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. 20-0082 Filed with AWCB Anchorage, Alaska on September 25, 2020

Allison Leigh's (Employee) September 1, 2020 oral appeal of a designee's same-dated oral discovery order was heard on the written record on September 24, 2020, in Anchorage, Alaska, a date selected on September 1, 2020. Employee's September 1, 2020 oral, hearing request, gave rise to this hearing. Effective September 14, 2020, non-attorney Barbara Williams represents Employee. Attorney Colby Smith represents Alaska Children's Service and its insurer (Employer). As this was a written record hearing there were no witnesses. The record closed at the hearing's conclusion on July 24, 2020.

ISSUE

Employee contends the September 1, 2020 prehearing conference designee abused her discretion, made arbitrary decisions and took away her discovery. She orally appeals the designee's orders.

Employer contends the designee did not abuse her discretion but properly granted its petition for a protective order regarding Employee's subpoena processes, and quashing two pending subpoenas. It seeks an order affirming the designee and denying Employee's discovery appeal.

Did the designee abuse her discretion in her September 1, 2020 discovery orders?

FINDINGS OF FACT

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

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

2) On March 14, 2018, a board designee granted Employee's petition for a protective order. (Prehearing Conference Summary, March 14, 2018).

3) On April 24, 2018, Employee, her former attorney and Employer's former attorney met before a board designee to set a hearing on Employer's appeal from the designee's March 2018 discovery decision. The "parties stipulated to an oral hearing" set on July 24, 2018, and the designee scheduled it. (Prehearing Conference Summary, April 24, 2018).

4) At hearing on July 24, 2018, the panel heard and decided the discovery matter on appeal from the designee's March 2018 decision. At Employee's lawyer's request under AS 23.30.108(c), the evidence and argument was limited to evidence and arguments referenced at the March 2018 prehearing conference giving rise to the discovery order. However, the parties agreed that a medical expert's deposition could be considered even though it was not raised at the prehearing conference. Employer had no objection to Employee's request and the evidence and arguments were limited pursuant to the statute and the parties' hearing stipulation. This resulted in *Leigh v. Alaska Children's Services*, AWCB Decision No. 18-0074 (July 26, 2018) (*Leigh I*), which was the only hearing before the board Employee attended in 2018. (Record, July 24, 2018; *Leigh I*).

5) On August 18, 2020, *Leigh v. Alaska Children's Services,* AWCB Decision No. 20-0071 (August 18, 2020) (*Leigh VII*), advised and instructed Employee regarding discovery disputes and related prehearing conferences:

> Unfortunately, at the July 6, 2020 prehearing conference where the parties had an opportunity to express their views . . . 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*. . . . On the available record, the designee did not abuse his discretion. AS 23.30.108(c). Employee's petition . . . will be denied. (*Leigh VII* at 52).
> . . . .
>
> 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 . . . 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 . . . 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 . . . 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 . . . was not an abuse of discretion and will be affirmed. (*Leigh VII* at 52-53).

6) *Leigh VII* cited AS 23.30.108(c) in full and explained to Employee that she has to provide her evidence and legal arguments supporting her position on a discovery dispute at the prehearing conference at which the dispute is discussed and discovery order is issued. (*Leigh VII*).

7) On August 19, 2020, Hearing Officer Kathryn Setzer wrote Employee that the subpoenas for Employer's payroll record custodian and Susan Daniels were not going to be signed because she failed to provide a deposition notice with required information to each deponent and party and failed to give adequate notice as required in the civil rules. (Setzer letter, August 19, 2020).

8) On August 20, 2020, Employee emailed Smith, his client Susan Daniels, and Acting Chief of Adjudications Ron Ringel about *Leigh VII*:

> To whom it may concern:

> Due to yesterday's waste of literally 62 pages. (The board can blame themselves for their complete lack of common sense, we don't even get into the laws that the board just literally thinks they are god and that they have the god given power to do whatever they please. . . . I'm here to shove my broken ankle into your corruption!).
>
> The supremes [sic] are getting a motion for reconsideration . . . for the first case . . . just because the supremes [sic] need to see what complete idiots the board is . . . can't follow and [sic] directions.
>
> Vile discusting [sic] people you are! You are now just seeing the beginning of this fight so you all better really get used to me now! (Employee email, August 20, 2020; omissions in originals).

