

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DEVON BETTS,)
)
) Employee,)
) Claimant,) INTERLOCUTORY
) DECISION AND ORDER
)
) v.)
) AWCB Case No. 201514088
)
) GREENLING ENTERPRISES, LLC,)
) AWCB Decision No. 23-0006
) Employer,)
) and) Filed with AWCB Juneau, Alaska
) on January 24, 2023
)
) ALASKA NATIONAL INSURANCE CO.,)
)
) Insurer,)
) Defendants.)
)

The Board designee's December 8, 2022 issues regarding how to proceed with the second independent medical evaluation (SIME) process was heard in Juneau, Alaska on January 10, 2023, a date selected on December 8, 2022. A December 8, 2022 prehearing conference gave rise to this hearing. Attorney David Graham appeared and represented Devon Betts (Employee), who appeared and testified. Attorney Nora Barlow appeared and represented Greenling Enterprises, LLC, and Alaska National Insurance Co. (Employer). *Betts v. Greenling Enterprises, LLC*, AWCAC Dec. No. 22-0056 (August 23, 2022), (*Betts I*) granted Employer's petition for an SIME and directed the parties to attend a prehearing conference at which dates for the parties to present medical records for the SIME physician would be scheduled in accordance with the applicable regulations. *Betts v. Greenling Enterprises, LLC*, AWCAC Dec. No. 22-0056 (November 30, 2022) (*Betts II*) denied Employee's petition for review of *Betts I*. There

were seven preliminary issues which were addressed with oral orders. The record closed at the hearing's conclusion on January 10, 2023.

ISSUES

Employee requested an order staying the SIME ordered in *Betts I* until proceedings before the Alaska Supreme Court (Court) ended. She contended she requested review of the Alaska Workers' Compensation Appeals Commission (Commission) order denying her petition to review *Betts I* and irreparable damage would result if a stay was not granted. She contended an SIME will require her to travel at "a great personal inconvenience and cost" even though the Court may reverse or modify *Betts I*. Employee contended Employer should not get "another otherwise unavailable bite at the apple in their ongoing efforts to deny compensation Employee is entitled to receive as a matter of law" as Employer's medical evaluation (EME) reports failed to rebut the presumption. She contended Barlow misused and misrepresented the scope of the medical release in the June 28, 2022 letter to a medical provider, which caused delay and confusion in the SIME process and invaded Employee's privacy. Employee contended a stay is an appropriate sanction for Employer's misrepresentation. Employee contended Appellate Procedure Rule 205 necessitates she request a stay with the Board before requesting it with the Court.

Employer objected to Employee's request for a stay. It contended Employee should have requested a stay with the Court, not the Board. Employer contended the issue cannot be heard because it was not included as an issue for hearing in the December 8, 2022 prehearing conference summary. It also contended granting a stay would violate Employer's right to due process because Employee requested a stay in her December 22, 2022 amended petition, and the period for it to answer the petition has not yet passed. Employer contended *Betts I* addressed Employee's contention the EME reports failed to rebut the presumption and denied her request for interim benefits.

An oral order denied Employee's request for a stay.

1) Was the oral order denying Employee's request for a stay correct?

As in *Betts I*, Employee again requested an oral order granting her interim benefits. She contended Employer's EME reports failed to rebut the presumption and she is entitled to benefits as a matter of law. Employee requested an order awarding her interim benefits. Employer objected to Employee's request and contended *Betts I* denied Employee's request for interim benefits, the Commission denied her petition for review and Employee requested review of the issue with the Court. It contended the issue cannot be heard because the December 8, 2022 prehearing conference summary did not include interim benefits as a hearing issue.

An oral order denied Employee's request for interim benefits.

2) Was the oral order denying Employee's request for interim benefits correct?

Employer requested a portion of Employee's hearing brief be stricken, specifically the portion regarding the "presumption analysis." It contended *Betts I* addressed this same request, denied interim benefits, the Commission order denied Employee's petition for review, and Employee requested the Court to review the issue. Employee objected, contending her arguments regarding the "presumption analysis" were relevant to issues at hearing. An oral order granted Employer's request.

3) Was the oral order granting Employer's request to strike a portion of Employee's hearing brief correct?

Employer requested Employee's witness list be stricken for failure to provide a brief description of the subject matter and substance of the witnesses' testimony. It also contended the witness list included Barlow and another staff member of Barlow's office, and neither would testify without subpoena and the attorney-client privilege applied.

Employee objected. She contended prior pleadings gave Employer notice of the subject matter and substance of the witnesses' expected testimony.

An oral order granted Employer's request to strike Employee's witness list.

4) Was the oral order granting Employer request to strike Employee's witness list correct?

Employee requested her November 14 and December 22, 2022 petitions be added as issues for hearing. She contended her November 14, 2022 petition sought a discovery order and the Board designee failed to issue an order without justification. Employer objected, contending adding the December 22, 2022 petitions as a hearing issue would violate its due process because its answer period has not yet lapsed. It contended Employee's November 14, 2022 petition sought a protective order, which was denied by the Board designee in the December 8, 2022 prehearing conference summary because Employee failed to identify medical records she contended were unrelated to the injury. Employer contended the proper procedure to bring a discovery order to hearing is to file a petition contending the designee abused her discretion, and Employee failed to file such a petition. It contended the December 8, 2022 prehearing conference summary governs the hearing issues.

An oral order denied Employee's request to add her November 14 and December 22, 2022 petitions as issues to be heard.

5) Was the oral order denying Employee's request to add her November 14 and December 22, 2022 petitions as hearing issues correct?

Employee requested Employer's evidence filed January 3, 2023 not be considered, contending it was filed late. Employer contended the evidence was first filed on December 21, 2022 but pages were inadvertently omitted due to a clerical error and its January 3, 2023 filing simply corrected the error. It contended the evidence was filed prior to December 21, 2022, and Employer was simply providing notice of evidence it intended to rely on for hearing. An oral order denied Employee's request.

6) Was the oral order denying Employee's request to not consider Employer's evidence correct?

Employee requested a continuance. She contended her due process would be denied if argument was taken on the issues set for hearing. She contended due process requires a decision and order addressing the preliminary issues before proceeding with oral argument on the hearing issues.

Employer objected, contending Employee provided no legal basis for her request. An oral order denied Employee's continuance request.

7) Was the oral order denying Employee's request for a continuance correct?

Employee contends Employer misrepresented the scope of the medical release in its June 28, 2022 letter and obtained nonrelevant medical records, which were included in the SIME records binder. She contends her right to privacy and confidentiality is violated. Employee contends the nonrelevant medical records irreparably "contaminated" the SIME process because Employer included them in the SIME binder. She contends the Board designee failed to instruct her on how to proceed when nonrelevant medical records were included in the SIME binders and the regulation provided no instruction either. Employee contends she did not specify which documents in the SIME binder were not relevant because she did not have the opportunity to review the SIME binder. She contends she cannot sign the SIME affidavit because it requires her to attest the SIME binders contain copies of all the medical records in her possession, which would not be true if the nonrelevant records were removed and returned to her. Employee contends Employer failed to withdraw the submitted SIME binder, remove objectionable records, and resubmit a new SIME binder. She requests orders staying the SIME and finding Barlow fraudulently misled the medical provider under AS 23.30.250 and reporting her to the Special Investigations Section under AS 23.30.280.

