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. 23-0007 Filed with AWCB Anchorage, Alaska on January 27, 2023

Silver Bay Seafoods, LLC's (Employer) July 29, 2022 petition appealing from a designee's discovery orders was heard on the written record on January 10, 2023, in Anchorage, Alaska, a date selected on December 9, 2022. A December 9, 2022 stipulation gave rise to this hearing. Attorney Elliott Dennis represents Nenad Gajic (Employee). Attorney Jeffrey Holloway represents Employer and its insurer. The record closed on January 10, 2023.

ISSUE

Employer contends the designee erred in his July 19, 2022, and November 8, 2022 discovery orders when he issued an order requiring Employer to respond to interrogatories. It contends Employee's four interrogatories are "harassing, inappropriate, burdensome, and outside the scope of allowed discovery in workers' compensation." Employer further contends regulations allow only oral or written depositions as the sole means of discovery unless Employee obtained

prior approval. It contends 750 documents previously provided Employee is adequate and Employer has no duty to "educate" him on how to understand insurance papers previously produced. Employer seeks an order reversing the designee's discovery order.

Employee contends Employer forfeited its right to appeal the designee's discovery order by failing to file its petition timely. He cites *Gajic v. Silver Bay Seafoods, LLC*, AWCB Dec. No. 22-0066 (September 27, 2022) (*Gajic II*), which he contends includes correct legal principles and analysis addressing the designee's discovery order. Employee contends interrogatories requesting Employer to identify specific medical and transportation costs Employer denies, is reasonable so he knows whether to pursue his claim. Similarly, he contends interrogatories asking Employer to identify the amount of *per diem* payments it made to him between specific dates, and the basis for any benefit payment made to him or on his behalf after a date certain ask specific questions that only the adjuster or defense attorney can answer. Employee further contends interrogatories are the most summary and simple method to obtain discovery at a reasonable cost to Employer. He contends the statutes and regulations specifically provide for obtaining testimony through interrogatories. Employee seeks an order affirming the designee's discovery orders.

Should the designee's discovery orders be affirmed in whole or in part?

FINDINGS OF FACT

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

1) On December 6, 2021, Employee claimed temporary total disability, temporary partial disability, and permanent partial impairment benefits, medical costs, related transportation expenses, interest, attorney fees and costs, and claimed Employer had made an unfair or frivolous controversion. (Claim for Workers' Compensation Benefits, December 6, 2021).

2) No answer to Employee's December 6, 2021 claim is found in his file. (Agency file).

3) On April 19, 2022, Employer denied the following:

> Medical costs which are not reasonable, necessary, related to the injury of July 6, 2021, or which are not for services performed in accord with a treatment plan under AS 23.30.095(c) or which do not comply with the usual and customary fee

> schedules and time frames of AS 23.30.097, including housing costs after 11/30/21.
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> Transportation expenses to healthcare facilities for treatment which is not reasonable, necessary, related to the work injury of July 6, 2021, and those not supported by proper documentation under 8 AAC 45.084, including per diem expenses not related to medically necessary travel after 11/30/21.
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> Unfair/frivolous Controversion.
>
> Attorney fees and costs.

Employer based its denial on Employee's March 14, 2022 deposition where he testified he applied for asylum in the United States. Employer contended this demonstrated he was not remaining in the United States solely for medical treatment and instead planned to make it his permanent home. It further contended all controversions were supported by the facts or the law at the time they were issued. Lastly, Employer said there was no nexus between any benefits paid to Employee and any work performed by his attorney, so no attorney fees or costs were due. (Amended Controversion Notice, April 19, 2022).

4) On May 19, 2022, Employee sent Employer Interrogatories No. 8 through No. 11 as follows:

> **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 or on behalf of employee. (Employee's Second Interrogatories, May 19, 2022).

