# ALASKA WORKERS' COMPENSATION BOARD

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

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| ERIC MCDONALD,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>ROCK & DIRT ENVIRONMENTAL, INC.,<br><br>Employer,<br>and<br><br>INSURANCE CO. OF THE STATE OF PENNSYLVANIA,<br><br>Insurer,<br>Defendants. | ) | FINAL<br>DECISION AND ORDER<br><br>AWCB Case No. 201410268M,<br>201410610J<br><br>AWCB Decision No. 23-0059<br><br>Filed with AWCB Anchorage, Alaska<br>on October 24, 2023 |

Rock & Dirt Environmental, Inc.'s (Employer) May 22, 2023 petition to dismiss Eric McDonald's (Employee) claims was heard on October 4, 2023, in Anchorage, Alaska, a date selected on September 13, 2023. Employee testified; non-attorney representative Heather Johnson entered her appearance after the hearing began, represented Employee and testified; they both appeared by Zoom. Attorney Colby Smith appeared and represented Employer and its insurer. Attorney Rikki Burns-Riley appeared on behalf of Ashton Kirsch, who Employee subpoenaed. Prior to hearing, several third-parties who Employee subpoenaed as witnesses, objected to the subpoenas and sought protective orders. Division of Workers' Compensation (Division) hearing officer Kathryn Setzer held a prehearing conference to address the subpoenas and petitions to quash and, after hearing the parties' and third-parties' arguments, quashed the subpoenas and decided, among other things, that the witnesses Employee wanted to call at hearing could not provide relevant evidence.

At hearing, Employee contended Setzer abused her discretion by quashing the subpoenas; he also requested a hearing continuance. An oral order affirmed Setzer's decision quashing the subpoenas, and disallowed the witnesses; it also denied Employee's continuance request. This decision examines the oral orders and decides Employer's petition on its merits. The record closed at the hearing's conclusion on October 4, 2023.

## ISSUES

At hearing, Employee renewed his objection to the hearing going forward for the reasons stated at the June 19, 2023 prehearing conference, and added new reasons. He requested a continuance.

Employer contended there was no good cause to continue the hearing, its dismissal petition was ripe and ready to be determined, and Employee's continuance request should be denied.

**1) Was the oral order denying Employee's continuance request correct?**

Employee appealed Setzer's September 29, 2023 prehearing order quashing subpoenas for his proposed witnesses. He contended his witnesses would prove that neither he nor his legal representatives in his third-party lawsuit in the Superior Court agreed to settle, or settled, his third-party case; he contended the witnesses were critical to his workers' compensation case.

Employer contended witnesses Employee intended to call at hearing had no relevant testimony to present on the limited issue set for hearing. It sought an order affirming Setzer's prehearing order striking the witnesses. An oral order affirmed Setzer's order, and denied Employee's request to call those witnesses, finding their testimony irrelevant.

**2) Were the prehearing conference designee's order quashing Employee's subpoenas, and the oral order at hearing disallowing Employee's witnesses' testimony correct?**

Employer contends Employee through his former attorney settled his third-party civil action arising from his work injury, without Employer's written approval. Consequently, it contends it is no longer liable to him for benefits and Employee's claims should be dismissed.

Employee contends he never settled his third-party action and never authorized his lawyer to settle it. He contends his third-party lawyer, and others, committed fraud upon the court, he has a pending motion before the court, and his workers' compensation claims should not be dismissed.

**3) Should Employee's claims be dismissed under AS 23.30.015(h)?**

FINDINGS OF FACT

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

1) On June 6, 2014, Employee was working for Employer when a cement wall collapsed on him. His injuries required a five-week hospital stay. (First Report of Occupational Injury or Illness, June 18, 2014; Workers' Compensation Claim, February 13, 2015).

2) On February 13, 2015, Employee claimed medical costs, associated interest and a penalty. (Workers' Compensation Claim, February 11, 2015).

3) On February 13, 2015, Employee filed a second claim for a compensation rate adjustment. (Workers' Compensation Claim, February 11, 2015).

4) On March 18, 2015, the parties attended a prehearing conference with a Board designee. The designee advised Employee that if the case did not resolve, either party could ask for a hearing by filing an Affidavit of Readiness for Hearing (ARH). The summary does not record any other discussion about a hearing request. (Prehearing Conference Summary, March 18, 2015).

5) On July 13, 2015, Employee claimed, in seven separate claims, temporary and permanent total disability (TTD, PTD) benefits, medical and related transportation, penalty, interest, and an unfair or frivolous controversion. (Workers' Compensation Claims, July 13, 2015).