Employer contended Employee refused to participate in the SIME process and adhere to the SIME deadlines as ordered in *Betts I* and in the September 20, 2022 prehearing conference summary. It contends Employee failed to identify which records she contends are not relevant to the work injury and to then properly request a protective order for those medical records to be returned to her. Employer contends the Alaska Workers' Compensation Act (Act) provides the Board authority to investigate an injury by those means it deems necessary to ascertain the parties' rights and requests the SIME process proceed without Employee's Affidavit of Review and Completeness of SIME records.

8) Should the SIME process proceed without Employee's Affidavit of Review and Completeness of SIME Records?

Employee contends records concerning Employee's pregnancy, maternal care and other unrelated conditions should also be removed. She contends she has not had the opportunity to review the SIME binder to identify the objectionable records. Employee agrees the records listed in Employer's November 16, 2022 response to her petition November 14, 2022 petition should be removed from the SIME records binder.

Employer contends the SIME records should consist of the records it filed. It also agrees to remove the medical records listed in its November 16, 2022 response from the SIME binder. However, Employer contends additional records should not be removed as Employee has had months to review the records and identify unrelated records but failed to do so without explanation.

9) If the SIME proceeds without Employee's Affidavit of Review and Completeness of SIME Records, which records should be included for the SIME panel's review?

FINDINGS OF FACT

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

- 1) On June 28, 2022, Patrick Carnahan from Barlow's law office requested medical documents from Island Primary Care-Orcas in a letter along with a release signed by Employee:

Enclosed is a medical release authorizing our firm to receive medical documents relating to the above patient. This includes any surgical photographs and/or surgical videos.

Please research your records concerning this patient and send single-sided copies of all the medical records including photographic identification, intake forms, patient paperwork, phone logs, records, prescription logs, prescriptions, reports, notes, chart notes, letters, photographs, color surgical photos, surgical videos, test reports or results (including as applicable, physical test results, pathology test results, laboratory test results, x-rays, MRI & CAT scans, EMGs, EKGs, sonograms, etc.), bills, and referral letters in your possession, whether generated by you or received from a third party. **If possible, please provide all records by e-mail to service@barlowanderson.com. Please provide radio graphic films and/or diagnostic studies and disc format mailed to the address above.**

Attached is a Statement of Custodian of Records which should be signed and returned with the records. This document states that copies of all records regarding the patient have been sent and that they are true and correct. If there are

no documents, please indicate so on the attached statement of custodian of records and return to our office by facsimile or mail. **If you require pre-payment for the records, please fax or e-mail an invoice. Otherwise, please bill us for any reasonable copying costs and note that our office requires pre-authorization for any charges over \$150 for these services.** . . . If you have any questions concerning this request, please call.

The release authorized Employee's physician to provide medical records to Barlow's law office relating to treatment of the "2013 work injury or illness at work, and the following parts of my body, diagnoses or conditions, organ systems, chief complaints and/or symptoms: low back, lumbar spine, demyelinating neuropathy." (Letter, June 28, 2022; Release of Medical Information).

2) On June 30, 2022, Employer filed a medical summary and served it upon Employee by email. It contained all the medical records Employer proposed removing from the SIME binder in its November 16, 2022 response. (Email and Medical Summary, June 30, 2022).

3) On August 23, 2022, *Betts I*, granted Employer's petition for a SIME with a neurologist, orthopedic surgeon and pain management specialist for causation and treatment disputes, directed the parties to appear before a Board designee for a prehearing conference as soon as possible to schedule dates for the parties to present medical records for the SIME physician, and cancelled a scheduled merits hearing. It also denied Employee's request for interim benefits. Employee contended Employer's EME reports failed to rebut the presumption and a SIME unreasonably delays medical treatment. *Betts I* found there are several "competing" causes of Employee's medical treatment needs, including lumbar spine disc disease and demyelinating polyneuropathy. It acknowledged a SIME will postpone a merits hearing, but an SIME was the best manner to ascertain the parties' rights and assist to resolve Employee's claim. *Betts I* found awarding interim medical benefits before Employee's claim was heard would not protect the parties' due process rights and her request was denied. (*Betts I*).

4) On September 7, 2022, Employee requested reconsideration of *Betts I*. (Employee's Petition for Reconsideration of the Interlocutory Decision and Order Granting SIME, September 7, 2022).

5) On September 20, 2022, Board designee Dani Byers ordered Employer to file three hardcopy sets of medical records in binders by September 28, 2022, along with an affidavit verifying the

binders contain copies of all medical records in Employer's possession and to serve Employee with an electronic copy. Employee was ordered as follows:

Employee must review the electronic copy of the binder. **If the binder is complete**, Employee must file with the board an affidavit verifying that the binder contains copies of all the medical records in Employee's possession. **If the binder is incomplete**, Employee must make **four** hardcopies of the additional medical records, including physician's depositions, missing from the first set of binders. Each copy must be put in a separate binder (as described above). Because there will be three SIME physicians, Employee must make and file with the board three sets of supplemental binders. Then, the **supplemental** binders and an **affidavit verifying the completeness of the medical records** must be filed with the board. The **fourth** copy of the supplemental binder must be served upon the opposing party together with an affidavit verifying that it is identical to the sets of binders filed with the board. The affidavit of completeness and supplemental binders (if any) must be served on the opposing party and filed with the board by **10/28/2022**. (Prehearing Conference Summary, September 20, 2022).

- 6) On September 27, 2022, Employer filed three copies of the 848-page SIME binder and a signed SIME affidavit, and Employee was served with an electronic copy. (SIME Medical Records and Affidavit of Service of SIME Medical Records, September 29, 2022).
- 7) Employee did not request the September 20, 2022 prehearing conference summary be modified or amended. (Record).
- 8) On October 10, 2022, Employee requested the Commission review *Betts I*. (Employee's Petition for Review of Interlocutory Decision and Order Granting SIME, October 10, 2022).
- 9) On November 2, 2022, Barlow emailed the following to Byers and copied Graham, "I wanted to make sure that we are moving forward with the SIME ordered by the Board. Could you please let me know where you are on making those appointments?" (Barlow Email, November 2, 2022). Graham replied to Barlow and copied Byers:

I do not know who Ms. Byers is, nor am I aware of what "appointments" you are referring to in this case. However, as you know the appeals commission is currently reviewing whether or not to grant interlocutory review as to the SIME order in this case. I will request your consent for a stay of the SIME order if that review is granted, and will make a motion if you decline that consent.

Would it not be simpler and less time and cost if we wait for that decision and then decide how to move forward? Otherwise I can file a request for a stay before

we know if review will be granted. Please advise. (Graham Email, November 2, 2022).

Barlow responded, “I do not consent to a stay. Your binders are due, and the process needs to move forward. Ms. Byers handles the SIMEs for the AWCB. Isn’t requesting the stay just causing further delay?” (Barlow Email, November 2, 2022).