5) On May 31, 2022, Employer petitioned for a protective order against Employee's interrogatories No. 8 through No. 11. It contended the interrogatories were overbroad, burdensome, oppressive and not in accord with the Alaska Workers' Compensation Act (Act) and its regulations. It does not mention format under the Civil Rules. (Petition, May 31, 2022).

6) On June 20, 2022, Employee answered Employer's petition for a protective order and explained his position on each interrogatory and its relevance to his claims or to Employer's defenses. Addressing interrogatory No. 8, Employee cited *Vue v. Walmart*, 475 P.3d 270, 287 (Alaska 2020), and stated this interrogatory would "flesh out" the bases for Employer's controversion denying certain medical costs. Employer's response would give Employee notice of disputed issues so he could evaluate whether to pursue his medical claim. Employee contended Employer must have a legitimate factual basis for its controversion and he is entitled to understand that factual basis. Absent that information, Employee contended the controversion may be "made in bad faith." As for interrogatory No. 9, Employee cited Employer's denial of transportation expenses and stated he was trying to understand the factual basis behind Employer's controversion to decide whether to prosecute that claim. Addressing interrogatory No. 10, Employee noted Employer stopped making *per diem* payments on December 2, 2022, and since Employee has a claim for *per diem*, he contended he is entitled to discover this information, which he contended is relevant to his claim. Lastly, Employee contended interrogatory No. 11 is an effort to understand the payments Employer made after December 15, 2021. He contended Employer probably has a spreadsheet and it should be "a simple matter" for the adjuster to answer these questions. (Employee's Answer to Employer's Petition for Protective Order, June 20, 2022).

7) Employee's answer also asserted his interrogatories are based on "standard language used by the employer's counsel" in these cases. He further contended interrogatories allow for specific answers to specific questions and are consistent with the favored broad discovery applicable in these matters. He sought an order denying the protective order. (Employee's Answer to Employer's Petition for Protective Order, June 20, 2022).

8) On July 12, 2022, Employee repeated his December 6, 2021 claim and added a request for a compensation rate adjustment, a penalty for late-paid compensation and "other," including a modification or "appeal" from the Reemployment Benefits Administrator's denial of his

eligibility for reemployment benefits. He also claimed Employer had failed to pay "living expenses owed to employee." (Claim for Workers' Compensation Benefits, July 12, 2022).

9) "Living expenses owed to employee" are taken to mean *per diem*. (Experience; judgment).

10) On July 19, 2022, the parties appeared before the Board's designee to address Employer's May 31, 2022 petition for a protective order. Employer contended (1) the Board has no authority to force written interrogatory answers as stated in previous case law; (2) 8 AAC 45.054 states discovery is to be done by deposition; (3) Employer already produced 752 pages of discovery, which answer Employee's interrogatory questions; and (4) the interrogatories (8-11) requesting itemizations were overburdensome. At the conference, Employee contended (1) exchanging information is important to litigation; (2) the requested itemization could be gathered at the adjuster's deposition, but; (3) Employee was seeking quick, fair and efficient discovery; and (4) he utilized the same format Employer's lawyer used in his interrogatory requests. Evaluating the parties' respective arguments and evidence, the designee stated:

> 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 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 the disclosure of information and provides 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. . . . (Prehearing Conference Summary, July 19, 2022).

11) On July 20, 2022, the Division served the summary from the July 19, 2022 prehearing conference on the parties. (Prehearing Conference Summary, July 20, 2022).

12) On July 29, 2022, Employer timely appealed from the designee's July 21, 2022 discovery order. The appeal does not mention format under the Civil Rules. Stated grounds included:

> ER petitions for review of the 7/21/22 discovery order by the Designee. The Designee ignored arguments by the employer concerning the invasive and improper discovery requests served by claimant. The Designee abused his

> discretion in allowing improperly served interrogatories to be effective. (Petition, July 29, 2022).

