withdrew her February 28, 2019 petition to strike Employer's hearing brief. (Claimant).

50) Claimant contends Employer has continually failed to respond to discovery requests. She contends she is asking for facts and evidence. Claimant contends witness statements are discoverable under *Hayes*. She contends either Employer has facts not disclosed to supports its conclusion she was not dependent on Employee or has no facts supporting its controversion. Claimant contends Employer must have additional investigative reports it failed to provide

because it continued to contact witnesses. She contends Employer has demonstrated a pattern of refusing to provide discovery evidence. Claimant contends Employer made factual assertions and she is entitled to evidence supporting its assertions. She contends evidence supporting factual assertions is discoverable under *Langdon*. (Claimant hearing arguments).

51) Employer contends it complied with the December 11, 2018 discovery order. It contends Claimant did not appeal the discovery order or request an in camera review and it is too late to request either now. Employer contends the investigative report was privileged and was produced to rebut Claimant's contention Employer's attorney violated the Alaska Rules of Professional Responsibility. It contends Claimant has the burden to prove dependency and did not produce evidence supporting dependency so Employer investigated. It contends Claimant can obtain statements from witnesses Employer contacted herself because the witnesses contacted Claimant and informed her of the investigation. It contends it cannot be ordered to reveal privileged information and there is a presumption of privilege after Employer's attorney entered its appearance. (Employer hearing arguments).

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;
> . . . .

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 23.30.105. Alaska Workers Compensation Board.**
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **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 23.30.135. 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 45.054. Discovery.**
> . . . .
>
> (d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.

. . . .

In *Miller v. Municipality of Anchorage*, AWCB decision No. 13-0099 (August 20, 2013), the board quashed a subpoena issued only seven days before hearing to the division director. *Miller* found seven days' notice for any witness, much less a public official, is inadequate notice to subpoena a witness to testify at a hearing.

> **8 AAC 45.114. Legal memoranda.** Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must
>
> (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established;
> . . . .
>
> **Department of Labor and Workforce Development Commissioner's (DOLWDC) Order No. 001.**
> . . . .
>
> (3) A document is considered filed or served upon receipt unless received on a Saturday, Sunday, a day the board is closed due to a state-recognized holiday, or after 5:00 p.m. Alaska standard time. If the document is filed on a Saturday, Sunday, a state-recognized holiday, or after 5:00 p.m. Alaska standard time, the filing date shall be the next working day.
> . . . .
>
> **8 AAC 45.120. Evidence.**
> . . . .
>
> (f) . . . The rules of privilege apply to the same extent as in civil actions. . . .
>
> **Alaska Rule 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.
>
> (2) *Limitations.*
>
> > (A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).
>
> (3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (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 the other party's 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 the party's case and that the party 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.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the U.S. Supreme Court recognized the work product rule which was later codified in the rules of civil procedure. In *Hickman*, after a publicly recorded hearing where four survivors of a tug boat sinking testified, the tug boat owners' attorney privately interviewed the survivors and obtained their signed statements. The attorney also interviewed other persons believed to have information relating to the accident and wrote memoranda for some of the interviews including what they told him. Afterwards the administrator for a deceased crew member of the tug brought a federal suit against the owners

and filed interrogatories asking, "State whether any statements of the members of the crews of the Tugs 'J.M. Taylor' and 'Philadelphia' or any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor'" and to "Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports." *Id*. at 498-499. Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased and if so, requested the nature of all such records, reports, statements or other memoranda. *Id*. at 499. The tug owners admitted statements had been taken but objected to the interrogatories contending they called for privileged matter obtained in preparation for litigation. The district court ordered the tug owners and attorney to produce all written statements obtained by the attorney, state any fact concerning the case learned through oral statements made by witnesses to the attorney and produce the attorney's memoranda containing statements of facts by witnesses or submit them for an in camera review. The tug owners and attorney refused, the court held them in contempt and ordered them imprisoned until they complied. The court of appeals reversed the district court holding the information sought was "work product of the lawyer" and privileged under the rules of civil procedure. The US Supreme Court affirmed the court of appeals. It held the attorney-client privilege did not extend to information secured by an attorney while acting for his client in anticipation of litigation. However, the party seeking to compel disclosure of memoranda, briefs, communications or other writing prepared for the opposing party's attorney's own use, or to writings containing the attorney's mental impressions, conclusions opinions or legal theories must show necessity or justification.

