# ALASKA WORKERS' COMPENSATION BOARD

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

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| ELIZABETH COOPER,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>CENTRAL PENINSULA GENERAL HOSPITAL, INC.,<br><br>Employer,<br>and<br><br>ALASKA NATIONAL INSURANCE,<br><br>Insurer,<br>Defendants. | INTERLOCUTORY<br>DECISION AND ORDER<br><br>AWCB Case No. 202006936<br><br>AWCB Decision No. 22-0023<br><br>Filed with AWCB Anchorage, Alaska<br>on April 11, 2022 |

Employee Elizabeth Cooper's March 7, 2022 petition appealing the designee's February 24, 2022 discovery ruling on her protective order request was heard on March 23, 2022, on the written record in Anchorage, Alaska, a date selected on March 7, 2022. The March 7, 2022 petition gave rise to this hearing. Because there were no Southcentral Panel members available, Southeast Panel members participated in all hearings held in Anchorage this date by the Commissioner's transfer under AS 23.30.005(e). Attorney Keenan Powell represents Employee. Attorney Jeffrey Holloway represents Central Peninsula General Hospital, Inc. and its insurer (Employer). The record closed at the hearing's conclusion on March 23, 2022.

## ISSUES

Employee contends the designee abused her discretion by denying her petition for a protective order. She contends the current issues and defenses do not justify the broad releases Employer requests. Employee contends language should be added to the medical releases preventing Employer's representatives from having *ex parte* communication with her attending physicians.

Employer contends since Employee is receiving medical and time loss benefits and may receive "potential reemployment benefits," the subject releases seek relevant discovery. It further contends it is using the medical release form from the Division's website and the designee had no right to "invalidate" this form. Employer contends it does not have to add additional verbiage to the releases regarding *ex parte* meetings because the "law is what it is."

1) **Did the designee abuse her discretion or otherwise err by denying Employee's petition for a protective order?**

Employee contends she is entitled to attorney fees if she succeeds in her appeal.

Employer contends Employee should receive no attorney fees because her appeal is "baseless" and not supported by law. Thus, it contends Employee's lawyer will obtain no benefit for her.

2) **Is Employee entitled to an attorney fee award?**

## FINDINGS OF FACT

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

1) In May 2011, the Division last revised its "Release of Medical Information" form 07-6146 found on its website under "Forms." (Release of Medical Information form; observations).

2) On June 18, 2020, Employee tripped and fell at work. (First Report of Injury, June 24, 2020).

3) On December 14, 2021, Employee claimed temporary total disability (TTD) benefits, a compensation rate adjustment, medical and related transportation costs, a penalty for late-paid compensation, interest, attorney fees and costs. The reason given for filing was a "compensation rate adjustment." (Claim for Workers' Compensation Benefits, December 15, 2021).

4) On January 3, 2022, Employee added a request for an unfair or frivolous controversion finding and related penalties and interest arising from Employer's alleged failure to reimburse her for mileage and expenses submitted on July 22, 2021. (Claim for Workers' Compensation Benefits, January 3, 2022).

5) On January 6, 2022, Employer admitted TTD benefits in accordance with the Act; reasonable and necessary medical costs related to the work injury performed in accordance with a treatment plan and the medical fee schedule; and properly documented medical-related transportation expenses. It denied benefits for the cervical spine and any medical costs that were not reasonable, necessary, related to the injury, performed in accord with a treatment plan or that exceeded the fee schedule; unreasonable, unnecessary and undocumented transportation expenses; attorney fees and costs; interest; a penalty; and a compensation rate adjustment. Employer denied the cervical spine pursuant to the Act's "notice" statute. It denied medical and time-loss benefits were owed and stated it had denied no medical payments and had paid all time-loss supported by medical authorization. Employer denied interest and penalty and contended it had paid all benefits. It contended no attorney fees or costs were owed because Employee's lawyer had not obtained any benefit for her. Employer denied the compensation rate adjustment and contended Employee incorrectly used her post-injury earnings to support an increased rate. (Answer to Workers' Compensation Claim, January 6, 2022).

6) On January 6, 2022, Employer controverted Employee's claim for all "benefits related to the neck," penalty, interest, a compensation rate adjustment and attorney fees and costs. (Controversion Notice, January 6, 2022).

7) On January 18, 2022, Employer sent Employee "Special Interrogatories, Set One," which included in relevant part the identity of every employer for whom she had worked from June 10, 2010, thru and including the date she responded to the interrogatories. (Interrogatory No. 2, January 18, 2022).

8) On January 18, 2022, Employer also sent Employee a formal "Request for Production of Documents, Set One," which in relevant part requested she provide "all documents" related to any employment she held from June 18, 2010, thru and including the date she responded to the requests. (Request for Production No. 9, January 18, 2022).