13) On August 1, 2022, Employer denied Employee's claim for temporary total or temporary partial disability benefits from July 15, 2022, and continuing, permanent partial impairment benefits greater than nine percent, and, among other things not relevant to the instant issue:

> . . . Medical costs which are not reasonable, necessary, related to the injury of July 6, 2021, or which are not for services performed in accord with a treatment plan under AS 23.30.095(c), for which supporting documentation does not exist, or which do not comply with the usual and customary fee schedules and time frames of AS 23.30.097, including housing costs after November 30, 2021, and including all medical benefits beyond July 15, 2022, with the exception of orthotics or special shoe for the right foot.
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> . . . Transportation expenses to healthcare facilities for treatment which is not reasonable, necessary, related to the work injury of July 6, 2021, and those not supported by proper documentation under 8 AAC 45.084, including per diem and lodging expenses not related to medically necessary travel after November 30, 2021, and all transportation expenses from July 15, 2022, forward, excepting those related to obtaining orthotics or a special shoe for the right foot.

Employer relied on July 15, 2022 opinions from its employer's medical examiner Steven Nadler, MD, stating Employee's injury was medically stable, and providing him with a nine percent permanent partial impairment rating and a full-duty work release without restrictions. It added that Dr. Nadler opined Employee did not require further medical care except for orthotics or a special shoe for his right foot. Employer contended Employee's *per diem* and lodging claims were "baseless" and had no place under the Act. It also relied on Employee's deposition testimony stating he applied for asylum in the United States and established an intent to remain here as a resident and was not here merely for medical care. Consequently, Employer contended he is not owed *per diem* or lodging. (Answer to Workers' Compensation Claim, August 1, 2022).

14) On September 8, 2022, Employee provided arguments opposing Employer's appeal from the Board designee's discovery order. He reiterated his arguments made in his June 20, 2022 answer to Employer's petition for a protective order. He added that Employer was putting "form before substance," and wanted the Board to ignore the legislative mandate that the Act be interpreted to ensure quick, efficient, fair and predictable delivery of benefits to injured workers

at a reasonable cost to Employer. Employee further contended interrogatories minimize costs "without going to the expense of deposing the adjuster on the file." Lastly, Employee contended there is no prohibition in the Act for using interrogatories. (Employee's Argument in Opposition to Employer's Appeal of the Denial of His Petition for Protective Order, September 8, 2022).

15) On September 9, 2022, Employer contended Employee's four interrogatories were "harassing, inappropriate, burdensome, and outside the scope of allowed discovery" in these cases. Employer contended 8 AAC 45.054 allows discovery only through depositions unless a party sought permission from the Board first. It contended Employee sought no permission to use interrogatories and the designee ignored this argument at the prehearing conference. Employer cited *Slattery v. Unisea, Inc*., AWCB Dec. No. 22-0038 (June 2, 2022) and *Cooper v. Central Peninsula General Hospital*, AWCB Dec. No. 22-0023 (April 11, 2022) as examples of cases where the Board had "chastised" employers for using interrogatories without first obtaining permission from the Board. It further implied for the first time, without adequately making its argument, that the interrogatories' format was wrong and contended the designee violated Employer's equal protection rights because his decision treated employees and employers differently about discovery using interrogatories. Employer contended it has no duty to educate Employee about "insurance documents" nor must it prepare and create special documents or lists, not otherwise in existence, to explain any previously provided discovery, citing *Menke v. Peak Oilfield Service Co*., AWCB Dec. No. 22-0055 (July 27, 2022). It contended Employee's four interrogatories require it to create lists including all payments made after December 15, 2021. Employer contended it already provided 750+ pages itemizing all medical and indemnity payments, and all bills the carrier received and corresponding explanations of payments. It did not cite to a specific page out of 750+ pages where this information is found in its prior discovery. As for denied medical benefits, Employer contended its April 19, 2022 Amended Controversion Notice was specific and denied costs for treatment that was not reasonable, necessary and work-related or was outside the Act's constraints. It contended documents already produced itemized all payments made on the claim and contended from this information Employee could determine what medical benefits were not paid. Employer contended its Amended Controversion Notice denied housing and *per diem* costs after November 30, 2021, and contended, "No additional explanation is needed for that." It contended Employee was harassing and over-burdening it with "an outlandish request to comb through all payments made

on his claim and provide to him simple explanations." (Hearing Brief of Silver Bay Seafoods, LLC, September 9, 2022).