In *Miller v. Harpster*, 392 P.2d 21 (Alaska 1964), the defendant in a personal injury case appealed an order to produce written statements of witnesses to an automobile accident, including any and all written statements of the defendant or plaintiff. The Alaska Supreme Court held it was not an error to order the written statements' production. It distinguished case's facts from *Hickman* because the defendant was not asked to reduce the witnesses' oral statements to writing; rather all that was requested was the production of written statements of witnesses to the collision. The Court concluded the information contained in the eyewitnesses' written

statements belongs to both parties to the dispute and stated, "The sooner both parties are aware of the observations of the witnesses, the sooner the litigation can proceed. . . . The broad policy of all of our rules permitting discovery is to eliminate surprise at the trial and to make it convenient for the parties to find and preserve all available evidence concerning the facts in issue. . . ." *Id*. at 23.

In *Hayes v. Xerox Corp.*, 718 P.2d 929 (Alaska 1986), the defendant served the plaintiffs in a personal injury suit with an interrogatory requesting a "detailed summary of the testimony to be given" by the plaintiff's witnesses. The Alaska Supreme Court held an interrogatory requesting an attorney to describe witnesses' testimony violated the work-product rule because it requires the attorney to reveal his mental impressions, strategy and opinion protected under Rule 26. *Id*. at 942.

The Alaska Rules of Civil Procedure provide for guidance in interpreting the Act's procedural statutes and regulations. *Granus*. In *Langdon v. Champion*, 752 P.2d 999, 1005 (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).

Langdon at 1007 held "materials contained in an insurer's files shall be conclusively presumed to have been compiled in the ordinary course of business, absent a showing that they were prepared at the request or under the supervision of the insured's attorney. Prior to such involvement, materials held by insurers are subject to discovery without regard to any work product restrictions."

In the Matter of Mendel, 897 P.2d 68 (Alaska 1995), the Court held the superior court has a mandatory duty to protect against disclosures of the mental impressions, conclusions, opinions or legal theories of the litigating attorney. It found the superior court violated Rule 26(b)(3) by compelling production of attorney work product without adopting measures to assure protected information was not disclosed.

Alaska Rule of Civil Procedure 33. Interrogatories to Parties.

. . . .

(b) **Answers and Objections.**

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer can be ascertained.

Alaska Rule of Civil Procedure 36. Requests for Admission. (a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall

> specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.
>
> **Alaska Rule of Evidence 503. Lawyer-Client Privilege.** (a) **Definitions.** As used in this rule:
>
> > (1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.
> > . . . .
> >
> > (3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
> > . . . .
> >
> > (5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Langdon at 1004 held the attorney-client privilege does not extend to statements made by insured to insurer except in those cases where it can be shown that the insurance adjuster received communication at express direction of the insured's counsel as the adjuster is acting as one employed to assist the lawyer in the rendition of professional legal services making him a representative of the lawyer under Rule 503(a)(4).

ANALYSIS

1) Was the oral order denying Claimant's request for additional time for opening and closing statements correct?

Claimant contends Employer filed its hearing brief late, and therefore, she should be provided additional time for opening and closing arguments to remedy Employer having an entire day to review her brief before it filed its own hearing brief. Hearing briefs were due by Tuesday, February 26, 2019 (March 5, 2019 – 5 business days = February 26, 2019). 8 AAC 45.114. Employer timely filed and served its hearing brief on February 26, 2019. Claimant also filed her hearing brief on February 26, 2019 because she filed it after 5:00 p.m. on February 25, 2019. DOLWDC Order No. 001. The fact Claimant chose to file and serve her hearing brief by email at 5:23 p.m. on February 25, 2019 does not constitute usual or extenuating circumstances justifying additional time for opening and closing statements. 8 AAC 45.114; *Rogers & Babler*. The oral order denying Claimant's request for additional time for opening and closing arguments was correct.

2) Was the oral order quashing Claimant's subpoena of Tara Michaels correct?