9) On January 18, 2022, Employer also sent Employee six releases to sign and return. Those relevant to this appeal, listed in the order they are attached as exhibits to Employee's January 31,

2022 petition, include: (1) "Release of Medical Information"; and (4) "Employment Records Release." (Letter, January 18, 2022, with attachments).

10) Only Release (1), Release (4), Interrogatory No. 2, and Request for Production No. 9 are relevant to Employee's appeal. (Petition for Protective Order, January 31, 2022).

11) Release (1) is similar but not identical to the "Release of Medical Information" form found on the Division's website. Employer's release allows release of medical records and "any information" relating to Employee's June 18, 2020 work injury for her "bilateral arms, bilateral legs, [and] neck." It sought records and "information" from June 18, 2018, forward. The release contains no requirement that Employee be notified in advance of Employer's intent to contact her attending physicians. (Observations; Release (1)).

12) Release (4) requests from any employer, union representative or records custodian "any and all employment or personnel records, dispatch records, pension records, or other personnel records of any nature" from June 18, 2010, forward. This releases records related to "employment, termination, performance in employment or other records kept in the normal course of business." It further allows these entities to "communicate" with any Employer representative concerning Employee's employment with that entity. (Release (4)).

13) On January 26, 2022, Employer answered Employee's amended claim and asserted the same admissions, denials and defenses as in its January 6, 2022 answer, but included a defense related to the unfair and frivolous controversion finding request. (Answer to Amended Workers' Compensation Claim, January 26, 2022).

14) On January 26, 2022, Employer again controverted Employee's claim for all "benefits related to the neck," and penalty, interest, an unfair or frivolous controversion finding, a compensation rate adjustment, attorney fees and costs. (Controversion Notice, January 26, 2022).

15) On January 31, 2022, Employee timely requested a protective order on Release (1), the medical record and "information" release and contended it was silent on *ex parte* contact with her physicians. She sought protection from Release (4) for employment records and contended it and Employer's interrogatory seeking names of Employee's employers from 10 years prior to the injury date requested irrelevant information. Employee also wanted protection from Employer's request for production of all documents related to employment from 10 years prior to her injury and cited the same relevancy grounds. (Petition, January 31, 2022, and attachments).

16) In her petition and attachments, Employee contended she injured her shoulder, wrists and knee on June 18, 2020, when she fell at work. She contended she had continued to work and had not sought reemployment benefits, so these were not at issue; Employee admitted to having received TTD benefits "intermittently" and was at that time recovering from shoulder surgery for which she "should be paid" TTD benefits. She relied on the Alaska Workers' Compensation Appeals Commission's (AWCAC) *Holt* and the Alaska Supreme Court's *Harrold-Jones* decisions as support for her position that once a controversion was filed in her case it became litigious and case law required "prior notice" to an injured worker of Employer's intent to have *ex parte* contact with a treating doctor so she could object and obtain a Board order prohibiting or limiting the contact. Employee contended changes in federal law evidenced "a strong public policy against the invasion of privacy rights in medical records" and a "cultural shift" in how medical privacy was viewed. She also contended *Holt* explicitly held that post-controversion *ex parte* contact violated her privacy rights. Employee contended Release (1) was "silent on *ex parte* contact" and therefore permitted it because providers were accustomed to such contact and thus would not be put on notice that it should not occur. She contended this could violate her privacy rights. Employee contended that prior Board decisions had determined an employment record release was only relevant if she was seeking reemployment benefits. Since she was not seeking reemployment benefits, Employee contended there could be no information gleaned from her employment records related to her claim. Therefore, Employee sought a protective order against (A) Release (1) seeking medical records without added language regarding *ex parte* contact; (B) Release (4) for employment records; (C) answering Employer's interrogatory No. 2 requesting all employers for whom she worked from 10 years prior to her injury date; and (D) responding to Employer's request for production No. 9 for the same period. She also sought attorney fees associated with her petition should she prevail. (Petition, January 31, 2022, and attachments).

17) On February 22, 2022, Employer contended Employee's protective order request was "frivolous" and "cited no law or requirement" mandating Employer modify a "form release." It contended Release (1) did not allow *ex parte* communications and contended, "It, in fact, does not state anywhere that the release of information allows any 'communications.'" It further contended Employee's assertions were "baseless" and no fees or costs should be awarded, and her benefits should be forfeited because she refused to cooperate with discovery. Employer

contended on "information and belief," Employee may have been unable to perform her job at the time of injury for 90 consecutive days, making her refusal to sign a medical release "frivolous" and it further prohibited Employer from gathering records to confirm her inability to work. It contended, "Therefore, as a potential mandatory eligibility referral is implicated" Employer was entitled to discover Employee's 10-year work history addressed by Release (4). (Answer to Petition for Protective Order, February 22, 2022).