16) On September 27, 2022, *Gajic v. Silver Bay Seafoods*, LLC, AWCB Dec. No 22-0066 (September 27, 2022) (*Gajic II*), declined to decide Employer's appeal from the Board designee's July 29, 2022 discovery order. *Gajic II* found the discovery order did not contain analysis adequate to review the designee's discretion, and remanded the issue to the Board's designee to apply the proper analysis. The designee was directed to review Employee's interrogatories No. 8 through 11, note the arguments and evidence each party presented for him to consider in resolving the discovery dispute, apply the *Granus* analysis and present his findings and reasons behind his findings in his discovery order. *Gajic II* said, "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." However, *Gajic II* also retained jurisdiction over Employer's May 31, 2022 petition. (*Gajic II*).

17) Neither party sought appellate review of *Gajic II*. (Agency file).

18) On September 29, 2022, Employer filed and served 777 pages of documents purported to provide, "All Employer documents responsive to discovery requests served by Employee." (Notice of Intent to Rely, September 29, 2022).

19) On November 8, 2022, the Board designee on remand issued the following:

> However, the AWCB requested Designee issue another ruling on Employer's 5/31/2022 Petition for Protective Order per D&O #22-0066. Employer representative argued that that [sic] AWCB has no authority to force written interrogatory answers as stated in previous case law and feels that 8 AAC 45.054(a) requires AWCB permission to take a written or oral deposition. Employer representative noted that regulation 8 AAC 45.054 further states that discovery is to be done by oral deposition and his client has already produced 752 pages of discovery which answers all of Employee's interrogatory questions. The interrogatories (8-11) requesting itemization is overburdensome. Employee representative argued that exchange of information is important to litigation and while the itemization can be gathered at an oral deposition of the Adjuster assigned to this case, Employee representative feels that the Adjuster's written answers to interrogatories (8-11) can yield a faster and more cost-effective path to the information sought. Per AS 23.30.001 Employee representative is seeking a quick, fair, and efficient resolution to a dispute and has utilized the same format often utilized by Employer representative in his own interrogatory requests. Designee notes that AS

23.30.135(a) states: 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 23.30.115(a) also states: (a) A person is not required to attend as a witness in a proceeding before the board at a place more than 100 miles from the person's place of residence, unless the person's lawful mileage and fee for one day's attendance is first paid or tendered to the person; but the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. Designee also reviewed 8 AAC 45.054 which states: (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. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition. (b) Upon the petition of a party, the board will, in its discretion, order other means of discovery. (c) The board or division will issue subpoenas and subpoenas duces tecum in accordance with the Act. The person requesting the subpoena shall serve the subpoena at the person's expense. Neither the board nor the division will serve subpoenas on behalf of a party. (d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request. Designee found that testimony of a material witness may be taken by written deposition, which Designee believes can be classified as interrogatories. Also Employee representative need not obtain board approval to pose interrogatories as AS 23.30.115 expressly provides for interrogatories and deposition as the only formal discovery measures allowed without requiring AWCB approval.

Designee reviewed Employer's 5/31/2022 Petition for Protective Order along with Employee's interrogatories (8-11):

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.

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.