A subpoena issued only seven days prior to a hearing does not allow a person reasonable time to comply. *Miller v. Municipality of Anchorage.* Claimant's February 28, 2019 subpoena of Ms. Michaels for the March 5, 2019 hearing was not reasonable because it only provided five days' notice. (February 28, 2019 to March 5, 2019 = 5 days). Claimant contended she subpoenaed Ms. Michaels after receiving Employer's brief and witness list, which was reasonable because she did not know she needed to subpoena her until she received them. However, Claimant has been contending she is entitled to discovery of information and documents involving or created by Ms. Michaels since June 2018. Furthermore, the March 5, 2019 hearing was scheduled on December 11, 2018, and Claimant discussed subpoenaing witnesses during the January 23, 2019 prehearing conference, at which Employer objected. Claimant had notice Employer opposed witness testimony at the hearing and had sufficient time to provide Ms. Michaels adequate notice and reasonable time with a subpoena but failed to do so. *Miller*; *Rogers & Babler*. The oral order to quash the subpoena of Ms. Michaels was correct.

3) Did Employer fully respond to Employee's June 4, 2018 informal discovery request and the discovery orders?

Discovery in this matter has been drawn out and contentious. Claimant's November 6, 2018 request for clarification of discovery was treated as a petition and a discovery order was issued on December 11, 2018. Claimant and Employer dispute whether Employer provided a complete discovery response to Employee's June 4, 2018 informal discovery letter and whether Employer complied with the December 11, 2018 discovery order. Claimant contends Employer's January 10, 2019 privilege log is inadequate and she is entitled to Ms. Michaels' adjuster notes and to witness statements from family and friends questioned by Ms. Michaels, an investigator and a paralegal from Employer's attorney's office. She also contends she is entitled to formal written responses to her June 4, 2018 informal discovery request which Employer never provided. She requests an order finding Employer failed to fully respond to her June 4, 2018 informal discovery request and the September 5, 2018 and the December 11, 2018 discovery orders. Claimant additionally requests an order compelling Employer to produce Ms. Michaels' adjuster notes and witness statements from Claimant's family and friends and precluding Employer from raising at hearing, or in any other pleadings, any defense to her claim based on information it failed to produce under 8 AAC 45.054(d). Claimant also requests an *in camera* review of any information that may be privileged should the panel find it necessary to make a determination.

Employer contends it has provided full discovery of non-privileged discovery material in response to Employee's June 4, 2018 informal discovery request and the December 11, 2018 discovery order. It contends its January 10, 2019 privilege log is sufficient to determine whether the withholding or redaction of material was proper Employer contends it was proper to withhold and redact information based upon the work-product doctrine, the attorney-client privilege and because the material was not reasonably calculated to lead to admissible evidence. It opposes an order compelling production of the discovery materials for an *in camera* review contending it is too late to order it as Claimant never filed a petition requesting it.

Employee's June 4, 2018 informal discovery request involved interrogatories, requests for production and one request for admission which also involved an interrogatory. Claimant's second and sixth questions are a request for production. Her first, third, fourth and fifth

questions are interrogatories. Claimant's seventh question starts out requesting an admission but ended with an interrogatory requesting a detailed summary of all actions taken to determine if Employee had a parent who was financially dependent upon him at the time of his death if Employer denied the admission. Civil Procedure Rule 33 and 36. Contrary to Claimant's assertion Employer must provide a written response to her June 4, 2018 informal discovery response, Employer is permitted to make underlying documentation available in lieu of preparation of a response to an interrogatory based upon review and evaluation of the documents when the burden of preparing the answer is substantially the same on both sides. Civil Procedure Rule 33(d). However, the parties' discovery dispute centers upon whether Employer's improperly withhold and redacted discovery materials.

The issues in dispute are whether the presumption of compensability applies to dependency under AS 23.30.215(a)(4), whether Claimant was dependent upon Employee at the time of his death and whether Employer unfairly or frivolously controverted benefits. Witnesses' written or recorded statements, including those from Claimant's family and friends, in Employer's possession regarding Claimant's dependency upon Employee is reasonably calculated to lead to discovery of relevant information. *Granus*; *Harpster*. On December 11, 2018, the designee issued discovery orders under AS 23.30.108(c) compelling Employer to produce all unprivileged information in the adjuster file, investigative reports, and written or recorded witness statements having any tendency to prove or disprove whether Claimant was dependent upon Employee. As demonstrated in *Hickman, Harpster*, *Hayes*, and *Langdon* discovery of witness statements when the attorney or its representative does not obtain a written or recorded witness statement from the witness but rather prepares or reduces the oral statements made by witnesses to the attorney or its representative to writing in claims adjuster journal notes, investigative reports or communications between the client, attorney or its representative complicates whether the material sought is privileged or protected by the work product doctrine.