18) On February 24, 2022, the parties appeared before the Board's designee to address Employee's January 31, 2022 protective order petition. Employee objected to Release (1) for medical records and Release (4) for employment records and stated hers was "a compensation rate adjustment case only." She contended Release (1) was silent regarding *ex parte* contact and, consistent with her petition, stated providers do not look for *ex parte* language so she wanted such language to protect against *ex parte* communications. Employee requested "minimal revision" of Release (1) to include language promising to include copies to her on any letters sent to providers and answers to those letters, which if followed would render them "no longer . . . *ex parte* communication." She opposed the employment record release and contended it was irrelevant because she had not claimed reemployment benefits. Employee acknowledged she had "been working since the injury" and did not believe her privacy should be invaded by releasing 10 years of employment records. (Prehearing Conference Summary, February 24, 2022).

19) On February 24, 2022, Employer contended Employee's claim was not limited to a compensation rate adjustment because she was getting medical and time-loss benefits and "potential reemployment benefits" all of which were open to discovery. Consistent with its answer to Employee's petition, Employer contended it used a "Board approved" medical release form and cut and pasted information directly from that release into its own release and the designee had no right to "invalidate" a Board form. Employer refused to include the additional language Employee suggested regarding *ex parte* contact and contended it was not necessary because the law on this issue "is just what it is." It further contended though Employee was working, this did not mean reemployment benefits "are not a potential issue" and if she had not been working "at her original position," and "had restrictions" the Rehabilitation Benefits Administrator (RBA) would by law still need to evaluate her after 90 days. Employer contended Employee had surgery and "medical records restricted her to not lift more than 5 pounds" and

she then had a second surgery and was limited to lift no more than two pounds. It contended it had the right to employment records and was uncertain about her limitations "due to lack of having the medical records." (Prehearing Conference Summary, February 24, 2022).

20) On February 24, 2022, the Board designee found Release (1) contained no words that could be interpreted to allow *ex parte* contact and declined to require Employer to add additional language prohibiting *ex parte* communication. The designee further found Release (4) regarding employment records was appropriate because Employee may eventually be evaluated for reemployment benefits. The designee found both subject releases "standard, relevant, and likely to lead to discoverable information." She denied Employee's January 31, 2022 protective order petition and ordered her to sign and return the releases by March 7, 2022. The designee did not discuss Employee's request regarding Interrogatory No. 2 or Request for Production No. 9 and did not expressly make an order on them. (Prehearing Conference Summary, February 24, 2022).

21) On February 24, 2022, Commissioner Tamika Ledbetter authorized transfer of Southeast Panel members to hear cases in Anchorage on March 23 and 24, 2022, under AS 23.30.005(e). (Commissioner's Memorandum, February 24, 2022).

22) On March 7, 2022, Employee timely appealed the designee's February 24, 2022 order. She contended the designee made "erroneous factual findings" and "improperly applied the law." (Petition, March 7, 2022).

23) On March 15, 2022, Employer reiterated its arguments made at the February 24, 2022 prehearing conference and stated it was "well aware" of the AWCAC's *Holt* decision "concerning *ex parte* communications being prohibited once a controversion is filed." It added that *Holt* "does not mean a standard medical release must be modified to address those ill-conceived decisions, and the designee was correct to agree." First, Employer contended nothing in Release (1)'s language could be construed to allow any communications much less *ex parte* communications. Second, Employer contended Release (1)'s language is copied directly from Board form 07-6146, and neither the Board designee nor a hearing officer can invalidate any Board form including a medical release. It relied on the AWCAC's *Hessel* decision for support. Consequently, Employer contended it is not obligated to add *ex parte* communication language to its release because the Board's medical release form does not include such language. It further contended:

> The law concerning *ex parte* communications, however unsupported and ill-conceived that it is, remains the law. . . . A release does not have to state whatever the law is.

As for Release (4) seeking employment records, Employer renewed its previous arguments, and primarily contended that since Employee "may be referred for a mandatory eligibility evaluation," vocational reemployment benefits are at issue and the prior 10-year employment records are relevant. (Hearing Brief of Central Peninsula General Hospital, Inc., March 15, 2022).

24) Apart from the evidence and arguments summarized above, Employer's March 15, 2022 hearing brief also contained new arguments and evidence related to or regarding Releases (1) and (4) not raised in its answer to Employee's petition and not raised at the February 24, 2022 prehearing conference, according to the conference summary. (Observations, judgment).

25) On March 16, 2022, Employee filed an untimely hearing brief without explanation as to why it was late. (Agency file).