6) On August 28, 2015, the parties, with Employee represented by non-attorney Barbara Williams, attended a prehearing conference. The designee addressed Employee's claims and petitions, but there was no hearing request. (Prehearing Conference Summary, August 28, 2015).

7) On or about October 14, 2015, Employee filed a civil lawsuit in Superior Court, seeking damages against two third-party defendants for his work injury. (*McDonald v. Architects Alaska, Inc. & BBFM Engineers, Inc*., Superior Court Case No. 3AN-16-07620 (Civil)).

8) On November 18, 2015, the parties attended a prehearing conference. Williams and another non-attorney representative Heather Johnson represented Employee. He did not discuss a hearing. (Prehearing Conference Summary, November 18, 2015).

9) On December 15, 2015, the parties attended a prehearing conference where Employer stated it had not received discovery from Employee. It was going to file an ARH on a petition to compel. Employee did not discuss a hearing. (Prehearing Conference Summary, December 15, 2015).

10) On February 25, 2016, Employee wrote former Rehabilitation Benefits Administrator (RBA) Mark Kemberling and disagreed with most everything Kemberling said in his February 16, 2016 Informal Conference Summary, dealing with Employee's retraining efforts. Employee contended Leon Chandler, MD, made "false" statements and an adjuster's assertion was "false." He contended "collusion" between Michael McNamara, MD, and the adjuster over Dr. McNamara's bill, resulted in Dr. McNamara changing his opinion. (Employee letter, February 25, 2016).

11) On March 7, 2016, Employee requested a second independent medical examination (SIME). (Petition, March 7, 2016).

12) On April 6, 2016, the parties attended a prehearing conference and the designee discussed Employee's SIME request. The parties stipulated to it and the designee set deadlines for filing SIME medical binders, with detailed instructions. Employee did not request a hearing. (Prehearing Conference Summary, April 6, 2016).

13) On April 11, 2016, Employee claimed medical costs, interest, penalty and an unfair or frivolous controversion. (Workers' Compensation Claim, April 10, 2016).

14) On July 19, 2016, the parties attended a prehearing conference to set new SIME deadlines. Employee did not mention a hearing. (Prehearing Conference Summary, July 19, 2016).

15) On July 25, 2016, Employee claimed PTD benefits, medical and related expenses, a penalty, interest, and an unfair or frivolous controversion. (Workers' Compensation Claim, July 25, 2016).

16) On August 24, 2016, the parties attended a prehearing conference, but Johnson was unavailable, so the designee continued it for one month, which the designee said would provide time for the parties to resolve issues regarding the SIME. The designee advised the parties to file an ARH if either party wanted a hearing on any pending petitions. Employee did not request a hearing. (Prehearing Conference Summary, August 24, 2016).

17) On September 14, 2016, the parties attended a prehearing conference where they stipulated to reschedule the conference to November, again hoping to resolve SIME issues. The designee again advised the parties they could file an ARH on any pending petition. Employee did not ask for hearing. (Prehearing Conference Summary, September 14, 2016).

18) On November 16, 2016, the parties attended a prehearing conference to again discuss the SIME. They agreed to reconvene in January, still hoping SIME issues could be resolved. Employee did not discuss a hearing. (Prehearing Conference Summary, November 16, 2016).

19) On January 12, 2017, the parties attended a prehearing conference where they agreed to hold the SIME in abeyance pending re-examination by Employer's physicians. Employee did not request a hearing. (Prehearing Conference Summary, January 12, 2017).

20) On February 13, 2017, Employee filed an ARH on his "2/13/15-3/13/15 petitions. (ARH, February 12, 2017).

21) On March 9, 2017, the parties attended a prehearing conference where the February ARH was noted. The parties discussed Employee's objections to Employer's medical evaluation (EME). The designee did not provide a definitive answer to Employee's objections and left it to the parties to petition the Board if a response was needed. Employee did not request a hearing on his pending ARH. (Prehearing Conference Summary, March 9, 2017).

22) On March 16, 2017, the parties attended a prehearing conference and agreed to an EME. The designee explained how Alaska law applied to "Outside" EMEs. When Employee inquired about his pending ARH, Employer noted the ARH referenced non-existent petitions. Employee did not request a hearing. (Prehearing Conference Summary, March 16, 2017).

