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. 20-0071 Filed with AWCB Anchorage, Alaska on August 18, 2020

Allison Leigh's (Employee) appeal from a designee's decisions denying her eight February 15, 2019 petitions seeking various relief, her appeal of Alaska Children's Service's (Employer) withdrawal of its June 21, 2019 petition to quash a subpoena and related deposition, and Employer's June 12, 2020 petition to dismiss her claim were heard on August 6, 2020, in Anchorage, Alaska, a date selected on July 6, 2020. Employee's two May 29, 2020 and Employer's July 2, 2020 hearing requests gave rise to this hearing. Employee appeared, testified and represented herself; Deirdre Aamonson appeared and gave spiritual support to Employee. Attorney Colby Smith appeared and represented Employer and its insurer. Preliminary issues included Employee's request to add as issues: a mental health record release remanded from the Alaska Supreme Court, and her claim on its merits. The parties stipulated to adding the mental health record release issue; an oral order denied Employee's request to add her claims' merits as

an issue. The parties stipulated to a decision on the written record on Employee's eight petitions and Employer's petition to dismiss. The record closed at the hearing's conclusion on August 6, 2020. This decision examines the oral order and decides the petitions and "appeal" on their merits.

For clarity and reference, Employee's eight February 15, 2019 petitions addressed in this decision are numbered (1) through (8) in the order they appear in the agency file. Prior decisions are enumerated: *Leigh v. Alaska Children's Service*, AWCB Decision No. 18-0074 (July 26, 2018) (*Leigh I*); *Leigh v. Alaska Children's Service*, AWCB Decision No. 19-0012 (February 1, 2019) (*Leigh II*); *Leigh v. Alaska Children's Service*, AWCB Decision No. 19-0022 (February 21, 2019) (*Leigh III*); *Leigh v. Alaska Children's Service*, AWCAC Appeal No. 19-005 (May 7, 2019) (*Leigh IV*); *Leigh v. Alaska Children's Service*, AWCB Decision No. 20-0037 (May 29, 2020) (*Leigh V*); *Leigh v. Alaska Children's Service*, --- P.3d --- (Alaska 2020) (*Leigh VI*).

ISSUES

As a preliminary matter, Employee contended her January 13, 2017 claim for disability and impairment benefits and other relief should be heard and decided at the August 6, 2020 hearing.

Employer contended the hearing issues were limited to those set forth in the July 6, 2020 prehearing conference summary, plus the mental health record release issue as stipulated. Therefore, it contended her 26 witnesses were not relevant to any issue duly noticed.

1) Were the oral orders denying Employee's request to add the merits of her claim as an issue for hearing and disallowing her witnesses correct?

Employer contends it wants a mental health record release without subject matter limitation going back to 2007, two years before her 2009 mental health treatment.

Employee contends she does not have to, and will not, sign any medical record release until she has a merits hearing. Alternately, she contends a release going back to 2007 makes no sense and the only logical release would go back to her childhood.

2) Does Employee have to sign and deliver restricted mental health record releases?

Employee's petition (1) contends no past or future decision using her real name or mentioning anything regarding her mental health should be on the Internet. A designee at the July 6, 2020 prehearing conference denied her request, stating he lacked authority.

Employer contends it previously stipulated with Employee to keep her decisions confidential. However, it notes that since the parties' stipulation, numerous decisions including from the Alaska Supreme Court have been published mentioning Employee's name and her mental health issues. Employer contends nothing can be done to address past publications.

3) Can past or future decisions in this case be kept confidential?

Employee's petition (2) contends a previous designee or decision stated "no harm" would come to her if it turned out her mental health records were irrelevant. She contends her ability to find future employment has been damaged; she questions the basis for the alleged "no harm" finding. A designee at the July 6, 2020 prehearing conference denied Employee's petition, stating it did not make "a specific request."

Employer contends the panel lacks jurisdiction on this issue until after the Alaska Supreme Court rules on her pending petition.

4) Does Employee's petition (2) state a specific request for relief?

Employee's petition (3) seeks reconsideration of the December 19, 2018 prehearing conference summary order vacating the second day of a two-day January 2019 hearing. A designee at the July 6, 2020 prehearing conference denied her petition noting the issue was moot because a hearing was held on January 29, 2019, which continued the hearing on the claim's merits.

Employer contends Employee's petition requesting reconsideration of a prehearing conference summary from December 19, 2018, is untimely. It further contends the basis for her petition, a decision canceling her hearing on the merits, has already been addressed and the issue is moot.

5) Was Employee's petition (3) timely or already decided?

Employee's petition (4) requests reconsideration of *Leigh II*, which continued a claim merits hearing until after the Alaska Supreme Court ruled on her petition for review. A designee at the July 6, 2020 prehearing conference denied her petition, noting *Leigh III* already decided it.

Employer contends *Leigh III* already addressed this request, rendering it moot.

6) Was Employee's petition (4) already decided?

Employee's petition (5) seeks an order compelling production of all notes, bills, correspondence and formal complaints made by present and past employees with Employer's adjusting company. A designee at the July 6, 2020 prehearing conference denied her petition, finding it irrelevant and moot as Employer already produced her file, and found she failed to identify documents not produced and does not have a right to access other employees' files not relevant to her claim.

Employer contends Employee has no right to investigative reports not relevant to her claim.

7) Did the designee abuse his discretion in denying Employee's petition (5)?

Employee's petition (6) contends Employer's lawyers withheld investigational reports in her file. She also wants Employer to answer questions "that have been avoided." A designee at the July 6, 2020 prehearing conference denied his petition finding it did not make a specific request.

Employer contends it already produced Employee's entire personnel file. It further contends any investigational reports would not be kept in her personnel file and she would not be entitled to them in any event because they are not relevant to her claim.

8) Did the designee abuse his discretion in denying Employee's petition (6)?

Employee's petition (7) contends Employer should produce evidence of costs it incurred to defend against her claim to date. A designee at the July 6, 2020 prehearing conference denied petition (7), finding *Leigh V* addressed it and denied Employee's first discovery appeal on the same issue.

Employer contends *Leigh V* already addressed this issue.

9) Did the designee abuse his discretion in denying Employee's petition (7)?

Employee's petition (8) contends Employer asked for cross-examination of her doctors, but has not scheduled any related depositions. She contends Employer should pay all deposition costs.

Employer contends it provided an occasion for Employee to question two attending physicians and contends her petition is moot. It further contends she has the obligation to schedule and pay for cross-examination of a report's author to which it objects. A designee denied Employee's petition (8) at the July 6, 2020 prehearing conference finding the request "irrelevant."

10) Does Employer have to pay initially for Employee to present her medical witnesses?

Employee contends she "appeals" Employer's withdrawal of its June 21, 2019 petition to quash a subpoena for a deposition for employer medical evaluator (EME) Scot Youngblood, M.D. The basis for Employee's appeal remains unclear.

Employer contends it already deposed Dr. Youngblood so Employer withdrew its request to quash the deposition and subpoena.

11) Can Employee prevent Employer's withdrawal of its June 21, 2019 petition to quash a subpoena and deposition?

Employer contends Employee has repeatedly interfered with its right and ability to obtain medical records and bills for her work injury. It contends she advised medical providers to not release any medical records or bills. Employer seeks an order dismissing Employee's entire claim or at least her medical benefits claim, or advising her to stop interfering with Employer's ability to obtain and pay her medical bills, along with a warning that continued obstruction will result in an order dismissing Employee's right to those benefits.

Employee contends she does not have to, and will not, sign any medical record release until she has a hearing on her claim's merits.

12) Should Employee's claim be dismissed at this time for refusing to sign a medical record release or for impeding Employee's medical record and billing discovery?

FINDINGS OF FACT

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

1) Employee was born in 1982; she ceased being a minor in 2000. (Agency file; official notice).

2) 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. (First Report of Injury, March 4, 2015; Claim for Workers' Compensation Benefits, February 20, 2015).

3) On July 8, 2015, Employee filed her first petition for a protective order on mental health releases; she did not object to releasing substance abuse records. Reasons included:

> I am requesting a protective order for the release of my psychological, psychiatric, mental health/counseling records to my employer. While holding my position at AK [C]hild and [F]amily I witnessed bad business practices as well as neglect within the company. I brought the issues to the attention of my employer and have since experienced retaliation and harassment. The information that can be obtained from my records has the potential to lead to further retaliation, of not only myself but current employees as well. I wish to protect and ensure the names and privacy of current and past employees.

The mental health records release at issue sought records from February 20, 2013, two years before her work injury with Employer, and continuing. (Petition, July 8, 2015).

4) On July 23, 2015, a designee granted Employee's first protective order and ordered Employer "to remove the language requesting medical and/or rehabilitation records related to Employee's psychiatric condition as well as the request for records relating to alcohol, drug, or other substance abuse from the medical release." (Prehearing Conference Summary, July 23, 2015).

5) No party appealed from the designee's protective order. (Agency file).

6) On November 9, 2015, Employer denied Employee's right to temporary total disability (TTD) and temporary partial disability (TPD) benefits based on a medical stability and release-to-work opinion from Bret Mason, D.O. (Controversion Notice, November 9, 2015).

7) On January 13, 2017, Employee asked for an unfair or frivolous controversion finding and claimed TTD, TPD, permanent total disability (PTD), permanent partial impairment (PPI)

benefits and a penalty and interest. She also wanted to "revisit her retraining program," but 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 an adjuster frivolously denied proper medical treatment and compensation, which resulted in further physical complications. (Claim for Workers' Compensation Benefits, January 11, 2017).

8) On February 2 and 6, 2017, Employer denied Employee's right to receive "PRP injections," relying on an opinion from attending physician Edward Chang, M.D., that they were not reasonable or necessary for her work injury. (Controversion Notices, February 2 and 6, 2017).

9) On February 8, 2017, Employer denied Employee's claim for PTD benefits, a PPI rating greater than three percent, reemployment benefits, penalties, interest, and a finding it made an unfair controversion. Based on the reemployment benefit designee's August 13, 2015 decision finding Employee not eligible for reemployment benefits, Employer contended there was no abuse of discretion and contended she failed to appeal the designee's decision timely. Employer contended no evidence supported PTD benefits, PPI benefits higher than three percent, penalties, interest or a claim it made an unfair or frivolous controversion. (Controversion Notice, February 8, 2017).

10) On March 30, 2017, Employer denied Employee's claim for disability benefits after September 13, 2016, a PPI rating greater than three percent, reemployment benefits, medical treatment after March 10, 2017, and related transportation costs based on Dr. Youngblood's EME report. (Controversion Notice, March 30, 2017).

11) On June 8, 2017, Employer filed a *Smallwood* objection to Dr. Chang's May 17, 2017 report, filed on a June 8, 2017 medical summary. (Request for Cross-Examination, June 8, 2017).

12) On September 8, 2017, Employer denied liability for medical bills received more than 180 days after the service date, specifically including treatment Employee received at Denali Family Health on August 23, 2016. (Controversion Notice, September 8, 2017).

13) On September 12, 2017, Employer filed a *Smallwood* objection to an August 31, 2017 report from Heath McAnally, M.D., filed on a September 12, 2017 medical summary. (Request for Cross-Examination, September 12, 2017).

14) On February 6, 2018, Thomas Gritzka, M.D., said Employee has "psychological factors affecting physical condition." (Gritzka report, February 6, 2018).

15) On February 12, 2018, Employee filed her first hearing request on her January 11, 2017 claim. (Affidavit of Readiness for Hearing, February 12, 2018).

16) There were no *Smallwood* objections filed after Employee's February 12, 2018 hearing request. Parties frequently file *Smallwood* objections shortly after receiving a medical summary containing records whose authors they wish to question. (Agency file; experience).

17) On February 23, 2018, Employer asked Employee to sign "Psychological, psychiatric, mental health/counseling records" releases reaching back to 1999. (Letter, February 23, 2018).

18) On February 28, 2018, Employee asked for a protective order on mental health records. (Petition, February 28, 2018).

19) On March 13, 2018, a designee granted Employee's request for a protective order. (Prehearing Conference Summary, March 13, 2018).

20) On March 20, 2018, Employer sought reconsideration or modification of the March 13, 2018 protective order. (Petition, March 20, 2018).

21) On July 26, 2018, *Leigh I* ordered Employee to sign releases for psychological, psychiatric and mental health counseling records from 1999 to the present. (*Leigh I* at 11).

22) On August 10, 2018, Employee asked the appeals commission to review *Leigh I.* (Petition for Review of AWCB Decision No. 18-0074, July 26, 2018).

23) On September 20, 2018, the appeals commission denied Employee's August 10, 2018 petition for review. She sought further review from the Alaska Supreme Court. (Order on Petition for Review, September 20, 2018; agency file).

