ALASKA WORKERS' COMPENSATION BOARD

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

ALLISON LEIGH, Employee, Claimant, v. ALASKA CHILDREN'S SERVICE, Employer, and REPUBLIC INDEMNITY CO. OF AMERICA (RIG), Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201503591 AWCB Decision No. 20-0037 Filed with AWCB Anchorage, Alaska on May 29, 2020

Allison Leigh's (Employee) January 13, 2017 claim, April 28, 2020 oral appeal from an April 28, 2020 discovery order addressing her February 15, 2019 petition requesting discovery, and her May 18, 2020 petition to extend time to file her witness list were heard on May 27, 2020, in Anchorage, Alaska, a date selected on March 3, 2020. A January 29, 2020 hearing request gave rise to this hearing. Non-attorney Employee appeared, testified and represented herself. Attorney Colby Smith appeared and represented Alaska Children's Service and its insurer (Employer). There were no other witnesses. The record closed at the hearing's conclusion on May 27, 2020.

ISSUES

Employee wants a hearing on her January 13, 2017 claim for benefits and other relief. She contends her pending petitions for review in the Alaska Supreme Court should not prevent a merits decision because agency jurisdiction has been exercised in other ways notwithstanding the pending matter before the court.

Employer contends Employee has a pending petition for review before the Alaska Supreme Court. Consequently, it contends this decision has no jurisdiction over her claim's merits.

1) Can Employee's claim be heard and decided on its merits at this time?

Employee contends she filed her witness list for the May 27, 2020 hearing the day prior to protect her witnesses from Employer's allegedly improper tactics. She seeks an order granting her May 18, 2020 petition to extend time to file her witness list.

Employer contends a prehearing conference designee ordered the parties to file their witness lists by May 7, 2020. It contends Employee did not file a witness list until May 26, 2020, and the document she filed is not a qualifying witness list because it does not conform to the applicable regulation and gives Employer no information about the witnesses, their addresses, telephone numbers or the subject matter and substance of the witness' expected testimony. Employer contends she should not be allowed to call any witnesses except Employee.

2) Should Employee's request for more time to file a witness list be granted?

Employee appeals from the designee's April 28, 2020 discovery order denying her February 15, 2019 petition, which requested Employer's attorney fees and costs expended in her case to date. She contends the designee abused his discretion and she seeks an order granting her discovery.

Employer contends its attorney fees and costs expended defending against Employee's case are not relevant to any pending issue. It contends the designee correctly denied the discovery request.

3) Did the designee abuse his discretion by refusing to allow Employee to discover Employer's attorney fees and costs?

FINDINGS OF FACT

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

1) On February 20, 2015, Employee slipped and fell in an icy parking lot at work and broke her right ankle; she may have suffered other bodily injuries resulting from her fall as well. (First Report of Injury, March 4, 2015; Employee).

2) On January 13, 2017, Employee claimed temporary total disability (TTD), temporary partial disability (TPD), permanent total disability (PTD), permanent partial impairment (PPI), asked for an unfair or frivolous controversion finding and claimed a penalty and interest. She also wanted to "revisit her retraining program." Employee did not initially claim medical costs. She stated that while walking on an unmaintained parking lot, she slipped and fell, injuring her right ankle, knee and shoulder. Employee alleged the adjuster frivolously denied proper medical treatment and compensation, which resulted in further physical complications. (Claim for Workers' Compensation Benefits, January 11, 2017).

3) On July 26, 2018, *Leigh v. Alaska Children's Service*, AWCB Decision No. 18-0074 (July 26, 2018) (*Leigh I*), ordered Employee to sign appropriately modified releases for psychological, psychiatric and mental health counseling records from 1999 to the present. (*Leigh I* at 11).

4) On February 1, 2019, *Leigh v. Alaska Children's Service*, AWCB Decision No. 19-0012 (February 1, 2019) (*Leigh II*), granted Employer's petition to continue and ordered that Employee's merits hearing is continued until after the Alaska Supreme Court issues a decision on her pending petition for review of *Leigh I*. (*Leigh II* at 6).