9) On August 20, 2020, Employee filed and purportedly served on Smith, former Employer attorney Vicki Paddock, a court reporter and Daniels five blank subpoenas, one for each of the five named people listed below, and six deposition notices including a records custodian, as follows:

> (1) Jeannie Fanning for September 2, 2020 at 12:00 p.m. "via Zoom."
> (2) Robert Morris for September 2, 2020 at 9:00 a.m. "via Zoom."
> (3) "AK Child and Familys [sic] Custodian of Payroll Records and Employee File" for August 31, 2020 at 9:00 a.m. "via Zoom."
> (4) Susan Daniels for August 31, 2020 at 2:00 p.m. "via Zoom."
> (5) Jeannie Tatum for August 31, 2020 at 11:00 a.m. "via Zoom."
> (6) Jessica Rush for September 1, 2020 at 9:00 a.m. "via Zoom." (Employee email, August 20, 2020).

10) On August 21, 2020, Setzer wrote to the parties in response to Employee's request for subpoenas submitted on August 20, 2020. Setzer stated the subpoena for Jeannie Tatum, Smith's paralegal, "will be denied because of the attorney-client privilege." However, Setzer signed five of the six subpoenas Employee submitted, on which Employee had stated:

> (1) "Robert Morris (already under subpoena and properly served!)" to appear and testify before the board on September 2, 2020, at 9:00 AM "Via Zoom" to "Appear & Testify regarding the retaliation and harasment [sic] of Ms. Leigh."
> (2) Employer's "Custodian of Payroll Records" to appear and testify before the board on August 31, 2020, at 9:00 AM "via Zoom. Deposition taken before midnight [sic] Sun Court reporters [sic]," regarding "payroll records, policy and procedures. Testify regarding the payment of Health Insurance made after injury by Ms. Leigh."
> (3) "Susan Daniels" to appear and testify before the board on August 31, 2020, at 2:00 p.m. "Via Zoom" regarding "illegally obtaining records, filing false EDI's [sic], withholding evidence, ect. ect. [sic].

> (4) "Jessica Rush (Former Adjuster)" to appear and testify before the board on September 1, 2020, at 9:00 a.m. "Via zoom" [sic] to "Appear and Testify."
> (5) Employer's "Director of Performance Improvement" Jeannie Fanning to appear and testify before the board on September 2, 2020, at 12:00 p.m. "Via Zoom" to "Appear & Testify (Review Ms. Leigh's Employee File prior to testimony to include all reports made to AK Child by Ms. Leigh and the investigations that coin[part of last word cut off]."

Each subpoena states, "Alaska law requires you to appear" and bears the official Workers' Compensation Division seal. (Subpoenas, August 21, 2020).

11) On August 24, 2020, Smith emailed Employee in reference to depositions and subpoenas:

> Ms. Leigh,
>
> I understand you would like to take depositions of at least five individuals based on the subpoenas we obtained this morning. You have unilaterally selected times and dates that do not work with the parties, or the individuals necessary for the depositions. I would prefer to talk to you and pick mutually convenient times for these depositions to occur. I am essentially reaching out with an olive branch to avoid continued unnecessary litigation. I believe it is much more efficient to mutually pick times instead of my office filing an objection to quash the subpoenas. Please let me know if you will be calling me to discuss a mutually convenient time for these depositions, or if you prefer me to file petitions to quash. (Smith email, August 24, 2020).

12) On August 24, 2020, Employee replied to Smith's August 24, 2020 email:

> Mr. Smith:
>
> I'm all for compromise . . . but, you on the other hand are only for it if it benefits you! Who do you think you are fooling? It certainly isn't me . . . and don't even talk to me about any olive branch . . . you mean I gave you an olive branch by not filing all the nonsense I was going to file against you on Friday?
>
> You can pick a time earlier . . . but, not a day later! Your witnesses have all had plenty of time to submit to a hearing or a deposition . . . just because your strategy backfired . . . . Never will that become my problem!
>
> Do you comprehend? (Employee email, August 24, 2020; omissions in original).

13) On August 24, 2020, Employee emailed Smith's assistant Tracy Lyons, Smith, Workers' Compensation Officer II Grace Morfield and Ringel:

> Tracy:
>
> You have the biggest mouth but yet you haven't answered me?
>
> Whose deposition is scheduled for the 28th?
>
> I said I was unavailable to argue with mr. smith [sic] which is true . . . I am forever unavailable to argue with that turd 💩! That however never will mean that a deposition can't be taken on that day. . . . I'm all about compromise!!!!!!! (Employee email, August 24, 2020; omissions in original).