> 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 or on behalf of employee.
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> Designee believes that the answer to Interrogatory #8 will assist in understanding the factual basis for Employer's denial of Medical costs which are claimed in Employee's 12/6/2021 and 7/12/2022 WCC(s).
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> Designee believes that the answer to Interrogatory #9 will assist in understanding the factual basis for Employer's denial of transportation costs which are claimed in Employee's 12/6/2021 and 7/12/2022 WCC(s).
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> Designee believes that the answer to Interrogatory #10 will assist in understanding the factual basis for Employer's cessation of Employee's per diem payments on 12/2/2022 which are part of Employee's claim for indemnity benefits in the 12/6/2021 and 7/12/2022 WCC(s).
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> Designee believes that the answer to Interrogatory #11 will assist in understanding the factual basis for Employer's payments to or on behalf of Employee since 12/15/2021 which will assist in determining what if any additional Workers Compensation Benefits may be owed to Employee per Employee's 12/6/2021 and 7/12/2022 WCC(s).
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> Designee found the noted Interrogatories to be relevant and likely to lead to discoverable information. The duty to ensure a speedy and economical remedy under the Alaska Worker's 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 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 the disclosure of information and provides 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. . . . (Prehearing Conference Summary, November 8, 2022).

20) On November 16, 2022, the Division served the November 8, 2022 discovery order on the parties. (Prehearing Conference Summary, November 8, 2022).

21) Employee's agency file does not contain a petition from Employer appealing from the designee's November 8, 2022 discovery order. (Agency file).

22) On December 9, 2022, the parties' representatives appeared before the Board's designee and stipulated to a written record hearing on January 10, 2023, on "Employer's 7/29/2022 Petition Appealing Designee's 7/19/2022 & 11/8/2022 Discovery Order." (Prehearing Conference Summary, December 9, 2022).

23) On January 6, 2023, Employee objected to any further proceedings on this discovery issue, contending Employer forfeited its right to appeal by failing to appeal from the designee's November 8, 2022 order. He contended it had 10 days to file an appeal and failed to do so. Employee contended the Board's designee on remand on November 8, 2022, properly analyzed the facts and applicable legal principles before issuing his discovery order denying Employer's request for a protective order. He further noted that while Employer produced 750+ pages of documents, Employee's interrogatories arose from Employer's Amended Controversion Notice and only the author of the Controversion Notice can answer his questions. Employee contended reviewing 750+ pages already provided would not provide complete answers to his questions. He reiterated that his discovery method, authorized under the Act, is less burdensome and expensive for Employer than taking the adjuster's deposition. (Employee's Supplemental Argument in Opposition to Employer's Petition for Protective Order, January 6, 2023).

24) On January 6, 2023, Employer contended it had "already undertaken significant time and expense" to respond to Employee's discovery requests and reiterated it produced 750+ pages to Employee, not including medical records. It contended Employee's four interrogatories were "harassing, inappropriate, burdensome, and outside the scope of allowed discovery in workers' compensation." Employer contended 8 AAC 45.054 allows discovery in the form of deposition only. It further contended any other discovery, including interrogatories, must be Board preauthorized. It expanded upon its implied argument made for the first time on September 9, 2022, that AS 23.30.115 does not justify the designee's order requiring it to answer Employee's four interrogatories because "they are not specific questions posed to a specific witness who is answering the questions under oath." Employer cited *Slattery v. Unisea, Inc*., AWCB Dec. No 22-0038 and *Cooper v. Central Peninsula General Hospital*, AWCB Dec. No. 22-0023 as examples of cases where it contended the Board has "chastised employers for serving interrogatories on employees without obtaining permission." Citing these cases, Employer contended the Board designee's order violated equal protection because it treats employees and employers differently in discovery disputes. It contended is not Employer's role educate

Employee how to read, interpret or understand insurance documents, nor does Employer have to prepare and create special documents or lists not otherwise in existence, citing *Menke v. Peak Oilfield Service Co*., AWCB Dec. No. 22-0055 (July 27, 2022). It contended this is what Employee wants Employer to do in his four interrogatories. Employer further contended it produced a "benefits print out" in pages 292-308 of its September 29, 2022 Notice of Intent to Rely, providing all payments, payees, dates of payment, billed amounts, paid amounts and codes with explanations, in chronological order, limited to medical bills. Employer contended its April 19, 2022 amended Controversion Notice was "quite specific" and denied medical benefits that exceeded the fee schedule and denied housing and *per diem* costs after November 30, 2021, and contended, "No additional explanation is needed for that." Employer contended the designee's discovery order should be reversed. (Hearing Brief of Silver Bay Seafoods, LLC, January 6, 2023).