24) On November 1, 2018, the parties met with a board designee to discuss scheduling a hearing. Employer contended no claim merits hearing should be scheduled because the Alaska Supreme Court was reviewing *Leigh I.* The designee over its objection scheduled a two-day hearing for January 29 and 30, 2019, on the merits of Employee's January 13, 2017 claim for benefits. (Prehearing Conference Summary, November 1, 2018).

25) On November 2, 2018, Employer appealed the designee's November 1, 2018 order setting a merits hearing on January 29 and 30, 2019, and sought a continuance on grounds the board lacked jurisdiction to hear the claim's merits given Employee's pending petition for review before the Alaska Supreme Court. (Petition, November 2, 2018).

26) On December 12, 2018, the parties met with a board designee so Employer could add its November 2, 2018 petition to continue the January 29 and 30, 2019 hearing as an issue for

hearing. Employer sought a hearing on its continuance petition before the January hearing and the designee offered four dates prior to the January hearing; Employer's counsel was available on all four dates; Employee's lawyer was not available on any. Consequently, the designee added Employer's November 2, 2018 petition as a preliminary issue "to be heard on 1/29/2019 and 1/30/2019." (Prehearing Conference Summary, December 12, 2018).

27) On December 17, 2018, Employer's former attorney Vicki Paddock wrote Ron Ringel, Acting Chief of Adjudications, to seek "a remedy." She explained Employee had asked for a hearing on her case's merits and Employer had objected given the pending petition for review before the Alaska Supreme Court on the mental health record release. Nonetheless, a designee had scheduled a two-day hearing on January 29 and 30, 2019, over Employer's objection, though it cited Alaska Supreme Court precedent that stated the board had no jurisdiction over the claim's merits. She explained it also had filed a November 2, 2018 petition, which Employee answered and it had filed a hearing request, which Employee did not oppose. Paddock further explained that the division had set a prehearing conference to address Employer's objection before a merits hearing; however, the November 30, 2018 earthquake closed the board's offices and canceled the prehearing conference. Paddock said she was available for four hearing dates prior to the January 29 and 30, 2019 hearing; Employee's attorney was not available on any date. "Both parties expressed that they would incur significant expenses for witnesses on the merits hearing," which should be continued at hearing. Consequently, Employer asked "is there a remedy, prior to the scheduled hearing dates, for the board to address the petition to continue and allow both parties to be heard?" (Paddock letter, December 17, 2018).

28) On December 19, 2018, Employee's former attorney Patricia Huna responded to Paddock's December 17, 2018 letter. Huna objected to the letter to Acting Chief Ringel and said it was not appropriate to ask him for "legal advice." She opined it was inappropriate for Ringel to intervene and he should allow the case to proceed pursuant to statutes and regulations. Huna further contended Employer's petition to continue had been set for hearing before the board and that is where she would set forth her position on the issue. (Huna letter, December 19, 2018).

29) On December 19, 2018, the board's designee vacated the January 30, 2019 hearing date but kept the January 29, 2019 hearing so "Employer's 11/2/2018 Petition to Continue Hearing may be heard." The designee cited appropriate Alaska Supreme Court precedent stating the board had no jurisdiction over the claim's merits while Employee's petition for review was

pending before the Alaska Supreme Court. The designee noted, "Whether, or to what extent, the board retains jurisdiction hinges on the question raised by the appeal." No parties appeared before the designee on this date. (Prehearing Conference Summary, December 19, 2018).

30) On February 1, 2019, *Leigh II* granted Employer's petition to continue and ordered Employee's merits hearing continued until after the Alaska Supreme Court issued a decision on her pending petition for review of *Leigh I*. (*Leigh II* at 6).

31) February 7, 2019, Huna withdrew from representing Employee before the board, and Employee began representing herself. (Notice of Withdrawal, February 7, 2019).

32) On February 15, 2019, Employee filed eight petitions; for citation purposes, these are numbered in the order in which they appear in her electronic file, as petition (1) through (8):

> (1) Petition for a protective order and "other": "No decision shall be placed on the Internet that mentions anything regarding mental health. Request hearing before the board."
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> (2) Petition for a protective order and "other": "The board previously stated that 'No Harm' would be done to myself if it turns out my psych records were irrelevant. Harm has already been done, so what factual basis did the board have? Opposing side has filed an EIME, it was not filed under seal, and apparently their own expert is not good enough for opposing side. Request hearing before the board."
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> (3) Petition for reconsideration or modification and "other": "Request reconsideration of pre-conference decision dated 12.29.18 [sic]. Who attended hearing, why were my due process rights completely ignored? Request hearing: Want to know how this can even happen?"
>
> (4) Petition for reconsideration or modification and "other": "Reconsideration of interlocutory decision + order dated 2.1.19 AWCB #19-0012. Request hearing so I may speak freely."
>
> (5) Petition to compel discovery and "other": "Ms. Rush (Adjuster). I would like all her notes, bills, correspondence w/ previous employer to include formal complaints made by present/past employees with Northern Adjusters. Request hearing."
>
> (6) Petition to compel discovery and "other": "Alaska Child and Family through their attorneys continue to withhold discovery, *i.e.*, investigational reports that should be in my employee file. In addition I would like previous employer to answer questions that have been avoided. Request a hearing before the board."
>
> (7) Petition to compel discovery: "Request to file with the board the cost to defend this claim so far, *i.e.* attorney[']s fees, costs, adjuster[']s cost, mediation, SIME, EIMEs."

> (8) Petition to compel discovery and "other": "Ms. Paddock has asked for cross-examination of my doctors. Yet she has not scheduled any depositions for them and she single-handedly took away my hearing on the merits. She should have to pay the cost of depositions now." (Petitions, February 15, 2019).

33) On February 21, 2019, *Leigh III* denied Employee's February 15, 2019 petition (4) request to reconsider *Leigh II*. (*Leigh III* at 11).

34) On March 8, 2019, Employee sought appeals commission review of *Leigh III*. (Petition for Review by Self-Represented Litigant, March 8, 2019).

35) On April 4, 2019, Employee claimed medical costs approximating $2,000 for immediate "PRP treatment." If her request was not granted, Employee wanted Dr. Youngblood to answer interrogatories. (Claim for Workers' Compensation Benefits, April 4, 2019).

36) On April 19, 2019, Employer denied Employee's claim for PRP treatment based on opinions from Drs. Chang, Youngblood and Gritzka. (Controversion Notice, April 19, 2019).

37) On May 07, 2019, the 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). It 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 IV*).

38) On August 12, 2019, the Alaska Supreme Court denied Employee's first motion to treat her then-pending petition for review as "confidential." (Ryan Montgomery-Sythe, Chief Deputy Clerk, Appellate Courts, email, July 10, 2020).

39) On November 27, 2019, Employee citing parties' duties and penalties under AS 23.30.107 and 108, asked for a protective order on a medical record release Smith sent her, which states:

> You are hereby authorized to release to Griffin & Smith or their representatives, any and all medical records of any nature which are in your possession or control, and which relate to any medical examination, care, treatment, laboratory or x-ray service performed on me concerning my right ankle for the period of 2007 to the

> present. 'Medical records' shall include x-rays, doctor's reports (including pharmaceutical), patient charts, intake forms, patient questionnaires, and hospital records concerning me, pathology specimens, or slides prepared from such specimens; radiology reports including cine films, sonograms and CT scans; nuclear medicine records, including radionuclide scans, and all billing records; and psychological, psychiatric, mental health/counseling records, whether such records are stored together with, or separately from, other medical and surgical records.

Employee contended the board had no jurisdiction to "hear any matter" in her case; Smith had valid releases and did not use them with due diligence to obtain records; and Smith should have all the evidence he needs to support Employer's controversions. She further contended "unprecedented irregularities" in this case make it impossible for the board to hear any matter until the Supreme Court ruled on her pending petition and restored jurisdiction to the board. Employee said her petition was merely a formality to illustrate Employer and its representatives continued to "waste time and resources." (Petition - Protective Order, November 27, 2019).

40) On December 11, 2019, the parties met with a board designee:

> Parties discussed the Employee's 11/29/2019 Petition for protective order. Mr. Smith explained that the Employer is willing to pre-authorize treatment so the Employee can take steps to get the treatment she needs. However, if she is unwilling to sign the releases, the employer cannot pay the bills without reviewing the medical records. M[s]. Leigh agreed that if for treatment were pre-authorized, she would sign the release and return it to Mr. Smith as soon as she can. Therefore, the Employee's 11/29/2019 Petition for a protective order is moot. (Prehearing Conference Summary, December 11, 2019).

41) On December 17, 2019, Employer verbally withdrew its November 9, 2015, February 2 and 6, 2017, and April 19, 2019 PRP controversions. (ICERS comment, December 17, 2019).

42) On March 3, 2020, the parties met with a board designee to discuss the case; he set a hearing for May 27 and 28, 2020, referred Employee to 8 AAC 45.112 and advised her:

> **Witness Lists:**
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> A party may call witnesses at the hearing. If a party intends to rely upon witness testimony, they must file a witness list that includes any possible witnesses that they may call at hearing. According to 8 AAC 45.112 '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.' The

> purpose of a witness list is to allow the opposing party to prepare to question the witness. Witness lists must be filed with the board and served upon the opposing parties at least five working days prior to a hearing. . . . (emphasis in original). (Prehearing Conference Summary, March 3, 2020).

43) On March 20, 2020, Employer denied Employee's claim for TTD and TPD benefits beginning April 10, 2019, and reemployment and PTD benefits. It based this on Dr. Chang's opinion that Employee's ankle reached medical stability on May 17, 2017, Dr. McAnally's opinion her complex regional pain syndrome (CRPS) became medically stable on April 10, 2019, a full return-to-work opinion from Jared Kirkham, M.D., and opinions from Drs. Chang and McAnally who said she could return to work as an accountant. (Controversion Notice, March 20, 2020).

44) On April 28, 2020, the parties met with a board designee on Employee's February 15, 2019 petition (7) seeking to discover Employer's attorney fees and costs for defending against her case. The summary for this meeting does not record any parties' legal arguments; it is unclear if they made any. The designee found Employee's petition (7) seeking defense attorney fees and costs irrelevant to her claim, and denied it; she orally appealed the designee's ruling and the designee added it as an issue for the May 2020 hearing. (Prehearing Conference Summary, April 28, 2020).

45) On April 29, 2020, Employee claimed a "compensation rate adjustment," medical costs" and "other." The reason was, "Request to purchase a home in Anchorage immediately with a pool to comply with [d]octor[']s orders." (Claim for Workers' Compensation Benefits, April 29, 2020).

46) On May 18, 2020, Employee filed and served a petition and email that states in part:

> 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. . . . (Leigh email, May 18, 2020).

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

> 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 attorney[']s fees? Is the system to benefit attorneys, and other experts that moonlight and the adjusters? . . . (Allison Leigh's Hearing Brief - 201503591, May 19, 2020).

48) On May 19, 2020, Employer contended the "pending [claim merits] 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." (Employer's Hearing Brief, May 19, 2020).

49) On May 21, 2020, the parties met with a board designee to discuss Employee's case and to clarify the issues for hearing. Issues included (1) Employee's appeal from an April 28, 2020 prehearing conference discovery order denying her February 15, 2019 petition (7); (2) Employee's May 18, 2020 petition to extend time to file her witness list; and (3) Employee's January 13, 2017 claim for benefits, on its merits. (Prehearing Conference Summary, May 21, 2020).

50) At hearing on May 27, 2020, Employee offered arguments and testimony generally not relevant to the issues. On Employee's appeal from the designee's April 28, 2020 discovery order denying petition (7) seeking discovery of Employer's defense attorney fees and costs, her contentions included: This case has dragged on too long and Employer is deliberately delaying. The percentage of Employer's attorney fees and costs far outweigh anything it has paid her. Everyone except Employee is getting paid. If anything, Employee's physicians are being under-paid. By contrast, Employer contended its defense attorney fees and costs are not relevant to any issue in Employee's claims. Therefore, it contended the designee did not abuse his discretion by not allowing Employee to discover them. The panel issued an oral order declining to hear Employee's January 13, 2017 claim, based on *Leigh II* and *III* and the commission's decision in *Leigh IV*. It reiterated again that a 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 on appellate review was closely intertwined with Employee's January 13, 2017 claim. Lastly, the panel agreed to hear and decide Employee's appeal from the designee's April 28, 2020 discovery order denying her petition (7), because this issue did not interfere with the court's jurisdiction. (Record, May 27, 2020).