14) On August 24, 2020, Smith responded to Employee's email:

> Ms. Leigh,
>
> I have no idea what question you are asking concerning a deposition on August 28th. The Board previously advised you the deposition you scheduled, did not provide adequate notice and they would not sign the subpoena for that day. You now have unilaterally re-set all of these depositions and obtained new subpoenas. Some of which do not provide adequate notice and some of which the parties are not available. If you are unwilling to have a prehearing conference to discuss these issues prior to the dates they are set, I will file another petition requesting the board to stay all of these subpoenas until after a prehearing can occur. Please let me know how you are going to proceed. (Smith email, August 24, 2020).

15) On August 24, 2020, shortly after Smith's email directly above, Employee and Smith had the following exchanges:

> What?
>
> Smith . . . are you out of your mind? (Employee email, August 24, 2020; omissions in original).
>
> Ms. Leigh,
>
> Does your response mean you are or are not willing to do a prehearing conference ahead of these depositions occurring? (Smith email, August 24, 2020).
>
> Mr. Smith:
>
> Does that mean you are are [sic] or you are not willing to do a neuro psych evaluation? (Employee email, August 24, 2020).

16) On August 24, 2020, Employer sought an order quashing the subpoenas, stating:

On August 21, 2020, Ms. Leigh submitted six subpoenas to the Board for signature for depositions. Five of these subpoenas were signed and through this petition, the employer is requesting the Board to quash these subpoenas. At the time of this petition, no deposition notifications have been served.

Previously, the employee filed a petition requesting the Board to compel the employer to produce discovery, including all investigational reports that were initiated concerning Ms. Leigh's co-employees at the time of her employment. This discovery petition was denied on July 6, 2020, and that denial was affirmed by the board with their August 18, 2020 Order. Based on the Board's prior determination, this information is irrelevant and the employer contends that the deposition of Jeannie Fanning to "appear and testify review Ms. Leigh's employee file prior testimony to include all reports made to Alaska Child by Ms. Leigh and the investigations that coincided." [sic] Should not be allowed. Essentially, Ms. Leigh again is requesting documentation concerning co-employees based on accusations or investigations that were initiated per her request while she was employed. The Board has already determined that this information is irrelevant. Thus, the employer contends that Ms. Leigh's attempt to depose Jeannie Fanning to obtain the same information is inappropriate and the subpoena should be quashed. Also, as of the date of this Petition, no deposition notice has been served. The subpoena indicated September 2, 2020 at noon. Depending on when Ms. Leigh actually serves notice of the deposition, it may be untimely. *See Miller v. Municipality of Anchorage*, AWCB decision No. 13-0099 (August 20, 2013); Alaska Civil Rule of Procedure 45; and Alaska Federal Rules of Civil Procedure 45(c)(3).

Ms. Leigh has also filed a subpoena and deposition notice concerning the custodian payroll of Alaska Child & Family and Susan Daniels. Both of these depositions have been set for August 31, 2020. Undersigned counsel has a prehearing conference and a deposition on the day that these depositions were set. Undersigned counsel has also advised Ms. Leigh if she would like to contact our office to find a mutually convenient time to set these depositions, we can do so. Instead, Ms. Leigh has unilaterally picked a time and date where a material party, meaning undersigned counsel, is unavailable. Thus, the employer requests the Board to quash the employee's subpoenas set for August 31, 2020.

Ms. Leigh has also submitted a subpoena for Jessica Rush to attend a deposition on September 1, 2020 at 9:00 AM. It is worth noting, that the deposition notice submitted with the subpoena is for August 1, 2020 at 9:00 a.m. Thus, the deposition does not appropriately notice the date matching the subpoena. As a result, Ms. Leigh has not submitted timely notification of this deposition. Again, the employer would like the ability to attempt to contact Ms. Rush to determine if she would be available and if so when, and then pick a mutually convenient time for the parties.

Similarly, Ms. Leigh filed a subpoena request for Robert Morris on September 2, 2020 at 9:00 a.m., with an attached deposition for September 2, 2020 at 2:00 p.m. This does not provide adequate notice since the two different times exist in

> comparison of the deposition notice and the subpoena. Additionally, Mr. Morris is currently employed by a different employer and would need adequate time to make himself available for a deposition since he would be missing work.
>
> Again, the employer contends that if Ms. Leigh would like to schedule these depositions, she could contact undersigned counsel and attempt to arrange for a mutually convenient time for all the parties she is requesting be present will be available. Lastly, no hearing on the merits has been set in this matter. The Board's most recent Order states that should not occur until discovery is completed. Specifically, Ms. Leigh has not signed the employer's release. Until such time a hearing on the merits is set, none of these depositions are relevant. (Petition, August 24, 2020).