26) On March 16, 2022, Employee timely filed an affidavit of attorney fees and costs. Her attorney claimed 8.8 hours of legal services related to the issues addressed in this decision. She billed at $425 per hour. Of the 8.8 attorney hours, seven hours were spent researching, beginning and finalizing Employee's untimely hearing brief and preparing her counsel's affidavit for attorney fees (1.2 researching for a written record hearing; 4.2 beginning Employee's untimely hearing brief; and 1.6 finalizing the untimely hearing brief and preparing the attorney fee affidavit. (Affidavit of Counsel regarding Fees and Costs, March 16, 2022).

27) Of the 1.6 hours spent finalizing the untimely hearing brief, and preparing the attorney fee affidavit, .6 hours was a reasonable time for Employee to spend on the fee affidavit. (Experience, judgment and inferences drawn from the above).

28) Although both parties agreed that Employee returned to work, their admissible pleadings do not state if she returned to work for Employer or for someone else. (Observations).

29) Historically, since 1988, most employers' medical and information releases routinely included language expressly allowing authorized medical providers to communicate with the employers' representatives without notice to or participation by the injured worker or his or her representatives. (Experience, judgment, observations).

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 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
>
> (e) A member of one panel may serve on another panel when the commissioner considers it necessary for the prompt administration of this chapter. Transfers shall be allowed only if a labor or management representative replaces a counterpart on the other panel. . . .

> **AS 23.30.008. Powers and duties of the commission**. (a) . . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

> **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. . . .

In *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987), the Alaska Supreme Court noted the filing of a personal injury lawsuit resulted in a waiver of the physician-patient privilege and concluded defense counsel were authorized to engage in informal, *ex parte* contacts with a plaintiff's physician.

*Baker v. Anglo Alaska Construction, Inc*., AWCB Dec. No. 88-0013 (January 29, 1988), expressly adopted *Langdon* and said:

> Accordingly, . . . we conclude that under AS 23.30.107 employees are required to give written medical authorization for the release of all relevant medical information, including the permission to consult with medical care providers without the employee's or his attorney's presence.

*Granus v. Fell*, AWCB Dec. No. 99-0016 (January 20, 1999), provided a two-step analysis to determine if information was discoverable under AS 23.30.107(a), as follows:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

*Gorospe v. Net Systems, Inc*., AWCB Dec. No. 08-0229 (November 21, 2008) using the two-step *Granus* analysis, looked to the matters in dispute to determine the benefits the injured worker was claiming and defenses the employer had raised to these claims. It then determined if the information the employer sought was reasonably calculated to lead admissible facts. *Gorospe* decided the scope of releases was case- and fact-specific. Noting Board decisions had found an employee's employment and union records beginning 10 years before her work injury were reasonably calculated to lead to evidence admissible in reemployment benefit cases, *Gorospe* found the injured worker had not sought reemployment benefits and could not be compelled to sign a release for employment records.

*Fletcher v. Pacific Rim Geological Consulting, Inc*., AWCB Dec. No. 12-0021 (January 30, 2012) said an employment records release may be relevant to causation and medical benefits where an employee had a prior work injury to the same body part and filed a claim arising from that injury.

*Carter v. Anchorage Daily News*, AWCB Dec. No. 13-0050 (May 10, 2013), held an employer's right to employment records was not solely dependent upon a claim for reemployment benefits but on the relevance of information sought compared to the benefits claimed. *Carter* held an employment records release was appropriate where the claim was one for a cumulative rather than a discrete injury.

*Liston v. Alaska Consumer Direct Personal Care, LLC*, AWCB Dec. No. 13-0111 (September 10, 2013) found the employee had a discrete injury and there was no evidence it included a prior work injury to the same body part. It found the employment release, which included personnel, dispatch, pension, and personnel records of any nature, including termination, performance and so forth, would not obtain evidence related to the employee's issues. *Liston* found the release

was too broad for its proffered purpose and denied the employer's appeal from the designee's protective order.

> **AS 23.30.108. Prehearings on Discovery Matters; Objections to Requests for Release of Information; Sanctions for Noncompliance**. . . .
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> (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 basis of the written record. . . . The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

An agency's failure to apply properly controlling law may be an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884 (Alaska 1962). A substantial evidence standard is applied to review the Board designee's discovery determination. A designee's decision on releases and other discovery matters must be upheld, absent "an abuse of discretion." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985).

*Providence Health System v. Hessel*, AWCAC Dec. No. 131 (March 24, 2010), reversed a Board decision that found the employee substantially complied with the requirement to request a hearing within two years of the date the employer controverted his claim. The Board found AS 23.30.110(c) and 8 AAC 45.182 required an employer to use its Board-prescribed controversion notice to give the employee notice that he had two years to ask for a hearing post-controversion. It found the form was "ineffective" to give him adequate notice. Reversing, *Hessel* held a "single board panel lacks the authority to reach this determination because the warnings on the controversion form implement a regulation." While noting not every form is a regulation, *Hessel* said the "requirement that all employers use a specific form, prescribed by the board or director" is a regulation.

