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, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201503591 AWCB Decision No. 21-0105 Filed with AWCB Anchorage, Alaska on November 22, 2021

Alaska Children's Service and its insurer's (collectively, Employer) November 23, 2020 and January 22, 2021 petitions to dismiss Employee Allison Leigh's claims were heard in Anchorage, Alaska, before a two-member panel on November 2, 2021, a date selected on September 29, 2021. A December 17, 2020 request gave rise to this hearing. Non-attorney Heather Johnson appeared by Zoom, represented Employee, who also appeared by Zoom, and testified on her behalf. Attorney Colby Smith appeared and represented Employer. As preliminary matters, the panel heard Employee's November 1, 2021 email request to disqualify Member Sara Faulkner from participating in the case; October 5, 2021 petition to quash the November 2, 2021 hearing and to add issues for hearing; and October 21 and November 1, 2021 petitions for a continuance. The record closed at the hearing's conclusion on November 2, 2021.

On October 5, 2021, Employee signed Employer's medical record release, resolving the main basis for Employer's petitions to dismiss. However, at the November 2, 2021 hearing, Employer contended Employee's claim should still be dismissed, because she repeatedly ignored an earlier protective order to cease contacting Smith's clients directly. At hearing, oral orders denied Employee's disqualification request but granted the continuance. This decision examines the oral orders and decides Employer's petitions to dismiss based on Employee's undisputed refusal to cease contacting Smith's clients directly.

ISSUES

At hearing, Employee contended Member Faulkner should be disqualified from hearing her case based on conflict of interest and to avoid the appearance of impropriety. She contended Employer had already stipulated to replace Member Faulkner.

Employer contended it never stipulated to replace Member Faulkner. It did not otherwise state a position on her participation.

1) Was the oral order declining to disqualify Member Faulkner correct?

In her October 5, 2021 petition, Employee contended she signed and delivered a medical record release to Employer, which eliminated the grounds for Employer's petitions to dismiss. She contended a merits hearing must be held on all her claims on November 2, 2021. Employee also contended her request for a "frivolous or unfair controversion" finding arising from Employer's December 22, 2015 controversion notice should be heard at this hearing.

Employer contended Employee's medical care issue was not ripe for hearing because Employer had just received the signed medical release after not having one for over a year. It also offered a second contention to support its petition to dismiss Employee's claims -- her willful failure to obey a previous order directing her to not contact Smith's clients directly, which must be decided.

2) Should Employee's claim be dismissed for willfully contacting represented parties?

In her October 21, 2021 petition, Employee contended the November 2, 2021 hearing should be continued for numerous reasons.

Employer opposed the continuance and contended Employee had taken inconsistent positions; she wanted the dismissal hearing continued but she wanted other issues from her claim heard on November 2, 2021; her representative wanted the entire hearing continued. Employer contended no other issues were set for hearing and only the dismissal issue could be heard and decided.

3) Was the oral order continuing the November 2, 2021 hearing correct?

FINDINGS OF FACT

A preponderance of the evidences establishes the following relevant facts and factual conclusions:

1) On January 13, 2017, non-attorney Employee filed a claim for various benefits. (Claim for Workers' Compensation Benefits, January 11, 2017; observation).

2) On February 8, 2017, Employer controverted the benefits requested in Employee's January 13, 2017 claim and noticed her by mail. (Controversion Notice, February 6, 2017).

3) On February 12, 2018, Employee timely requested a hearing on her January 11, 2017 claim. (Affidavit of Readiness for Hearing, February 12, 2018).

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

5) After appellate review of *Leigh I*, the parties appeared for another hearing on August 6, 2020. From that hearing, *Leigh v. Alaska Children's Service*, AWCB Decision No. 20-0071 (August 18, 2020) (*Leigh VII*) ordered Employee to sign and deliver to Smith a medical record release including psychological, psychiatric and mental health counseling records from 2007 to the present. (*Leigh VII* at 60).