51) On May 29, 2020, *Leigh V* reiterated it could not hear Employee's claim unless and until the Alaska Supreme Court ruled on her petition on the mental health medical record release. However, *Leigh V* decided Employee's petition (7) to discover Employer's attorney fees and

costs, denying it on relevance grounds; it reiterated that petition (7) did not involve the matter under appellate review and did not interfere with the court's jurisdiction. (*Leigh V* at 15-16).

52) On June 12, 2020, Employer sought an order dismissing Employee's claim on grounds she stipulated on December 11, 2019, that she would sign Employer's medical release, rendering her November 27, 2019 petition for a protective order moot. Employer contends this was a binding stipulation. It further contends it obtained the signed release, requested medical records and bills from several providers but Employee revoked "any and all releases" she had signed. Employer contends Employee contacted various medical providers, to whom Employer had been paying work-related bills, and advised them to cease sending records and bills to Employer for processing. It contends Employee is deliberately interfering with its ability to obtain and pay medical bills related to her claim; Employer also contends Employee's actions put her providers in jeopardy because they cannot get paid through workers' compensation and cannot legally bill Medicaid for their services because that would be a crime. It seeks an order to obtain Employee's medical records and bills for her ankle and CRPS conditions, advising her to cease and desist in her intentional interference in Employer's ability to obtain medical records and bills and advising her that if she continues to obstruct Employer's ability to obtain medical records and bills it has no obligation to continue paying her work-related bills and her workers' compensation "case" will be dismissed. (Petition June 12, 2020).

53) On July 6, 2020, the parties met with a board designee to review the issues, rule on any discovery matters and schedule a hearing. Employee requested a hearing on her February 15, 2019 petitions (1) through (8); Employer wanted a hearing on its June 12, 2020 petition to dismiss. The designee noted that "frequent interruptions, arguments and hostility between the parties" made it difficult for him to elicit "meaningful information or clarification." Employee insisted she was entitled to a hearing on the merits of her claim and "declined to present her position with regard" to her eight pending February 15, 2019 petitions. Consequently, the designee relied on the agency file to issue his orders, which included: Petition (1): denied because the designee lacked authority to resolve this issue at a prehearing conference; Petition (2): denied as this was not a specific discovery request; Petition (3): denied as moot, since a hearing was held on January 29, 2019; Petition (4): denied because *Leigh III* had reviewed *Leigh II* and denied Employee's petition to reconsider *Leigh II*; Petition (5): denied as irrelevant and because Employer stated it had already produced Employee's file from Employer in its entirety;

Petition (6): denied as it did not present a specific discovery request; Petition (7): denied because *Leigh V* had reviewed the April 28, 2020 prehearing order and denied Employee's appeal from it; Petition (8): denied as irrelevant. The designee also addressed Employer's June 21, 2019 petition to quash a subpoena and deposition of Dr. Youngblood and noted Employer withdrew its petition; the designee rendered the issue moot because Dr. Youngblood had already been deposed. The issues ultimately set for hearing on August 6, 2020, included: (1) Employee's appeal of the July 6, 2020 prehearing conference orders denying her February 15, 2019 petitions (1) through (8); (2) her "appeal" of Employer's withdrawal of its June 21, 2019 petition to quash a subpoena and deposition; and (3) Employer's June 12, 2020 petition to dismiss Employee's claim. The designee required the parties to file witness lists and referred them to 8 AAC 45.112 for specific directions. (Prehearing Conference Summary, July 6, 2020).

54) On July 10, 2020, the Alaska Supreme Court in *Leigh VI* ruled on Employee's petition and stated: "We hold that the statute permits an employer to access the mental health records of employees when it is relevant to the claim, even if the employee does not make a claim related to a mental health condition." The court said, "The Board appropriately decided that Leigh's mental health records were potentially relevant to a defense." *Leigh VI* remanded the case for further proceedings so the board could consider reasonable limits on the mental health record release at issue, "particularly with respect to the time period covered by the release." The court further noted the legislature's intent in respect to medical record releases:

> As set out in the intent section of the bill, the legislature's intent (as relevant to this provision) was that 'claimants provide releases of information that allow employers and insurers and their agents to obtain promptly information needed to investigate and adjust claims' and 'medical information relevant to claims be discoverable and promptly provided' (footnote omitted) (*Leigh VI* at 1, 8).

55) On July 10, 2020, Employee after receiving the court's opinion asked the division:

> Please see the attached [S]upreme [C]ourt order. An emergency pre hearing needs to be scheduled to add this to the [h]earing already scheduled!
>
> Please let me know immediately when the pre-hearing is. (Employee email, July 10, 2020).

Her second request later that day to the division stated:

> Charlotte:
>
> I have ccd you on this email as well as the earlier email sent to everyone requesting the emergency ore [sic] hearing to add the Supreme [C]ourt issued [sic] on remand to the issues already set for hearing. I have yet to hear an answer from Mr. Smith. . . . from this email that clearly contradicts what he just argued!
>
> We don't actually need to have a [p]re-hearing these issues can just be added to the pre hearing conference summary after a prehearing no one attends . . . right Mr. Jeo [sic]? . . . (Employee email, July 10, 2020).

56) On July 14, 2020, Division staff wrote to the parties:

> This email is only for coordinating the emergency prehearing request. The prehearing officer is available Monday, 7/20 at 2 PM or 3 PM.
>
> If you guys are not available we can let the Hearing Officer know that there are preliminary issues to discuss at the 08/09/2020 hearing *and let the board decide to add the issues or not*. **Please only answer with:**
>
> 1. Yes, Monday, 7/20 either at 2 PM or 3 PM will work for me OR
>
> 2. No, Monday, 7/20 in the afternoon will not work for me. Please add this as a preliminary issue in the 08/09/2020 [sic] hearing. (Grace Morfield email, July 14, 2020; emphasis in original; italics added).

Later that same day, Employee wrote:

> Please add this as a preliminary issue for the hearing on the 6th. . . .

Morfield responded:

> . . . Thank you, it will be added as a preliminary issue. No other prehearing will be scheduled prior to the 08/06/2020 hearing. (Morfield email, July 14, 2020; emphasis in original).

57) On July 14 and 15, 2020, Employer set forth its position on various subpoenas Employee wanted for the August 6, 2020 hearing; Smith initially and inadvertently failed to serve his email on Employee but sent her a copy the following day. It states in part:

> . . . The pending hearing is addressing her appeal of a number of petitions that were denied. No witnesses or new testimony is allowed with an appeal. Additionally, the other issue being addressed is the employer's petition to dismiss

> Ms. Leigh's case. No witnesses are needed for the pending hearing. If these subpoenas are signed, the employer will be filing petitions to quash the ones filed today and yesterday. In an effort to not expend more judicial resources, the employer requests that none of the subpoenas be issued without the opportunity for the employer to address whether they are reasonable and necessary for the pending hearing. (Smith email, July 14 and 15, 2020).

58) On July 16, 2020, a board designee reviewed Employee's July 15, 2020 email with subpoenas for the August 6, 2020 hearing and Employer's July 14 and 15, 2020 emails objecting to them. Relying on the July 6, 2020 prehearing conference summary, the designee set forth the issues for the August 6, 2020 hearing as: (1) "Employee's appeal of the July 6, 2020 prehearing orders denying her February 15, 2019 petitions"; (2) "Employee's appeal of Employer's withdrawal of its June 21, 2019 petition to quash subpoena and deposition of EME Youngblood"; and (3) "Employer's June 12, 2020 petition to dismiss claim." The designee denied Employee's request for signed subpoenas, finding no witness would provide testimony relevant to the hearing issues and, as to attorney Paddock and paralegal Tatum, they were protected against testimony by the attorney-client privilege. (Katherine Setzer letter, July 16, 2020).

59) On July 22, 2020, the Alaska Supreme Court denied Employee's unopposed July 20, 2020 motion to use pseudonyms in the court's decisions and orders and to treat her case as "confidential." This was the second time the court denied such a request. (Order, July 22, 2020).

60) On July 30, 2020, Employee filed and served an email purporting to include "Leigh witness list with brief.pdf." There was no brief attached to the email; attached was a list of 25 named witnesses (one witness, Jessica Rush, was listed twice) and one un-named payroll records custodian for Employer. The list did not provide a brief description of the subject matter or substance of the proposed witness' expected testimony; the stated purpose for each witness was "Regarding Leigh's case." Table I states the witnesses' names and Employee's August 6, 2020 arguments to the proposed witnesses' relevance to the issues being heard at hearing, as best as they could be discerned, and sets forth the board's decision:

Table I

Witness's Name	Employee's Argument or Allegation	Board Determination
Dr. Youngblood	Employer's physician; one question to him from Employee and the case would be over.	Employee withdrew as not relevant to the

		issues being heard.
Dr. Craig	Employer's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Dr. McAnally	Employee's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Dr. Chang	Employee's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Dr. Johnston	Employee's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Dr. Sexson	Employee's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Dr. Perkins	Employee's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Dr. Thomas	Employee's physician; relevance to the issues set for hearing not explained.	Employee withdrew as not relevant to the issues being heard.
Susan Daniels	Illegally obtained her medical records.	Not relevant to the issues being heard.
Jessica Rush	Former adjuster who was aware of a medical referral for treatment that is still not paid for.	Not relevant to the issues being heard.
Jeannie Tatum	Knows about Medicaid issues.	Not relevant to the issues being heard; attorney-client privilege applies.
Tracy Lyons	Was involved in Dr. Youngblood's deposition "nonsense."	Not relevant to the issues being heard; attorney-client privilege applies.
Nina Caterinichio	Works for Employee's orthopedic surgeon and would explain how Susan Daniels illegally contacted her physician.	Not relevant to the issues being heard.
Jeannie Fanning	Managerial person with Employer who knows about Employee's harassment and firing.	Not relevant to the issues being heard.
Rachel Cooper	Employer's employee; Employee withdrew at hearing; will call at the merits hearing.	Withdrawn.
Robert Morris	Employer's employee; Employee withdrew at hearing; will call at the merits hearing.	Withdrawn.
Anne Dennis Choi	Employee withdrew at hearing; will call at the merits hearing.	Withdrawn.

Vicki Paddock	Employer's former attorney who would address decision confidentiality issues.	Not relevant to the legal issue.
Patricia Huna	Employee's former attorney who would address decision confidentiality issues.	Not relevant to the legal issue.
Eric Croft	Employee's former attorney who would address decision confidentiality issues.	Not relevant to the legal issue.
Shasta Hood	Works for Select Physical Therapy and knows about Medicaid issues.	Not relevant to the issues being heard.
Harvey Pullen	Workers' Compensation Officer who vacated the January 30, 2019 merits hearing date and said it was done at Ron Ringel's direction.	Not relevant to the issues being heard.
Jung Yeo	The board designee who authored the July 7, 2020 prehearing conference summary. Relevance not articulated.	Not relevant to the issues being heard.
Grey Mitchell	Former Workers' Compensation Division director who wrote a letter to Employee incorrectly stating why Dr. Youngblood did not show up for his deposition.	Not relevant to the issues being heard.
Stacie Kraly	Assistant Attorney General familiar with Medicaid lien.	Not relevant to the issues being heard.
Employer's payroll record custodian	This person would prove she "returned to work," contrary to a board finding.	Not relevant to the issues being heard.

(Employee email; Allison Leigh's Witness List-201503591, July 30, 2020).

61) At hearing on August 6, 2020, in addition to the witnesses listed in Table I, Employee sought to call Acting Chief Ringel as a witness. Ringel was not listed on her witness list; Employee's request to call him as a witness was denied because he could have nothing to say that was relevant to any issues at hearing. When asked why she thought the merits of her January 13, 2017 claim were set to be heard on August 6, 2020, Employee responded, "Why wouldn't it." (Record).

62) Employer still wants a mental health records release. Its previous mental health release went back to 1999 because Employee said in her deposition that she had been hospitalized in 2001 or 2002 for depression and received psychological treatment. Therefore, Employer initially sought a release back to 1999 based on her on that testimony. However, though it believes it is justified going back to 1999, Employer seeks a mental health release only back to 2007. The basis for 2007 is a neuropsychological report from Paul Craig, PhD, stating in 2009 Employee began regular mental health counseling. Dr. Gritzka stated CRPS frequently has a psychological aspect; he stated Employee did not respond well to orthopedic treatment. Therefore, Employer seeks a mental health record release going back two years prior to that treatment.

Notwithstanding Dr. Gritzka's opinion that a tertiary care facility would need Employee's medical records back to childhood, Employer at this time does not seek those records. It hopes to rely on initial psychological records for the 2009 treatment, which should contain a history. Based on what may be in those records, Employer reserves its right to seek mental health records earlier than 2007. (Record).