In *Hays v. Arctec Alaska*, AWCB Dec. No. 18-0068 (July 11, 2018), an attending physician met with a medical case manager for a "care conference" which "ironically did not include Employee." During that conference, the medical case manager "pointed out medical evidence she thought showed Employee was doing 'very well' following his shoulder surgery until he tripped and fell over a log." The nurse case manager asked the physician for his opinion on causation and "not

surprisingly," he opined the work injury was not the substantial cause of the employee's disability or current need for right shoulder surgery but rather "the trip and fall over the log was." However, in his subsequent deposition the same physician repeatedly denied the employee had reinjured his right shoulder when he tripped and fell over the log. Still later the physician flip-flopped and said he thought the trip and fall was the larger of the two causes for the employee's need for a second right shoulder surgery. Ultimately, the physician said he "could not opine on . . . shoulder causation."

In *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018), a plaintiff sued a physician for medical malpractice. The defendants requested a release authorizing *ex parte* contact with the plaintiff's new doctor. She refused to sign the release and sought a protective order prohibiting the defendants from having *ex parte* contact with her new physician. The trial court denied her motion and granted the defendant's request for a release, relying on *Langdon*. On appeal, *Harrold-Jones* expressly overruled *Langdon* in civil cases and explained:

> But we also conclude that we should overrule our case law because its foundations have been eroded by a cultural shift in views on medical privacy and new federal procedural requirements undermining the use of *ex parte* contact as an informal discovery measure. We therefore hold that -- absent voluntary agreement -- a defendant may not make *ex parte* contact with the plaintiff's treating physicians without a court order, which generally should not be issued absent extraordinary circumstances. We believe that formal discovery methods are more likely to comply with the federal law and promote justice and that such court orders rarely, if ever, be necessary. (*Id*. at 569).

*The Home Depot, Inc. v. Holt*, AWCAC Dec. No. 261 (May 28, 2019) distinguished between "routine and non-litigious" claim handling and claim handling once "a claim becomes litigious." *Holt* stated in "routine" cases where questions arise and medical bills must be paid promptly, clarification may be needed with unfettered access to the treating physician. However, *Holt* also stated that "after a controversion of benefits has been filed," the claim's posture "is now different" and "adversarial." *Holt* held "at minimum" if *ex parte* contact with the treating doctor was sought, "it should be with notice to the employee." *Holt* noted:

> The Act does not define 'information' to exclude *ex parte* contacts, except for the SIME process, nor does it include it. Since it is silent on *ex parte* contacts, statutory constructions principles would indicate it is allowed. Neither HIPAA

> nor the Act preclude *ex parte* contacts between the employer and the treating doctor.

*Holt* agreed *Harrold-Jones* applied to workers' compensation cases once the right to benefits or a claim for benefits was controverted. *Holt* held "prior notice should be given to an injured worker of the intent to have *ex parte* contact with the treating doctor, once the employer has controverted the claim." This will give the injured worker time to object and seek a remedy.

> **AS 23.30.110. Procedure on claims**. . . .
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> (c) . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

> **AS 23.30.115. Attendance and fees of witnesses**. . . . [B]ut the testimony of a witness may be taken by deposition or interrogatories in accordance with the rules of Civil Procedure. . . .

> **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. . . .

In *Brown v. Carr-Gottstein*, AWCB Dec. No. 88-0117 (May 6, 1988), a party objected to formal "requests for production." *Brown* took "a dim view of efforts to graft the Rules of Civil Procedure onto our proceedings." *Brown* further noted:

> AS 23.30.115 does not mention requests for production. They are, therefore, another 'means of discovery' available at our discretion on the petition of a party. 8 AAC 45.054(b). In the past we have refused to order discovery by formal means in 'the absence of evidence that informal means of obtaining relevant evidence have been tried and failed.

*Brown* refused to order a party to respond to formal "requests for production" unless and until the requesting party first attempted informal requests for the information and failed.

> **AS 23.30.145. Attorney fees**. . . .

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging,* 787 P.2d 103 (Alaska 1990).

**AS 23.30.220. Determination of spendable weekly wage**. . . .

Where past wage levels are an accurate predictor of losses due to the injury, the Board must apply the statutory formula from AS 23.30.220. The decision to depart from the statute must be based on substantial evidence supporting the conclusion that past wage levels from the two years prior to the injury will lead to an irrational workers' compensation award. *Justice v. RHM Aero Logging, Inc*., 42 P.3d 549 (Alaska 2002). Depending upon the theory under which the claimant brings a compensation rate adjustment claim, long-term historical earnings may be probative on the rate adjustment claim because under some theories the Board "must conduct a broader inquiry." *Wilson v. Eastside Carpet Co.*, AWCAC Dec. No. 106 (May 4, 2009).