23) On May 15, 2017, the parties attended a prehearing conference and discussed the EMEs, which had been canceled. Employer offered to schedule EMEs with different physicians or simply proceed to an SIME, but Employee rejected both options and contended Employer was "corrupting and hiding evidence" from physicians and the Board. Employee stated he would be filing petitions addressing his contentions and an ARH to request a procedural hearing, but he did not request a hearing at this conference. (Prehearing Conference Summary, May 15, 2017).

24) On June 19, 2017, Employee called and spoke with a Workers' Compensation Division (Division) staff member for 65 minutes regarding his case. He initially wanted to remain anonymous, but eventually told the staff member about his case and raised allegations that defense counsel was harassing him and should be sanctioned. Employee also alleged insurance fraud and "criminal acts" by the defense. The staff member gave general advice about the Board's jurisdiction and suggested he seek other avenues for relief. (Agency file: Judicial, Communications, Phone Call tabs, June 19, 2017).

25) On July 10, 2017, Employee filed an ARH on "all claims" and all previously filed petitions for discovery. (ARH, July 10, 2017).

26) On July 13, 2017, the parties attended a prehearing conference where Employer agreed there were no current controversions regarding Employee's shoulders and right knee, which it agreed to cover. Employee refused to agree to an SIME on the remaining controverted body parts and conditions because he contended the medical records were "tainted" and would prejudice the SIME physicians. Given his refusal, Employer said it would file a petition for an SIME. The designee noted Employee had 18 petitions that had not yet been decided. He asked Employee to provide at the next prehearing conference a list of any petitions the designee had missed and any he wanted heard at the next hearing. The designee noted "much acrimony between the parties in this case." Employee did not request a hearing. (Prehearing Conference Summary, July 17, 2017).

27) On July 14, 2017, when Employee refused to participate in the SIME process, Employer filed its own petition for an SIME. (Petition, July 14, 2017).

28) On August 7, 2017, Employee filed a petition with 11 pages of his single-spaced typed statements accusing former Division employee David Grashin, who had conducted numerous prehearing conferences in this case, of making "false statements" in a previous conference summary to portray an "unethical and prejudiced" attitude favoring the defense. He contended Grashin "stifled" him and providing intentionally "misleading" information. Employee also contended "Griffin & Smith" made "false and misleading" and even "fraudulent" controversions, on which he demanded an immediate hearing to address Griffin & Smith's "criminal acts." Employee contended Grashin had not included all his contentions in the conference summaries, including allegations of defense attorney and adjuster "crimes" and asked for Grashin's disqualification because Grashin noted "acrimony" between the parties, a statement Employee found offensive. He stated his intent to litigate these "documented criminal acts," with the Board, the Division of Insurance, federal courts, superior courts, the Bar Association, the Minnesota and Oregon "work comp board" and any other entity he deemed necessary to ferret out all alleged "felony and criminal acts" including "theft by deception," "fraud," "spoilation of evidence," and "more." (Petition, August 3, 2017).

29) On August 3, 2017, a Division staff member had a 20-minute telephone conversation with Employee, who refused to give his name. The staff member recognized his voice and he later responded to his name during the teleconference. Employee called to complain about EME

physicians not retaining medical records after an examination. The staff member advised him to ask Employer for the records it had sent to its EME physicians and petition to compel if it did not comply. She also suggested an SIME may resolve the disputes, to which Employee responded:

> EE [Employee] stated SIMEs are not neutral and because it was requested by the ER [Employer], it must be to their benefit. I tried to explain that SIME physicians are checked for any conflict of interest and are not biased for the ER. EE then went on a very long rant about how fraudulent and biased the entire WC system is, and how the WC Act only offers protection to the employer, but almost none to the injured worker. EE got very loud and heated, and when I pointed out he was yelling, he denied it. When I offered to transfer him to my supervisor because I had helped him as much as I knew how, he hung up. (Agency file: Judicial, Communications, Phone Call tabs, August 3, 2017).

30) On August 7, 2017, Grashin denied Employee's petition to disqualify him from future prehearing conferences. However, to move the case forward, Grashin voluntarily recused himself from any further activity in this case. (Prehearing Conference Summary, August 8, 2017).

31) On August 15, 2017, the parties attended an "emergency" prehearing conference and the new Board designee set a hearing for October 17, 2017, on Employer's petition for an SIME. The designee, former hearing officer Matthew Slodowy, extended Employee's deadline to produce discovery an additional 30 days. Employee objected to Employer's request for an SIME, citing his upcoming surgery. Slodowy addressed Employee's ARHs in which he requested a hearing on his claims. Employer opposed the Division setting a hearing on Employee's claims as the SIME question was still pending and discovery was outstanding. Slodowy determined, "because there is still very significant discovery and a possible SIME to occur, designee declines to set hearing on Employee's claims at this time." (Prehearing Conference Summary, August 15, 2017).