6) On September 14, 2020, Employer sought a protective order directing Employee to have no direct contact with Smith's clients. (Petition, September 14, 2020).

7) On October 27, 2020, the Board's designee at a prehearing conference granted Employer's request for a protective order and stated:

> 9. Employer 09/14/2020 Petition for a protective order: "The protective order is to indicate that Ms. Leigh can no longer have direct communications with Alaska Child & Family Services and Northern Adjusters."
>
> > **GRANTED**. Under 8 AAC 45.065(15) *the designee will exercise discretion on other matters that may aid in the disposition of the case*. To ensure the process remains fast, fair and efficient, all contact from the Employee and her representative must go through the Employer's attorney, Colby Smith. (Prehearing Conference Summary, October 27, 2020) (emphasis in original).

8) Employee did not appeal the October 27, 2020 protective order to the Board. (Agency file).

9) It is undisputed that Employee has repeatedly contacted Smith's clients directly by email after he had entered his appearance. For example, on November 21, 2020, Employee emailed Smith and his client Susan Daniels directly and advised, "As you are fully aware All Releases have been revoked by myself!" Later the same day, Employee emailed Smith and Republic Indemnity Insurance, one of Smith's clients, directly. (Leigh emails, November 21, 2020).

10) On November 23, 2020, Employer sought an order dismissing Employee's claim (1) because she refused to sign the releases as ordered in *Leigh VII*, and (2) because she violated the Board designee's October 27, 2020 protective order that she not contact Smith's clients directly. (Petition, November 23, 2020).

11) On January 22, 2021, Employer again sought an order dismissing Employee's claim for the same reasons stated in its November 23, 2021 request. (Petition, January 22, 2021).

12) On September 29, 2021, at 10:00 AM, Smith appeared at a properly noticed prehearing conference by telephone but Employee did not appear; the designee tried to call Employee but her phone number was not in service. Employee had earlier this date sent the Division an email asking for a later prehearing time because she had "high blood pressure." When the designee could not reach Employee at 10:00 AM, he continued the prehearing conference until 11:30 AM; the designee was not available to conduct a prehearing conference later in the day. Smith notified Employee by email that the prehearing conference had been adjourned to 11:30 AM. (Smith email, September 29, 2021). At 11:30 AM, Smith again appeared by telephone, and when Employee did not appear, the designee again tried to call her, unsuccessfully. The prehearing conference proceeded in her absence and the designee set a November 2, 2021 hearing limited to Employer's November 23, 2020 and January 22, 2021 petitions to dismiss Employee's claim for (1) failing to sign the medical record release *Leigh VII* had ordered her to

sign and (2) her undisputed, repeated violation of the designee's October 27, 2020 protective order directing her to have no contact with Smith's clients directly. (Prehearing Conference Summary, September 30, 2021).

13) On October 5, 2021, Employee signed Employer's medical record release. (Medical record release, October 5, 2021).

14) After Employee signed the medical record release at issue, the parties failed to schedule or attend a prehearing conference, as the Board's designee Jung Yeo requested, to add or clarify any remaining issues for the November 2, 2021 hearing. (Jung Yeo; Colby Smith; and Allison Leigh emails, October 11, 2021; agency file).

15) On October 21, 2021, Employee asked for an order continuing the November 2, 2021 hearing contending: (1) the Division failed to provide Employee's agency file to her and she lives in Arizona; (2) the Division failed to provide subpoenas for her witnesses; (3) medical benefits were not added as an issue for the hearing; (4) no new prehearing conference was held to add medical benefits as an issue for hearing and the previous prehearing conference summary was never changed; (5) Employee signed and returned the medical record release at issue, rendering the dismissal issue moot; (6) she has not received a copy of any evidence Employer has obtained by using the release; (7) the Division had not explained Electronic Data Interchange (EDI) reports to her; (8) the Division only gave Employee one month to prepare for hearing even though she had been asking for a hearing for years while she lived in Alaska; (9) Employee did not know "what hearing is supposed to be about"; (10) she objected to Hearing Officer Yeo's September 29, 2021 prehearing conference summary because he had blocked her emails, so none of her issues were considered; (11) a protective order must be issued to stop Smith from re-disclosing records without first informing Employee; (12) a protective order needs to be issued to stop Smith from "tampering with" Employee's witnesses; and (13) the hearing needs to be reset for two days to accommodate the witnesses Employee plans to call. (Petition, October 21, 2021).