63) Employee contends Dr. Gritzka did not say a tertiary care facility would need "all psychological records," but said such a facility would need "all records." She contends "no doctors" want her mental health records. The designated chair asked Employee if she would agree to sign a mental health records release going back to 2007, based on Employer's statement explaining its basis for that starting date. Employee stated among other things, "I object to signing any release at all until I can have a hearing on the merits, because penalty, interest and all of these things need to be decided and you cannot order me to sign any a release until the past benefits have been paid, which is HHS, which was actually mentioned in the Supreme Court order." When asked to repeat her position that she would not sign any mental health release until her underlying claim was heard on its merits, Employee stated, "I will not sign *any release at all*, not even just mental health, *any release at all* because I am entitled to a hearing on the merits" (emphasis added). When asked to put aside her argument about a hearing on the merits for a moment, Employee still objected to a mental health record release going back to 2007. She contended if Employer wants to use Dr. Gritzka's opinion to obtain mental health records, the only "legal" and "logical" release would have to go back to her childhood. Employee never specifically addressed the question of whether or not 2007 was a legally sufficient starting point for a mental health records release though she admitted she began regular counseling in 2009. Employee contends Smith called her a "criminal." In Employee's view, Employer does not need any more records because they already have an opinion from Dr. Craig. She brushes off the suggestion that mental health conditions might affect her disability or need for medical treatment as nonsensical and "vile." (Employee).

64) Employer contends, consistent with *Leigh VI*, it has a right to obtain records addressing "the substantial cause" analysis, which include psychological records because psychological issues could be delaying Employee's recovery or affecting her need for medical treatment. Employer does not at this time request a medical record release for Ehlers-Danlos syndrome and

is unaware that any doctor has diagnosed Employee with that condition. (Record). No doctor has diagnosed Employee with Ehlers-Danlos syndrome. (Employee)

65) When asked to explain her concern that disclosure of her counseling records "might impact" her coworkers, Employee said she "already answered that" in her July 8, 2015 petition for a protective order. Embarrassment about her mental health is not an issue. Rather, Employee contends she suffered Employer retaliation at work and was fired. Therefore, in her view, Employer will retaliate against former co-workers because Employee's mental health records mention co-workers' names, Employer's alleged wrongdoing including payroll "problems," Medicare fraud, Health Insurance Portability & Accountability Act (HIPAA) violations and a child's suicide related to Employer's actions. (Employee).

66) Employer agrees to redact any former co-worker's or third-party's name in Employee's mental health records. It does not seek or need to discover bills for Employee's mental health counseling prior to the date of her work injury with Employer and does not object to removing "bills" language in its mental health records releases for pre-injury records. It contends non-physicians should not decide what mental health records may or may not be relevant to Employee's claim; therefore, it objects to an *in camera* review. (Record). Employee also objects to an *in camera* review of her mental health records but did not give a clear reason. (Employee).

67) Employer objects to serving Employee's mental health records on her so she can file for a protective order, with a prohibition against it re-disclosing them before she could file for a protective order. It contends this defeats speed and efficiency and would result in her objecting to every record, which would require additional litigation. (Record). Employee also objects to this process though her reasoning was not clear. However, she will agree to release all her mental health records to her treating physicians if they decide they need them. (Employee).

68) Employer objects to any subject matter limitations on Employee's mental health record releases. It contends only a trained expert can determine what diagnoses or mental health conditions might be relevant to her pending claims. (Record). Employee contends Employer first has to demonstrate relevance before it even gets a mental health record release. Alternately, "according to law" she contends Employer can only discover mental health records related to "depression," but she did not explain why. (Employee).

69) Employer contends *Leigh VI* already determined Employee's mental health records are potentially relevant to a defense and discoverable. The law requires Employer to put relevant medical records on a medical summary and file them with the board. Employer contends it can give her mental health records to its clients and medical experts, and HIPAA does not apply to workers' compensation cases. Its clients include Alaska Child Services, its insurer and adjuster. As to whether Smith would ever need to show or give Employee's mental health records to Employer's employees, Smith reserved his right to share information from medical records depending upon what the records stated; for example, if Employee's mental health records revealed that she planned "to kill" someone and "burn his house," Smith would feel obligated to tell that person. Employer has no plans to re-disclose records to any person outside the re-disclosure requirements in the Act and regulations, including medical summaries, EME, SIME and vocational reemployment requirements. (Record). Employee contends the Act lacks adequate re-disclosure restrictions because she has received other people's medical records. She contends the board should "secure the records." She contends HIPAA and other unspecified federal law applies in this case. (Employee).

70) Employer contends the language from AS 23.30.095(e) the Supreme Court cited in *Leigh VI* applies to all treating doctors, and does not apply only to EMEs, and Employee's records are not privileged. It contends this interpretation fits with the court's opinion. (Record). Employee contends the court's citation from §095(e) applies only to EMEs. (Employee).

71) Employer contends AS 08.29.200, AS 08.63.200 and AS 08.86.200 have no bearing on this case because §095(e) trumps these statutes when an injured worker files a claim for benefits under the Act. (Record). Employee contends AS 08.29.200, AS 08.63.200 and AS 08.86.200 involve constitutional issues in a petition pending before the Alaska Supreme Court. (Employee).

72) Employer contends Employee's "right to privacy" under Alaska's Constitution does not apply because she filed a claim and Employer is entitled to her mental health records. (Record). Employee contends she has a right to privacy and Employer has no right to obtain mental health records in an ankle injury case. (Employee).

73) Both parties agreed there is nothing currently before the Alaska Supreme Court that could divest the board's jurisdiction over the issues set for the August 6, 2020 hearing. (Record).

74) Employee contends her "appeal" of Employer's withdrawal of his June 21, 2019 petition to quash a subpoena deposition notice is important because it bears on when the board had jurisdiction and did not have it and on penalty and interest issues. She was not able to articulate a specific requested remedy for Employer withdrawing its own petition. (Employee). Employer contends Employee's "appeal" is moot because Dr. Youngblood has already been deposed; it further contends it has a right to withdraw its own petition. (Record).

75) Employee stated Employer would get "no discovery" until she had a hearing on the merits of her claim. (Employee)

76) The parties stipulated the board could decide Employee's remaining eight petitions, the petition withdrawal "appeal" and Employer's petition to dismiss, on the written record. (Record).

77) Employer contends Employee's unequivocal hearing testimony shows she will sign no medical record release until she has a merits hearing. It contends Employee's obstruction prevents it from obtaining and paying for her medical benefits. Employer seeks an order dismissing her claim or relieving Employer from paying her undisputed work-related medical bills because it is not possible to pay them so long as she refuses to sign a medical record release and advises her treating physicians to not release any records or bills to Employer or its agents. (Record).

78) Employee admitted she told her doctors to send no medical records or bills to Employer or its representatives because they have not been paid the proper amounts. Employee insisted that Tatum be excluded from the hearing room because Employee intended to call a witness that would impugn Tatum's credibility and she did not want Tatum to hear that testimony. (Employee).

79) It was extraordinarily difficult to elicit information from Employee addressing the issues pending at the August 6, 2020 hearing. It took over an hour to go over her witness list to determine if any listed witness could provide testimony relevant to any issue scheduled to be heard, or to decide if Tatum should leave the room. (Record; experience and judgment).

80) "Claim merits" hearings where parties' causation issues or right to benefits and defenses are decided, often require lay and expert witnesses; obtaining and arranging testimony at a hearing can be complicated and expensive and is not done easily on short notice. (Experience; judgment).

81) Many medical providers will not accept releases that list numerous providers, but require an individual release listing only that specific provider's name. (Experience; judgment).

PRINCIPLES OF LAW

45 C.F.R. §160.103 – Definitions.

Except as otherwise provided, the following definitions apply to this subchapter:
. . . .

Covered entity means:
. . . .

(1) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

45 C.F.R. §164.512. Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. . . .
. . . .

(l) ***Standard: Disclosures for workers' compensation.*** A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

The commission in *Home Deport v. Holt*, AWCAC Decision No. 261 (May 28, 2019), held that HIPAA "explicitly contains an exemption for workers' compensation acts and expressly allows for medical providers to provide records and information in a workers' compensation claim in certain situations to the employer or insurer without the injured worker's consent." (*Id*. at 7). *Holt* noted employers have only 30 days in which to pay injured worker's medical bills. *Holt* cited from the US Department of Health & Social Services website describing medical record disclosures in workers' compensation cases and stated:

> The HIPAA Privacy Rule does not apply to entities that are either workers' compensation insurers, workers' compensation administrative agencies, or employers, except to the extent they may otherwise be covered entities. However, these entities need access to the health information of individuals who are injured on the job or who have a work-related illness to process or adjudicate claims, or to coordinate care under workers' compensation systems. Generally, this health information is obtained from health care providers who treat these individuals and who may be covered by the Privacy Rule. The Privacy Rule recognizes the legitimate need of insurers and other entities involved in the workers' compensation systems to have access to individuals' health information as authorized by State or other law. Due to the significant variability among such laws, the Privacy Rule permits disclosures of health information for workers' compensation purposes in a number of different ways. (*Id*. at 7).

The State of Alaska Constitution states in part:

> **Article 1 -- Declaration of Rights**
> . . . .
>
> §22 Right of Privacy
>
> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

The board does not have jurisdiction to decide constitutional issues. *Burke v. Raven Electric, Inc*., 420 P.3d 1196 (Alaska 2018).

> **AS 08.29.200. Confidentiality of communications.** (a) A person [professional counselors] licensed under this chapter may not reveal to another person a communication made to the licensee by a client about a matter concerning which the client has employed the licensee in a professional capacity. . . .

> **AS 08.63.200. Confidentiality of communication.** (a) A person [marital and family therapist] licensed under this chapter may not reveal to another person a communication made to the licensee by a client about a matter concerning which the client has employed the licensee in a professional capacity. . . .

> **AS 08.86.200. Confidentiality of communication.** (a) A psychologist or psychological associate may not reveal to another person a communication made to the psychologist or psychological associate by a client about a matter concerning which the client has employed the psychologist or psychological associate in a professional capacity. . . .

In *Richard v. Fireman's Fund*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court said:

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

In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 319-21 (Alaska 2009), the Alaska Supreme Court addressed this same issue and said:

> A central issue inherent to Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim. . . .
>
> In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation (footnote omitted). We have not considered the extent of the board's duty to advise claimants. . . .

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The 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." That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." "Even if a finding of fact or conclusion of law is erroneous, the mistake is not grounds for reversal if the finding or conclusion is not necessary to the . . . ultimate decision" (citations omitted). "Similarly, an administrative agency ruling, even if mistaken, will not be reversed unless substantial rights of a party have been prejudiced" (citations omitted). *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a) . . . Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

Construing AS 23.30.010(a), *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224, 237 (Alaska 2019), said the board must consider different causes of the "benefits sought" and the extent to which each cause contributed to the need for the specific benefit at issue. The board must then identify one cause as "the substantial cause." *Morrison* held the statute does not require the substantial cause to be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The board need only find which of all causes, "in its judgment is the most important or material cause related to that benefit." (*Id*.). *Morrison* further held that preexisting conditions, which a work injury aggravates, accelerates or combines with to cause disability or the need for medical treatment, can still constitute a compensable injury. (*Id*. at 234, 238-39).

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .
>
> (e) . . . Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter.
> . . . .
>
> (h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during dependency of the proceeding. . . .

> **AS 23.30.097. Fees for medical treatment and services**. . . .
> . . . .
>
> (d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.

. . . .

(h) A provider of medical treatment or services may receive payment for medical treatment and services under this chapter only if the bill for services is received by the employer within 180 days after the later of

(1) the date of service; or
(2) the date that the provider knew of the claim and knew that the claim related to employment.

AS 23.30.107. Release of information. (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.

(b) Medical or rehabilitation records, and the employee's name, address, social security number, electronic mail address, and telephone number contained on any record, in an employee's file maintained by the division or held by the board or the commission are not public records subject to public inspection and copying under AS 40.25.100 -- 40.25.295. This subsection does not prohibit

(1) the reemployment benefits administrator, the division, the board, the commission, or the department from releasing medical or rehabilitation records in an employee's file, without the employee's consent, to a physician providing medical services under AS 23.30.095(k) or 23.30.110(g), a party to a claim filed by the employee, or a governmental agency; or

(2) the quoting or discussing of medical or rehabilitation records contained in an employee's file during a hearing on a claim for compensation or in a decision or order of the board or commission.

(c) The division may not assemble, or provide information respecting, individual records for commercial purposes that are outside the scope of this chapter.

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. 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. *Granus v. Fell,* AWCB Decision No. 99-0016 (January 20, 1999).