17) On August 25, 2020, Employer sought a protective order so Employee could not obtain subpoenas from the board before the parties appear at a prehearing conference. It contended:

> The employer is filing this Petition for Protective Order concerning Ms. Leigh's submission of subpoenas. To date, Ms. Leigh has submitted over 26 subpoenas to the Board. Some of these have been signed and some have not. The employer has been obliged to file petitions to strike each time this occurs for various reasons. Additionally, the Board has addressed the relevancy of Ms. Leigh's request for witnesses at two different hearings, excluding the majority of her requests. The basis for the exclusions is relevancy. The employer is filing this petition to request the Board not to sign any further subpoenas in this matter without having a prehearing conference first. This will give the employer the opportunity to avoid unnecessary expenses filing petitions to strike, ability to determine if material witnesses are available, and voice concerns that the information sought has already been denied by the Board. (Petition, August 25, 2020).

18) On August 27, 2020, Employer sought an order staying subpoenas. It contended:

> Previously, on August 24, 2020 the employer filed a petition to quash five subpoenas the Board had signed, per the request of Ms. Leigh. The employer additionally requested a prehearing conference so these issues could be addressed prior to the scheduled subpoenaed depositions. Ms. Leigh has indicated she is unavailable to attend any prehearing conference prior to these depositions occurring.
>
> A prehearing conference has been scheduled in this matter for September 1, 2020 at 1:30 p.m. Prior to this prehearing conference occurring, Ms. Leigh has obtained subpoenas for three depositions. Depositions have been scheduled of a payroll custodian on August 31, 2020 at 9:00 a.m., of Susan Daniels on August 31, 2020 at 2:00 p.m., and of Jessica Rush on September 1, 2020 at 9:00 a.m. Through various correspondences on August 26, 2020, Ms. Leigh verified that she had not submitted deposition notification to Jessica Rush. Thus, any notification service occurring at

> this point in time is untimely and insufficient. *See Miller v. Municipality of Anchorage*, AWCB decision No. 13-0099 (August 20, 2013); Alaska Civil Rule of Procedure 45; and Alaska Federal Rules of Civil Procedure 45(c)(3).
>
> Recently, the Board has issued an Order opining that a hearing on the merits cannot be scheduled until all discovery is complete. Thus, there is no existing hearing necessitating the immediate need of these depositions. All of these depositions were not provided timely notice despite Ms. Leigh's representation that she served a certified true and correct copy to the parties. This was a misrepresentation. Since Ms. Leigh is unavailable to attend any prehearing conference prior to September 1, 2020, the employer through this petition is requesting the Board to unilaterally Stay the subpoenas concerning the payroll custodian's deposition on August 31, 2020 at 9:00 a.m., Susan Daniels' deposition on August 31, 2020 at 2:00 p.m., and September 1, 2020 deposition of Jessica Rush at 9:00 a.m. This Stay is being requested so that the employer can establish with the Board a Code of Conduct, scope of questions, and require Ms. Leigh to provide the appropriate notice prior to unilaterally scheduling depositions in this matter. The employer agrees that Ms. Leigh should have the opportunity to depose the employer's payroll custodian and Susan Daniels. These depositions can be rescheduled since no hearing is pending, at a mutually convenient time for all of the parties. (Petition, August 27, 2020).

19) On September 1, 2020, the parties appeared telephonically before board designee Workers' Compensation Officer II Felicia Baptista to address Employer's: (1) August 24, 2020 petition to quash five subpoenas; (2) August 25, 2020 petition for a protective order to prevent Employee from submitting subpoenas without first appearing at a prehearing conference; and (3) August 27, 2020 petition to stay subpoenas already issued. Employer argued Employee does not always properly serve subpoenas or give adequate notice for deposition testimony. It further contended she has filed 26 subpoenas, and a prehearing conference should occur before any more are ordered. Employer contended Employee is abusing the subpoena power provided in the Act and in the regulations and causing unnecessary expense and litigation for the parties and potential opponents. While Employer did not oppose the board issuing subpoenas or the parties having depositions, it contended a prehearing conference would allow it to participate to avoid scheduling conflicts. It also contended the board should quash two of five subpoenas issued on August 21, 2020, because deponents Morris and Fanning had not received a deposition notice. Employee contended Smith lies and she and other injured workers are sick and tired of being called "liars and scumbags." She reiterated other matters not relevant to the discovery dispute pending before the designee; specifically, Employee wanted Smith to explain why a December 2015 controversion notice was still active based on an allegation that she had refused to return to modified work duty, when she

