ALASKA WORKERS' COMPENSATION BOARD

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

NENAD GAJIC, Employee, Claimant, v. SILVER BAY SEAFOODS, LLC, Employer, and EVEREST NATIONAL INSURANCE, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202122788 AWCB Decision No. 22-0066 Filed with AWCB Anchorage, Alaska on September 27, 2022

Silver Bay Seafoods, LLC's (Employer) July 29, 2022 petition appealing a designee's discovery order was heard on the written record on September 15, 2022, in Anchorage, Alaska, a date selected on August 31, 2022. An August 31, 2022 hearing request gave rise to this hearing. Attorney Elliott Dennis represents Nenad Gajic (Employee). Attorney Jeffrey Holloway represents Employer and its insurer. The record closed at the hearing's conclusion on September 15, 2022.

ISSUE

Employer contends the designee erred and abused his discretion by denying Employer's request for a protective order and by ordering it to respond to Employee's formal interrogatories No. 8 through No. 11. It contends the interrogatories are "invasive and improper discovery requests" because Employee did not first seek permission before submitting them. Employer further

contends it provided 700+ pages of documents in response to Employee's request, and it does not have to provide simpler explanations for Employee's ease of reference. It seeks an order overruling the designee's discovery order.

Employee contends discovery is important and can be gathered either at the adjuster's deposition or through interrogatories. He contends he is simply seeking a quick, fair and efficient resolution to a dispute and utilized the same interrogatory format Employer's lawyer uses. He seeks an order affirming the designee's discovery order.

Should this decision decide Employer's appeal from the designee's discovery order?

FINDINGS OF FACT

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

1) On May 19, 2022, Employee sent Employer the disputed interrogatories giving rise to the designee's discovery order and Employer's related appeal. The relevant interrogatories stated:

> **INTERROGATORY NO. 8**: In employer's April 19, 2022 Amended Controversion Notice it denied "medical costs," which are not reasonable, necessary, related to the injury of July 2021, or which are not for services performed in accordance with a treatment plan or supported by proper documentation. Identify by provider, date of service, date of billing, amount and reason for denial, all medical costs of which the employer or adjuster is aware which are being denied.
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> **INTERROGATORY NO. 9**: In employer's April 19, 2022 Amended Controversion Notice, it denied "transportation expenses" for treatments which are not reasonable, necessary, related to the July 2020 work injury or supported by documentation. Identify by date, amount of transportation expenses or distance all transportation expenses being denied.
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> **INTERROGATORY NO. 10**: Identify with specificity the amount of daily per diem paid to employee between July 6, 2022 and December 2, 2022.
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> **INTERROGATORY NO. 11**: Identify with specificity the basis for each payment made by employer/insurer after December 15, 2021 to on behalf of employee. . . . (Employee's Second Interrogatories, May 19, 2022).

2) On May 31, 2022, Employer sought a protective order against Employee's May 19, 2022 discovery request. As the reason for its request, Employer stated the "specially prepared interrogatories, set two, are overbroad, burdensome, and oppressive. The requests are not in accord with the Act and its regulations." (Petition, May 31, 2022).

3) On July 19, 2022, the parties met before a Board designee for a ruling on Employer's May 31, 2022 petition for a protective order. Employer contended the Board has no authority to force written interrogatory answers. It contended its 752 pages already provided answered Employee's interrogatories, and contended 8 AAC 45.054 states discovery must be done by deposition. Therefore, Employer contended interrogatories No. 8 through No. 11 requesting specific itemizations were burdensome. Employee contended discovery is important to litigation and while the requested itemization could be gathered at an adjuster's deposition, he sought a "quick, fair, and efficient resolution," and he had utilized the same interrogatory format Employer's attorney often used in his interrogatory requests, without prior Board permission. The summary states:

> Designee reviewed Employer's 5/31/2022 Petition for Protective Order along with interrogatories (8-11) and found the same to be standard, relevant and likely to lead to discoverable information. The duty to ensure a speedy and economical remedy under the Alaska Workers' Compensation Act (the Act) requires the discovery process to move quickly. Informal discovery such as interrogatories assist in the speedy resolution of claims. Voluntary cooperation in the discovery process is encouraged. Prompt responses to reasonable interrogatories plays [sic] a critical role in making it possible for employers to fulfill the intent of the Act to provide a speedy remedy to injured workers. To assist in this regard, statutes and regulations have been promulgated which requires [sic] the disclosure of information and provides [sic] a process by which disputes are to be resolved. Employer's 5/31/2022 Petition for Protective Order is denied. Employer is ordered to provide answers to Employee's interrogatories (8-11) as soon as possible. . . .