25) Employer's "benefits print out" pages 292 through 308, referenced above, does not readily identify any *per diem* payments Employer made to Employee. (Observations).

26) Without broad pre-hearing discovery, a party could be unfairly surprised at hearing and the parties' and the Board panel's time wasted. (Experience; judgment; observations).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
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> (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**. . . .
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> (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.

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 23.30.108. Prehearings on discovery matters**. . . .
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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.

> **AS 23.30.115. Attendance and fees of witnesses**. . . . [B]ut the testimony of a witness may be taken by deposition or interrogatories according to 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 or to require a party obtain Board approval before using

them. To the contrary, *Cooper* and *Slattery* both held that the 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 discovery was 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." Agreeing, *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. 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.

In *Vue v. Walmart Associates, Inc*., 475 P.3d 270 (Alaska 2020), the Alaska Supreme Court stated, in respect to Controversion Notices being unfair or frivolous:

> Walmart's May 2017 controversion also controverted "Medical Benefits . . . which are unnecessary, unreasonable, and/or unrelated to employee's injury of 02/03/16." The reason related to medical benefits was Dr. Baer's April EME about Lyrica and pulsed neuromodulation, but the controversion did not state with specificity what medical treatment was controverted.
> A controversion of all medical benefits that are not reasonable or necessary fails to provide notice to anyone what specific benefit is disputed and therefore does not fulfill the basic function of providing notice of what part of a claim is disputed (citation omitted). It also does not provide an explanation of coverage related to the facts of Vue's case that would allow him or a provider to discern whether coverage exists for specific care (citation omitted). . . . A claimant could not decide on the basis of this type of notice whether to pursue a claim (citation omitted).

ANALYSIS

Should the designee's discovery orders be affirmed in whole or in part?

Employer timely appealed from the designee's July 19, 2022 decision denying its petition for a protective order. 8 AAC 45.065(h). It contended the designee did not properly apply the law. That appeal led to *Gajic II*, which remanded the matter for the designee to reexamine his discovery order. On November 8, 2022, the designee issued his discovery order on remand, which the Division served on the parties on November 16, 2022. There is no post-remand discovery order appeal from Employer in the agency file. Accordingly, Employee contends Employer waived its right to challenge the discovery order by failing to appeal from the November 8, 2022 discovery order on remand. *Gajic II* states that after the designee issued his discovery order on remand, any party could "appeal the designee's prehearing conference discovery order in accordance with the Act and applicable regulations. . . ." That means Employer had 10 days from the service date to appeal the discovery order. This supports Employee's position that Employer waived its right to challenge the designee's November 8, 2022 discovery order and that order is therefore "final." 8 AAC 45.065(h). However, *Gajic II* also retained jurisdiction over Employer's May 31, 2022 petition, which *Gajic II* had previously, expressly declined to decide. Thus, this decision will review the merits of Employer's May 31,

2022 petition because the issues remain the same, and unresolved, following the designee's November 8, 2022 discovery order.

Employee contends discovery is important and rather than depose the adjuster and attempt to get the same information, he used an authorized discovery method and sought a quick, fair and efficient resolution to the discovery issue, at reasonable cost to Employer. AS 23.30.001(1). He further contends he mimicked interrogatories Employer's attorney uses without first seeking permission, as Employer contended was required. Employer contends Employee's interrogatories are unauthorized discovery, are overbroad, burdensome, harassing and oppressive.

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.