32) On August 24, 2017, Employee claimed PTD and permanent partial impairment (PPI) benefits, an unfair or frivolous controversion, medical and related costs, a penalty, and interest. (Claim for Workers' Compensation Benefits, August 24, 2017).

33) On August 25, 2017, Employee claimed Employer's adjuster and defense attorneys had "lied, cheated, stole and done every manner of criminal and fraudulent activity that can be found as examples of insurance, adjuster and defense fraud." (Claim for Workers' Compensation Benefits, August 25, 2017).

34) On August 25, 2017, the parties attended a prehearing conference and a different designee, Harvey Pullen, identified three Employee petitions and three Employer petitions set for hearing on

August 17, 2017. Employee reaffirmed his contention that Employer and its representatives continued to "commit fraudulent and criminal acts." He further advised that "these fraudulent and criminal acts will need to be litigated before moving forward with the adjudication of his Workers' Compensation Claims." Pullen advised Employee that the Board's authority was limited under the Alaska Workers' Compensation Act (Act), and it cannot assist Employee in his pursuit of claims against Employer or its representatives for fraud or criminal activity. He also advised Employee of the "necessity of completing the discovery process before parties can be move towards a hearing on the merits of this case." (Prehearing Conference Summary, August 28, 2017).

35) On August 28, 2017, Employee claimed, in 10 separate but similar claims, PPI benefits, an unfair or frivolous controversion, medical and related costs, a penalty, interest and claimed Employer was "meddling" with his physicians. He filed a separate claim for each body part or medical procedure. (Claims for Workers' Compensation Benefits, August 28, 2017).

36) On September 20, 2017, at Employee's request, and by the parties' stipulation, Division staff deleted nearly 175 pages of EME records and related medical summaries from his agency file. (Agency file, Judicial, Communications, Case Notes tabs, September 20, 2017).

37) On September 29, 2017, Employee accused former Chief of Adjudications Amanda Eklund of intruding into his case simply "to allow Smith a platform in order to obstruct" a subpoena Employee wanted for an upcoming hearing. He alleged Eklund retaliated against him for disclosing Grashin's alleged prior fraud, and secretly agreed with Smith to cancel a prehearing conference. (Agency file: Judicial, Communications, Email tabs, September 29, 2017).

38) On September 20, 2017, the parties appeared at a prehearing conference where Employer said it had withdrawn some controversions, but had issued new ones as well. The parties agreed to strike specific EME records from the file and the designee directed a Division staff member to remove the EME reports. (Prehearing Conference Summary, September 20, 2017).

39) On October 12, 2017, the parties attended a prehearing conference where Employee said he had frustrations with this case and wanted a "halt" on it until these issues were resolved. In response, the designee canceled the October 17, 2017 hearing, and scheduled a November 22, 2017 hearing concerning Employee's subpoena and Employer's two petitions to quash it, and a second hearing for January 23, 2018, on the issues previously set for the October 17, 2017 hearing. (Prehearing Conference Summary, October 12, 2017).

40) On November 7, 2017, the parties attended a prehearing conference and the designee clarified issues for the January 23, 2018 hearing, which now included three Employee petitions and two Employer petitions. The parties also discussed Employee's petition to continue the November 22, 2017 hearing, to which Employer responded it had no objection to continuing the hearing if Employee was actually in the process of obtaining medical treatment. Given this, the designee canceled the November 22, 2017 hearing and Employee wanted to add the issues from that hearing to the January 23, 2018 hearing, with the caveat that Employer's petition for an SIME was removed as a hearing issue. Employer did not object to removing the SIME petition as a hearing issue for January 23, 2018. When Employee said he wanted more than 20 minutes to "present his case," the designee explained that 20 minutes applied only to opening statements and closing arguments, not the entire case presentation. (Prehearing Conference Summary, November 7, 2017).

41) On January 9, 2018, the parties attended a prehearing conference to address Employee's newly filed petitions to continue the January 23, 2018 hearing. Johnson, who had entered an appearance as Employee's non-attorney representative but had withdrawn it, stated she was now his "accommodation," because he had attention and organizational issues. She added that she had surgery scheduled on January 23, 2018, and would not be able to participate or prepare for the hearing. Employer initially objected to the continuance and noted the large volume of materials Johnson contended would be necessary to prepare for hearing were not needed for the limited issues set for hearing. It also noted that "hearings had been continued multiple times previously at Employee's request," but nevertheless, it did not oppose his continuance request. It requested a new hearing date and stipulated to extend hearing deadlines. Consequently, the parties stipulated to a March 20, 2018 hearing on three Employee petitions and two Employer petitions. (Prehearing Conference Summary, January 9, 2018).