16) On October 27, 2021, non-attorney Heather Johnson entered an appearance for Employee. (Notice of Appearance, October 27, 2021).

17) At the Zoom hearing on November 2, 2021, Employee, then represented by non-attorney Johnson, repeatedly and continuously interrupted the hearing. (Record).

18) On the Faulkner recusal issue, Employee admitted she had not filed a petition or an accompanying affidavit to disqualify Member Faulkner because Johnson was too busy working on a brief before the Alaska Supreme Court in another case, had just entered her appearance, and had not read a lengthy email from the designated chair to the parties explaining exactly how to request a Board member's disqualification. Employee contended Member Faulkner had a conflict of interest and participation would at least be an appearance of impropriety if not improper. (Record).

19) Johnson testified that Smith's law firm (through attorney Schwarting) represents claimant "Twing" who had pending workers' compensation "claims" against Member Faulkner's business, at least one arising from Twing allegedly getting hit by a "backhoe bucket." Johnson testified that Member Faulkner's husband failed to report this injury. Employee further contended and Johnson testified that Member Faulkner did not mention this backhoe bucket incident on her Alaska Public Offices Commission (APOC) report; she provided no evidence that the APOC requires such information. Because Smith's firm represents Member Faulkner's business against a party who had allegedly filed claims against Member Faulkner's business, Employee contended this created a direct conflict of interest requiring Member Faulkner's disqualification. In Johnson's opinion, Member Faulkner may rule against Employee in the instant case just to keep her insurance premiums low, since she allegedly testified at a recent, unspecified meeting that she was trying to "lower premiums." Johnson further said Member Faulkner and Smith's client in this case Susan Daniels are "personal friends," and Daniels bought or leased property from Member Faulkner; Johnson admitted she heard this through "friends." Thus, Employee contended Member Faulkner cannot be impartial. As further support for this contention, Johnson referenced the last hearing in which she participated when Member Faulkner was on the hearing panel; in Johnson's opinion, Member Faulkner was "not impartial" in that case but Johnson provided no specifics. Employee is concerned Member Faulkner will have regular conversations with Smith about cases in which his law firm represents her business and speculated the conversations might drift toward the instant matter. In her view, Member Faulkner could not find Smith "not credible" if she is represented by him. When asked if there were any other grounds supporting Employee's request to disqualify Member Faulkner, Johnson testified Member Faulkner used to be Johnson's Employer but did not specify when, in what capacity or how that prior relationship could affect Member Faulkner's objectivity in this case.

She further added as a ground for disqualification -- in Johnson's opinion Member Faulkner was "a big piece of crap." (Johnson).

20) Before hearing, the chair had reviewed the *Twing* files, took official notice and so advised the parties at hearing that claimant Twing had three cases in the Division's database against Member Faulkner's business. However, there were no "claims" filed or pending in any of those three cases. Smith's law firm (through attorney Schwarting) had entered an appearance in only one case. The panel further took official notice and advised the parties that in mid-2020, Member Faulkner's business changed insurance companies from Republic Indemnity to another insurer, so Member Faulkner's business was no longer paying premiums to Republic Indemnity. Employee provided no evidence showing any financial gain or loss to Member Faulkner based on her business' past relationship with Republic Indemnity or its adjuster. (Record).

21) Member Faulkner stated: She has never spoken to Smith outside a hearing room and did not think she had ever even spoken to him during a hearing. She has no relationship with Susan Daniels and does not know her. Member Faulkner has no financial interest in Employee's case and can be fair and impartial. She has two relatives who share her name and thought perhaps Johnson's friends were confusing her with her two relatives by the same name. (Record).