**8 AAC 45.054. Discovery**. (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. . . .

(b) Upon the petition of a party, the board will, in its discretion, order other means of discovery. . . .

**8 AAC 45.065. Prehearings**. . . .
. . . .

(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 . . . that sets out the grounds for the appeal. . . .

**8 AAC 45.114. Legal memoranda**. Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must

(1) be filed and served at least five working days before the hearing. . . .

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

(e) Technical rules relating to evidence . . . do not apply in board proceedings, except as provided in this chapter. . . .

> **8 AAC 45.182. Controversion**. (a) To controvert a claim the employer shall file form 07-6105. . . .

## ANALYSIS

**1) Did the designee abuse her discretion or otherwise err by denying Employee's petition for a protective order?**

Employee timely appeals from the designee's February 24, 2022 decision denying her petition for a protective order. 8 AAC 45.065(h). She contends the designee made incorrect factual findings and did not properly apply the law. Employer contends the designee correctly applied the law to the facts and properly denied Employee's petition for protective order.

When a discovery order is appealed, no evidence or argument, not previously presented to the designee, may be considered. Rather, the appeal shall be determined "solely on the basis of the written record." AS 23.30.108(c). Evidence and argument "presented" to the designee at a prehearing conference includes claims, answers, the moving party's petition for a protective order and any responsive pleadings, and the parties' timely-filed briefs reiterating their evidence and arguments. In this case, Employer's hearing brief contains additional argument and evidence that will not be included in this decision, because it was not included in Employer's pleadings or in its presentation to the designee at the February 24, 2022 prehearing conference. This additional evidence and argument will not be considered. AS 23.30.108(c). Employee filed her hearing brief untimely, and Employer objected; consequently, it will not be considered. 8 AAC 45.114(1).

To address Employee's appeal, the issues and defenses must first be determined, and a comparison made between these, and the information sought in the subject releases and discovery requests. *Granus*. The issues include Employee's request for TTD benefits, a compensation rate adjustment, medical and related transportation costs, a penalty for late-paid compensation, interest, attorney fees, costs, and an unfair or frivolous controversion finding and associated penalties and interest related to reimbursement for medical mileage and expenses. Employer's denials and defenses address these issues in turn, but do not suggest Employee had a cumulative trauma injury or a prior injury to the same body parts for which she filed a prior

claim. *Fletcher*; *Carter*; *Liston*. The issues raised in this appeal are legal. The designee's discovery order must be affirmed absent an abuse of discretion. *Sheehan*.

**(A) The designee erred as a matter of law on Release (1).**

Release (1) is for medical records and "information." Employee's objection to this release is that it fails to require notice to her physicians that *ex parte* communication between them and Employer's agents is not authorized without her prior notice and consent. She contends the release is "silent" on *ex parte* communication and thus does not prohibit it, but implicitly allows it. Employee does not object to signing a medical release; she simply objects to signing one without *ex parte* communication notice included. Employer contends Employee's protective order request is "frivolous" and "cited no law or requirement" mandating Employer modify a "form release." It further contends the subject release does not allow *ex parte* communications and nothing in it allows "any 'communications.'" Employer contends neither the designee nor this panel has legal authority to "invalidate" a form found on the Division's website. It contends the law on this issue "is just what it is" and does not need to be stated on the release.

Employer contends *Holt* states *ex parte* communications are "prohibited once a controversion is filed," but it also contends *Holt* does not require it to modify a "standard medical release" to address *Holt*'s "ill-conceived" decision and this panel has no authority to invalidate the medical release form. Employer relies on *Hessel* to support the latter contention. *Holt* does not actually prohibit *ex parte* communication; it requires "prior notice should be given to an injured worker of the intent to have *ex parte* contact with the treating doctor." As the Commission correctly stated in *Holt*, the Act is silent on this question and under normal statutory construction rules, the Act's silence would imply that *ex parte* communication "is allowed." *Holt* made new law in this area and, for the first time, applied the *Harrold-Jones* rationale to workers' compensation cases, as precedent. AS 23.30.008(a). An appropriate way to provide Employee with prior notice in the event Employer or its representatives want to engage in communication with her physicians is to include that limitation in her medical record releases. Doing so places no burden whatsoever on Employer's right to discover relevant information; it simply protects Employee's right to notice of what would otherwise be *ex parte* contacts.