The prehearing conference summary does not state if the designee entered an oral discovery decision at the prehearing conference, or first revealed his discovery order in the July 19, 2022 prehearing conference summary. It also does not state whether the prehearing conference was recorded. (Prehearing Conference Summary, July 19, 2022).

4) The July 19, 2022 prehearing conference summary does not contain an analysis adequate to review the designee's discretion because the legal and factual bases for his conclusory analysis is not disclosed in the summary. (Experience, judgment and inferences drawn from the above).

5) On July 29, 2022, Employer timely appealed the designee's discovery order to the Board. It contended the designee ignored Employer's arguments concerning "the invasive and improper discovery requests" and abused his discretion by allowing "improperly served interrogatories to be effective." (Petition, July 29, 2022).

6) On September 9, 2022, Employer reiterated its arguments and said the designee denied its petition for protective order "without analysis." For example, Employer contended the designee failed to address 8 AAC 45.054, which it contended "does not allow a party to serve interrogatories without permission from the Board." It further contended the designee ignored the fact that Employer had served over 750 pages on Employee that "effectively answered all of his interrogatories." Employer repeated its contentions that interrogatories No. 8 through No. 11 were "harassing" and "burdensome." (Hearing Brief of Silver Bay Seafoods, LLC, September 9, 2022).

7) According to his file, Employee did not file a hearing brief. (Agency file).

PRINCIPLES OF LAW

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 the employers. . . .

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. . . .

> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. The . . . board . . . may for the purposes of this chapter subpoena witnesses, administer or course to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. . . .

Parties have a constitutional right to defend against claims or petitions. *Granus v. Fell*, AWCB Dec. No. 99-0016 (January 20, 1999). A thorough investigation allows parties to verify information provided by the opposing party, effectively litigate disputed issues and detect fraud.

Id. Information inadmissible at a civil trial may be discoverable in a workers' compensation case if it is reasonably calculated to lead to relevant facts. *Id*. *Granus* provided a two-step analysis to determine if information was discoverable: (1) The first step is to identify matters in dispute; this requires the designee to, at a minimum, review both the claims (which generally state the issues from the injured worker's perspective) and the answers and controversions (which generally state the issues from the employer's perspective). (2) The second step is to decide (*i.e*., analyze) whether the information sought is relevant; or in other words, is it "reasonably calculated" to lead to facts that will tend to make a disputed issue, identified in step one, more or less likely.

Goemer v. University of Alaska, AWCB Dec. No. 21-0006 (January 21, 2021) remanded a discovery appeal back to a designee, finding and directing:

> FINDINGS OF FACT
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> 11) The December 15, 2020 PHC summary did not list all the arguments and evidence presented by the parties and considered by the designee. Nor did it include an analysis, which reflects the designee's discretion. Without further explanation, the designee found the releases "to be standard, relevant, and likely to lead to discoverable information." Employee's requests for protective orders was denied. (*Id.*).
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> ANALYSIS
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> The designee's analysis merely states, the releases are standard, relevant, and likely to lead to discoverable information. With no further information regarding the issues in dispute and how the requested releases will lead to relevant evidence regarding those issues, the analysis does not reflect the designee's discretion and it is impossible to determine if it was abused. *Granus*.
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> This decision will remand Employee's requests for protective orders to the appropriate designee. The designee shall make rulings on Employee's petitions for protective orders that includes each parties' arguments and lists each parties' evidence presented at the December 15, 2020 prehearing. The designee is directed to thoroughly analyze each release from which Employee requests a protective order and provide an analysis that reflects the designee's discretion. The parties may appeal the designee's prehearing conference discovery orders in accordance with the Act and applicable regulations if either party does not agree with the designee's determination. This result interprets the Act to ensure . . . quick,

> efficient, fair, and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). It also fosters the Act's requirement that process and procedure be as summary and simple as possible. AS 23.30.005(h). . . . (*Id*. At 4-5).