22) At hearing, the designated chair's oral order denied Employee's request to disqualify Member Faulkner, based on Employee's failure to prove that Member Faulkner had a conflict that was substantial and material or that she showed actual bias or prejudgment. The chair noted Alaska is a small insurance market served by relatively few insurers and adjusters. He also noted many people favor reduced insurance premiums. (Record).

23) On the continuance request, Employee contended she lives out-of-state and did not feel "comfortable" returning to Alaska to assist her representative in hearing preparations. Her newly-acquired representative did not have enough time to present a brief. Johnson testified Employee's repeated interruptions during the hearing reflected her "attention span" issues, implying this meant Employee needed assistance in preparing and presenting her case. When expressly asked if she believed Employee needed a guardian for her workers' compensation claim, Johnson testified Employee did not need a guardian but just "needs to be heard." Employee further contended a hearing continuance was needed because she had requested her agency file both for herself and Johnson and alleged neither had yet received it. Johnson testified she had no idea what was going on in this case and it would take her time to review it,

speak to doctors and get subpoenas. Johnson further suggested the Division should have "accommodated" Employee before it scheduled the hearing, but did not state specifically what accommodation Employee needed and what the Division failed to accommodate; however, she did mention the hearing should have started "later in the day." Employee contended Hearing Officer Yeo blocked her emails, preventing her from participating in the prehearing conference in September 2021. She further contended all issues in this case should be heard together, noting a continuance would be appropriate because Employee "has been tortured by these people and the Board." (Johnson).

24) Employer contended Employee has a pattern of delaying her case especially when it comes to issues that could result in it being dismissed. She only recently signed the medical records release and Employer had yet to have an opportunity to use it to complete discovery; nevertheless, some issues could be heard at this hearing and no witnesses were needed for those issues. Employer conceded it had received no medical records from Arizona, where Employee resides. Nevertheless, it contended if the panel continued the hearing to give Johnson more time to prepare, the Board should "freeze" the procedural deadlines as previously stated in the September 29, 2021 prehearing conference. Employer reasoned it abided by the procedural timelines and timely filed a witness list and a brief; Employee filed neither. It contended Employee would have an unfair advantage if the Board "reset" the filing deadlines and she could use Employer's hearing brief to bolster her hearing preparation and fill in missing information or evidence. Notwithstanding the fact that Employee recently signed the medical record release, Employer contended the Board should still dismiss Employee's claims because she repeatedly violated the Board's protective order that directed her to have no personal contact directly with Smith's clients. It presented no specific statute, regulation or case law supporting this request. (Record).

25) At hearing, the panel's oral order granted Employee's continuance request, primarily so her representative could prepare for hearing, but denied Employer's request to "freeze" the record. The remaining dismissal issue was discussed at hearing but taken under advisement. (Record).

26) Effective November 10, 2021, Johnson, who may have been able to assist Employee with prosecuting her claims, withdrew from representing her. (Johnson email, November 10, 2021; experience; judgment).

PRINCIPLES OF LAW

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

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

> **AS 23.30.110. Procedure on claims**. . . .
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> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing.
> . . .
> . . . .
>
> (h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.

> **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 44.62.450. Hearings**. . . .
>
> (c) A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. . . . An agency member may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.

In *Kling v. Norcon, Inc*., Superior Court Case No. 3AN-92-1232 (September 2, 1993), an injured worker appeared for his hearing against two defendants before a three-member Board panel. The "labor" panel member immediately recused himself, leaving the hearing officer and the industry member, a quorum, remaining on the panel. The industry panel member disclosed that his company had retained the employer's attorney "for the last five years to do worker compensation cases." He also disclosed that he had "an active case with her at the moment" that was "actually closing up." The industry panel member said he had also retained the law firm representing the second defendant as well. Despite the injured worker's objections at hearing, the industry member refused to step down "claiming that he could be fair." (*Id.* at 2).