Employer's reliance on *Hessel* is also misplaced. *Hessel* is distinguishable from this case because it involved a "board-prescribed" Controversion Notice, also found on the Division's website. Employers must use the "board-prescribed" controversion notice pursuant to AS 23.30.110(c) and 8 AAC 45.182(a). By contrast, there is no requirement in the Act or regulations requiring a party to use the medical record release form found on the Division's website. Further, the Division's "Release of Medical Information" form 07-6146 was last revised in May 2011. The precedent on this issue in *Holt* issued eight years later, on May 28, 2019. The Division's medical records and information release form is inconsistent with *Holt*'s precedent. AS 23.30.008(a). Moreover, there is no evidence "Release of Medical Information" form 07-6146 was ever approved, adopted and approved again by the lieutenant governor pursuant to the Administrative Procedures Act, to give it the force and effect of a regulation.

Employer controverted Employee's claims on January 6 and 26, 2022. On January 18, 2022, shortly after its first controversion, Employer sent her the subject releases. *Holt* states that once a claim is controverted, its nature changes from "routine" to "adversarial." On January 6, 2022, protections afforded by *Harrold-Jones* and *Holt* applied to this case. Therefore, "prior notice should be given to an injured worker of the intent to have *ex parte* contact with the treating doctor, once the employer has controverted the claim." *Holt* is precedent, directly addresses this issue and supports Employee's position. Even if form 07-6146 was somehow considered a "regulation," *Holt* would overrule it as no longer in conformance with legal precedent. Although *Holt* does not expressly state that a medical record release must contain language prohibiting *ex parte* contact, neither does it prohibit such language. One way to prevent Employer or its representatives, such as a nurse case manager, from inappropriately engaging in *ex parte* contact with Employee's physicians is to make it explicit in the release that she must be notified before any such contact may occur. *Hayes*. Employee is correct that the absence of such language in the medical record release implies that *ex parte* contact is acceptable, especially since pursuant to *Langdon* and *Baker* such contact was the law for decades prior to *Harrold-Jones* and *Holt*. *Rogers & Babler*.

Employer contends *Holt* does not require it to alter its medical record release to include a statement of what "the law is" on this topic. But after *Langdon* and *Baker*, employers routinely included language in their medical record releases expressly stating the release gave the

employers' representatives "permission to consult with medical care providers without the employee or his attorney's presence" as ordered in *Baker*. *Rogers & Babler*. Since employers understandably wanted past medical record releases to reflect past law, is not unreasonable for Employee to want her current medical record releases to reflect the current law.

Moreover, AS 23.30.107(a) and the subject release are not limited to only "medical records," but include "medical information." The release expressly directs the reader to "interpret the terms release of 'medical information' and 'medical records' broadly to include everything one could consider medical "information," including physician's "opinions." Employer could try to obtain such by *ex parte* letter, telephone call, email, or personal visits by its representatives.

Consequently, the designee's order on Release (1) was an abuse of discretion because it is not in conformance with the law as stated in *Holt* and will be reversed. *Manthey*. Employer is entitled to a medical record release that includes language requiring prior notice to Employee of Employer's intent to communicate with her providers. Such a release will advise her medical providers that the law on *ex parte* communication has changed but will not fetter Employer's right to obtain relevant medical records or information from Employee's medical providers.

**(B) The designee abused her discretion on Release (4).**

Employee objects to the employment record Release (4) because she contends this is only a compensation rate adjustment claim, and vocational reemployment benefits are not at issue. Employer contends she is claiming more than just a rate adjustment. Employer is correct; Employee claims TTD benefits, a rate adjustment, medical and related transportation costs, a penalty for late-paid compensation, interest, attorney fees and costs as well as an unfair and frivolous controversion finding with related penalties and interest associated with past mileage and expenses. Employee is partially correct; she is not claiming vocational reemployment benefits. But Employer contends Employee's 10-year pre-injury employment records are critical because Employee may be entitled to reemployment benefits at some point and these records are crucial in defending against all the benefits Employee claims.

A 10-year employment record release is typically used in cases where reemployment benefits are at issue. *Gorospe*. But that is not always the case. Employment records going back 10 years

may be relevant to causation and medical benefits if Employee suffered previous work injuries to the same body parts and filed claims for those injuries. *Fletcher*. There is no evidence that occurred here. If Employee claimed she had a cumulative trauma rather than a discrete injury, her prior 10-year employment history might also be relevant. *Carter*. That is not the case here either.