> **AS 23.30.110. Procedure on claims**. (a) . . . the board may hear and determine all questions in respect to the claim. . . .
> . . . .
>
> (c) . . . Within 30 days after the hearing record closed, the board shall file its decision. . . .
> . . . .
>
> (e) The order rejecting the claim or making the award, referred to in this chapter as a compensation order, shall be filed in the office of the board. . . .

The language "all questions" in §110(a) means questions raised by a party or by the agency upon notice duly given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252 (Alaska 1981).

> **AS 23.30.115. Attendance and fees of witnesses**. (a) A person is not required to attend as a witness in a proceeding before the board at a place more than 100 miles from the person's place of residence, unless the person's lawful mileage and fee for one day's attendance is first paid or tendered to the person; but the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure.
>
> (b) A witness summoned in a proceeding before the board or whose deposition is taken shall receive the same fees and mileage as a witness in the Superior Court.
>
> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. . . .

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.127. Appeals to commission**. . . .
>
> (b) an appeal is initiated by filing with the office of the commission
> . . . .
>
> (3) other material the commission may by regulation require. . . .
>
> **AS 23.30.128. Commission proceedings**. . . .
> . . . .
>
> (b) . . . The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. . . .
>
> **AS 23.30.135. Procedure before the board**. . . .
>
> (b) All testimony given during a hearing before the board shall be recorded. . . . Hearings before the board shall be open to the public.
>
> **AS 44.62.310. Government meetings public**. . . .
>
> (b) If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. . . .
>
> (c) The following subjects may be considered in an executive session:
> . . . .
> (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; . . .
>
> (d) This section does not apply to
>
> (1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding; . . .
> . . . .
>
> (h) In this section,
>
> (1) "governmental body" means [a] . . . board . . . with the authority to . . . make decisions for the public entity. . . .

8 AAC 45.052. Medical summary. (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

. . . .

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

(1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination, together with the affidavit of readiness for hearing and an updated medical summary and copies of the medical reports listed on the medical summary, if required under this section.

(2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

(A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and

(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the

updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.

(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues;
. . . .
(3) accepting stipulations, requests for admissions of fact, or other documents that may avoid presenting unnecessary evidence at the hearing;
(4) limiting the number of witnesses, identifying those witnesses, or requiring a witness list in accordance with 8 AAC 45.112;
. . . .
(6) the relevance of information requested under AS 23.30.107(a) and AS 23.30.108;
. . . .
(10) discovery requests;
. . . .
(15) other matters that may aid in the disposition of the case.
. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.
. . . .

(h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition in accordance with 8 AAC 45.050 that sets out the grounds for the appeal. Unless a petition is filed under this subsection no later than 10 days after service of a board designee's discovery order, a board designee's discovery order is final.

(i) Notwithstanding the provisions of (d) of this section, a board designee may order a reconsideration of all or part of a discovery order entered by the board designee under AS 23.30.108 on the board designee's own motion or on petition of a party. To be considered by the board designee, a petition for reconsideration must set out the specific grounds for the reconsideration and be filed with the board in accordance with 8 AAC 45.050 no later than 10 days after service of a board designee's discovery order. The power to order reconsideration expires 20 days after service of a board designee's discovery order. If no action is taken on a petition during the time allowed for ordering reconsideration, the petition is considered denied. If a petition for reconsideration is timely filed with the board, a petition for appeal under (h) of this section must be filed no later than 10 days after service of the reconsideration decision or the date the petition for reconsideration is considered denied in the absence of any action on the petition, whichever is earlier.

8 AAC 45.070. Hearings. . . .
. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing. . . .

8 AAC 45.092. Second independent medical evaluation. . . .

. . . .

(h) In an evaluation under AS 23.30.095(k), the board . . . may direct (1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder; . . .

8 AAC 45.095. Release of information. . . .
. . . .

(c) If after a prehearing an order to release information is issued and an employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the requested release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release.

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. . . .

8 AAC 45.120. Evidence. . . .
. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

8 AAC 45.130. Findings and awards and orders. The board will prepare and serve the findings and award as well as all other orders in these proceedings.

8 AAC 45.180. Costs and attorney's fees. . . .
. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

(1) costs incurred in making a witness available for cross-examination;
(2) court reporter fees and costs of obtaining deposition transcripts;
. . . .
(4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;
. . . .
(8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;
. . . .
(12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;
. . . .
(17) other costs as determined by the board.

(g) Costs incurred in attending depositions not necessitated by a Smallwood objection may be awarded only where the board finds that attendance at the deposition was reasonable.

8 AAC 45.900. Definitions. (a) In this chapter
. . . .

(11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see Commercial Union Insurance Companies v. Smallwood, 550 P.2d 1261 (Alaska 1976). . .

Commercial Union Insurance Companies v. Smallwood, 550 P.2d 1261 (Alaska 1976) stated the general proposition, "We therefore hold that the statutory right to cross-examination is absolute and applicable to the Board" (*id*. at 1265). *Smallwood* further said:

> We therefore strongly recommend that the Board adopt procedures which will fill the present procedural void relating to medical reports and the right of cross-examination. In Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 823 (Alaska 1974), this court alluded to the possibility of the Board's adopting a procedural system for medical reports similar to the one in effect for affidavits, or a system requiring a notice of intention to cross-examine to be filed before hearing when the medical reports are served upon opposing parties, pursuant to the Board's current medical report rules (*id*. at 1267-68).

> **8 AAC 57.180. Contents of excerpts of record.** (a) The excerpt of record from an appellant . . . must include the following: . . . (2) the order or decision of the board from which the appeal is taken; (3) other decisions or orders of the board for which review is sought; (4) if the party is challenging the admission or exclusion of evidence or other oral ruling or order, a copy of the pages of the transcript at which the evidence, ruling, or order, the relevant discussion by the board, and any necessary objection are recorded; and (5) documents referenced in the party's brief that support each factual assertion of the appellant or appellant/cross-appellee.
>
> (b) An excerpt of record from an appellee . . . must include documents referenced in that party's brief that support each factual assertion of that party and are not included in the party's excerpt of record under (a)(5) of this section. . . .

> **Evidence Rule 803. Hearsay Exceptions-Availability of Declarant Immaterial**. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
>
> > (6) **Business Records**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Dobos v. Ingersoll, 9 P.3d 1020, 1027 (Alaska 2000) held "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule," unless there is some reason to doubt the records' authenticity.

In *Lindhag v. State, Department of Natural Resources*, 123 P.3d 948, 956 (Alaska 2005), the Alaska Supreme Court explained that relevant evidence must be discovered prior to a merits hearing and a post-decision rehearing or modification request will be denied unless new evidence offered post-decision could not have been discovered before hearing with due diligence.

ANALYSIS

1) Were the oral orders denying Employee's request to add the merits of her claim as an issue for hearing and disallowing her witnesses correct?

This hearing panel has authority to hear and decide "all questions" in respect to Employee's claim. AS 23.30.110(a). "All questions" means those questions raised by the parties upon notice duly given. *Simon*. Advance notice to parties of issues to be heard at hearing provides all parties with time to prepare for hearing and protects their rights to due process. AS 23.30.001(4). It is unclear why Employee thought the August 6, 2020 hearing was going to address her January 13, 2017 claim on its merits; when asked at hearing, she asked in return, "Why wouldn't it?"

a) Disallowing the merits claim as an issue.

Prehearing conferences identify hearing issues. 8 AAC 45.065(a)(1). A prehearing conference summary records issues in dispute; unless modified it governs the issues and the hearing's course except in "unusual and extenuating circumstances." 8 AAC 45.065(c); 8 AAC 45.070(g). The July 6, 2020 prehearing conference summary specifically highlighted and enumerated the "**Issues for the August 6, 2020 hearing**" (emphasis in original): (1) Employee's appeal from a designee's July 6, 2020 prehearing conference orders on her eight petitions; (2) her "appeal" from Employer's withdrawing its June 21, 2019 petition to quash a subpoena and deposition; and (3) Employer's June 12, 2020 petition to dismiss Employee's claim. At hearing, the parties stipulated to add issue (4), the mental health records release on remand.

The "merits" of Employee's January 13, 2017 claim for benefits, as amended, include whether she is entitled to additional disability, impairment, medical or vocational reemployment benefits, penalties, interest or an order finding Employer made an unfair or frivolous controversion. Her January 13, 2017 claim was not listed as an issue for the August 6, 2020 hearing. Although in some instances "unusual and extenuating circumstances" may exist to justify adding a previously

un-listed issue as an issue for a previously scheduled hearing, a claim on its merits is generally not among them. 8 AAC 45.070(f). "Merits" hearings often require lay and expert witnesses; obtaining and arranging for their testimony at a hearing is sometimes complicated and expensive and cannot be done easily on short notice. *Rogers & Babler*. Since the merits of Employee's January 13, 2017 claim for benefits and other relief was not listed as an issue for the August 6, 2020 hearing, the oral order denying her request to add and decide that claim was correct.

On Friday, July 10, 2020, just after *Leigh VI* issued, Employee asked for an emergency prehearing conference to add the remanded mental health records release issue from *Leigh VI* to the August 6, 2020 hearing. On July 14, 2020, Division staff advised the parties that the designee was only available for a prehearing conference on July 20, 2020, in the afternoon; Smith's office said he was available on July 20, 2020, at 2 PM; Employee said she was not available and wanted the remand matter as a new issue scheduled as a preliminary matter at the August 6, 2020 hearing.

Prehearing conferences are the time and place for parties to argue about adding additional issues for a scheduled hearing. 8 AAC 45.065(a)(1). Had the parties been able to agree on a time for an emergency prehearing conference, the mental health release issue could have been added as an issue, and adding the January 13, 2017 claim on its merits as an additional issue could have been argued. Employer presumably would have agreed to add the remanded mental health release issue, since it did so at hearing, and retained its objection to adding the merits hearing. The designee could have recorded the stipulation to add the mental health release remand as an issue and could have explained to Employee why a hearing on her claim on its merits was premature, and could not be set for hearing on short notice, and why her witnesses were consequently not necessary. 8 AAC 45.065(1), (3)-(4), (15). This procedure would have saved time at the hearing and prevented stand-by witnesses from wasting their time. Employee is entitled to a hearing on her claim's merits. However, her repeated demands for a hearing on her claim's merits are premature because the merits hearing cannot be held until all discovery issues are resolved so all parties' arguments and evidence can be fairly considered. AS 23.30.001(4); *Lindhag*.

b) Disallowing Employee's witnesses.

At the hearing's outset, Employee insisted that Tatum be excluded from the hearing room because Employee intended to call a witness that would impugn Tatum's credibility and she did not want Tatum privy to that testimony. Her initial objection to Tatum's presence required an evaluation of the proposed witness's testimony. Disallowing Employee's request for a merits hearing on her claim also raised a preliminary issue concerning her 26 named witnesses. Oral orders disallowed her from calling any witnesses.

Employee began representing herself on February 7, 2019, when her last attorney withdrew. On March 3, 2020, a designee referred her to the witness list regulation 8 AAC 45.112 and told her about witness list requirements. On July 6, 2020, a designee again referred her to 8 AAC 45.112 and required the parties to file a conforming witness list if they intended to call any witnesses on August 6, 2020. Employee's witness list identified witnesses only by name, and as to each said, "Regarding Leigh's Case." This was unhelpful; the witness list did not state whether the witnesses would testify in person, by deposition or telephonically and did not include the witness's addresses, phone numbers or a brief description of the subject matter and substance of the witness's expected testimony. 8 AAC 45.112. Because Employee's witness list was not in accordance with the applicable regulation, it was proper to "exclude the party's witnesses from testifying at the hearing" on that basis alone. 8 AAC 45.112. It was also correct to decline Employee's request to call Acting Chief Ringel as a witness because he was not on her witness list and had no relevant testimony on the hearing issues.

Nevertheless, to accord Employee, a self-represented litigant, an opportunity to call relevant witnesses, the designated chair painstakingly asked her to articulate some nexus between her listed witnesses and the issues set for hearing. It took over an hour; results are summarized in Table I. Employee withdrew some witnesses and some are privileged. In all instances, she was not able to articulate a relationship between her listed witnesses and the issues set for hearing; consequently, the witnesses were deemed irrelevant. Irrelevant evidence may be excluded at hearing. Since Employee identified no relevant testimony addressing the issues set for hearing on August 6, 2020, there was no need for their testimony and the oral order excluding them from testifying at this hearing was also correct. 8 AAC 45.120(e).

2) Does Employee have to sign and deliver restricted mental health record releases?