42) On February 27, 2018, the parties attended a prehearing conference to discuss three more Employee petitions. The designee advised Employee that the three petitions were not yet ripe, and if he wanted to add them as issues for the March 20, 2018 hearing, he should file an ARH. (Prehearing Conference Summary, February 28, 2018).

43) On March 15, 2018, the parties attended an "emergency" prehearing conference on Employee's request. He contended the March 20, 2018 hearing had to be continued because an attorney who had entered an appearance on behalf of an EME provider had "exposed" Employee's personal and medical information, an issue that needed to be resolved before the hearing. Focusing on

Employee's continuation request, a new designee, former hearing officer Henry Tashjian denied it finding no good cause for a continuance. (Prehearing Conference Summary, March 16, 2018).

44) On March 27, 2018, Employee filed two ARHs on a July 14, 2015 petition about an unfair or frivolous controversion. The agency file does not include a July 14, 2015 petition. (ARHs, March 23, 2018; agency file).

45) On March 29, 2018, Employee claimed TTD, PTD and PPI benefits, a rate compensation adjustment, an unfair or frivolous controversion, medical and related costs, a penalty and interest. He contended Employer's adjuster and defense attorneys had submitted him to severe legal abuse and mental stress that caused a host of mental and physical issues. (Claim for Workers' Compensation Benefits March 28, 2018).

46) On March 30, 2018, Employee claimed an unfair or frivolous controversion, transportation costs, a penalty and interest. He contended Employer acted in bad faith. (Claim for Workers' Compensation Benefits, March 30, 2018).

47) On April 17, 2018, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 18-0039 (April 17, 2018) (*McDonald I*), among other things, granted Employer's petition to compel Employee to sit for a deposition, which he had refused to do. (*McDonald I*).

48) On April 24, 2018, the parties appeared before Tashjian for a telephonic prehearing conference to address Employee's "numerous outstanding petitions." Following the designee's attempt to discuss each enumerated petition, Employer noted that Employee had refused to sign releases, or establish a date for his deposition; it also wanted to readdress its SIME petition. The designee addressed 26 Employee petitions, and either denied them or, for the most part, the parties agreed they were moot. Employee twice terminated the call when the designee's rulings did not go in his favor. Tashjian noted Employee's two claims were pending. When Employer tried to obtain a date for Employee's deposition, Employee refused to give one or sit for deposition. He stated he would be gone from the state for the entire month of May and declined to say where he would be or provide other information concerning his availability. Employer wanted a hearing on its request for an SIME and Employee terminated his participation at the conference. Tashjian set a June 5, 2018 hearing on the SIME issue. He also found Employee was "familiar" with the Alaska Workers' Compensation Act (Act) and its regulations and "frequently cites to statute, regulation, and case law." (Prehearing Conference Summary, April 24, 2018).

49) On April 25, 2018, Employee filed 11 ARHs on two claims and various petitions. (ARHs, April 25, 2018).

50) On May 29, 2018, Employer attended a prehearing conference, but Employee did not appear or respond to Tashjian's voicemail message. Thus, Tashjian took no action on 10 petitions Employee had filed since his April 24, 2018 prehearing conference. One sought to disqualify Tashjian from future prehearing conferences. He treated an email Employee sent the Division as a request to continue the June 5, 2018 hearing, which Tashjian granted; he rescheduled the hearing to June 19, 2018. (Prehearing Conference Summary, May 31, 2018).

51) On June 23, 2018, Employee emailed the Division and stated it had a section that investigated fraud. He alleged Tashjian and Slodowy "both falsely claimed" that the Division would not investigate or acknowledge his alleged proof of "ongoing and severe insurance fraud." Employee said he would send his documentation to the Division of Insurance for investigation. (Agency file: Judicial, Communications, Email tabs, June 23, 2018).

52) On July 31, 2018, Employee called the Division stating he wanted to disqualify Tashjian as the prehearing officer for his July 31, 2018 prehearing conference. Division staff advised Employee he could raise that issue at the conference. (Agency file: Judicial, Communications, Phone Call tabs, July 31, 2018).