> **AS 23.30.108. Prehearings on Discovery Matters; Objections to Requests for Release of Information; Sanctions for Noncompliance**. . . .
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> (b) . . . At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. . . .
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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).

> **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. . . .

Cooper v. Central Peninsula General Hospital, AWCB Dec. No. 22-0023 (April 11, 2022) and *Slattery v. Unisea, Inc*., AWCB Dec. No. 22-0038 (June 2, 2022), did not interpret any statute or regulation to prohibit interrogatories. To the contrary, *Cooper* and *Slattery* both held that the Alaska Workers' Compensation Act (Act) in AS 23.30.115 expressly provided for interrogatories and depositions as the only formal discovery measures allowed without requiring Board approval. Both decisions set forth well-established decisional law favoring informal discovery and both eschewed "formal requests for production," but noted the statutes and regulations provide for additional means of discovery if informal, initial discovery requests prove unfruitful.

> **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.

> **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. . . .
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> (b) Upon the petition of a party, the board will, in its discretion, order other means of discovery. . . .
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> **8 AAC 45.065. Prehearings**. . . .
> . . . .
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> (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. . . .

ANALYSIS

Should this decision decide Employer's appeal from the designee's discovery order?

Employer timely appealed from the designee's July 19, 2022 decision denying its petition for a protective order. AS 23.30.108(c); 8 AAC 45.065(h). It contends the designee did not properly apply the law. Employee contends discovery is important and rather than depose the adjuster and get the same information, he used an authorized method and seeks a quick, fair and efficient resolution to the discovery dispute. He further contends he mimicked interrogatories Employer's attorney uses without first seeking permission, as Employer contended was required.

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." The reviewing panel must affirm the designee's discovery orders absent "an abuse of discretion." AS 23.30.108(c). Evidence and argument "presented" to the designee at a prehearing conference includes the parties oral contentions made at the prehearing conference and claims, answers, controversions, the moving party's petition for a protective order and any responsive pleadings, and if provided, the parties' prehearing briefing setting forth their evidence and arguments for use at the prehearing conference. Therefore, the prehearing designee's conference summary setting forth the evidence and argument upon which each party relies, and the designee's legal analysis related to the discovery in dispute is critical. *Goemer*.

To address any discovery dispute at a prehearing conference properly, the prehearing designee must apply the two-step *Granus* analysis: (1) The first step is to identify matters in dispute; this requires the designee to, at a minimum, review the claims (which generally state the issues from Employee's perspective) and the answers and controversions (which generally state the issues from the employer's perspective). (2) The second step is to decide (*i.e*., analyze) whether the information sought is relevant; or in other words, is it "reasonably calculated" to lead to facts that will tend to make a disputed issue, identified in step one, more or less likely. *Granus*. The designee's discovery order must be affirmed absent an abuse of discretion. On appeal, this decision does not have authority to insert its discretion in place of the designee's. *Sheehan*.

On July 19, 2022, the parties met before the prehearing designee for a ruling on Employer's May 31, 2022 petition for a protective order. Employer contended there was no legal authority to force it to provide written interrogatory answers. It further contended the 752 pages it already provided answered Employee's interrogatories, and contended 8 AAC 45.054 states discovery must be done by deposition pursuant to 8 AAC 45.054 (a), (b). Therefore, Employer contended interrogatories No. 8 through No. 11 requesting specific itemizations were improper, harassing and burdensome. Employee contended discovery is important to litigation and while the requested itemization could be gathered at an adjuster's deposition, he sought a "quick, fair, and efficient resolution" and utilized the same format often used by Employer's lawyer in his interrogatory requests. The designee reviewed Employer's May 31, 2022 petition and the subject interrogatories and found

them to be "standard, relevant and likely to lead to discoverable information." This is a conclusory analysis that does not apply the two-step *Granus* analysis. *Rogers & Babler*. The designee did not analyze the discovery request considering the claims and defenses.