10) On November 4, 2022, Byers emailed Barlow and Graham:

I was the designee at the prehearing when you set the SIME deadlines. We’ve spoken before.

Anyway, I have three copies of the binders already. What I am missing is an Affidavit of Completeness from you, per paragraph “G” of the 9/20/22 prehearing conference summary. This was due last week. Please file it at your earliest convenience and I will schedule the SIME appointments. This SIME was ordered by the board, so you will need to file a petition if you’re trying to delay the SIME process. (Byers Email, November 4, 2022).

11) On November 14, 2022, Barlow emailed Byers and Graham stating, “Mr. Graham has not filed the Affidavit of Completeness in an apparent attempt to delay the SIME without obtaining a stay. Could you please proceed with scheduling the SIME appointments. . . .” (Barlow Email, November 14, 2022).

12) On November 14, 2022, Employee requested the SIME binder be revised to remove nonrelevant medical records submitted by Employer and a protective order “prohibiting Employer, its Insurer or their attorneys from misusing or misrepresenting the scope of any medical releases.” She contended Employer submitted records concerning her “pregnancy, maternal care and other unrelated conditions beyond the scope of a release she signed in November 2021.” Employee failed to identify which medical records she sought to have removed. She filed this petition by email and the email contained the November 14, 2022 email from Barlow to Byers and all the November 2, 2022 emails. (Employee’s Petition to Revise SIME Medical Records and for Protective Order, November 14, 2022).

13) On November 14, 2022, Barlow emailed Graham in response to his email filing the November 14, 2022 petition and copied Byers and the Division’s workers’ compensation email address, stating, “Please specify the records you would like removed.” Barlow’s email included her first email to Byers. (Employer Email, November 14, 2022).

14) On November 16, 2022, Barlow emailed Byers and Graham:

Mr. Graham has not petitioned the Commission for a stay of the SIME. He did, however, file a petition to strike medical records. Unfortunately, Mr. Graham did not contact me before filing the petition. If he had, we would have worked with him to resolve the issue. Moreover, in his petition, Mr. Graham did not identify the specific offending SIME records. Today, we will be filing a response to the petition in which we agree to remove the SIME records that do not contain information pertaining to employee's injury and/or disputed conditions. I encourage Mr. Graham to contact me directly if there are other medical records he believes should not be included.

Mr. Graham has ignored the SIME deadline for advising the board as to whether the SIME records are complete. As such, I again request that the board move forward with scheduling the SIMEs. . . ." (Email, November 16, 2022).

15) On November 16, 2022, Employer agreed to remove medical records in the SIME binder on pages 708-22, 727-50, 759-71, 795-96 and 799-804 and requested Employee inform it if there were other medical records she contended should be removed. (Employer's Response to Employee's Petition to Revise SIME Medical Records and for Protective Order, November 16, 2022).

16) On November 17, 2022, Byers replied to Barlow and Graham:

The employee **must** either file a motion for stay with the commission or an affidavit of review and completeness of the SIME records with the board. I've already said this. I've never seen any attorney (or even a pro se claimant) fail to file a motion for stay when appealing a board-ordered SIME before, and at this point the non-compliance seems willful, so I'm I am reaching out to Chief for direction. (Email, November 17, 2022).

17) On November 23, 2022, Employee requested a stay of the SIME until the Commission proceedings ended. She contended she petitioned for review of *Betts I* with the Commission and proceeding with an SIME will waste money and time if it is reversed; the petition for review would likely become moot if the SIME report is received prior to a decision; the important issue raised in the petition for review regarding the presumption of compensability could evade review; it would be "unfair and illegal for the SIME process to be converted into a method" for Employer to obtain another bite at the apple of whether its evidence rebutted the presumption of compensability; and Employer "misused and misrepresented the scope of a medical release, and

this violation of law and trust has caused Employee harm” by adding delay and confusion to the SIME process. (Employee’s Petition to Stay SIME Order, November 23, 2022).

18) On November 28, 2022, Employer opposed Employee’s petition for a stay. It contended she provided no authority which would allow a stay of *Betts I* orders. Employer also contended Employee reasserted arguments already rejected in *Betts I*. It contended Employee was properly informed by Byers she must request a stay with the Commission in a November 17, 2022 email. Employer attached the November 2, 4, 16 and 17 emails between the parties and Byers as exhibits. (Employer’s Opposition to Employee’s Petition for Stay SIME Order, November 28, 2022; Email, November 4, 2022).

19) On November 30, 2022, the Commission denied Employee’s request for review. (Order on Petition for Review, November 30, 2022).

20) On December 8, 2022, the Board designee held a prehearing conference to discuss Employee’s November 14 and 23, 2022 petitions:

Employee’s attorney requested to start off the prehearing conference by reiterating that Employee wants her medical benefits reinstated immediately and recited his arguments from his SIME hearing brief and subsequent appeal to the Commission. This issue has already been decided by the board and the Appeals Commission. Employee is considering appealing the Commission’s decision to the Supreme Court.

The SIME process was not able to move forward as ordered in *Betts I*:

Employee has not filed an Affidavit of Review and Completeness of Records or provided any additional information to resolve Employee’s objection to the SIME records. . . .

Employee instead objected to unspecified records as irrelevant and petitioned for protective order. The employer filed an answer, agreeing to strike specific records, but Employee has not responded or identified the records.

The designee was unable to issue a discovery order on Employee’s petition without Employee specifying the objectionable records.

Employee’s attorney stated he could not identify the objectionable records or file an Affidavit of Review and Completeness of SIME records because he had not had the opportunity, because he did not understand whether he or his client should review the records, because the records are not complete, and because the binders cannot be complete if the objectionable records are removed.

The designee set a hearing on her own motion and notified the parties of the issues for hearing, “1) Should the SIME process proceed without Employee’s Affidavit of Review and Completeness of SIME Records” and “2) If the SIME proceeds without Employee’s Affidavit of Review and Completeness of SIME Records, which records should be included for the SIME panel’s review.”

Employee requested an additional issue be set for hearing: “How can my client obtain a summary, prompt determination to her present legal right to medical benefits?” He clarified that he is not asking the board to determine credibility, just the presumption of compensability.” Employer objected to adding the issue because no petition has been filed. This issue was not set for hearing because “it has already been decided” in *Betts I* and the Commission denied Employee’s petition for review, and the issue “may soon be appealed” to the Court.

Employer requested a separate hearing evidence deadline be set to require Employee to specify the objectionable SIME records, contending it cannot properly prepare for hearing without knowing which specific SIME records Employee objects to inclusion. The designee “found this argument to be circular and declined to set this additional deadline” because SIME record deadlines were already set, and Graham refused to participate in the SIME records process as ordered. The designee saw “no purpose in resetting a deadline Employee has already refused to obey, causing the need for the hearing.” The designee directed parties to serve all evidence for hearing by December 21, 2022, and to file witness lists pursuant to 8 AAC 45.112. Parties were also instructed how to request reconsideration and to appeal a discovery order. The summary incorrectly stated the prehearing conference date was January 10, 2023. (Prehearing Conference Summary, December 8, 2022).