53) On July 31, 2018, the parties attended a prehearing conference to address "all outstanding petitions in this case." Tashjian denied Employee's request to disqualify him, and addressed 27 more Employee petitions and two Employer petitions. He granted four of Employee's petitions, denied one and determined all others were either previously resolved or were set for a future hearing. Tashjian stated, "All petitions filed by the date of this prehearing and not addressed herein are considered resolved." He set an October 9, 2018 hearing on four Employee petitions. (Prehearing Conference Summary, August 6, 2018).

54) On August 2, 2018, Employee emailed the Division and others alleging Employer and its "accomplices," including "the Board," Grashin, Tashjian, Slodowy, former Division Director Marie Marx, certain medical providers, the insurer and its representatives, had all discriminated against him for various reasons. He stated he was beginning a federal lawsuit against all "guilty parties." (Agency file: Judicial, Communications, Email tabs, August 2, 2018).

55) On August 2, 2018, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 18-0076 (August 2, 2018) (*McDonald II*), found Employee signed for a hearing notice for the June 19, 2018

hearing, but at hearing, said he had been given no notice whatsoever of a hearing date and had no knowledge of a hearing. Employee contended he had no time to file his hearing evidence or otherwise prepare for hearing. *McDonald II* found Employee's testimony that he had never received any notice of hearing "in any way" not credible. Although he admitted to twice terminating his participation in the prehearing conference giving rise to the hearing, Employee blamed this on Tashjian's conduct, which he said resulted in him "not being allowed to participate" in scheduling the hearing. He objected to the SIME going forward, even though he had previously requested one and had stipulated to it, alleging Employer committed fraud, illegally interfered with his care and tainted opinions of Employer's EMEs. *McDonald II* found Employee's pleadings and oral arguments cogent and skillful. Nevertheless, given Employee's repeated objections, and to afford him due process, the panel extended Employee's time to file a 15-page brief and gave Employer and a subpoenaed person time to respond. It ordered the SIME would proceed. *McDonald II* also advised Employee that he could depose EME physicians or staff at his expense, or call relevant witnesses associated with EME providers at a merits hearing. (*McDonald II*).

56) On August 30, 2018, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 18-0089 (August 30, 2018) (*McDonald III*), granted Employee's petition for reconsideration of *McDonald II*, to reopen the record for additional evidence and arguments. (*McDonald III*).

57) On October 4, 2018, the parties attended a prehearing conference to address new Employee petitions and other issues. Employer stated it had scheduled Employee for new EME visits for three specific days in November 2018, and it would copy Employee with the medical records provided to those EMEs. It had sent Employee 75 pounds of discovery documents, which it had previously provided him at a hearing on a compact disc. Employer noted the Social Security release it had received from Employee was marked, "At the forceful request of Griffin and Smith," and Employer had not received a response from the Social Security Administration after utilizing this release. It contended a contract signed under duress was invalid and the Social Security Administration was unlikely to rely on it to release documents. Tashjian addressed 12 new petitions from Employee; he denied eight and found the remaining petitions were either moot or previously resolved. (Prehearing Conference Summary, October 8, 2018).

58) On October 11, 2018, the parties attended a prehearing conference to address petitions remaining after the October 4, 2018 prehearing conference. Tashjian granted Employer's petition to remove an EME provider as a party. He also addressed five Employee petitions, including one

to disqualify Tashjian and strike all prehearing conference summaries that he wrote, based on Employee's contention that as soon ignoring was "ignoring him, ignoring his disabilities, stifling him, telling him things that don't matter when they do," was actually representing Employer, violating Employee's privacy requests under the Americans with Disabilities Act (ADA) and was biased. Nevertheless, Tashjian granted one Employee petition for discovery, and denied four. He scheduled a hearing for December 4, 2018, on four Employee petitions. (Prehearing Conference Summary, October 12, 2018).

59) On October 23, 2018, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 18-0109 (October 23, 2018) (*McDonald IV*), denied Employee's petition to reconsider *McDonald II*, on its merits. (*McDonald IV*).

60) On November 14, 2018, Employee claimed an unfair or frivolous controversion. He contended Employer wanted an irrelevant medical record release and had committed Social Security fraud. He contended Employer continued meddling with his doctors and engaged in "fraudulent actions," in bad faith. (Claim for Workers' Compensation Benefits, November 12, 2018).

61) On November 19, 2018, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 18-0121 (November 19, 2018), (*McDonald V)* denied Employee's petition to reconsider *McDonald IV.* (*McDonald V*).