5) On February 15, 2019, Employee filed and served a request to compel Employer's prior attorney Vicki Paddock to file and serve evidence showing Employer's costs to defend against Employee's claim to date including attorney fees and costs, adjusters' costs and expenses related to mediation, second independent medical examinations and employer's medical examinations. (Petition, February 15, 2019).

6) On February 21, 2019, *Leigh v. Alaska Children's Service*, AWCB Decision No. 19-0022 (July 26, 2018) (*Leigh III*), denied Employee's request to reconsider *Leigh II*. (*Leigh III* at 11).

7) On May 07, 2019, the appeals commission decided since "the issue of release of her mental health records is pending before the Court, the Court retains jurisdiction over any claims for benefits. Therefore, the board no longer has jurisdiction to hear *the merits* of Leigh's claim until

the Court resolves the discovery dispute" (emphasis added). The commission further stated, "until the Court decides what discovery is allowable with regards to Ms. Leigh's mental health records, the Board does not have jurisdiction to consider *the merits of any part* of Ms. Leigh's claim" (emphasis added). The commission reasoned that all decisions regarding benefits at issue are potentially affected by and encompassed within the issue before the court. It concluded, "The board was correct in deciding it did not have jurisdiction to hear *the merits of her claim for transportation and other benefits*" (emphasis added). (*Leigh v. Alaska Children's Service*, AWCAC Appeal No. 19-005(May 7, 2019) (*Leigh IV*)).

8) On April 28, 2020, the parties presented their arguments to the board's designee on Employee's February 15, 2019 petition seeking to discover Employer's attorney fees and costs for defending against her case. The summary for this meeting does not contain the parties' legal arguments. The designee concluded Employee's February 15, 2019 petition to compel disclosure of defense costs was a discovery matter that he could decide at a prehearing conference. The designee determined Employee's February 15, 2019 petition seeking defense attorney fees and costs was irrelevant to Employee's claim, and denied it. Employee orally appealed the designee's ruling and the designee for convenience added it as an issue for the May 27, 2020 hearing. (Prehearing Conference Summary, April 28, 2020).

9) On May 18, 2020, Employee filed and served an email along with a petition. The email states:

> To whom it may concern:
>
> I do not know who to email from my "employer" as Jeannie Fanning was so prompt to point out that she has nothing to say to me and that I needed to have contact go through Mrs. Paddock . . . oh so long ago!
>
> Well Mrs. Paddock now stands accused of perjury and is no longer current counsel (but she still is for the first 2 Supreme Court cases) . . . so Mrs. Fanning is back included. She has still failed to produce any internal let alone external investigations that should be in my employee file.
>
> Regards,
>
> Allison Leigh (Leigh email, May 18, 2020).

Employee's May 18, 2020 petition seeks "Other" relief: "Accept 'late filed' witness list." As grounds for this request, Employee states:

> The act is meant to be fair and efficient (This saves all parties involved). Mrs. Paddock stated in Dec 2018 in the Pre-hearing conference that the employer need not even answer who they will be using as an expert let alone file a witness list until it is due. In the March 2020 prehearing Mr. Smith than [sic] proceeds to make false statements to get the witness lists filed early. This request was granted under false pretenses, not to mention that it doesn't represent anything remotely fair according to the procedural history of my case.
>
> Please also see the Protective order that was granted in 2015 for further explanation of why I am requesting witness lists be filed the day prior to hearing to protect the identity of employees at AK child [sic] and Family.
>
> Mr. Smith has been sent subpoenas so it should come as no surprise as to why and whom I will be calling as witnesses. (Petition, May 18, 2020).