21) On December 9, 2022, Barlow emailed Graham and the Board designee stating, “This case has proven to be incredibly frustrating for me. That does not, however, excuse my behavior during the prehearing conference yesterday. For that, I apologize and will make sure in the future I refrain from unnecessary comments.” (Email, December 9, 2022).

22) On December 12, 2022, the Division served parties with the December 8, 2022 prehearing conference summary. (Prehearing Conference Summary Served, December 12, 2022).

23) On December 12, 2022, Employee requested the Court review the Commission's November 30, 2022 order denying review of *Betts I*. She requested orders finding Employer failed to rebut the raised presumption, reversing *Betts I*'s order for an SIME, and granting her claim for interim benefits. (Employee's Petition for Review of Order Denying Review of D&O Granting SIME, Denying Interim Benefits and Vacating a Merits Hearing, December 12, 2022).

24) On December 21, 2022, Employer filed and served evidence it intended to rely upon at hearing totaling 43 pages and one page for the Notice of Filing. The evidence was missing every other page of the original documents but included the November 2, 2022 emails and the November 16, 2022 email. (Notice of Filing, December 21, 2022).

25) On December 22, 2022, Employee requested an order staying *Betts I*'s order for a SIME until termination of proceedings before the Court. She contended irreparable damage would result if a stay was not granted because she would be required to travel at "a great personal inconvenience and cost" even though the Court may reverse or modify *Betts I*; Employer should not get "another otherwise unavailable bite at the apple in their ongoing efforts to deny compensation Employee is entitled to receive as a matter of law" as Employer's evidence failed to rebut the presumption; Barlow misused and misrepresented the scope of the release in the June 28, 2022 letter which added delay, confusion and invaded Employee's privacy and a stay would be appropriate sanction. Employee contended Appellate Procedure Rule 205 necessitates she request a stay with the Board first. (Employee's Amended Petition to Stay SIME Order, December 22, 2022).

26) On December 22, 2022, Employee requested reconsideration of the December 8, 2022 discovery order and modification or amendment of the December 8, 2022 prehearing conference summary to add Employee's November 14, 2022 petition and Employee's December 22, 2022 modified petition for stay as hearing issues and to correct misstatements of fact. (Employee's Petition to Modify or Amend the Prehearing Conference Summary, For Reconsideration of a Discovery Order, and For an Additional Prehearing Conference, December 22, 2022).

27) On January 3, 2023, Employer refiled and reserved its hearing evidence originally filed on December 21, 2022 totaling 86 pages and two-pages for the Notice of Filing. (Notice of Filing, January 3, 2023).

28) On January 3, 2023, Employee filed a brief containing a portion addressing the presumption analysis, contending she is entitled to receive interim benefits because Employer's EME reports failed to rebut the presumption. (Employee Hearing Brief, January 3, 2023).

29) On January 4, 2023, Employee filed a witness list and included McCoy, from Island Health, Barlow and Carnahan. Employee failed to briefly describe the subject matter and substance of each witness's expected testimony. (Employee Witnesses for Hearing, January 4, 2023).

30) Barlow contended she and Carnahan refused to testify without a subpoena. (Record).

31) Employer contended the subject matter and substance of McCoy's expected testimony was not clearly provided in previous filings. It contended McCoy refused to discuss her expected testimony with Barlow when she contacted McCoy. (Record).

32) Employee contended the subject matter of McCoy's testimony is provided in previous pleadings. However, she contended she was not sure exactly what McCoy's expected testimony would be, but she would be examined regarding Employer's June 28, 2022 letter with the release. (Record).

33) Employee requested Employer's evidence filed January 3, 2023 not be considered, contending it was filed late. Specifically, she requested the November 2, 4, 14 and 16, 2022 emails not be considered. (Record).

34) Betts testified she received the SIME records but has not reviewed them all. She believes records concerning her pregnancy, maternal care, and other unrelated conditions were improperly included in the SIME records. Employee felt violated when she saw the records were included. She could not identify specific records she wanted removed. She did not know if she received and reviewed the June 30, 2022 medical summary. (Betts).

35) The "Affidavit Verifying SIME Records are Complete" includes the following sworn statements, "a. I am a party to this case. b. I reviewed the medical records in my possession regarding this case. c. The SIME binders contain copies of all the records in my possession. . . ." (Form 07-6148).

36) Employee did not request a finding under AS 23.30.250 in her November 14, 2022 petition, nor in any other pleading received to date. (Record).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
.....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or particular 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 23.30.107. 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. . . This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.
.....

AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance. (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. . . .

(b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority. . . .

(c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. 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 decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

(d) If the employee files a petition seeking a protective order to recover medical and rehabilitation information that has been provided but is not related to the employee's injury, and the board or the board's designee grants the protective order, the board or the board's designee granting the protective order shall direct the division, the board, the commission, and the parties to return to the employee, as soon as practicable following the issuance of the protective order, all medical and rehabilitation information, including copies, in their possession that is unrelated to the employee's injury under the protective order.

AS 23.30.129. Judicial review of commission orders. (a) Notwithstanding the provisions of AS 44.62.560, orders of the commission may not be appealed to the superior court. Consistent with AS 22.05.010(b), final decisions of the commission may be appealed to the supreme court, and other orders may be reviewed by the supreme court as provided by the Alaska Rules of Appellate Procedure.

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Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174, 176 (Alaska 1965), overruled on other grounds by *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 n. 6 (Alaska 1979), stated in respect to an administrative agency's jurisdiction when its decision is appealed:

It is the general rule that when an order of an administrative agency is appealed to a court, the agency's power and authority in relation to the matter is suspended as to questions raised by the appeal. (Citation omitted). The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

Operation of the rule is limited to situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court's jurisdiction. If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred upon it by law.

Whether, or to what extent, the board retains jurisdiction hinges on the questions raised by the appeal. In *Pietro v. Unocal Corporation*, AWCB Decision No. 11-0132 (August 25, 2011), the

employee argued the board retained jurisdiction during an appeal to the Commission. The issue on appeal was the compensability of the employee's injuries. The board determined it did not have jurisdiction, because the issues before it were wholly dependent on the issues in the appeal. On the other hand, the board found it had jurisdiction over a claim for attorney fees where the appeal was limited to the correctness of the compensation rate. *Barnes v. State of Alaska*, AWCB Decision No. 84-0130 (May 10, 1984).

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 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions. (a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120 — 11.46.150.

AS 23.30.280. Investigation of fraud; staffing. (a) The director shall establish a section within the division for the investigation of fraudulent or misleading acts under AS 23.30.250 and other fraudulent acts relating to workers' compensation.

(b) The director may investigate facts reported under this section and may refer facts indicating a possible violation of law to the appropriate prosecutor or agency. If the director determines that there is credible evidence that a person obtained a payment, compensation, medical treatment, or other benefit provided under this chapter by a fraudulent act or false or misleading statement or representation as provided in AS 23.30.250(a), the director shall notify the affected employer, insurer, and adjuster upon conclusion of the investigation. If the fraudulent act or false or misleading statement or representation was perpetrated against the division, the director may file a petition as provided in AS 23.30.110 for an order of forfeiture against the person, precluding, in whole or in

part, the person from future payment, compensation, medical treatment, or other benefit provided under this chapter.