The Alaska Supreme Court in *Leigh VI* held Employer has a right to access Employee's mental health records if relevant to her claim even if she did not make a claim for work-related mental health conditions. It also stated *Leigh I* appropriately decided "that Leigh's mental health records were potentially relevant to a defense." As in *Leigh I* and the commission in *Leigh IV*, the Alaska Supreme Court in *Leigh VI* stated, given the legal standard of proof, that Employer has a right to develop evidence and a defense that something other than Employee's work injury is "the substantial cause" of her ongoing disability and need for continuing treatment. AS 23.30.010(a); *Morrison*. Therefore, the question of whether she has to sign mental health record releases has been decided notwithstanding her implied protestations to the contrary.

The question on remand from *Leigh VI* is whether any reasonable restrictions should be placed on her mental health records releases. Surprisingly, at hearing Employee unequivocally and repeatedly stated that under no circumstances would she sign *any* medical record release unless and until she had a hearing on her claim's merits. Her tone and demeanor showed Employee was sincere and honest and her testimony that she would not sign any release until she had a merits hearing was credible. AS 23.30.122; *Smith*. While her refusal to sign any release seems to render the remanded issue moot, this decision will address the Supreme Court's remand and fashion appropriate mental health record release restrictions in case Employee changes her position.

a) Date restrictions.

Employer still wants a mental health records release. However, while it considers a release beginning in 1999 justified, at this point, it seeks a mental health record release only going back to 2007. Employer reserves its right to request a release for additional mental health records going back earlier in time in the event the records obtained from 2007 foreword elicit evidence of other past diagnoses or conditions that could be relevant. It assumes records for treatment beginning in 2009, for example, will include a full history of Employee's mental health diagnoses and conditions. Employer bases this 2007 release date on Dr. Craig's report, and Employee's hearing admission that she obtained mental health counseling in 2009; she concedes

this was for attention deficit disorder (ADD), depression and posttraumatic stress disorder (PTSD) from testifying against a criminal defendant when she was a child. Relying on *Granus*, Employer contends it has a right to discover mental health records two years prior to 2009, resulting in the 2007 date.

Employee objects to signing any release at all until she has a merits hearing. Putting that position aside, however, Employee's objection to signing a mental health release going back to 2007 is still difficult to understand. She contends Employer relies on part of Dr. Gritzka's opinion to justify obtaining her mental health records, but ignores his opinion stating that a tertiary care facility would need "all her records" going back to childhood. Consequently, Employee contends the only "legal" and "logical" mental health record release should go back much further than 2007. She seems to argue for a mental health records release far broader than Employer seeks.

Employer articulated a reasonable nexus between the 2007 mental health release and Dr. Gritzka's opinion, which would allow it to obtain Employee's mental health records much closer in time to her 2015 work injury. Dr. Gritzka stated CRPS frequently has a psychological aspect; he stated Employee did not respond as expected to her orthopedic treatment. In 2009, Employee admittedly either began or perhaps resumed mental health treatment to address ADD, depression and PTSD. Without a release, Employer cannot determine how long this treatment continued or if she is still receiving it, or whether her preexisting mental health diagnoses could be disabling or affect her ability to recover from her ankle injury.

Employer has a right to develop a defense, if applicable, based on Employee's mental health conditions. *Leigh I*; *IV*; *VI*. Her work injury must still be "the substantial cause" of her continued need for treatment and disability. AS 23.30.010(a); *Morrison*. Regardless of whether or not Employee seeks medical care or other benefits related to a mental health condition that could have been aggravated, accelerated or combined with her work injury to produce disability and need for medical treatment, Employer has a right to develop its defense. If, for example, mental health experts opine that the substantial cause of Employee's current disability and continuing need for medical treatment is her preexisting mental health conditions, and those

opinions are given greatest weight at a merits hearing, she would no longer be entitled to ongoing benefits. Experts cannot offer legally convincing opinions and determinations without reviewing her records. Employee brushes off the suggestion that mental health conditions might affect her disability or need for medical treatment as nonsensical and "vile." However, this hearing is about Employer's right to discover the information and develop its defense, not whether any such evidence or defense will be given credibility and weight at a hearing on the merits of her claim. Accordingly, a mental health record release going back to 2007, two years before she began or resumed her 2009 mental health counseling, is a reasonable date to begin mental health record discovery. *Granus*.

b) *In camera* record review.

Neither party requests nor favors *in camera* review of Employee's medical records. Furthermore, the fact-finders are not mental health experts and would have difficulty determining what diagnoses, conditions or facts in mental health records, may or may not be relevant to a mental health expert. Therefore, *in camera* review is not appropriate in this case.

c) Employee previewing her mental health records.

Assuming Employee signed and delivered the appropriate mental health records release and Employer obtained her mental health records, Employer could serve a complete set of Employee's mental health records on her for preview so she could file a petition for a protective order to exclude some or all of the records and seek an order prohibiting Employer from filing the records or allowing the insurer or adjuster to review them before she could file for a protective order. Employer objected to that process as contrary to the legislature's mandate that these hearings be quick and efficient. AS 23.30.001(1). It contends Employee would simply object to all the records, requiring endless litigation. Employee's opinion of this potential process to protect her privacy was non-responsive. *Rogers & Babler*.

Leigh I, *IV* and *VI* all found Employee's mental health records potentially relevant to a defense. Thus, as Employer notes it would do little good to allow Employee to again object to some or all of her mental health records and seek additional protective orders that would require more prehearing conference orders and ultimately further discovery appeals. Employee expressed

extreme frustration over how long this process is taking. Lengthening the administrative process would add to the delay and would probably result in additional appellate review. Given the status of this issue, using the previewing process would also be an unreasonable cost to Employer. Therefore, given the legislative mandate that the Act be interpreted to ensure quick, efficient, fair and predictable delivery of benefits to Employee, if she is entitled to them, at a reasonable cost to Employer, and to allow all parties due process and an opportunity to be heard and their arguments and evidence to be fairly considered, giving Employee an opportunity to preview her medical records before they are filed is not appropriate in this case. AS 23.30.001(1), (4).

d) Subject matter limitations on mental health releases.

Leigh VI said this panel has discretion in ruling on discovery issues based on the specific circumstances of this case. Employer objects to placing any subject matter limitations on mental health record releases because it has no idea what mental health facts, diagnoses or conditions may be relevant to Employee's disability and need for treatment for her work injury. Employee maintained her objection to signing any medical records release, but contends a mental health record release should be limited to only depression records; she contends records for any other mental health condition would not be relevant.

This case is distinguishable from cases where a physically injured worker claims the work injury aggravated the worker's preexisting depression, for example, and seeks disability benefits or medical care related to it. In such cases, without a potential defense applicable, it may be reasonable to limit a mental health release only to depression, as that that is what the injured worker was claiming. By contrast, Employee seeks no benefits at this time for mental health issues arising from her work injury; rather, Employer seeks mental health records to develop a defense.

Employee, like Employer and the fact-finders in this case, is not a mental health expert. Nevertheless, she believes any link between her preexisting mental health issues and her continuing disability and need for treatment for her work injury is both nonsensical and vile. Given her viewpoint, it is unclear how Employee concludes that only depression records could

possibly be relevant to her claim. Depression, other mental health diagnoses and the level and degree to which Employee may have them, all could bear on the substantial cause of her continued disability or need for medical care. *Morrison*. Employer will never know what other mental health diagnoses may be in her mental health records or the extent to which they may be disabling without having an opportunity to discover them; it does not have to take Employee's word for it. *Granus*. Both parties are entitled to an opportunity to be heard and to have their arguments and evidence fairly considered. AS 23.30.001(4). Employer will not have that opportunity unless it has mental health record releases to investigate its defense. Accordingly, because mental health experts must opine on the relationship, if any, between her preexisting mental health and her claim, the mental health releases Employee will be required to sign will have no subject matter limitations.

e) Impact on Employee's co-workers.

Employee is concerned that releasing her mental health records to Employer might impact her former co-workers, many of whom she believes still work for Employer. She contends her counseling records include information about alleged fraud that was going on at work, which when reported to supervisors resulted in retaliation and harassment against her; she fears her former co-workers will receive the same retaliation and harassment. She does not want her co-workers' names appearing in her medical records to be revealed. Employee refers to her July 8, 2015 petition for a protective order in which she contended she witnessed "bad business practices" and "neglect" while working for Employer. She is also concerned that a child's suicide mentioned in her records will be revealed in violation of HIPAA rules and that child's privacy.

Smith agrees to redact names of former co-workers and any third-person such as the child whose names may appear in Employee's mental health records. This reasonable restriction should resolve Employee's concern. Smith will be directed to redact all names of third-parties appearing in Employee's mental health records before re-disclosing them to anyone, including Employer, the insurer and its adjuster and before filing and serving them on a medical summary.

f) Pre-injury medical bills.

Leigh VI questioned why Employer would need pre-injury mental health care bills. Employer agreed it did not need pre-injury bills for Employee's mental health care or treatment but reserved its right to obtain post-injury bills in the event Employee makes a claim for post-injury mental health treatment. Since Employee is not presently making any claim for benefits related to post-injury mental health care, Employer's mental health care record release will not include a release for any bills for pre- or post-injury mental health care. In the event Employee's claim changes, Employer may send her another mental health care record release that includes post-injury bills.

g) Disclosing counseling records when Employee was a minor.

Leigh VI also queried why Employee's childhood counseling records would have any bearing on her injury's compensability. Employee has not been a minor since 2000. Employer now seeks her mental health records beginning in 2007. Therefore, there is presently no reason for Employer to obtain any counseling records from any time while Employee was a minor and its requested mental health releases do not include any time period during which she was a minor. *Granus*.

h) Re-disclosing Employee's mental health records.

Employee contends her mental health records should be treated like records in a physician's office; they should be secured. She questions whether there are any re-disclosure prohibitions in the Act. Employer contends the Act requires it to file and serve Employee's relevant medical records on medical summaries and to re-disclose her medical records to an SIME and allows it to re-disclose them to its EME physicians. It has no intention of re-disclosing her records outside the Act's limitations and requirements and in accordance with the administrative regulations. It also contends HIPAA does not apply to workers' compensation cases, and under *Leigh VI*, Employee's medical records "are not privileged" under AS 23.30.095(e).

Employee's medical records in division files are not open to public inspection. AS 23.30.107(b). Employer has a right to send Employee and her records to an EME or an SIME. AS 23.30.095(e); 8 AAC 45.092(h). Upon filing a claim or petition, all parties must file and serve all the injured worker's physicians' reports in their possession or control and serve them on "any

adverse party"; this is a continuing duty. AS 23.30.095(h); 8 AAC 45.052(a). While Employee's medical records are not subject to public inspection or copying, "the reemployment benefits administrator, the division, the board, the commission, or the department" may release medical records without her consent, to a physician performing an SIME, to any party to a claim she files, or "to a governmental agency." AS 23.30.107(b)(1). The parties and panel may quote and discuss records in Employee's agency file during a hearing or in a decision. AS 23.30.107(b)(2). Parties seeking appellate review must provide the commission with medical records. AS 23.30.127(b)(3); 8 AAC 57.180(a)-(b). The commission must review the "whole record" in deciding a case before it, including any medical records. AS 23.30.128(b).

At hearing, Smith could not confirm that he would never re-disclose Employee's mental health records to a third-party, citing the hypothetical example of discovering a medical record in which Employee threatened to kill someone or burn their house down, in which case he would feel obligated to notify that party or perhaps law enforcement. Nevertheless, Smith unequivocally stated he would not re-disclose Employee's records without a legal basis for doing so. Even the hypothetical example Employer cited at hearing fits into its right to re-disclose records to a "governmental agency," such as a police department. Employer's mental health record releases will be required to include language limiting re-disclosure of Employee's records only in accordance with the Act and applicable regulations, which trump all other provisions including HIPAA, which does not apply to the division's or Employer's re-disclosure of medical records in workers' compensation cases. 45 C.F.R. 160.103(1); 45 C.F.R. 164.512(l); *Holt*.

i) Counseling-related confidentiality statutes.

Alaska statutes address confidential communications between licensed professional counselors, marital and family therapists, and psychologists and their clients. AS 08.29.200; AS 08.63.200; AS 08.86.200. Employer contends the Act, and especially AS 23.30.095(e) trump all other state statutes once Employee filed a claim for benefits. Employee agrees that these three statutes do not affect this case. Once Employee filed an injury report and a claim for benefits under the Act, she submitted herself to the Act's provisions regarding physician-patient and all other provider-patient privileges. Other state statutes regarding confidentiality are inapplicable because the Act

covers the parties' rights and duties to disclose relevant medical information, including counseling records. AS 23.30.107(a); AS 23.30.108(c); *Leigh VI*.

j) The constitutional right to privacy.