contends she had returned to work. However, on the prehearing-before-a-subpoena issue, Employee contended there is no law that allows the designee to require a prehearing conference before a party obtains a subpoena; to do so in her view would be an "abuse of power." Employee maintained she served deposition notices on Morris and Fanning using a process server. Employer contended Employee is confusing serving Morris for a hearing in February, which is not same thing as serving him for a deposition in September. Employee contended "Mary" the court reporter actually served the deposition notices on Morris and Smith for Morris' deposition. When the designee asked the dates the Morris and Fanning notices were served, "Employee refused to provide it, stating she did not need to make arguments before a Board designee." Employer contended it is within the designee's authority to require a prehearing conference prior to the board issuing subpoenas in the future just as the board has power to issue subpoenas in the first instance. Employee said that while she would not sign Smith's psychiatric records release she would sign an appropriate one, which she implied would be of her own making. The written order noted:

> Due to frequent interruptions, arguments unrelated to today's issues, and general hostility between the parties, the designee could not elicit meaningful information or clarification; the designee relied on the agency file to issue the following orders.
>
> The Employee's requests for subpoenas without consultation with the Employer has resulted in numerous disputes, and it is not quick, fair, or efficient for either party to have to deal with repeated petitions and prehearings. Further, there was no evidence the subpoenas were properly served in a timely manner; therefore the designee **GRANTED** the Employer's petition for protective order. The designee also partially **GRANTED** the Employer's petition to quash the two subpoenas for Mr. Morris and Ms. Fanning as there was no evidence they were properly served.

Employee hung up on the designee and the conference ended. The designee's written order states:

> 1. 08/25/2020 ER's August 25, 2020 Petition for Protective Order concerning EE's submission of subpoenas **GRANTED** -- A prehearing with a hearing officer will be necessary prior to approving any subpoenas submitted by the Employee to allow parties to find a mutually agreeable date and deposition method.
>
> 2. 08/27/2020 ER's August 27, 2020 Petition to stay subpoenas of Custodian of Payroll Records, Susan Daniels, and Jessica Rush.
> **Moot** -- details below
>
> 3. 08/24/2020 ER's August 24, 2020 Petition to quash five subpoenas (listed below)

4. **GRANTED in part** -- details below. . . .

The designee ordered deponents Morris' and Fanning's subpoenas were quashed because they were not properly or timely served. She also decided the subpoenas for Employer's payroll records custodian, Daniels and Rush were moot because the deposition dates for these had already passed. (Prehearing Conference Record; Prehearing Conference Summary, September 1, 2020).

20) On September 1, 2020, following the prehearing conference, Employee called the division *ex parte* and spoke with Morfield, who recorded:

> EE called upset and requested a hearing, informed her that we have to set a prehearing to set a hearing. EE stated she wished to file a petition on today's prehearing. Explained to her that once we receive the petition we will set a prehearing. EE got angry and demanded that I set a hearing now on a petition she has not filed and I asked her how she will serve it on the opposing party. She said she will email but she is telling me now and wants it scheduled now. As I tried to explain it to her she got really upset and was crying and hanged [sic] up. I didn't really understand what she wanted the hearing for until I talked to the prehearing officer and figured out that she wanted a hearing on prehearing officer's discovery ruling. So, I set a hearing on the written record per EE's verbal request to appeal board designee's discovery ruling on 9/1/2020 prehearing. (Phone call note to agency file, September 1, 2020).

21) The division treated Employee's September 1, 2020 teleconference with Morfield as a request to appeal Baptista's September 1, 2020 discovery rulings. (Experience; judgment).

22) Later on September 1, 2020, at 4:16 PM Employee sent Baptista several emails with copies to Smith, Ringel and Workers' Compensation Division Director Charles Collins:

> Mr. Ringel
>
> I wanted to file a formal complaint regarding The [sic] woman that Violated [sic] her discretion in today's prehearing.
>
> Please cite me the law that allows this woman to arbitrary [sic] make the decisions she made today? Is she an attorney? Do I have no rights? She just took away discovery from me!!!!!
>
> She should not be working there any longer.
>
> I want to see the report!