(c) The director shall establish a toll-free fraud hotline to receive calls relating to fraudulent or misleading acts under this chapter. The director shall publicize the availability of the toll-free fraud hotline and encourage the public to provide information to the division relating to fraudulent or misleading acts relating to workers' compensation.

8 AAC 45.050. Pleadings. . . .

(c) Answers. . . .

(2) An answer to a petition must be filed within 20 days after the date of service of the petition and must be served upon all parties.

. . . .

(6) Upon a verified petition of a party or upon its own motion, the board will, in its discretion, extend or postpone the time for filing an answer or otherwise continue the proceedings under such terms as may be reasonable.

(e) Amendments. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading.

. . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

. . . .

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

....

8 AAC 45.063. Computation of time.

....

(b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

8 AAC 45.065. Prehearings. (a) . . . At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues;

....

(4) limiting the number of witnesses, identifying those witnesses, or requiring a witness list in accordance with 8 AAC 45.112;

....

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

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. . . .

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

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

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). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. . .

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

(A) For review of an administrator's decision issued under AS 23.30.041, a party shall file a petition asking for review of the administrator's decision. An affidavit of readiness for hearing form is not required. . . .

(2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. If an affidavit is filed before the time set by this paragraph,

(A) action will not be taken by the board or designee on the claim or petition; and

(B) the party must file another affidavit after the time set by this paragraph.

(3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

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

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

....

(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

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness, becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d) ;

(F) a second independent medical evaluation is required under AS 23.30.095 (k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041 (d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d) (1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; 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.

8 AAC 45.090. Additional examination. . . .

(d) Regardless of the date of an employee's injury, the employer must

(1) give the employee and the employee's representative, if any, at least 10 days' notice of the examination scheduled by the employer;

(2) arrange, at least 10 days in advance of the examination date, for the employee's transportation expenses to the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, at no cost to the employee if the employee must travel more than 100 road miles for the examination or, if the employee cannot travel on a government-maintained road to attend the examination, arrange for the transportation expenses by the most reasonable means of transportation; and

(3) arrange, at least 10 days in advance of the examination date, for the employee's room and board at no cost to the employee if the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, requires the employee to be away from home overnight.

(g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section,

(1) the employer will pay the physician's fee, if any, for the missed examination; and

(2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds

(A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or

(B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

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

(h) In an evaluation under AS 23.30.095(k), the board or the board's designee will identify the medical disputes at issue and prepare and submit questions addressing the medical disputes to the medical examiners selected under this section. The board may direct

(1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder;

(2) the party making the copy to serve the binder of medical records upon the opposing party together with an affidavit verifying that the binder contains copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binder to review the copies of the medical records to determine if the binder contains copies of all the employee's medical records in that party's possession; the party served with the binder must file the binder with the board not later than 10 days after receipt and, if the binder is

(A) complete, the party served with the binder must file the binder upon the board together with an affidavit verifying that the binder contains copies of all the employee's medical records in the party's possession; or

(B) incomplete, the party served with the binder must file the binder upon the board together with a supplemental binder with copies of the medical records in that party's possession that were missing from the binder and an affidavit verifying that the binders contain copies of all medical records in the party's possession; the copies of the medical records in the supplemental binder must be placed in chronological order by date of treatment, with the initial report on top, and numbered consecutively; the party must also serve the party who prepared the first binder with a copy of the supplemental binder together with an affidavit verifying that the binder is identical to the supplemental binder filed with the board;

8 AAC 45.112. Witness list. A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing. . . .

8 AAC 45.120. Evidence. . . .

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

. . . .

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 denying Employee’s request for a stay correct?

The December 8, 2022 prehearing conference summary identified the issues for hearing. Unless modified, the prehearing conference summary will “limit the issues” at hearing and “governs the issues and the course of the hearing.” 8 AAC 45.065(c). This requirement helps avoid misunderstandings and allows all parties to properly prepare their evidence and arguments. Once the parties are at the hearing, absent “unusual and extenuating circumstances,” that have not been shown to exist in this case, the prehearing conference summary still “governs the issues and the course of the hearing.” 8 AAC 45.070(g).

Employee’s November 23, 2022 petition was her first request for a stay of the SIME process until the proceedings with the Commission ended. The Commission denied Employee’s request for review of *Betts I* on November 30, 2022. The Board designee correctly concluded Employee’s November 23, 2022 petition was moot at the December 8, 2022 prehearing conference when issues were set for hearing. On December 12, 2022, Employee requested the Court review the Commission’s November 30, 2022 order; then on December 22, 2022, she filed an amended petition seeking a Board order to stay the SIME based upon her request for review with the Court. Employer had 20 days to answer Employee’s December 22, 2022 amended petition, and the deadline had not passed by the January 10, 2022 hearing (December 22, 2022 + 20 days = January 11, 2023). 8 AAC 45.050(c)(2). While the designee has discretion to set a hearing even though Employee has not filed an ARH, the designee does not have discretion to shorten the time for filing an answer. 8 AAC 45.050(c)(6); 8 AAC 45.070(b)(3). Employee’s December 22, 2022 amended petition for a stay was not properly raised as a hearing issue; Employer is entitled to sufficient time to respond to the issue. AS 23.30.001(4); 8 AAC 45.065(c); 8 AAC 45.070(g). The oral order denying Employee’s request for a stay was correct.

2) Was the oral order denying Employee’s request for interim benefits correct?

Betts I denied Employee’s request for interim benefits. The Commission’s November 30, 2022 order denied review of *Betts I*. Employee requested review on December 12, 2022, and this issue is currently before the Court. Her December 12, 2022 petition for review requested an order granting interim benefits, which was denied in *Betts I*. The Board’s power and authority

of an order is suspended as to questions raised by Employee's petition to review as the Board cannot take actions which would interfere with or frustrate the Court's jurisdiction. AS 23.30.129(a); *Fischback*; *Lynn*; *Pietro*; *Barnes*. Thus, the Board lacks jurisdiction to reconsider or modify Employee's entitlement to interim benefits because doing so would interfere with the Court's jurisdiction. The oral order denying Employee's request for interim benefits was correct.

3) Was the oral order granting Employer's request to strike a portion of Employee's hearing brief correct?

Employer requested the portion of Employee's brief regarding the "presumption analysis" be stricken and Employee objected, contending her arguments regarding the "presumption analysis" were relevant to issues set for hearing. The portion of Employee's brief addressing the "presumption analysis" contends she is entitled to receive interim benefits because Employer's EME reports failed to rebut the presumption. As found above, Employee's request for interim benefits was denied in *Betts I* and is pending review with the Court upon Employee's December 12, 2022 request. The only issues set for hearing in the December 8, 2022 prehearing conference were: 1) Should the SIME process proceed without Employee's Affidavit of Review and Completeness of SIME Records, and 2) If the SIME proceeds without Employee's Affidavit of Review and Completeness of SIME Records, which records should be included for the SIME panel's review. Employee's arguments concerning the presumption analysis and interim benefits are not relevant to the issues set for hearing and will not be considered. 8 AAC 45.065(c); 8 AAC 45.070(g). The oral order granting Employer's request to strike the portion of Employee's hearing brief regarding the "presumption analysis" was correct.