10) On May 19, 2020, Employee filed and served her hearing brief. It states:

> 1. Attorney's fees and costs should be provided as a matter of routine. Why does the defense get to see my attorney's fees and I don't get to see there's [sic]? They have been through how many attorneys? What percentage of my claim makes up attorneys [sic] fees? Is the system to benefit attorneys, and other experts that moonlight and the adjusters?
>
> The act is meant to be fair and efficient.
>
> Since the written record has been reviewed by the board on more than one occasion this hearing brief will be simple and brief.
>
> Ms. Leigh will be relying on the written record, witness and the recordings of all hearings and pre-hearings that are part of the record.
>
> The facts are simple[:] Ms. Leigh sustained a work injury. Ms. Leigh was not provided appropriate treatment in 2015 for her orthopedic condition nor was that treatment ever controverted to this date according to the act; in fact quite the opposite has occurred and Ms. Leigh was subjected to unnecessary appointments by the defense that the defense has had no problems paying for essentially being the treating physicians for Ms. Leigh on multiple occasions.
>
> I will prove that Ms. Paddock committed Perjury and I will also prove that Ms. Daniels illegally obtained my records while arguing the board had no jurisdiction, I will prove that my employer submitted false payroll records and false affidavits to the board amongst many other things.

> The defense continues to waste the Supreme Court[']s time, the board's time and my time. I can assure you I did not asked to be injured at work.
>
> I look forward to presenting my case.
>
> Allison Leigh (Allison Leigh's Hearing Brief - 201503591, May 19, 2020).

11) On May 19, 2020, Employer contended the "pending hearing set for May 27, 2020 and May 28, 2020, was inappropriate and it should be continued until after the Alaska Supreme Court has issued a decision." It based this contention on the board's prior decisions declining to hear the merits of Employee's claim until after the Supreme Court ruled on a medical release issue pending before it, and on the commission's similar order. Alternately, were the merits hearing to go forward, Employer contended Employee is not entitled to permanent total or temporary total disability benefits after April 10, 2019, the RBA-designee did not abuse her discretion in determining Employee was not eligible for reemployment benefits, and future medical treatment at Hospital for Special Surgery is not reasonable or necessary. It relied on opinions from Eugene Chang, M.D., who testified Employee became medically stable from her work injury on May 17, 2017. He also opined she does not need additional treatment, including injections, distraction orthoplasty or a referral to Hospital for Special Surgery. Drs. Chang, Bret Mason, M.D., and Scot Youngblood, M.D. agreed Employee may someday need an ankle fusion. Employer contended Dr. Chang said Employee could return to work as an accountant. Employer relied on Heath McAnally, M.D., who it contended said Employee's Complex Regional Pain Syndrome became medically stable effective April 10, 2019. Employer contended her medical stability prohibits Employee from receiving temporary total or temporary partial disability benefits after April 10, 2019. It contended Drs. McAnally, Chang, Youngblood and Jared Kirkham, M.D., all agree she has the ability to work as an accountant. Further, Employer contended Employee's appeal from the RBA-designee's determination was untimely. In summary, given the opinions that Employee is capable of returning to work as an accountant, Employer contended she is entitled to no temporary or permanent disability benefits. (Employer's Hearing Brief, May 19, 2020).

12) At hearing on May 27, 2020, Employee offered arguments and testimony generally not relevant to the issues pending at hearing. Employee said she had no witnesses who would address her appeal from the designee's April 28, 2020 discovery order denying her February 15,

2019 petition seeking discovery of Employer's defense attorney fees and costs. On the only issue set for hearing that the panel ultimately heard and will decide, Employee's appeal from the designee's April 28, 2020 discovery order, Employee's relevant contentions include: This case has dragged on too long; Employer is deliberately delaying. The percentage of Employer's attorney fees and costs far outweigh anything Employer has paid her. Everyone except Employee is getting paid. If anything, Employee's physicians are getting under-paid. (Record).

13) At hearing, Employer reiterated arguments from its hearing brief and contended the panel lacks jurisdiction to decide Employee's claim on its merits for the same reasons the board stated in *Leigh II* and *III* and the commission identified in *Leigh IV*. It objected to any Employee witnesses testifying at hearing because she failed to file a conforming witness list timely. On Employee's appeal from the designee's April 28, 2020 discovery order, Employer contended its defense attorney fees and costs are not relevant to any issue in any of Employee's pending claims. Therefore, it contends the designee did not abuse his discretion by not allowing Employee to discover its attorney fees and costs. (Record).