62) On November 20, 2018, the parties attended a prehearing conference with a new designee, hearing officer Janel Wright, who added two more Employee petitions to the issues for the December 4, 2018 hearing, at his request. Employee contended an SIME was premature because he was appealing *McDonald II*, which had ordered him to attend an SIME. Given that scheduling an SIME is a lengthy process, Wright set deadlines for the parties to provide appropriate documents. (Prehearing Conference Summary, November 21, 2018).

63) On December 4, 2018, the parties attended a prehearing conference. Given that Employee was scheduled for hernia surgery on December 7, 2018, Wright accommodated his recovery and rescheduled the December 4, 2018 hearing to February 6, 2019. The issues for the February 6, 2019 hearing expanded, at his request, to include Employee's request to disqualify former hearing officer Ronald Ringel's participation in this case, and six more Employee petitions. (Prehearing Conference Summary, December 6, 2018).

64) On January 15, 2019, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 19-0006 (January 15, 2019) (*McDonald VI*), on its own motion modified one factual finding from *McDonald IV*, which did not change the result. (*McDonald VI*).

65) On January 22, 2019, the parties attended a prehearing conference at which Employee contended his hernia surgery interfered with his ability to review SIME records. Wright accommodated his recovery time and set new SIME deadlines. Issues for the February 6, 2019 hearing were expanded to include six Employee petitions and one Employer objection. Employee contended Ringel was a "potential witness" in a civil action Employee was going to file against him for "tortious acts involving his conduct as the hearing officer in a previous decision." Employee withdrew two prior petitions. Wright granted his request to accept his overlength brief. Employee opposed attending an SIME until the Alaska Workers' Compensation Appeals Commission (Commission) ruled on a petition for review he intended to file. Wright noted Employee had failed to comply with a previous directive that he finalize an SIME form. She also advised him that under AS 23.30.250, the Board had jurisdiction over fraudulent or misleading acts as they pertain to obtaining compensation, or assisting with or making false or misleading submissions affecting benefits under the Act. Wright advised that under the statute the Board could only make factual findings regarding submissions affecting coverage under the Act. It had no authority to award civil damages or determine that crimes were committed. (Prehearing Conference Summary, January 23, 2019).

66) On January 28, 2019, Employee petitioned the Commission to review *McDonald II*, *IV*, and *V* (written by Ringel), and requested a stay on the Board-ordered SIME, which he had requested in March 2016, and to which he later stipulated. He contended the Board was biased against him, and most of *McDonald IV*'s factual findings and legal conclusions were wrong because they were based on erroneous facts. (Petition for Review by Self-Represented Litigant, January 28, 2019).

67) On February 4, 2019, the parties attended a prehearing conference on Employee's petition to modify issues for the February 6, 2019 hearing. Wright noted Employee's previous petition to compel discovery had still not been resolved. She clarified the six Employee petitions set for hearing on February 6, 2019. (Prehearing Conference Summary, February 5, 2019).

68) On February 6, 2019, Wright issued a second summary from the February 4, 2019 conference. This referenced an April 10, 2019 hearing scheduled at the February 4, 2019 conference, which included Employee's request that Employer present its EME physicians for cross-examination

prior to an SIME, two Employee petitions, and Employer's petition to compel him to attend an EME panel without interference. Wright also discussed Employee's third-party suit he had filed against entities he believed were responsible for his work injury. Employer stated it "asserts a lien under AS 23.30.015 and confirmed it wants repayment." Smith said he would send notice of the lien to Employee's third-party lawyers. Wright advised Employee he must notify Employer "if he settles his third-party claim and obtain" its "written approval of the settlement." Included in this summary was AS 23.30.015(h). (Prehearing Conference Summary, February 6, 2019).

69) On February 8, 2019, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 19-0016 (February 8, 2019) (*McDonald VII*), denied Employee's petition to reconsider *McDonald VI*, because his petition was untimely. (*McDonald VII*).

70) On February 21, 2019, the parties attended a prehearing conference. Wright confirmed the Division had mailed Employee compact discs with approximately 16,000 pages from his file. The material did not include Employee's four flash drives, which would be mailed to him on February 22, 2019. Given the Division's delay in providing Employee's file, and to accommodate his alleged Post-Traumatic Stress Disorder (PTSD) issues, Wright again extended SIME deadlines and set Employee's request that Employer present its EME physicians for cross-examination before an SIME, for the April 10, 2019 hearing. (Prehearing Conference Summary, February 22, 2019).