The Board ruled against the claimant and he appealed to the superior court. Relevant to the instant matter, the claimant contended on appeal that the Board's proceedings had violated his state and federal constitutional right to due process because the industry panel member was allowed to sit on the case despite his acknowledged, ongoing and extensive professional relationship with the employer's attorney. The employer and the Board contended that disqualification is required only in instances of "actual bias." Since the industry member denied he harbored any such bias, and because his presence was required by AS 44.62.450(c), which precludes recusal of an agency member "if disqualification would prevent the existence of a quorum qualified to act in a particular case," *Kling* held the Board acted properly to proceed with the hearing with the industry member seated on the panel. In reviewing the parties' arguments, the superior court in *Kling* concluded:

> The court . . . concerned . . . there was at least an appearance of impropriety here, undertook to research additional law. . . . No case directly on point was found.

Despite broad language regarding the importance of preserving the "appearance of justice," the opinions in this area rest on the maxim that adjudicators enjoy a presumption that they are unbiased. Only a direct, usually personal and pecuniary interest can operate to rebut the presumption. *See*, *Schweiker v. McClure*, 45 U.S. 188 (1982); *Sifagaloa v. Bd. of Trustees*, 840 P.2d 367 (Hawaii 1992); *Airline Pilots Ass'n v. United States Department of Transportation*, 899 F.2d 1230 (D.C. Circ. 1990). No such interest was demonstrated in this case. (*Kling* at 12).

8 AAC 45.070. Hearings. . . .

(b) Except as provided in (1)(A) of this subsection and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). . . .

(1) A hearing is requested by using the following procedures:

. . . .

(C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.

. . . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when
. . . or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;
. . . .

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

(1) the affidavit of readiness is inoperative for purposes of scheduling another hearing;
. . . .
(3) a party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

8 AAC 45.105. Code of conduct. (a) Nothing in this section relieves a board member's duty to comply with the provisions of AS 39.52.010-39.52.960 (Alaska Executive Branch Ethics Act) and 9 AAC 52.010-9 AAC 52.990. A board member holds office as a public trust, and an effort to benefit from a personal or financial interest through official action is a violation of that trust. A board member is drawn from society and cannot and should not be without personal and financial interests in the decisions and policies of government. An individual who serves as a board member retains rights to interests of a personal or financial nature. Standards of ethical conduct for a board member distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) The provisions of this section do not prevent a board member from following other independent pursuits, if those pursuits do not interfere with the full and faithful discharge of a board member's public duties and responsibilities under AS 23.30 and this chapter.

(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member (1) has a conflict of interest that is substantial and material; or (2) shows actual bias or prejudgment.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if

the recusal is based on clear and convincing evidence that the board panel member (1) has a personal or financial interest that is substantial and material; or (2) shows actual bias or prejudgment.

(e) Unethical conduct is prohibited, but there is no substantial impropriety or substantial appearance of impropriety if, as to a specific matter, the standards of AS 39.52.110(b) would permit participation.

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. (a) Before conducting a hearing on a case, each board panel member shall be given the names of the parties involved in the hearing and any other appropriate information necessary for the board panel member to determine if the individual member, or another member, has a conflict of interest as described in 8 AAC 45.105.

(b) If a board panel member determines that the member has a potential conflict of interest, the potential conflict of interest must be disclosed to the board panel chair before the hearing.

(c) Upon notification by a board panel member of potential conflict of interest under (b) of this section, the board panel chair shall request that the board panel member recuse oneself or refer the matter to the remainder of the board panel to determine if recusal is appropriate.

(d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

8 AAC 45.120. Evidence. . . .

(e) . . . 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. . . .

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may

> not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1) Was the oral order declining to disqualify Member Faulkner correct?