At 5:37 PM, Employee wrote:

> Mr. Ringel
>
> Did you not get my message? Or I just don't deserve an answer? You get to waste my time how many years? And how many more?
>
> This woman is in desperate need of a heart. . . . I actually feel very bad for her after listening to the hearing!
>
> I will pray for her poor soul! . . . but, I cannot have her Doing [sic] power trips and atrocious behavior on other vulnerable injured workers. She doesn't listen to a word out of our mouths . . . this is her pattern abd [sic] I did bring it up in the hearing.
>
> The supreme court [sic] will get a far more detailed descriptions [sic] of the things this woman has done/not done. . . . I still however expect you to do your own investigation. The December 12, 2019 pre hearing that is already transcribed will be haunting this woman with her own words!!!!
> . . . .
>
> I will call tomorrow to make sure she's fired, she literally has no business being in her position!

At 6:35 PM, Employee wrote:

> FYI: the only reason any of you have a job is because injured workers are injured.
> . . .
>
> Don't ever forget it!

At 7:25 PM, Employee wrote:

> And Mr. Collins if Mr. Ringel or Batista [sic] dare say anything contrary to what I have stated . . . you may contact me personally!

At 7:48 PM, Employee wrote to Smith, Ringel, Daniels and Collins:

> Mr. Collins:
>
> You will be getting every single one of my emails from here on out.
>
> So. . . .
>
> I suggest you get mighty familiar with my case . . . than [sic] you would at least be farther [sic] than the defense, the adjuster and everyone at the board!

> I than [sic] would suggest you take a very thoughtful look into the inner workings of your SYSTEM your [sic] in charge of (Mr. Ringel doesn't have a backbone!). . . . I will inform you who was respectful to me at the board and whom has no business ever stepping foot in that office again!
>
> Northern adjusters [sic] will not [sic] longer be in business when I'm done with this woman as well.

At 8:09 PM, Employee wrote to Baptista, Ringel, Smith and Collins:

> In case it wasn't obvious to everyone. . . .
>
> I never want to see or hear that woman's name mentioned again nor do I ever want to see that unkind woman at the board!

At 8:38 PM, Employee wrote to Baptista, Ringel, Smith and Collins:

> Oh and another snotty woman I talked to today . . . Theresa was her name is what the recording sounded like she said her name was. . . .
>
> This woman was literally arguing with me that she didn't have to listen to me, and she lost it when I said they force us to argue every single day if [sic] our lives and he [sic] called liars and all sorts of names ever [sic] single day by defense counsel. (Employee emails, September 1, 2020; omissions in originals).

23) On September 2, 2020, the division served on the parties a "**HEARING NOTICE ON THE WRITTEN RECORD**" for September 24, 2020, on Employee's oral appeal of the designee's September 1, 2020 discovery orders. The notice states:

> **This case has been set for hearing on the written record. It will be decided based on documents in the board's case file and the parties' written arguments. If filed, written arguments must be filed at the address below and served all parties no later than five business days prior to the hearing.** (Hearing Notice on the Written Record, September 1, 2020; emphasis in original).

24) On September 17, 2020, Employer's brief reiterated its September 1, 2020 prehearing conference arguments. It contends the board's designee appropriately quashed the Morris and Fanning deposition notices and subpoenas because Employee failed to provide proper service and timely notice. Employer contends the designee was correct to require a prehearing conference prior to the division issuing any subpoenas in this case to avoid ongoing litigation and inconvenience to the parties and witnesses. It does not object to Employee scheduling relevant

depositions so long as they are arranged in advance to take into account the parties' and witnesses' availability. (Employer's Hearing Brief, September 17, 2020).

25) On September 18, 2020, Employee filed and served her hearing brief. The brief made no relevant arguments and did not reiterate any argument or evidence offered at the September 1, 2020 prehearing conference. (Hearing Brief for Discovery Issues and Release of Information Petition to Quash Subpoenas/Petition to Dismiss, September 18, 2020).

26) On September 24, 2020, at approximately 8:34 AM, Williams called the division to confirm the hearing was a written record variety and parties were not required to attend. She said Employee was confused because in 2018 she was "required to attend" what she thought was a written record hearing. A Workers' Compensation Technician explained the differences in hearing types but Williams wanted something in writing explaining it. Employee joined the call and said she wanted the explanation from the designated chair. The technician suggested Williams and Employee submit a written request. (Phone call note, agency file, September 24, 2020).