4) Was the oral order granting Employer's request to strike Employee's witness list correct?

A party's witnesses will be excluded from testifying at hearing if a witness list is required under 8 AAC 45.065(a)(4) and a party fails to include a brief description of the subject matter and substance of the witness's expected testimony in the witness list. The designee exercised her discretion under 8 AAC 45.065(a)(4) and the December 8, 2022 prehearing conference summary directed the parties to file a witness list pursuant to 8 AAC 45.112.. Employee's witness list

failed to provide a brief description of the subject matter and substance of the witness's expected testimony.

Employee contended other pleadings, including Employee's November 14, 2022 petition, Employer's November 16, 2022 response and Employee's and Employer's hearing briefs, provided Employer notice of the witnesses' testimony's subject matter and substance in. Her November 14, 2022 petition and hearing brief contended Employer's June 28, 2022 letter to Island Primary misrepresented the medical release's scope and requested the SIME records be revised to remove nonrelevant medical records and a protective order "prohibiting Employer, its Insurer or their attorneys from misusing or misrepresenting the scope of any medical releases." At hearing Employee contended she was not sure exactly what McCoy's expected testimony would be, but she would be examined regarding Employer's June 28, 2022 letter and release. Employee's November 14, 2022 petition and hearing brief asserting Barlow engaged in misrepresentation does not provide the substance of McCoy's expected testimony. Likewise, Employer's denial of her assertion does not mean it knows the substance of McCoy's expected testimony either.

Parties decide if calling witnesses will assist them to prove their allegations or contentions. To avoid surprises at hearing, witness lists must describe the subject matter and substance of each witness's expected testimony. The witness list regulation is intended to prevent "trial by ambush." A basic witness list in conformance with 8 AAC 45.112 provides parties notice of who they can expect their opponent to call at hearing and in basic terms what they are expected to say. Employee failed to provide such notice to Employer. If witness list regulations are to have any meaning, they must be followed; otherwise, they are just suggestions the parties can choose to follow or not at their option. Graham, an attorney, attended a prehearing conference and was directed to file a witness list pursuant to 8 AAC 45.112. This is not an instance where a *pro se* litigant requests more latitude because he or she does not understand the rules. Of all workers' compensation regulations, 8 AAC 45.112 is perhaps the simplest and easiest one with which to comply. *Rogers & Babler*. It requires parties to timely file their witness lists and gives specific instructions for the information required: A witness list must indicate whether the witness will testify in person, by deposition, or telephonically and must provide the witness's

address, phone number “and a brief description of the subject matter and substance of the witness’s expected testimony.” The regulation further states if a party fails to file a witness list in accordance with 8 AAC 45.112 the panel “will exclude the party’s witnesses from testifying at the hearing,” but it will allow a party’s testimony.

Employee’s February 9, 2021 witness list was not in accordance with 8 AAC 45.112. It provided no description of the subject matter or substance of any witness’s expected testimony. Graham diverted responsibility for filing a non-conforming witness list when he asserted Employer had notice of witnesses’ expected testimony based on other pleadings. Employee failed to comply with the regulation requirement. 8 AAC 45.195. Therefore, the oral order granting Employer’s request to strike Employee’s witness list was correct.

5) Was the oral order denying Employee’s request to add her November 14 and December 22, 2022 petitions as issues for hearing correct?

Employee’s November 14, 2022 petition requested the SIME binder be revised to remove medical records unrelated to her injury included by Employer. The designee denied the request at the December 8, 2022 prehearing conference because Employee failed to specify which medical records were unrelated to her injury. The hearing issues were set and did not include Employee’s November 14, 2022 petition. The December 8, 2022 prehearing conference summary was served on December 12, 2022. On December 22, 2022, Employee requested reconsideration of the designee’s discovery order under 8 AAC 45.065(i). The designee had until January 11, 2023, 20 days after service of the December 8, 2022 prehearing conference summary to take an action on the December 22, 2022 request to reconsider the discovery order (December 12, 2022 + 20 days = January 11, 2023). *Id.* No action had been taken at the time of the January 10, 2023 hearing and the designee had until close of business on January 11, 2023 to do so. Therefore, Employee’s December 22, 2022 request for reconsideration could not be raised as an issue for the January 10, 2023 hearing. The oral order denying Employee’s request to add her December 22, 2022 request for reconsideration as an issue for hearing was correct.

Employee contended the designee failed to issue a discovery order at the December 8, 2022 prehearing conference without justification. The designee denied Employee’s request for a

discovery order because Employee failed to identify medical records she contended were not related to her work injury. It is not a designee's duty to review SIME binders' medical records to determine if each record submitted is related to a claimant's work injury. The parties are required to review the records and, if the employee finds the binder contains records unrelated to the work injury, there are two avenues that can be taken. The first is a non-litigious approach. The employee can contact the employer, voice their concern and reach a stipulation to remove unrelated records. If an agreement cannot be reached, the employee can then petition for removal of the records. Either way, the party who asserts medical records are unrelated to the work injury and should be removed must identify those records specifically. Employee has not identified which records she believes should be removed other than in a general manner. Upon review of Employee's petition, Employer attempted to specifically identify the records to avoid further litigation. Nonetheless, had the designee failed to issue a discovery order, the procedure under the Act is to remand the matter back to the designee for an order because discovery orders are determined by a designee at prehearings. AS 23.30.108; 8 AAC 45.065(a)(1). Under the circumstances, the oral order denying Employee's request to add her November 14, 2022 request for a discovery order as an issue for hearing was correct.

Employee's November 14, 2022 petition also sought a "protective order" "prohibiting Employer, its Insurer or their attorneys from misusing or misrepresenting the scope of any medical releases." It is unclear what relief Employee sought with this request because the protective orders issued under AS 23.30.108 addresses parties' requests to return unrelated information. There is no provision permitting the protective order Employee sought. At hearing, for the first time, Employee requested orders finding Barlow committed fraud under AS 23.30.250 by misrepresenting the scope of the medical release in the June 28, 2022 letter and reporting her to the Special Investigation Section under AS 23.30.280. Employee did not request a finding under AS 23.30.250 in her November 14, 2022 petition, nor in any other pleading received to date. Due process requires Employee to file and serve upon Employer a petition seeking such a finding under AS 23.30.250 as Employer has the right to notice and to defend against such claims. AS 23.30.001(4). Thus, had Employee intended this protective order request to request such a finding under AS 23.30.250, the issue was not properly raised as an issue for the January 10, 2022 hearing. It is unclear why Employee requested an order reporting Barlow to the Special

Investigation Section because Employee can herself report a statement she contends is misleading. AS 23.30.280(c). Employee's request for orders finding Barlow mislead the medical provider under AS 23.30.250 and reporting her to the Special Investigations Section under AS 23.30.280 were not identified as issues for this hearing and cannot without violating Employer and Barlow's due process be heard. 8 AAC 45.070. The oral order denying Employee's request to add her November 14, 2022 request for a "protective order" "prohibiting Employer, its Insurer or their attorneys from misusing or misrepresenting the scope of any medical releases" was correct.