14) At hearing, after considering extensive arguments, the panel issued an oral order declining to hear or decide Employee's January 13, 2017 claim, which while not her only claim, was the only claim set for hearing. The panel relied on its prior decisions in *Leigh II* and *III*, and the commission's decision in *Leigh IV*. It concluded the pending petition for review before the Alaska Supreme Court divested the panel's jurisdiction to decide Employee's claim on its merits because the medical release issue in dispute before the Supreme Court is closely intertwined and connected to all the issues Employee raised in her January 13, 2017 claim. Because an oral order declined to hear Employee's January 13, 2017 claim, and Employee had no witnesses addressing her appeal from the designee's April 28, 2020 discovery order denying her February 15, 2019 petition, another oral order decided Employee's May 18, 2020 petition regarding her witness list was moot as there would be no witnesses. Lastly, the panel agreed to hear and decide Employee's appeal of the designee's April 28, 2020 discovery order denying her February 15, 2019 petition, because deciding this issue does not interfere with the court's jurisdiction. (Record).

15) Board designees routinely require parties in some cases to file witness lists earlier than the date provided for in the applicable regulation. In difficult cases, an earlier witness list allows parties to prepare to question their opponent's witnesses, informally interview witnesses

assuming there is no privilege prohibiting *ex parte* communication and the witnesses agree to talk with the party, and generally allows them to better prepare for the hearing. Claims and petitions are not usually set for hearing unless a party files an Affidavit of Readiness for Hearing. (Experience).

PRINCIPLES OF LAW

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

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**. . . .
> . . . .
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties presents releases that are likely to lead to or documents admissible evidence relative to an employee's injury. . . . If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the written record. . . . The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

Evidence is "relative" where the information is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell,* AWCB Decision No. 99-0016 (January 20, 1999).

The first step in determining whether information sought to be released is "relative" and thus relevant is to analyze what matters are 'at issue' or in dispute in the case. This is done by primarily looking to the parties' pleadings and the prehearing conference summaries to ascertain the specific benefits Employee is claiming, and defenses Employer has raised to these claims. Next, the elements which must be proven to establish Employee's entitlement to each benefit claimed and the elements of any affirmative defense Employer asserts are reviewed, to determine what propositions are properly the subject of proof or refutation in the case. It is also necessary

to review the available evidence to determine if there are specific material facts in dispute and whether the information being sought may be relevant to cross-examine a potential witness. *Weseman v. Dairy Queen of Anchorage, Inc*., AWCB Decision No. 90-0027 (February 23, 1990).

In the second step it must be decided whether the information sought 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. In other words, information is relevant for discovery purposes, if it is reasonably "calculated" to lead to facts that are relevant for evidentiary purposes. In interpreting the meaning of "relevant" in discovery, *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987) states:

> We believe that the use of the word 'relevant' in this context should not be construed as imposing a burden on the party seeking the information to prove beforehand, that the information sought in its investigation of a claim is relevant evidence which meets the test of admissibility in court. In many cases the party seeking information has no way of knowing what the evidence will be, until an opportunity to review it has been provided.

For a discovery request to be reasonably "calculated," it must be based on a deliberate and purposeful design to lead to admissible evidence, and that design must be both reasonable and articulable. 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. *In the Matter of Mendel*, 897 P.2d 68 (Alaska 1995).

> **AS 23.30.110. Procedure on claims**. (a) . . . the board may hear and determine all questions in respect to the claim. . . .