27) Depositions are an integral part of discovery. (Experience; observations).

PRINCIPLES OF LAW

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." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987).

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

> (c) . . . 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.
>
> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 44.62.570. Scope of Review**. . . .
>
> (b) . . . Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
>
> (c) . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by
>
> (1) the weight of the evidence; or
> (2) substantial evidence in the light of the whole record.

Several definitions of "abuse of discretion" appear in Alaska law although none appears in the Act. An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884 (Alaska 1962).

> **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;
> . . . .
> (4) limiting the number of witnesses, identifying those witnesses, or requiring a witness list in accordance with 8 AAC 45.112;
> . . . .
> (10) discovery requests;
> . . . .
> (15) other matters that may aid in the disposition of the case.

Miller v. Municipality of Anchorage, AWCB Decision No. 13-0099 (August 20, 2013), held that seven days was not a reasonable time for a witness to respond to a subpoena.

ANALYSIS

Did the designee abuse her discretion in her September 1, 2020 discovery orders?

On September 1, 2020, the prehearing conference designee issued the following orders after a contentious conference: (1) Employer's August 25, 2020 Petition for a Protective Order concerning Employee's subpoena requests was granted; the designee ordered a prehearing conference with a hearing officer prior to approving any subpoenas submitted by the Employee, to allow parties to find a mutually agreeable date and deposition method; (2) Employer's August 27, 2020 petition to stay existing subpoenas of its Custodian of Payroll Records, Susan Daniels, and Jessica Rush was found moot because the deposition dates had already passed; and (3) Employer's August 24, 2020 petition to quash five subpoenas were granted in part and Morris' and Fanning's subpoenas were quashed because they were not properly or timely served.

Employee was upset at and following the September 1, 2020 prehearing conference when the designee granted Employer's requests concerning discovery. Shortly after the prehearing conference, Employee called the division *ex parte* to demand a hearing. After reviewing the file and speaking with the designee who held the prehearing conference, staff determined that Employee wanted to appeal the designee's orders. At the designated chair's direction and in an effort to move Employee's case forward, the division scheduled a written record hearing; the chair could have and should have given Employer better notice about the issue set for hearing.

This decision on the written record is prohibited by statute from considering any evidence or argument not presented to the designee at the subject prehearing conference. AS 23.30.108(c). The September 1, 2020 prehearing conference recording and summary shows Smith and Employee repeatedly spoke over each other and on occasion over the designee. This makes the parties' arguments and any evidence upon which they relied at the prehearing conference difficult to discern. As best as can be determined from the prehearing conference recording, the only relevant arguments Employee made on Employer's requests was her implicit contention that no statute

allowed the designee to require a prehearing conference before the division issued any further subpoenas in her case, and her contention that Morris and Fanning were properly and timely served with deposition notices and associated subpoenas.

(1) Employer's August 25, 2020 Petition for a Protective Order concerning Employee's subpoena requests.

The legislature expressly requires all decision-makers to interpret the Act to ensure "quick, fair, efficient, and predictable delivery" of benefits to Employee if she is entitled to them, at a "reasonable cost" to Employer. All hearings must be impartial and fair to all parties and each party must be afforded due process and an opportunity to be heard and their arguments and evidence to be fairly considered. AS 23.30.001(1), (4). The Act delegates authority to a "designee" at a prehearing conference to resolve discovery disputes and rule on all related "discovery matters." AS 23.30.108(c). Nothing in the Act requires the designee to be an attorney or hearing officer. Both parties have a right to file a petition seeking a protective order. AS 23.30.001(4). Employer's petition to require a prehearing conference before Employee can obtain additional subpoenas falls within the broad concept of a "discovery matter," which a designee can address at a prehearing conference, because depositions are indisputably part of discovery. *Rogers & Babler*.