Alaskans have a right to privacy. Alaska Constitution, Article 1 §22. Employer contends the Act and especially AS 23.30.095(e) trump even Employee's constitutional right to privacy. It contends she gave up that right to the extent necessary for Employer to defend itself when she filed an injury report and a claim for benefits under the Act. Employee contends the right to privacy in Alaska's Constitution protects her against Employer's mental health record discovery requests. This decision does not have jurisdiction to decide this constitutional issue. *Burke*.

In summary, Employee will be directed to sign one or more mental health releases in accordance with the above analysis. Employer may provide several mental health releases for her signature and return if certain providers require a release listing only their name. *Rogers & Babler*.

3) Can past or future decisions in this case be kept confidential?

To the extent Employee's petitions (1) through (8) are appeals from the designee's discovery orders, no evidence or argument that was not presented to the designee at the prehearing conference can be considered and the discovery order appeals must be decided solely on the written record. AS 23.30.108(c). Employee's petition (1) does not raise or appeal a "discovery dispute" issue; therefore, the evidence and argument limitations under §108(c) do not apply. Employee wants her previous and future decisions kept confidential. She wants no evidence in online databases using her real name or mentioning any mental health issues. Employer maintains a neutral stance on this issue. Employee referenced no statute, regulation or case law supporting her request. The Alaska Supreme Court has twice denied a similar request she made before it. The designee at the July 6, 2020 prehearing conference denied her request, finding he lacked authority to resolve the issue.

Hearings in workers' compensation cases "are open to the public." AS 23.30.135(b). Consequently, issues, witnesses and arguments directed toward mental health or other sensitive matters are discussed and aired in an open hearing, which the public may attend according to the

Act. This decision has no authority to close Employee's hearing to the public. Further, panels are required to make "findings and award as well as all other orders" in writing. 8 AAC 45.130. The Act requires a written, filed compensation order in each case. AS 23.30.110(c), (e). Some administrative meetings have an "executive session" option under the Open Meetings Act where information that may damage a person's reputation is not discussed publicly. However, the Open Meeting Act's executive session rules expressly do not apply to "a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding," as in this case. AS 44.62.310(b), (c)(2), (d)(1), (h)(1). There is no executive session confidentiality available in this adjudicatory hearing.

The designee was correct in finding he had no authority to resolve this issue at the July 6, 2020 prehearing conference because it does not appear as something within the designee's authority to resolve. 8 AAC 45.065. The Alaska Supreme Court has twice denied a similar request Employee made on appellate review. Absent a statute, regulation or case law suggesting this decision can use an acronym for her real name or can otherwise keep her decisions "confidential," and given the above statutory references requiring written decisions and orders in a public hearing setting, Employee's request to keep her past and future decisions in this matter confidential will be denied.

4) Does Employee's petition (2) state a specific request for relief?

Employee's petition (2) says Employee seeks a protective order but it actually just states her displeasure with an unspecified representation that "no harm" would come to her if her mental health records were deemed not relevant. She contends harm has already been done because potential employers can read about her mental health issues online, which may affect her employment, and she questions the factual basis underlying *Leigh I*. Employee's other statements in petition (2) are difficult to understand. The designee on July 6, 2020 denied this petition as "not a specific request." Petition (2) does not appear to raise or appeal a "discovery dispute." If it does not, hearing evidence and argument limitations in §108(c) do not apply. To the extent Employee is re-arguing her objections to the mental health records release, *Leigh VI* has already resolved that issue. Either way, the designee was correct in denying petition (2) and it will be denied again.

5) Was Employee's petition (3) timely or already decided?

Employee's petition (3) requests reconsideration of a December 19, 2018 prehearing conference. Employer contends it is too late to reconsider the prehearing conference summary and its topic, which was continuance of a scheduled January 30, 2019 hearing on her claim's merits, because the continuance has already been addressed and the merits hearing was continued on January 29, 2019. The designee denied petition (3), finding it moot. Petition (3) does not raise or appeal a discovery dispute, so evidence and argument limitations in §108(c) do not apply.

As stated on the July 6, 2020 prehearing conference summary, Employee had three options once she received the December 19, 2018 summary: (1) she could have asked the designee to modify or amend it to correct a factual error or to change a determination; (2) she could have filed a petition appealing the designee's order; or (3) she could have filed a petition asking the designee to reconsider a discovery order. For each choice, Employee had to make her request within 10 days of December 19, 2018. 8 AAC 45.065(d), (h), (i). There is no evidence Employee made any request, even by letter or email, regarding this prehearing conference summary between December 19, 2018 and February 15, 2019. Her February 15, 2019 petition was untimely and will be denied.

Moreover, both parties' attorneys wrote to the designee and Acting Chief Ringel regarding the designee setting a merits hearing even though the mental health records release issue had not been resolved by the Alaska Supreme Court. This was their first chance to be heard. Employer's November 2, 2018 petition to continue the merits hearing, which it filed as a result of the designee setting a hearing on the merits was added as an issue for the January 29, 2019 hearing. Both parties on January 29, 2019, had a second opportunity to be heard on Employer's request to continue the merits hearing. *Leigh II* granted Employer's petition and continued the merits hearing.

Assuming for argument's sake that vacating the January merits hearing on a prehearing conference summary was incorrect or premature, this was at best a procedural mistake and is not grounds for reversal if it was not necessary to the ultimate decision. An agency ruling, even if mistaken, is harmless error and will not be reversed unless substantial rights of a party have been

prejudiced. *Rogers & Babler*. In this instance, as well as when *Leigh V* decided to not hear Employee's claim on its merits in May 2020, both parties would have been prejudiced had Employee's claim been heard on its merits in January 2019, before the Court decided the mental health release petition. Had a merits hearing gone forward in either January 2019 (or May 2020), and had Employee prevailed on her claims for benefits, the process would have had to start over and a new merits hearing would have had to convene once the Alaska Supreme Court in *Leigh VI* held that Employee was required to sign a release for her mental health records. All parties had an opportunity to be heard on the merits hearing continuance issue, twice. AS 23.30.001(4). Employee repeatedly requests a merits hearing on her January 13, 2017 claim prematurely. Hearings on claims are held after all discovery issues have been resolved, not before. Evidence available through discovery is generally not allowed after a decision is issued. *Lindhag*. For all these reasons, Employee's petition (3) was untimely, already decided and will be denied.

6) Was Employee's petition (4) already decided?

Employee's petition (4) seeks reconsideration of *Leigh II*. Employer contends *Leigh III* already addressed this issue and petition (4) is therefore moot. The designee on July 6, 2020 denied Employee's petition (4) because *Leigh III* had previously denied it. Petition (4) does not raise or appeal a discovery dispute and hearing evidence and argument limitations in §108(c) do not apply. Employer is correct; *Leigh III* reviewed *Leigh II* at Employee's request and denied her February 15, 2019 petition for reconsideration. Therefore, this petition will be denied as already decided.

7) Did the designee abuse his discretion in denying Employee's petition (5)?

Employee's petition (5) seeks an order compelling discovery from Employer's insurance adjuster, including all notes, bills, correspondence with Employer to include formal complaints made by past and present employees with Northern Adjusters. Employer contended at the prehearing conference that complaints from Employer's other employees about Northern Adjusters are not relevant to Employee's claim. The designee at the July 6, 2020 prehearing conference denied this discovery request finding it irrelevant. Because Employee appeals the designee's determination of a discovery dispute, the limitations in §108(c) apply and the panel

may not consider any evidence or argument that was not presented to the designee and must decide this issue solely on the written record. AS 23.30.108(c).

Unfortunately, at the July 6, 2020 prehearing conference where the parties had an opportunity to express their views on petition (5) and provide evidence or arguments supporting them, Employee refused to present her position on her petitions. The designee noted, "Due to frequent interruptions, arguments and hostilities between the parties," he could not "elicit meaningful information or clarification" from either party and decided the discovery request on the written record. Since Employee provided no information supporting her request and Employer stated she had no right to other people's complaints, the designee's decision to decide this petition on the written record was not an abuse of discretion because the request was irrelevant. *Granus*. The designee denied Employee's request to discover formal complaints made by past and present employees with Northern Adjusters finding Employer had already produced Employee's personnel file in its entirety, and determined that former co-workers' complaints are not relevant to her claim. On the available record, the designee did not abuse his discretion. AS 23.30.108(c). Employee's petition (5) appealing the designee's July 6, 2020 discovery order will be denied.

8) Did the designee abuse his discretion in denying Employee's petition (6)?

This is an appeal from a designee's discovery order and must be decided solely on the written record. AS 23.30.108(c). Employee's petition (6) seeks an order compelling discovery from Employer including "investigational reports," and states she would like to ask her former employer questions. Employee may have attempted to clarify this petition at the August 6, 2020 hearing; however, the panel cannot consider any argument or evidence she presented at the hearing because the only evidence and argument the designee considered at the July 6, 2020 prehearing conference addressing petition (6) was stated on the petition itself. At that prehearing, Employee was too busy arguing with Smith and the designee to present any "meaningful information or clarification." Employee failed to explain to what "investigational reports" she referred and simply stated she wanted to ask Employer questions "that have been avoided." The designee found this "not a specific request" for discovery and denied petition (6) as not being specific. The designee did not abuse his discretion in denying this request because

Employee provided him with inadequate arguments and evidence. A party must present the designee with evidence and argument to justify a petition to compel discovery. AS 23.30.108(c). Employee failed to do so and the designee's decision denying petition (6) was not an abuse of discretion and will be affirmed.

9) Did the designee abuse his discretion in denying Employee's petition (7)?

This too is a discovery order appeal and the panel must decide this issue solely on the written record. AS 23.30.108(c). Employee's petition (7) seeks an order compelling defense counsels' files showing all costs incurred to defend against her claim. The July 6, 2020 prehearing conference summary does not disclose either party's position on this issue. However, based on the written record the designee through his own research determined that *Leigh V* had already decided this same issue; he denied Employee's petition (7) on this basis. His decision was correct, was not an abuse of discretion, will be affirmed and Employee's petition (7) will be denied.

10) Does Employer have to pay initially for Employee to present her medical witnesses?

Employee's petition (8) says it seeks an order compelling discovery but it actually addresses Employee's dissatisfaction with the *Smallwood* procedure. Petition (8) is not an appeal of a discovery order and the argument and evidence limitations in §108 do not apply. Employee contends Employer asked for cross-examination of her doctors but has not scheduled their depositions. Consequently, she contends Employer should have to pay deposition-related costs. Employer contends the subject physicians', Drs. Chang and McAnally, depositions have already occurred and therefore Employee's petition (8) is moot. It further contends Employee does not understand the legal process for obtaining and paying for depositions in the *Smallwood* situation. The designee denied petition (8) as "irrelevant."

Petition (8) raises a cost dispute; Employee wants Employer to pay for her doctors' depositions, presumably if she deposes or re-deposes them or perhaps even if she calls them as witnesses at a

merits hearing. Employee misunderstands the law. A party's "request for cross-examination" is called a *Smallwood* objection when it applies to medical reports. 8 AAC 45.900(11). The *Smallwood* name derives from *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976). *Smallwood* stated the general principle that litigants have the right to cross-examine authors of medical records on hearsay grounds. The *Smallwood* court suggested the division develop regulations to clarify the law regarding a party's right to cross-examination. Over the years, the division has developed regulations addressing this topic in detail; unfortunately, they are relatively complex. A brief explanation will be provided to assist Employee who is not an attorney. *Richard*; *Bohlmann*.

First, parties must file and serve medical records on medical summaries; this is a continuing duty on all parties so long as a case is pending. AS 23.30.095(h); 8 AAC 45.052(a). If a party wants to cross-examine the medical records' authors, it may file a *Smallwood* objection. 8 AAC 45.052(c). Parties frequently file their *Smallwood* objections shortly after receiving a medical summary containing records whose authors they wish to question. *Rogers & Babler*. This is not always effective in protecting the party's right to cross-examine the records' authors or in shifting the cost of producing the authors for cross-examination to the proffering party.

Timing is critical; the applicable regulations are specific. If a party files an Affidavit of Readiness for Hearing (ARH), that party must attach an updated medical summary if they have received any new medical reports since the last medical summary was filed. 8 AAC 45.052(c). If the party filing the ARH wants to cross-examine the author of any medical report listed on any medical summary filed to date, that party must also file and serve a *Smallwood* objection together with their ARH. 8 AAC 45.052(c)(1). If a party served with an ARH wants to cross-examine the author of a medical report listed on any medical summaries filed to date that party must file and serve a *Smallwood* objection within 10 days after service of the ARH. 8 AAC 45.052(c)(2). Once a party files an ARH, and until the claim is resolved, all updated medical summaries filed by a party must be accompanied by a *Smallwood* objection if the party filing the records wants to cross-examine the authors of the updated records; if the party receiving an updated medical summary wants to cross-examine the author of a medical record attached to an

updated medical summary that party must file a *Smallwood* objection on the new medical records within 10 days after service of the updated medical summary. 8 AAC 45.052(c)(3)(A)-(B).