To qualify for protection under the work-product doctrine Employer has the burden to show the (1) documents or other tangible thing (2) were prepared in anticipation of litigation or for trial (3) by or for Employer's attorney or representative. Civil Procedure Rule 26(b)(3); *Hickman*. Then the burden is on Claimant to show a substantial need of the materials and that she is unable to

obtain the substantial equivalent of the materials by other means without undue hardship. Civil Procedure Rule 26(b)(3). Claimant seeks witness statements, investigative reports and Ms. Michaels' adjuster notes which were all dated after Employer's attorney entered her appearance on November 8, 2017, and Employer controverted Claimant's October 19, 2017 claim on November 20, 2017. Under *Langdon*, the presumption the claims adjuster documents and investigation notes or reports were prepared in the ordinary course of business appears to drop out once an attorney is involved. However, even when an attorney is involved, unless the materials were prepared at the direction or under the supervision of the attorney, they are not protected by the work product rule. *Id*. The confidential communications between an attorney and her client are privileged. Evidence Rule 503. The attorney-client privilege does not extend to statements made by an insured to his insurer, except in those cases where it can be shown the adjuster received the communication at the express direction of counsel for the insured. *Langdon*.

The parties do not dispute that an investigator and a paralegal from Employer's attorney's office contacted Claimant's family members and friends about her claimed dependency upon Employee. Claimant can obtain statements from witnesses at hearing, during a deposition, or in an affidavit. She contended deposing the numerous witnesses would pose an undue financial hardship. Employer presented no other evidence besides its entry of appearance to support its contention that the investigation report and Ms. Michaels' claims adjusters report were prepared at its attorney's direction or under her supervision. Due to the complexity of the discovery issue, an *in camera* review will ensure a more efficient handling of the parties' discovery dispute. AS 23.30.001; AS 23.30.135(a). To promote a process and procedure to be as summary and simple as possible and to protect against disclosure of privileged and protected materials, Employer shall provide a Anchorage hearing officer, Janel Wright, the full adjuster file and all investigative reports, including the withheld and redacted materials, for an *in camera* review to determine whether the redacted or withheld materials are relevant to Claimant's claim or Employer's defenses or reasonably calculated to lead to discovery of relevant evidence and if so, whether the material or portions of it are protected by the work-product doctrine or attorney-client privilege. AS 23.30.005(h); Civil Procedure Rule 26(b)(3); Evidence Rule 503; *Mendel*. Anchorage hearing officer Wright will hold a prehearing conference at which she will advise the parties of

the decision as to whether any or all records must be released to Claimant and a prehearing conference summary will issue providing each party an opportunity to appeal the decision. Anchorage hearing officer Wright will maintain in camera custody and control of the records until a final decision is made concerning her decision. If it is determined records are not relevant or reasonably calculated to lead to the discovery of relevant, admissible evidence or are privileged or protected under the work product doctrine, they will be sealed and maintained apart from Claimant's file by Anchorage hearing officer Wright and returned to Employer's counsel, after the time elapses for all appellate review.

Because an *in camera* review has been ordered to determine whether Employer's withholding and redaction of discovery material was proper, an order finding Employer did not fully respond to Claimant's June 4, 2018 informal discovery request and refused to comply with the designee's discovery orders, and imposing sanctions cannot be decided.

CONCLUSIONS OF LAW

1) The oral order denying Claimant's request for additional time for opening and closing arguments was correct.
2) The oral order to quash the subpoena of Tara Michaels was correct.
3) An order shall be issued requiring in camera review of Employer's claims adjuster records by Anchorage hearing officer Wright to prevent the release of any irrelevant or protected records.

ORDER

1) Employer is directed to provide Anchorage hearing officer Wright the full adjuster file and all investigative reports, including the withheld and redacted materials, for an *in camera* review to determine whether the redacted or withheld materials are relevant to Claimant's claim or Employer's defenses or reasonably calculated to lead to discovery of relevant evidence and if so, whether the material or portions of it are protected by the work-product doctrine or attorney-client privilege.
2) The hearing officer shall hold a prehearing conference as soon as possible after receiving and reviewing the records.
3) Jurisdiction is retained over this discovery dispute.

Dated in Juneau, Alaska on April 9, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 Estate of Anthony Dozier *et al*, employee / decedent v. E.C. Phillips and Son Inc., employer; Liberty Mutual Fire Insurance Co., insurer / defendants; Case No. 201616155; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on April 9, 2019.

/s/
Dani Byers, Technician