Relevant to this discovery dispute and appeal, Employee claimed medical benefits, transportation costs, an unfair or frivolous controversion finding and *per diem*. Employer denied Employee's right to all requested relief on legal and factual grounds. In his December 8, 2022 discovery order, the designee came to the following decisions, reviewed here in order:

> 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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> Designee believes that the answer to Interrogatory #8 will assist in understanding the factual basis for Employer's denial of Medical costs which are claimed in Employee's 12/6/2021 and 7/12/2022 WCC(s).

The designee correctly noted Employee has a claim for medical care. Employer's September 29, 2022 production at pages 292 through 308 identifies medical bills that were paid, not those that were not paid. Employer's August 19, 2022 amended controversion denied any medical costs that were not reasonable or necessary. This notice provides no information to Employee or his healthcare providers about what care may be contested or why. Just as Employer has the right to know with specificity prior to hearing what medical bills Employee contends he is owed but Employer as not paid, Employee has the right to know with specificity what bills Employer considers unreasonable or unnecessary. Moreover, Employee has a claim for an unfair or frivolous controversion finding. The Alaska Supreme Court stated, "A controversion of all medical benefits that are not reasonable or necessary fails to provide notice to anyone what specific benefit is disputed and therefore does not fulfill the basic function of providing notice of what part of a claim is disputed." *Vue*. As Employee contends, he needs enough information to determine whether he should pursue a claim for specific medical benefits. He needs to know what medical costs Employer contends are not related to his work injury, not for services performed in accordance with a treatment plan and not supported by proper documentation. Employer's answer to these questions will help him make that decision; it may also provide evidence admissible at hearing on these two issues -- medical benefits and an unfair or frivolous controversion. The designee's discovery order on Interrogatory No. 8 is supported by substantial evidence and was not an abuse of his discretion. *Granus*; *Manthey*; *Sheehan*. The designee's decision on this will be affirmed.

> 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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> Designee believes that the answer to Interrogatory #9 will assist in understanding the factual basis for Employer's denial of transportation costs which are claimed in Employee's 12/6/2021 and 7/12/2022 WCC(s).

The designee correctly noted Employee has a claim for medical transportation expenses, which are connected to medical costs. The same analysis for medical costs in Interrogatory No. 8 applies here and is incorporated here by reference. The designee's discovery order on

Interrogatory No. 9 is supported by substantial evidence and was not an abuse of his discretion. *Granus*; *Manthey*; *Sheehan*. The designee's decision on this interrogatory will be affirmed.

> 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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> Designee believes that the answer to Interrogatory #10 will assist in understanding the factual basis for Employer's cessation of Employee's per diem payments on 12/2/2022 which are part of Employee's claim for indemnity benefits in the 12/6/2021 and 7/12/2022 WCC(s).

The designee correctly noted Employee has a claim for *per diem*. Employee has a right to discover *per diem* payments Employer made so he can determine the parameters of unpaid *per diem*, if any, prior to hearing. The designee's discovery order on Interrogatory No. 10 is supported by substantial evidence and was not an abuse of his discretion. *Granus*; *Manthey*; *Sheehan*. The designee's decision on this interrogatory will also be affirmed.

With respect to interrogatories No. 8 through 10, Employer's responses to these inquiries help to prevent "trial by ambush" at hearing. *Rogers & Babler*. Without specific information, Employee could prepare for hearing on his claims only to have Employer's witness at hearing reveal for the first time the answers to these questions. If the witness' answers resolve the matters, Employee's hearing preparation would have been for naught, and the parties and the hearing panel would have wasted their time and effort on issues that could have been resolved through discovery before hearing. This process is not quick, efficient or fair nor is it as summary and simple as possible as the Act requires. AS 23.30.001(1); AS 23.30.005(h).

> INTERROGATORY NO. 11: Identify with specificity the basis for each payment made by employer/insurer after December 15, 2021 to or on behalf of employee.
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> Designee believes that the answer to Interrogatory #11 will assist in understanding the factual basis for Employer's payments to or on behalf of Employee since 12/15/2021 which will assist in determining what if any additional Workers Compensation Benefits may be owed to Employee per Employee's 12/6/2021 and 7/12/2022 WCC(s).