Second, assuming a party seeking a right to cross-examine a physician has properly and timely filed a *Smallwood* objection, the party wanting to rely on the doctor's written report must provide an opportunity for the party filing the *Smallwood* objection to cross-examine the physician. The *Smallwood* objection applies only to the medical reports listed on a *Smallwood* objection, and does not apply to the physician's medical reports in their entirety; in other words, Employee may file 100 different reports from her treating physician and if Employer only files a *Smallwood* objection on the first report, the remaining 99 reports are admissible as evidence at a hearing. There are a few exceptions to *Smallwood*; most notably, some medical records are admissible over a *Smallwood* objection if they are "business records" and thus exceptions to the hearsay rule under Alaska Evidence Rule 803(6). *Dobos*.

Given this background, in this case Employer filed and served *Smallwood* objections on only two specific records: on June 8, 2017, it objected to Dr. Chang's May 17, 2017 report filed on a June 8, 2017 medical summary and on September 12, 2017, it objected to Dr. McAnally's August 31, 2017 report filed on a September 12, 2017 medical summary. Any and all other medical reports in this case as of today's date are admissible as evidence at any hearing without according any party a right to cross-examine the records' authors.

On February 12, 2018, a date after Employer had filed *Smallwood* objections on two specific reports, Employee filed an ARH on her January 11, 2017 claim. Since Employer did not file *Smallwood* objections to Dr. Chang's May 17, 2017 or Dr. McAnally's August 31, 2017 reports within 10 days of Employee's February 12, 2018 ARH, its prior *Smallwood* objections were not effective in protecting its right to cross-examine these physicians about these reports, or shifting the cost of producing the doctors for cross-examination to Employee. 8 AAC 45.052(c)(2). These regulations do not require a party to file two *Smallwood* objections on the same medical reports to protect their right to cross-examine a doctor or to shift the cost to the opposing party; they simply require a party to file a *Smallwood* objection once, within 10 days of service of an ARH.

Employee mistakenly believes that because Employer filed two *Smallwood* objections on her treating physician's reports that Employer bears the burden of producing her physicians for cross-examination. As the above analysis shows, this is exactly the opposite of what happens when a party files a *Smallwood* objection; where the *Smallwood* doctrine applies, the party offering the medical record bears the burden of producing the physician and paying for the physician's time for the opposing party's cross-examination. In this case, notwithstanding Employer's *Smallwood* objections, it paid for and deposed both Drs. Chang and McAnally; it did not have to pay to depose them under the *Smallwood* regulations, but it did anyway. In short, if a party offers a medical record into evidence on a medical summary and the opposing party wants the right to cross-examine the author of that record, and files a timely *Smallwood* objection, the party relying on the medical report, not the party filing the *Smallwood* objection to it, bears all costs associated with providing that medical witness at a deposition or at hearing for cross-examination.

Nothing in this decision should be construed to imply Employee does not have a right to depose or re-depose her own physicians or the EME physicians at any mutually convenient time, under the Rules of Civil Procedure, at her expense, just like Employer did with Drs. Youngblood, Chang and McAnally. The Act expressly allows parties to depose witnesses; but this issue is not before the panel for decision now as it is not been fully argued or briefed. AS 23.30.115(a), (b); *Simon*.

In the event Employee prevails at a merits hearing on her claim, and assuming any medical providers' deposition or hearing testimony she may present is "necessary and reasonable" to the presentation of the issues upon which she may prevail, she may be entitled to a cost award and may recover her initial cost outlay from Employer. 8 AAC 45.180(f)(1)-(2), (4), (8), (14). In other words, while Employee must pay from her own pocket to provide testimony in deposition or at hearing from her medical providers, if she prevails at a merits hearing and if it was reasonable and necessary for her to present witnesses, she can recover her costs from Employer. Employer has no initial obligation to pay for Employee's witnesses' availability for testimony at deposition or hearing. To the extent petition (8) seeks an order requiring Employer to pay the

initial costs so that Employee can present her medical witnesses at deposition or hearing, it will be denied.

Furthermore, Employee is advised that if she wants to present medical witnesses for her merits hearing, the best practice is to depose them prior to hearing to save time and avoid scheduling conflicts. She is encouraged to speak with Employer's attorney and the medical witnesses to arrange on mutually agreeable deposition times, typically before or after a physician's work day. This process avoids scheduling difficulties, since physicians and other medical providers are often treating patients during the same time hearings are held on claims. *Richard*; *Bohlmann*.

11) Can Employee prevent Employer's withdrawal of its June 21, 2019 petition to quash a subpoena and deposition notice?

On June 21, 2019, Employer filed and served a petition to quash a subpoena and related deposition notice for Dr. Youngblood. Employer withdrew its petition after deposing Dr. Youngblood. Employee objects to this withdrawal and "appeals" it. At hearing, she was not able to articulate a remedy for Employer withdrawing its own petition. Though she may disagree with the procedures used to schedule and take Dr. Youngblood's deposition, Employee did not suggest or argue an appropriate remedy for her appeal. Whether or not she can re-depose Dr. Youngblood at her own expense is not an issue presented for this hearing. If Employee wants to re-depose him at her expense, she should contact Smith and arrange for a properly noticed re-deposition. If the parties cannot agree on this, Employee may file a petition to compel discovery and a designee will hear the party's respective arguments at a prehearing conference, apply the Act, regulations and civil rules pertaining to depositions, and issue an appropriate discovery order on this topic subject to a discovery order appeal. Parties are reminded that on a discovery order appeal, a reviewing panel can consider no argument or evidence not presented to the designee at the prehearing conference and must decide any appeal solely on the written record. Therefore, it is important for the parties to set forth their evidence and argument in support of any discovery matter with fullness and clarity at the prehearing conference level. AS 23.30.108(c). There is no requested or available remedy for Employer withdrawing its own petition for a protective order, and Employee's appeal of Employer's petition withdrawal will be denied.

12) Should Employee's claim be dismissed at this time for refusing to sign a medical record release or for impeding Employee's medical record and billing discovery?

Employer contends Employee refuses to sign a medical record release and actively told her medical providers to release no records to Employer, the insurer or Smith. It contends this prevents Employer from obtaining her medical records and bills for her ankle and CRPS condition, and paying the providers. Consequently, on June 12, 2020, Employer filed a petition seeking an order dismissing her claim in its entirety or in the alternative dismissing her claim for medical benefits. At the August 6, 2020 hearing, Employee admitted she revoked her previous medical record release, refused to sign a new release and told her providers not to send any records or bills to Employer or its representatives. Employee repeatedly made it clear that she refuses to sign any medical record release, including those that would allow Employer to obtain and pay bills for un-contested medical care, until she has a merits hearing on her July 11, 2017 claim.

Employee's hearing testimony was a surprising and disturbing turn of events and makes her situation worse. The agency record is unclear if Employer has sent Employee new releases for her to sign and return since she withdrew her prior releases; if it did and she has refused to sign them, her rights to all benefits under the Act "are suspended until the written authority is delivered." If not, and Employer sends her new releases under AS 23.30.107, she must object to signing them or file a petition for a protective order within 14 days after service of the request. AS 23.30.108(a). If she does neither, her rights to all benefits under the Act will be suspended. If she files a petition for a protective order, a prehearing conference will be scheduled under §108(c) and a designee will review the parties' evidence and argument and issue a discovery order. In that event, for the reasons stated above, Employee's argument that she does not have to sign any medical record release until she has a merits hearing is not a proper basis for a protective order. If the designee at a prehearing conference orders her to sign and deliver releases and she refuses to do so within 10 days, her rights to benefits will remain suspended until the releases are signed and delivered. Since Employer has a right to discovery, this will further delay a merits hearing as no merits hearing can occur until after the parties have completed discovery. *Leigh II*; *III*; *IV*; 8 AAC 45.095(c). If Employee insists on not signing a

release even after a designee orders her to do so, her suspended benefits are subject to forfeiture under §108(c) and her claim may be dismissed in part or whole.

Furthermore, Employer has accepted Employee's ankle and related CRPS condition as compensable injuries and is trying to pay related medical bills. Employee's direction to her providers that they not send medical records or bills to Smith or his clients thwarts Employer's ability to pay these bills in a timely fashion. This may affect the providers' willingness to provide services to her in the future. It also places her medical providers in a difficult position. Medical providers may receive payment for medical treatment under the Act only if the bill for services is received by Employer within 180 days after the latter of the service date or the date the provider knew the claim is related to her employment. AS 23.30.097(d), (h)(1)-(2). At this point, there is no dispute about Employee's ankle and related CRPS condition; the only impediment to getting the bills paid is Employee's direction to withhold them from Employer.

There are other possible ways for Employer to obtain the ankle and CRPS records and bills. HIPAA does not prevent medical providers treating Employee for her work injury from providing medical records and bills to an insurance company pursuant to the Act over her objection. It may be understandably difficult for Employer to convince Employee's providers to release them. Alternately, Employer can subpoena records and bills from Employee's providers over her objection. This process is slower, less efficient and more expensive than simply obtaining the records from the providers voluntarily or with Employee's authorization. AS 23.30.001(1). Nevertheless, it is an option. Therefore, at this point no part of Employee's claim will be dismissed notwithstanding her expressed refusal to sign and deliver a medical record release.

Employee is encouraged to reconsider her refusal to sign and deliver both a mental health record release, in accordance with this decision, as well as medical record releases for her accepted work injury including her ankle and CRPS. Employer is encouraged to submit new releases to Employee with a request that she sign and return them pursuant to the Act. Further adjudication on Employer's June 12, 2020 petition to dismiss will occur depending upon Employee's response to Employer's request to sign new releases. Jurisdiction is retained over this issue.

CONCLUSIONS OF LAW

1) The oral orders denying Employee's request to add the merits of her claim as an issue for hearing and disallowing her witnesses was correct.
2) Employee does have to sign and deliver restricted mental health record releases.
3) Past or future decisions in this case cannot be kept confidential.
4) Employee's petition (2) does not state a specific request for relief.
5) Employee's petition (3) was not timely and was already decided.
6) Employee's petition (4) was already decided.
7) The designee did not abuse his discretion in denying Employee's petition (5).
8) The designee did not abuse his discretion in denying Employee's petition (6).
9) The designee did not abuse his discretion in denying Employee's petition (7).
10) Employer does not have to pay initially for Employee to present her medical witnesses.
11) Employee cannot prevent Employer's withdrawal of its June 21, 2019 petition to quash a subpoena and deposition.
12) Employee's case will not be dismissed at this time for refusing to sign a medical record release or for impeding Employee's medical record and billing discovery.

ORDER

1) Employee is not entitled to a hearing on the merits of her January 13, 2017 claim unless and until the discovery issues in this case are resolved.
2) Employee is ordered to sign and deliver appropriate mental health record releases for records beginning in 2007, in accordance with this decision. Employer's mental health record releases shall include language limiting re-disclosure of Employee's records only in accordance with the Act and applicable regulations. Employer may provide several mental health releases for her signature and return if certain providers require a release listing only their name; mental health releases will not include a release for bills for mental health services.
3) If Smith, the insurer or its adjusters or agents receive Employee's mental health records, they shall redact all names of third-parties appearing in those records before re-disclosing them to anyone, including Employer, and before filing and serving them on a medical summary.

4) Employee's petition (1) request to have past or future decisions and orders in this case kept confidential is denied.

5) Employee's petition (2) does not state a specific request for relief and is denied.

6) Employee's petition (3) is denied as untimely and already decided.

7) Employee's petition (4) is denied as already decided.

8) The designee's denial of Employee's petition (5) is affirmed.

9) The designee's denial of Employee's petition (6) is affirmed.

10) The designee's denial of Employee's petition (7) is affirmed.

11) Employee's request for an order requiring Employer to pay costs related to Employee presenting her medical witnesses at deposition or hearing is denied. If Employee prevails at a merits hearing, she may submit a cost request for expenses related to presenting medical witnesses, in accordance with the appropriate relations, which will be decided at that time.

12) Employee's "appeal" of Employer's withdrawal of its June 21, 2019 petition to quash a subpoena and related deposition is denied.

13) Employer's June 12, 2020 petition to dismiss is denied at this time. Jurisdiction over this issue is retained in accordance with this decision.

Dated in Anchorage, Alaska on August 18, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Bob Doyle, Member

/s/
Bronson Frye, 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 certified U.S. Mail, postage prepaid, on August 18, 2020.

/s/
Nenita Farmer, Office Assistant