On November 1, 2021, Johnson sent the Division an email requesting Member Faulkner's disqualification from hearing Employee's case to "avoid the appearance of impropriety." She contended it was inappropriate for Member Faulkner to sit on the hearing panel because Smith's law firm represents Member Faulkner's business and its insurer and adjusting company. Employee contended Member Faulkner could not be impartial, and "more importantly, the appearance of impropriety is present." At hearing, Employee admitted she had not filed a petition and affidavit setting forth with particularity the grounds upon which Member Faulkner should be disqualified. For that failure the email recusal request could have been denied. AS 44.62.450(c); 8 AAC 45.106. However, to ensure fairness and to best ascertain the parties' rights, Johnson was allowed to testify and provide grounds for disqualifying Member Faulkner. AS 23.30.001(1), (4); AS 23.30.135(a); 8 AAC 45.195. Johnson's testimony was hearsay, which may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. 8 AAC 45.120(e). Johnson did not say how her testimony fit any exception to the hearsay rules or form a non-hearsay basis for admission.

Johnson testified claimant Twing had three pending workers' compensation "claims" against Member Faulkner's company. Employee contended the Twing matters created an appearance of impropriety and a conflict of interest vis-à-vis Member Faulkner, Smith and Employee because Smith's law firm represents Member Faulkner's business and its insurer and adjusters, which Johnson testified are the same insurer and adjusters in Employee's case. During the hearing, the designated chair took official notice from the Twing cases that though claimant Twing had three injuries, there were no pending "claims" in any of them. The chair also took notice that in mid-2020, Member Faulkner's business changed insurance companies and no longer shared the same insurer or adjusting firm with Employer. Employee failed to show there would be any financial burden or benefit to Member Faulkner as her business no longer pays workers' compensation

premiums to Republic Indemnity and has a new adjuster. Even if the facts were as Employee alleged, this would not be a basis for Member Faulkner's recusal. Such relationships are "unavoidable" and arise in small insurance markets. 8 AAC 45.105(1), (2); *Rogers & Babler*.

Johnson gave hearsay testimony that Twing was hit by a "backhoe bucket" and Member Faulkner's husband allegedly failed to report the accident; it was not clear how this allegation, even if true, would affect Employee's case. 8 AAC 45.120(e). Johnson further contended Member Faulkner had testified at an unspecified recent meeting that she wanted to lower workers' compensation premiums, and Johnson implied, without any proof, that to do so Member Faulkner would simply deny cases. Many people favor reducing insurance premiums. *Rogers & Babler*. Even if Johnson's allegation was true, Member Faulkner generally favoring reduced premiums is not evidence of bias, prejudgment or conflict of interest. *Schweiker*; *Sifagaloa*; *Airline Pilots*.

Johnson "heard" Member Faulkner and Employer's adjuster Susan Daniels were personal friends. Member Faulkner stated she does not know Daniels and has no personal relationship with her. Johnson further opined Member Faulkner was "not impartial" in the last hearing in which Johnson participated, but cited no specific evidence. Johnson also "heard" that Daniels had purchased or leased property from Member Faulkner; she cited no direct evidence to support this. 8 AAC 45.120(e). In Johnson's view, Member Faulkner is just "a big piece of crap." Johnson's personal opinion about a panel member does not demonstrate a substantial and material conflict of interest, bias or prejudgment. 8 AAC 45.105(c), (d). Further, Johnson contended that since Smith's law firm represents Member Faulkner's business, it was possible that Smith would talk to her frequently and possibly communicate *ex parte* about Employee's case as well. Member Faulkner said she had never spoken to Smith outside of a workers' compensation hearing and could not even recall speaking to him during a hearing. Johnson presented no evidence supporting her hearsay allegations, much less clear and convincing evidence. 8 AAC 45.105(c), (d).

Member Faulkner unequivocally stated she has no personal or financial interest in Employee's case. Her sister-in-law and cousin share her same name and perhaps the hearsay information

Johnson offered refers to a different person with the same name. Member Faulkner stated she can and will be fair and impartial in Employee's case. The chair, who was the only remaining panel member, denied Employee's request to disqualify Member Faulkner. 8 AAC 45.106(d).