The designee at the July 19, 2022 prehearing conference further found the Act envisioned a quick discovery process and "informal discovery such as interrogatories" assist in resolving claims speedily. He found voluntary cooperation in discovery is encouraged and prompt responses to interrogatories play a critical role in providing a speedy remedy. While these are accurate legal statements, they are again conclusory and contain no legal analysis. The designee further found statutes and regulations require information disclosure to assist in dispute resolution -- again a true statement, but without analysis. Without adequate analysis using the two-step *Granus* process, the designee denied Employer's May 31, 2022 petition for a protective order and ordered Employer to provide answers to interrogatories No. 8 through No. 11 "as soon as possible."

With no further information regarding the issues in dispute and how interrogatories No. 8 through No. 11 will lead to relevant evidence regarding those issues, the designee's conclusory analysis does not reflect his discretion and it is impossible to determine if he abused it. *Granus*. In short, the designee's recitation of valid legal principles combined with his conclusory statement that interrogatories No. 8 through No. 11 are "standard, relevant and likely to lead to discoverable information," is inadequate for any meaningful review on appeal. *Goemer*.

As was done in *Goemer*, this decision will remand this discovery issue to the appropriate designee. The designee shall make rulings on Employer's May 31, 2022 petition for a protective order against interrogatories No. 8 through No. 11 that applies the two-step *Granus* analysis and includes each parties' arguments and lists each parties' evidence presented at the July 19, 2022 prehearing conference. Given Employee's claims and Employer's defenses, the designee is directed to thoroughly analyze interrogatories No. 8 through No. 11 for which Employee requests a protective order and from which it appealed, and provide analysis that reflects the designee's discretion. In other words, the designee shall explain why Employer either must answer, or need not answer, interrogatories No. 8 through No. 11 based on Employee's claims and Employer's defenses and the applicable law. AS 23.30.108(b). The parties may thereafter appeal the designee's prehearing

conference discovery order in accordance with the Act and applicable regulations if either party does not agree with the designee's determination on remand. This result interprets the Act to ensure quick, efficient, fair, and predictable delivery of benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. AS 23.30.001(1). It also fosters the Act's requirement that the litigation process and procedure be as summary and simple as possible. AS 23.30.005(h).

The designee will also be directed to interpret the statutes and regulations related to discovery in deciding Employer's legal defense to Employee's use of interrogatories without "permission," as set forth above. *Manthey*; *Sheehan*; AS 23.30.115; AS 23.30.135; *Brown*; *Cooper*; *Slattery* .

CONCLUSION OF LAW

This decision should not decide Employer's appeal from the designee's discovery order.

ORDER

1) Employer's appeal from the designee's July 19, 2022 denial of its May 31, 2022 petition for a protective order is remanded to the appropriate prehearing designee to make rulings on the protective order petition limited to interrogatories No. 8 through No. 11. The designee is directed to make his discovery determination on remand based upon the parties' arguments and evidence presented at the July 19, 2022 prehearing conference and the information in Employee's agency file consistent with those arguments and evidence.

2) The designee on remand is directed to include in his prehearing conference summary the arguments and evidence each party presented for him to consider at the July 19, 2022 prehearing conference. The evidence and arguments should be identified by date and author. The designee's analysis should explain how or why the information Employee seeks through interrogatories No. 8 through No. 11 will lead to information relevant to Employee's claims and Employer's defenses. Finally, the analysis should reflect how the designee is exercising his discretion and why.

3) Jurisdiction over Employer's May 31, 2022 petition is retained to resolve any disputes.

Dated in Anchorage, Alaska on September 27, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, Member

/s/
Anthony Ladd, 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 Nenad Gajic, employee / claimant v. Silver Bay Seafoods, LLC, employer; Everest National Insurance, insurer / defendants; Case No. 202122788; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 27, 2022.

/s/
Rachel Story, Office Assistant