Noey v. Bledsoe, 978 P.2d 1264, 1275 (Alaska 1999) addressing a trial court's jurisdiction when a case is on appeal stated:

> Moreover, even if all facts were as Noey alleged, the trial court would not have been deprived of jurisdiction to hear the contract dispute in this case. Alaska Appellate Rule 203 divests trial courts of jurisdiction over "proceedings on appeal . . . in the appellate court[.]" Because this interpleader action was not the "proceeding on appeal" in *DEC,* the appeal in *DEC* could have had no effect on

> the superior court's jurisdiction to hear the interpleader trial, even if *DEC* conceivably might have impacted this case.

In *Doyon Drilling, Inc. v. Whitaker*, AWCAC Decision No. 006 at 4 (March 2, 2006), the commission, in a case where the continuance of a temporary disability order was appealed, said:

> Whitaker is correct that *Fischback & Moore of Alaska, Inc*. *v. Lynn* (citation omitted) requires the board to yield jurisdiction to the court when the board's order 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. 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 (citation omitted).
>
> However, in *Fischback* the Supreme Court did not stop at the proposition that an appeal suspends the board's jurisdiction over the matter. It went on to state that the board could exercise concurrent jurisdiction when the exercise of such jurisdiction would not "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*" (emphasis in original). The question is whether the determination of whether the employee is entitled to continuing temporary disability compensation would conflict with the proper exercise of the court's jurisdiction.

AS 23.30.145. Attorney fees. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

(c) If proceedings are had for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

AS 23.30.260. Penalty for receiving unapproved fees and soliciting. (a) A person is guilty of a misdemeanor and, upon conviction, is punishable for each offense by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both, if the person

(1) receives a fee, other consideration, or a gratuity on account of any services rendered for representation or advice with respect to a claim, unless the consideration or gratuity is approved by the board or the court; or

(2) makes it a business to solicit employment for a lawyer or for the person making the solicitation with respect to a claim or award for compensation.

(b) Notwithstanding AS 23.30.145 and (a) of this section, approval of a fee is not required if

(1) the fee does not exceed $300 and is a one-time-only charge to an employee by an attorney licensed in this state who performed legal services with respect to the employee's claim but did not enter an appearance; or

(2) the parties who reach an agreement in regard to a claim for injury or death under this chapter agree to the payment of attorney fees, and the agreement in regard to a claim for injury or death does not require board approval under AS 23.30.012.

8 AAC 45.112. Witness list. A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in

> accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider
>
> (1) the testimony of a party, and
> (2) deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list.
>
> **8 AAC 45.180. Costs and attorney's fees**. . . .
>
> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee. . . .
> . . . .
> (h) Board approval of an attorney fee is not required if the fee is paid by the employer to the employer's attorney.

ANALYSIS

1) Can Employee's claim be heard and decided on its merits at this time?

Employee wants her January 13, 2017 claim heard. There is a difference between this panel's jurisdiction to decide Employee's claim for benefits and ancillary issues "on its merits" and its jurisdiction to decide issues not pending on appellate review before the commission or the Alaska Supreme Court, but nonetheless still related to her case. *Lynn*. A future hearing panel could for example hear procedural matters; on these and similar issues, the Supreme Court and this panel may have "concurrent jurisdiction." *Whitaker*. There is no question the law confers upon this panel authority to hear and decide all issues in respect to this claim so long as it does not interfere with an appellate tribunal's jurisdiction. AS 23.30.110(a); *Noey*. Employee has a claim for various disability, medical and vocational reemployment benefits; she also seeks penalties, interest and ancillary relief related to these benefits. *Leigh I* ordered her to sign specific medical releases. She petitioned the commission for review, which it denied, and she then petitioned the Alaska Supreme Court for review; the court's decision is pending.

Leigh II and *III* held any benefits to which Employee might be entitled are affected by the court's decision on whether or not Employer is entitled to the mental health releases addressed in *Leigh I*. Consequently, *Leigh II* and *III* declined to hear the merits of Employee's claim until the court

ruled on her pending petition for review. The appeals commission declined to hear Employee's challenge to these decisions and stated this panel "no longer has jurisdiction to hear the merits of Ms. Leigh's claim until the Court resolves the discovery dispute." *Leigh IV*. The commission's order included in "the merits," "any part of Ms. Leigh's claim" including "her claim for transportation and other benefits." Accordingly, not only has *Leigh II* and *III* declined to address the merits of Employee's claim, the commission's May 7 2019 order on Employee's petition for review of those orders held *Leigh II* and *III* were correct. *Leigh IV*. This decision has no jurisdiction to address Employee's claim's merits until the court rules on the release issue. That is not to say there will never be a hearing on Employee's claims' merits; it just will not happen unless and until the court rules on her pending petition for review, or returns jurisdiction.