The primary problem with Interrogatory No. 11 is the language "the basis for each payment" Employer made to Employee or to anyone on his behalf. Secondarily, this request is not only

overly burdensome, but also vague. Based on Employer's September 29, 2022 production 292 through 308, it appears Employer made hundreds of payments just to medical providers in this case. It is not reasonable or relevant to Employee's claims for Employer to identify "the basis" for each payment. Presumably, there is a legal basis as well as a factual basis for each payment. Similarly, Employer undoubtedly had a factual or legal basis to pay indemnity benefits to Employee. It is not clear how the innumerable answers to Interrogatory No. 11 would assist in determining what, if any, additional benefits may be owed to Employee. The record the designee reviewed does not demonstrate Employer's answer to this interrogatory is likely to lead to discoverable evidence. *Granus*; *Manthey*; *Sheehan*. Therefore, the designee's ruling on this interrogatory is not supported by substantial evidence, is not relevant to his claim and was an abuse of his discretion. *Granus*. The designee's decision on Interrogatory No. 11 will be reversed.

Employer also contends, relying on *Slattery* and *Cooper*, that prior decisions have treated employees and employers differently, thus violating equal protection. It contends a party may not use interrogatories without requesting and obtaining prior permission. Neither *Slattery* nor *Cooper* stand for this proposition. By contrast, both decisions state the Act expressly authorizes depositions and interrogatories as "formal" discovery. AS 23.30.115(a); 8 AAC 45.054(a). Both expressly state "formal" Requests for Production under the Civil Rules are not allowable by statute or by prior decisional law. Neither a claimant nor an employer may use formal Requests for Production under the Civil Rules to obtain documents from the opposing party under the Act and applicable regulations, without attempting "informal" discovery methods without success and seeking and obtaining an order allowing "other means of discovery." 8 AAC 45.054(b); *Brown*.

If a party to a workers' compensation claim wants tangible evidence from the opposing party, the Act expressly and as interpreted by prior decisional law requires them to try to first obtain it informally. "Informal" requests may include phone calls, emails, and letters setting forth what information the party is requesting. For example, if Employer wanted to obtain Employee's income tax returns for the two years prior to his injury, its attorney should simply email Employee's lawyer the request or mail a letter asking for Employee to produce these documents within a time certain. Employee's attorney then has the right to respond timely and object to the

request and state his reasons; or if there were no objection he could simply provide the requested documents timely. If Employee objected, Employer could file a petition to compel, and the parties could attend a prehearing conference at which the designee would render an appealable discovery decision. This "quick, efficient, fair," and "summary and simple as possible" process is what the legislature mandated. AS 23.30.001(1); AS 23.30.005(h). This is nothing new and has been the standard practice in these cases since at least 1988. AS 23.30.135(a); *Brown*.

Lastly, in its January 2023 briefing, Employer contends Employee did not follow the applicable Civil Rules regarding interrogatories because they were not directed to a specific person to provide answers, under oath. The written record does not indicate Employer raised this argument prior to the designee's order. Therefore, this decision cannot consider that argument. AS 23.30.108(c).

CONCLUSION OF LAW

The designee's discovery orders will be affirmed in part.

ORDER

1) The designee's November 8, 2022 discovery orders on Interrogatories No. 8, 9 and 10 are affirmed.
2) Employer is ordered to respond to Interrogatories No. 8, 9 and 10 fully within 30 days of this decision's date.
3) The designee's November 8, 2022 discovery order on Interrogatory No. 11 is reversed.
4) Employer need not respond to Interrogatory No. 11.

Dated in Anchorage, Alaska on January 27, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/

Randy Beltz, Member

/s/
Nancy Shaw, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 January 27, 2023.

/s/
Rachel Story, Office Assistant