Given the Act's delegation of authority to a designee to resolve discovery matters at a prehearing conference, the designee is empowered to make her investigation or inquiry in the manner by which she may best ascertain the parties' rights. AS 23.30.135(a). Baptista accepted Employer's argument and evidence that Employee failed to coordinate depositions and failed to timely give accurate notice of the times and places for depositions to the deponents. When asked to refute with evidence Employer's contentions at the prehearing conference, Employee refused, stating she did not have to present this evidence to the designee and would present it at the appeal hearing. The designee's decision is reasonable, supported by substantial evidence and is not an abuse of discretion. AS 44.62.570. Employee's appeal brief contains no supporting evidence refuting Employer's allegations, notwithstanding the prohibition from considering the brief even had it contained evidence because Employee provided no evidence at the September 1, 2020 prehearing conference. AS 23.30.108(c). Given the legislative mandate to interpret the Act quickly, efficiently, fairly and predictably and in a way to keep Employer's costs reasonable, and the

designee's statutory authority to resolve discovery disputes, the designee's September 1, 2020 order requiring a prehearing conference before Employee can obtain additional subpoenas was reasonable, followed the law and was not an abuse of discretion. *Manthey*; 8 AAC 45.065(a)(10).

As a layperson, Employee cannot be expected to understand perfectly what witnesses may be relevant to issues pending in a case. Consequently, a hearing officer designee will review Employee's future subpoena requests for depositions at a prehearing conference and both parties will have an opportunity for their evidence and arguments to be fairly considered before further subpoenas will be issued. AS 23.30.001(4). This will reduce Employer's costs because it will not have to file a petitions for protective orders or to quash inappropriate, irrelevant or improperly scheduled depositions. AS 23.30.001(1).

The designee's September 1, 2020 discovery order is also consistent with her regulatory discretion to identify and simplify issues, limit the number of witnesses, address discovery requests and resolve "other matters that may aid in the disposition of the case." 8 AAC 45.065(a)(1), (4), (10), (15). Requiring the parties to attend a prehearing conference before the division signs Employee's subpoenas will save all parties considerable time and cost, while still maintaining her right to appeal the designee's discovery decisions and ultimately to obtain a subpoena if one is warranted. Therefore, the designee did not abuse her discretion and the appeal on this point will be denied.

(2) Employer's August 27, 2020 petition to stay existing subpoenas.

It is undisputed that the times and dates on subpoenas for Employer's payroll records custodian, Daniels and Rush had already passed by the time the designee held the September 1, 2020 prehearing conference. Consequently, the designee did not abuse her discretion and correctly determined that Employer's request to stay these three subpoenas was moot. *Manthey*.

(3) Employer's August 24, 2020 petition to quash five subpoenas.

The parties agreed that Employer's payroll record custodian and Daniels had already been deposed. The designee granted Employer's request to quash subpoenas for Morris and Fanning because Employee failed to prove she had properly and timely served them with both a deposition notice and a subpoena. Parties must give witnesses "reasonable" notice prior to a deposition.

Reasonable notice has generally been considered more than seven days. *Miller*. Employee failed to present evidence at the September 1, 2020 prehearing conference, or even in her appeal hearing brief, demonstrating she gave Morris and Fanning more than seven days' notice of their depositions through proper deposition notice and subpoena service. Therefore, the designee did not abuse her discretion and Employee's appeal on this point will be denied. *Manthey*.

Lastly, on September 24, 2020, Williams called the division to confirm her appeal hearing was on the written record and the parties need not appear. She and Employee further requested a written explanation for why Employee appeared at a 2018 hearing, which she thought was also on the written record, but the parties do not need to appear at today's hearing.

The only hearing Employee attended in 2018, resulted in *Leigh I*, which addressed Employer's appeal from an adverse discovery order. Procedurally and by statute, the 2018 hearing also should have been on the written record. But at the April 24 2018 prehearing conference, Employee, represented by an attorney, stipulated to an "oral hearing" on July 24, 2018. At that hearing, Employee's former attorney raised AS 23.30.108(c) and contended the evidence and arguments at hearing should be limited to those presented at the prehearing conference giving rise to the appeal, except for a medical expert's deposition that she wanted considered. Employer had no objection to this process and the hearing proceeded accordingly. If this explanation is inadequate, Employee is encouraged to contact her former attorney for more information.

CONCLUSION OF LAW

The designee did not abuse her discretion in her September 1, 2020 discovery orders.

ORDER

Employee's September 1, 2020 oral appeal from the designee's September 1, 2020 prehearing conference discovery orders is denied. A designee who is a hearing officer will conduct a prehearing conference before the division will issue any further subpoenas in this case.

Dated in Anchorage, Alaska on September 25, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, Member

/s/
Nancy Shaw, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Allison Leigh, employee / claimant v. Alaska Children's Service, employer; Republic Indemnity Co. of America (RIG), insurer / defendants; Case No. 201503591; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 25, 2020.

/s/
Nenita Farmer, Office Assistant