By contrast, other issues in Employee's case may arise that are not pending appellate review before the commission or the Alaska Supreme Court; a future panel may have concurrent jurisdiction to decide those issues if they do not go to the merits of Employee's claim even though the court might not yet have ruled on the pending petition. *Whitaker*. Whether or not a future panel has concurrent jurisdiction on an issue will be decided on a case-by-case basis should either party bring a petition for relief to hearing. Though there are some exceptions, claims and petitions do not normally come to hearing without a party filing a hearing request, commonly called an Affidavit of Readiness for Hearing. *Rogers & Babler*. As *Whitaker*, citing *Lynn*, stated the general rule divesting a tribunal from exercising its jurisdiction when its order has been appealed does not limit the tribunal from addressing other issues that do not interfere with a higher tribunal's jurisdiction. These differences in jurisdictional limitations appear to be where Employee is frustrated and confused.

For example, this decision will address Employee's request to discover Employer's attorney fees and costs because this is a procedural issue that does not interfere with the issue presently pending before the court. *Whitaker*. Employee does not understand why this decision will not decide the merits of her claim but will address her discovery request, or why a hearing officer can exercise his jurisdiction to approve her former lawyers' attorney fee and cost settlements. The difference is that Employee's request to discover Employer's attorney fees and costs can have no effect on the court's jurisdiction over the release issue. Her former lawyers' attorney fee stipulations have nothing to do with the medical record release discovery issue pending before

the court. Exercise of jurisdiction on those issues will not affect the court's jurisdiction over Employee's petition for review on medical record releases; by contrast, ruling on the merits may. *Whitaker*; *Lynn*.

2)Should Employee's request for more time to file a witness list be granted?

Once the panel declined to hear Employee's January 13, 2017 claim on its merits, and she conceded she had no witnesses to address her April 28, 2020 appeal from the designee's discovery order, there were no longer any witnesses needed for hearing. The appeal issue was strictly legal; therefore, her May 18, 2020 petition addressing her witness list became moot. This decision nonetheless provides guidance to Employee for future hearings. Parties have a right to know who the other side is calling as a witness; foreknowledge helps to determine if one or more witnesses need to be deposed prior to hearing or if rebuttal witnesses are required. Parties also may try to interview opposing witnesses informally so long as there is no privilege that would prevent *ex parte* communication and the witnesses are willing. *Rogers & Babler*. Thus, designees may require parties to file and serve witness lists earlier than the regulatory deadline. Employee's objection to the procedure by which an earlier witness list deadline was required is without merit.

The designee on March 3, 2020, advised Employee how to file a witness list. A witness list must state whether the witness will testify in person, by deposition or telephonically. It must list the witness' addresses and phone numbers and provide a brief description of the subject matter and substance of the witness' expected testimony. The designee further explained, "The purpose of a witness list is to allow the opposing party to prepare to question the witness." It is not appropriate for a party to withhold its witness list until the last minute and suggest the fact-finders and opposing counsel search the record to determine who witnesses may be and what they may say. Employee is encouraged to follow the witness list regulation strictly in the future; her failure to may result in an order excluding her "witnesses from testifying at the hearing." 8 AAC 45.112.

3) Did the designee abuse his discretion by refusing to allow Employee to discover Employer's attorney fees and costs?