Employee's December 22, 2022 amended petition for a stay was addressed in section one above. The oral order denying Employee's request to add her November 14 and December 22, 2022 petitions as issues for hearing was correct. *Id.*

6) Was the oral order denying Employee's request to not consider Employer's evidence correct?

Employee requested the November 2, 4, 14 and 16, 2022 emails filed by Employer on the January 3, 2023 Notice of Intent to Rely not be considered at hearing because they were filed late. The December 8, 2022 prehearing conference summary directed the parties to file evidence by December 21, 2022. 8 AAC 45.120(f). Employer's December 21, 2022 Notice of Intent to Rely included the November 2 and 16, 2022 emails. A review of the record shows Employee filed her November 14, 2022 petition by email and the email contained the November 14, 2022 email from Barlow to the designee and all of the November 2, 2022 emails. Employer first filed the November 4 and 16, 2022 emails with its November 28, 2022 opposition to Employee's November 23, 2022 petition for an SIME. Thus, the November 2, 4, 14 and 16, 2022 emails were filed before the December 21, 2022 deadline and can be considered. *Id.* The oral order denying Employee's request not to consider Employer's evidence was correct.

7) Was the oral order denying Employee's request for a continuance correct?

Employee requested a continuance, contending proceeding with argument on the issues set for hearing violated her due process. She contended due process requires a decision and order

addressing the preliminary issues be released before proceeding with oral argument on the issues for hearing. Employer objected, contending there is no legal basis for Employee's request.

Continuances are not favored and are not routinely granted. 8 AAC 45.074(b). Discretion to continue hearings is limited. 8 AAC 45.074(b). The moving party must demonstrate "good cause" to support a continuance request. 8 AAC 45.074(b)(1). There are 14 listed "good cause" reasons for granting a continuance. 8 AAC 45.074(b)(1)(A)-(N). The only possible basis for granting Employee's continuance request comes under 8 AAC 45.074(b)(1)(N). This is a "catchall provision" allowing for an order granting a continuance if, despite a party's "due diligence, irreparable harm may result from a failure to grant the requested continuance." The preliminary issues address requests to add issues for hearing and objections to witness lists and evidence. Objections to witness lists and evidence are commonly addressed as preliminary issues for hearing. Employee's failure to file a confirming list does not constitute "due diligence." *Rogers & Babler*. Employee's request for interim benefits was previously addressed in *Betts I* and is currently under review with the Court. Employee's December 22, 2022 petition for a stay, and if Employee properly files petitions, an appeal of the December 8, 2022 discovery order under 8 AAC 45.065(h) and a request for a finding under AS 23.30.250, could be addressed at a separate hearing. AS 23.30.001(4).

Betts I denied Employee's request for interim benefits and ordered a SIME. She asserts a SIME will require her to travel at "a great personal inconvenience and cost." This does not constitute "irreparable harm." Employee has a right to pursue her claim. *Betts I* found significant disagreement between Employee's treating physicians and the EME physician's regarding causation and the kind and nature of proposed medical treatment. It also found a SIME will assist to understand the symptoms and treatment of demyelinating peripheral polyneuropathy, an uncommon diagnosis, medical treatment and whether there was overlap with her low back complaints. A panel SIME will assist to understand the medical issues raised. Traveling to a SIME may, perhaps, be inconvenient. Employer is required to arrange and pay for Employee's transportation, room and board. 8 AAC 45.090(d). If Employee wishes to pursue her claim, and does not attend the SIME appointments, there are consequences. 8 AAC 45.090(g).

Employee could not demonstrate how “irreparable harm” may come from proceeding with oral arguments on the issues set for hearing. *Rogers & Babler*. The oral order denying Employee’s continuance request was correct.

8) Should the SIME process proceed without Employee’s Affidavit of Review and Completeness of SIME Records?

Betts I ordered an SIME and directed the parties to appear before a designee for a prehearing conference as soon as possible at which the designee would schedule dates for the parties to present medical records for the SIME physician in accordance with the applicable regulations. At a September 20, 2022 prehearing conference, Employee was instructed to review the electronic copy of the binder sent to her by Employer and to return a signed SIME affidavit if the record was complete or supplemental binders if records were missing along with the signed SIME affidavit. Employee failed to file anything regarding the SIME process until after Employer, on November 14, 2022, requested the SIME proceed without Employee’s SIME affidavit. Employee then sought to revise the SIME records to remove medical records regarding “pregnancy, maternal care and other unrelated conditions” and for a discovery order “prohibiting Employer, its Insurer or their attorneys from misusing or misrepresenting the scope of any medical releases.” The designee denied Employee’s request to issue a protective order at the December 8, 2022 prehearing conference because she failed to identify which medical records she contended were not related to her injury. The designee set the January 10, 2023 hearing to decide whether the SIME should proceed without Employee’s SIME affidavit and, if so, which records should be included in the SIME binder.

Employer requested the SIME proceed without Employee’s signed SIME affidavit, contending she refused to participate in the SIME process and adhere to the orders in *Betts I* and in the September 20, 2022 prehearing conference summary. Employee requested the SIME process not proceed because it was irreparably “contaminated” as Employer included unrelated medical records in the SIME binder. The SIME process is not irreparably contaminated because such records may be removed from the SIME binder and returned to Employee before the SIME panel reviews the SIME binder under AS 23.30.108(d) upon her request.

Employee contends the designee did not instruct her how to proceed the SIME binder contains unrelated medical records. The designee's September 20, 2022 prehearing conference instructions mirrored 8 AAC 45.092(h), which instructs the parties how to prepare the medical record for the SIME physician and includes directions for when the record is complete, incomplete and when additional records are received after the binder is prepared. Neither include a procedure to remove medical evidence the party contends is not related to her work injury. However, AS 23.30.108(d) provides an employee may request a protective order to return unrelated medical records. Graham, an attorney, is presumed to know the process to request removal of medical records not related to the work injury. While AS 23.30.108(d) does not contain a deadline, Employee was instructed to review the SIME binder and return the signed the SIME affidavit by October 28, 2022, but she failed to timely review the SIME binder and to properly request removal of unrelated medical documents in her November 14, 2022 petition to revise the SIME binder. Employee could have requested assistance from the designee had she not understood the SIME process. Instead, Employee failed to do anything.

On November 16, 2022, Employer responded to Employee's November 14, 2022 petition to revise the SIME binder and identified medical records it agreed to remove and requested Employee identify any additional unrelated records. At the December 8, 2022 prehearing conference, Employee failed to identify records she contends are unrelated to her work injury with any specificity other than generally contending medical records concerning her "pregnancy, maternal care and other unrelated conditions" are not relevant and should be removed. She testified and contended at hearing that she has not identified specific records because she still has not had the opportunity to review the SIME binder. Employer served Employee with the SIME binder on September 27, 2022. She had a month to review the 848-page SIME binder, which is a reasonable amount of time. *Rogers & Babler*. Employee could have requested additional time or requested modification or amendment of the September 20, 2022 prehearing conference summary deadline to review the SIME binder, but she did not. 8 AAC 45.063(b); 8 AAC 45.065(d).