The argument that reemployment benefits "might someday" be an issue justifying the 10-year employment history has been previously raised and rejected. *Liston*. The employment record release in *Liston* was like the release here and required release of personnel, dispatch, pension, and records of any nature including termination, and performance. *Liston* determined the release was too broad. Here, Employer failed to articulate how its broad employment record release could discover evidence related to medical and related transportation costs, a penalty for late-paid compensation, interest, attorney fees and costs or an unfair and frivolous controversion finding with related penalties and interest related to mileage and expenses. Employer's release is too broad; Employee is entitled to a protective order and the designee's broad order will be reversed.
However, Employee also has a compensation rate adjustment claim; the legal theory underlying this claim is not clear. In some cases, a rate adjustment claim may require evidence of her prior earnings and the nature of her work and work history. Accordingly, Employer is entitled to a 10-year employment record release limited to the names, addresses and phone numbers of her pre-injury employers, her job titles and descriptions and payroll information while working for those employers. Since the record is not clear whether Employee returned to work for Employer or for someone new, her post-injury earnings would also be discoverable both for her rate adjustment and TTD benefit claims. AS 23.30.220. Employee will be directed to sign a limited employment record release if Employer provides her one in conformance with this paragraph.

**(C) The designee abused her discretion on Interrogatory No. 2.**

Employee asked for protection against interrogatory No. 2, which required her to identify every employer for whom she had worked from June 10, 2010, thru and including the date she responded to the interrogatories. The designee did not discuss or specifically rule on this request as the statute requires. AS 23.30.108(c). The failure to apply the statute was an abuse of

discretion. *Manthey*. Nonetheless, as this decision will require Employee to sign a much narrower employment record release if Employer provides her one in accordance with this decision, she will necessarily have to provide the information required in Interrogatory No. 2.

**(D) The designee abused her discretion on Request for Production No. 9.**

Employee asked for protection against production request No. 9, which required her to provide "all documents" related to any employment she held from June 18, 2010, thru and including the date she responded to the request. The designee did not specifically address this request and her failure to do so was an abuse of discretion. AS 23.30.108(c); *Manthey*. Moreover, the controlling law does not provide for parties to use formal "Requests for Production," without a discovery order. AS 23.30.135(a); 8 AAC 45.120(e). Unless informal efforts have been tried and failed and more formal discovery is ordered, formal discovery in workers' compensation cases is limited to depositions and interrogatories. AS 23.30.115(a); 8 AAC 45.054(a), (b); *Brown*. Employer's formal production request was not authorized; given the limitations this decision places on the information Employer may discover about Employee's 10-year pre- and post-injury employment records, the production request, even had it been done informally, was still too broad. In the future, Employer should write a letter or an email requesting production from an injured worker. If this does not produce results, Employer may petition to compel or to use more formal discovery means.

**2) Is Employee entitled to an attorney fee award?**

Employee contends she is entitled to attorney fees and costs because she should prevail on her appeal from the designee's discovery order. Employer contends Employee's appeal is baseless so no attorney fee should be awarded; it did not dispute the hourly rate, or the hours expended other than implicitly objecting to time spent on the untimely brief; thus, the full "nature-length-complexity-benefits" analysis need not be applied. This decision reversed the designee's ruling and placed the required restriction on the medical record release that Employee requested. It also prohibited Employer from utilizing a formal Request for Production not provided for in the Act or regulations. She partly prevailed on her appeal. However, Employee's hearing brief was untimely and not considered in this decision. Accordingly, though Employee is entitled to an attorney fee award, the award must be reduced by the time spent working on the untimely

hearing brief because it availed nothing. AS 23.30.145; *Cortay*. As best as can be determined from Employee's affidavit, 6.4 hours of the 8.8 hours incurred applied to the brief (1.2 hours for legal research for a written-record hearing + 4.2 hours beginning the brief + 1 hour for finalizing the brief = 6.4 hours). Therefore, Employee will be awarded 2.4 hours (8.8 – 6.4 = 2.4) times $425 per hour totaling $1,020 as a reasonable attorney fee. *Cortay*.

## CONCLUSIONS OF LAW

1) The designee abused her discretion or otherwise erred by denying Employee's petition for a protective order.
2) Employee is entitled to an attorney fee award.

## ORDER

1) The designee's February 22, 2022 discovery order is reversed.
2) Employee's request for a protective order is granted in part.
3) Employer is entitled to a medical record release that includes language requiring prior notice to Employee of Employer's intent to engage in communication and her right to object. Employee is ordered to sign such a release if Employer provides it, written in accordance with this decision and order. She is not required to sign a medical record release not including this notice.
4) Employee is ordered to provide Employer with the names, addresses and phone numbers of all her employers from June 18, 2010, to the present.
5) Employer is entitled to an employment record release limited to releasing her job titles, duties and payroll information while working for those employers.
6) Employer is ordered to pay Employee's attorney $1,020 as a reasonable attorney fee.

Dated in Anchorage, Alaska on April 11, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/

Christina Gilbert, Member

/s/
Brad Austin, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 Elizabeth Cooper, employee / claimant v. Central Peninsula General Hospital, Inc., employer; Alaska National Insurance, insurer / defendants; Case No. 202006936; 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 April 11, 2022.

/s/
Nenita Farmer, Office Assistant