Panel members are presumed to be unbiased. *Schweiker*; *Sifagaloa*; *Airline Pilots*. Employee had the burden to show Member Faulkner is not; she failed to meet that burden. Her disqualification request regarding concurrent legal representation is similar to the one made in *Kling*; the main difference is that the defense lawyer in that case was actively representing the panel member sought to be recused. Even so, the Superior Court in *Kling* rejected the identical contentions made here, noting only "a direct, usually personal and pecuniary, interest can operate to rebut the presumption" that a panel member is unbiased. Absent any reliable, direct and specific evidence to the contrary, Member Faulkner is presumed unbiased. Employee presented no evidence that Member Faulkner cannot be fair and impartial or that she has a substantial and material conflict of interest. 8 AAC 45.105(c), (d). Therefore, the designated chair's oral order, as the only remaining panel member, denying Employee's recusal request, was correct. 8 AAC 45.106(d).

2) Should Employee's claim be dismissed for willfully contacting represented parties?

The designee at the October 27, 2020 prehearing conference granted Employer's request for a protective order preventing Employee from contacting Smith's clients directly. Employee did not appeal that order. It is undisputed that Employee has, since that order was issued, continued to contact Smith's clients directly. If she were an attorney, Employee's actions could be addressed by sanctions from the Alaska Bar Association. However, Employee is not an attorney. Employer cited no statute, regulation or case law providing a remedy for enforcement of the protective order, arising from Employee's conduct outside the hearing room. Consequently, Employee's claim will not be dismissed for her failure to comply with the October 27, 2020 protective order.

3) Was the oral order continuing the November 2, 2021 hearing correct?

The day before hearing, Johnson entered her appearance as Employee's non-attorney representative; she has since withdrawn. Both parties mistakenly thought the November 2, 2021 hearing would consider issues other than those actually set for hearing. Nevertheless, Johnson's grounds for requesting a continuance were not unlike those an attorney would make -- Johnson just entered the case; her client lived in a different state; Johnson was busy working on another case's brief; she did not have chance to review the file because she allegedly had not yet received it; and Johnson needed time to familiarize herself with the case. Given these arguments, the oral order continuing the hearing was correct to avoid "irreparable harm" to Employee's case, since Johnson may have been able to assist Employee in prosecuting her claims. 8 AAC 45.074(a), (b)(1)(N); *Rogers & Babler*. Employer's request to "freeze" the hearing record effective November 2, 2021, was correctly denied because given the complicated history in this case, Employee should have a chance to brief and make her arguments and present relevant witnesses, as discussed in prior decisions. AS 23.30.001(1), (4); AS 23.301.135(a).

Employee requested a hearing continuance, which Employer opposed. Her granted continuance request rendered her February 12, 2018 hearing request "inoperative" effective November 2, 2021, when the panel orally continued the hearing. When all discovery is done and she is fully prepared for hearing, Employee must file a new hearing request and an affidavit to obtain a hearing on her pending claims. AS 23.30.110(c), (h); 8 AAC 45.070(b)(1)(C); 8 AAC 45.074(c)(1), (3).

CONCLUSIONS OF LAW

1) The oral order declining to disqualify Member Faulkner was correct.
2) Employee's claim will not be dismissed for willfully contacting represented parties.
3) The oral order continuing the November 2, 2021 hearing was correct.

ORDER

1) Employer's November 23, 2020 and January 22, 2021 petitions to dismiss Employee's claims for willfully contacting represented parties are denied.
2) Employer's request to "freeze" the record as it was on November 2, 2021, is denied.

3) Employee's November 1, 2021 email request to disqualify Member Faulkner is denied.

4) Employee's October 5, 2021 petition to quash the November 2, 2021 hearing and to add issues for hearing is denied as moot.

5) Employee's October 21, 2021 and November 1, 2021 petitions for a continuance are granted.

6) When all parties' discovery is done, Employee will file a new hearing request in accordance with this decision.

Dated in Anchorage, Alaska on November 22, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, 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 November 22, 2021.

/s/
Nenita Farmer, Office Assistant