Employer's November 16, 2022 response informed Employee it possessed the medical records it identified as unrelated when Employer filed and served those medical records on a medical

summary form on June 30, 2022. Employee's right to request a protective order to return unrelated medical records requires her to review medical summaries and SIME binders and specify which records are unrelated. AS 23.30.108(d). Employee could have requested return of unrelated medical records as early as June 30, 2022. She has had more than enough time to review the medical records in the June 30, 2022 medical summary and the SIME binder and to identify the specific records she contended were unrelated to the injury and request their removal. *Rogers & Babler*.

Employer contended she could not complete the SIME process as ordered because Employer failed to withdraw the SIME binder, remove the records it identified as unrelated in its November 16, 2022 response, and resubmit the SIME binder with a new affidavit. Employer is required to file on a medical summary and include in the SIME binder copies of all medical records which are or may be relevant to Employee's claim and work injury. 8 AAC 45.052(a); 8 AAC 45.092(h). Until Employee agreed with Employer to remove the specific records identified by Employer or Employer was ordered to removed specific records after Employee requested removal of specific medical records, Employer could not remove them. AS 23.30.107(a); AS 23.30.108(d); 8 AAC 45.052(a); 8 AAC 45.092(h). Employee failed to agree to move the records Employer identified in its November 16, 2022 response until the January 10, 2023 hearing and continues to fail to specifically identify any additional records she contends are not related to her work injury. Employee was instructed how to properly request removal of unrelated medical records in the December 8, 2022 prehearing conference when the designee denied her request for a protective order because she failed to identify specific medical records. Employee's failure to complete the SIME process as ordered was due to her failure to timely review the SIME binder and to properly request removal of unrelated medical records under AS 23.30.108(d). It will not be quick, fair, or efficient to provide Employee additional time to identify unrelated medical records in the SIME binder. *Rogers & Babler*; AS 23.30.001(1).

Employee contended the SIME process should not proceed because she cannot sign the SIME affidavit since it requires her to attest the SIME binder contains copies of all the medical records in her possession, which would not be true if the nonrelevant records were removed and returned to her. The SIME affidavit includes the sworn statements that, "I am a party to this case," "I

reviewed the medical records in my possession regarding this case” and “The SIME binders contain copies of all the records in my possession.” Employee’s contention disregards the second statement on the affidavit stating she reviewed all the records in her possession *regarding her case*. (Emphasis added). Additionally, interpreting the SIME affidavit and 8 AAC 45.092(h) to require all medical records in the parties’ possession be included in the SIME binder is a misinterpretation of the regulation’s plain language and fails to construe its language while considering the Act. The regulation states the board “*may* direct a party to make a copy of all medical records, including medical providers’ depositions, regarding the employee in the party’s possession” and put them in a binder. (Emphasis added). 8 AAC 45.092(h)(1). This language is permissive rather than mandatory. The Act requires Employee to authorize the release of medical information “relative” to the employee’s injury and only records “applicable to the employee’s injury” are discoverable. AS 23.30.107(a). The SIME affidavit and 8 AAC 45.092(h) do not require an employee to swear she provide all medical records in their possession that are not relative or applicable to the work injury. AS 23.30.107(a). Employee’s interpretation of the SIME affidavit is incorrect. If medical records are removed from an SIME binder and returned to an employee because they are not related to the claim or work injury, then an employee can clearly sign the SIME affidavit because the SIME binder contains all the medical records in their possession relevant to their claim. AS 23.30.107(a); AS 23.30.108(d); 8 AAC 45.092(h).

As 8 AAC 45.092(h) is permissive and not mandatory, the SIME process may proceed without Employee’s signed SIME affidavit. A regulation’s procedural requirement may be waived or modified if “manifest injustice” to a party would result from strict application. 8 AAC 45.195. Employer requested a SIME, and a SIME was ordered in *Betts I*. It would contravene the legislative intent to ensure the quick, efficient, fair, and predicable delivery of benefits to injured workers at a reasonable cost to employers to allow an injured worker to indefinitely delay the SIME by failing to identify unrelated medical documents and provide a signed SIME affidavit as ordered to avoid attending a SIME to which it was opposed. AS 23.30.001(1). Therefore, manifest injustice would result to Employer if 8 AAC 45.092(h) was strictly applied in this instance. The SIME should proceed without Employee’s signed SIME affidavit. AS 23.30.135(a).

9) If the SIME proceeds without Employee's Affidavit of Review and Completeness of SIME Records, which records should be included for the SIME panel's review?

Employer agreed to remove medical records in the SIME binder on pages 708-22, 727-50, 759-71, 795-96 and 799-804. At hearing, Employee agreed to remove those pages. These records will be removed from the SIME binder. 8 AAC 45.050(f). The remainder of the records in the SIME binder will be included for the SIME panel's review. Employer will be directed to withdraw the September 27, 2022 SIME binder, to remove the medical records in the SIME binder on pages 708-22, 727-50, 759-71, 795-96 and 799-804, and to serve the revised SIME binder on Employee along with the SIME affidavit verifying the binder contains copies of all the medical records in Employer's possession and three hardcopy binder sets with the Board.

CONCLUSIONS OF LAW

- 1) The oral order denying Employee's request for a stay was correct.
- 2) The oral order denying Employee's request for interim benefits was correct.
- 3) The oral order granting Employer's request to strike a portion of Employee's hearing brief was correct.
- 4) The oral order granting Employer's request to strike Employee's witness list was correct.
- 5) The oral order denying Employee's request to add her November 14 and December 22, 2022 petitions as issues for hearing was correct.
- 6) The oral order denying Employee's request to not consider Employer's evidence was correct.
- 7) The oral order denying Employee's request for a continuance was correct.
- 8) The SIME process should proceed without Employee's affidavit of review and completeness of SIME records.
- 9) The medical records on pages 708-22, 727-50, 759-71, 795-96 and 799-804 in the SIME binder should not be included in the SIME panel's review; the remainder of the records in the SIME binder will be included for the SIME panel's review.

ORDER

1) Employer is to withdraw the September 27, 2022 SIME binder, remove SIME binder medical records pages 708-22, 727-50, 759-71, 795-96 and 799-804, and serve three hardcopy sets of binders with the Board and the revised SIME binder on Employee along with the SIME affidavit verifying the binder contains copies of all medical records in Employer's possession.

Dated in Juneau, Alaska on January 24, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley 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

DEVON BETTS v. GREENLING ENTERPRISES, LLC

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Devon Betts, employee / claimant v. Greenling Enterprises, LLC, employer; Alaska National Insurance, insurer / defendants; Case No. 201514088; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 24, 2023.

/s/
Lorvin Uddipa, Workers' Compensation Technician