Employee's February 15, 2019 petition sought to discover Employer's defense fees and costs; she now seeks this information through the present. A designee at the April 28, 2020 prehearing conference reviewed her request, and decided Employer's defense fees and costs were irrelevant to Employee's claims and denied her February 15, 2019 petition; she appeals. AS 23.30.108(c). Her discovery request appears to be based on her contention that since her previous attorneys had to provide Employer with itemized statements and affidavits delineating their attorney fees and costs, Employee should likewise be entitled to receive the same information from Employer. Unlike attorneys who represent injured workers, lawyers who represent employers and their insurance companies do not need approval to receive attorney fees or costs. 8 AAC 45.180(h). Attorney fees paid to lawyers representing injured workers require approval; receiving unapproved fees from any source may be a crime. AS 23.30.145(a)-(c); AS 23.30.260; 8 AAC 45.180(b). Another possible basis for her discovery request is her disagreement with how much money Employer has spent defending against her claim; she feels it should have paid her benefits without mounting such a vigorous defense; she wants to show a skewed attorney-fee-to-benefit ratio.

a) What are the matters at issue?

The first step in determining whether information sought is relevant is to analyze what matters are "at issue" or in dispute. AS 23.30.001(a); AS 23.30.135(a); *Weseman*. The parties' pleadings and the prehearing conference summaries assist in ascertaining the specific benefits Employee is claiming, and Employer's defenses to these claims. *Weseman*. Employee seeks TTD, TPD, PTD, PPI, reemployment benefits and medical treatment, and related ancillary relief; she does not seek attorney fees or costs. Even if she claimed attorney fees and costs, it is difficult to understand how Employer's defense fees and costs could lead to discovery of admissible evidence on this issue.

For a discovery request to be reasonably calculated to lead to admissible evidence, it must be based on a deliberate and purposeful design and that design must be both reasonable and articulable. *In the Matter of Mendel*. There must be a reasonable nexus between the information Employee seeks and a material issue in her case. Employee did not articulate such a nexus. In

other words, she could not articulate how defense attorney fees and costs could make her entitlement to any claimed benefit, or request for relief, any more or less likely. *Granus*.

b) Is the information Employee seeks reasonably calculated to lead to facts relative to the issues in dispute?

Is the second step, Employee must demonstrate the information she seeks is relevant, meaning it is reasonably calculated to lead to facts that will make any question at issue more or less likely. *Schwab*. She was not able to identify or articulate how Employer's defense fees and costs could lead to the discovery of evidence, or be evidence, admissible at hearing on any issue in her claim. Her request was properly denied on that basis alone and the designee did not abuse his discretion.

Further, Employee apparently believes that since her prior attorneys had to itemize and provide an affidavit setting forth their attorney fees and costs, the same rule must also apply to Employer. As stated above, she labors under a misimpression; only attorney fees and costs for lawyers representing injured workers must be approved; Employer's attorney fees and costs do not require approval. 8 AAC 45.180(h). Employer's attorney fees and costs are not reasonably calculated to lead to facts relative to the issues in dispute. *Granus*. The designee's April 28, 2020 discovery order on Employee's February 15, 2019 petition to discover Employer's defense attorney fees and costs was not an abuse of discretion, was properly grounded in the law and will be affirmed.

CONCLUSIONS OF LAW

1) Employee's claim cannot be heard and decided on its merits at this time.
2) Employee's request for more time to file a witness list will not be granted.
3) The designee did not abuse his discretion by refusing to allow Employee to discover Employer's attorney fees and costs.

ORDER

1) This decision does not have jurisdiction to decide Employee's claim for benefits on its merits until the Alaska Supreme Court has ruled on her petition for review of *Leigh II* and *III*, or otherwise relinquishes the court's jurisdiction.
2) Employee's request to compel Employer to produce evidence of its attorney fees and costs incurred in defending against Employee's claim is denied.

Dated in Anchorage, Alaska on May 29, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, Member

/s
Nancy Shaw, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Allison Leigh, employee / claimant v. Alaska Children's Service, employer; Republic Indemnity Co. of America (RIG), insurer / defendants; 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 May 29, 2020.

/s/
Nenita Farmer, Office Assistant