71) On February 27, 2019, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 19-0026 (February 27, 2019) (*McDonald VIII*), denied Employee's various procedural requests. (*McDonald VIII*).

72) On February 28, 2019, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 19-0030 (February 28, 2019) (*McDonald IX*), denied Employee's petition to reconsider *McDonald VIII*. (*McDonald IX*).

73) On March 14, 2019, Cupoli sent Employee's third-party lawyers a letter advising that in early 2019, the workers' compensation carrier's lien was $1,075,787.29. (Letter, March 14, 2019).

74) On April 8, 2019, the parties appeared for a prehearing conference; Johnson assisted Employee. Among other things discussed at the conference and presented in the conference summary were:

> **Discussions regarding Mr. McDonald's Third-Party Litigation**
>
> Mr. McDonald confirmed he has sued a third party he believes is liable for his injury while working for ER [Employer]. He is represented in his third-party claim by Kate Elsner and Pete Ehrhardt.

ER asserts a lien under AS 23.30.015 and confirmed it wants repayment. Mr. Smith will send a copy of ER's lien to EE's [Employee's] attorneys in his third-party claim. AS 23.30.015 was explained to EE. He was reminded he must notify ER if he settles his third-party claim and obtain ER's written approval of the settlement.

The parties are reminded that if EE prevails in his third-party claim or if the third-party claim is settled, ER is entitled to recover all amounts of costs and expenses itemized in AS 23.30.015(e)(1)(A)-(D), including all reasonable attorney fees expended by ER in this matter. The statute is provided below in relevant part:

**AS 23.30.015. Compensation where third persons are liable**. (a) If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, the person need not elect whether to receive compensation or to recover damages from the third person.

(b) Acceptance of compensation under an award in a compensation order filed by the board operates as an assignment to the employer of all rights of the person entitled to compensation and the personal representative of a deceased employee to recover damages from the third person unless the person or representative entitled to compensation commences an action against the third person within one year after an award.

. . . .

(e) An amount recovered by the employer under an assignment, whether by action or compromise, shall be distributed as follows:

(1) the employer shall retain an amount equal to

(A)the expenses incurred by the employer with respect to the action or compromise, including a reasonable attorney fee determined by the board;
(B) the cost of all benefits actually furnished by the employer under this chapter;
(C) all amounts paid as compensation and second-injury fund payments, and if the employer is self-insured or uninsured, all service fees paid under AS 23.05.067;
(D)the present value of all amounts payable later as compensation, computed from a schedule prepared by the board, and the present value of the cost of all benefits to be furnished later under AS 23.30.095 as estimated by the board; the amounts so computed and estimated shall be retained by the employer as a trust fund to pay compensation and the cost of benefits as they become due and to pay any finally remaining excess sum to the person entitled to compensation or to the representative.

(2) the employer shall pay any excess to the person entitle to compensation or to the representative of that person.

> (f) Even if an employee, the employee's representative, or the employer brings an action or settles a claim against the third person, the employer shall pay the benefits and compensation required by this chapter.
>
> (g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A)-(C) of this section insofar as recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. If the employer is allocated a percentage of fault under AS 09.17.080, the amount due the employer under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).
>
> (h) If compromise with a third party is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.
> . . . .
>
> (j) Notice of the commencement of an action against a third party shall be given to the division and to all interested parties within 30 days. (Prehearing Conference Summary, April 9, 2019).

75) On April 8, 2019, Employee emailed the Division to state former Acting Chief of Adjudications Ringel had "committed a criminal act" in his previous decision. He contended Ringel, Slodowy and Tashjian all lied in their decisions and abused their position as government officials. Employee promised to sue Ringel, Slodowy, Tashjian, Smith and the adjuster in federal court. He alleged "some kind of criminal collaboration" between Ringel, other Board officers and Employer's insurer. Employee expressed concern that Ringel thought he was above the law and Employee feared for his own life and his family's life, suggesting Ringel could have him killed. (Agency file: Judicial, Communications, Email tabs, April 8, 2019).

76) On April 12, 2019, the Commission issued its order on Employee's January 28, 2019 pleadings including his Petition For Review. It noted his request for the Division Director to provide accommodations under the ADA had been granted in part. One granted accommodation was that his request remain private from Employer. The Commission noted a request the Director did not grant was for him to take a break to calm down if stressed. However, the Director advised Employee the Division would make every effort to accommodate his need for breaks as necessary.

The Commission further found that notwithstanding the approved request to keep his accommodations private from Employer, Employee filed the Director's letter granting two of his 21 accommodations with the Board as evidence supporting a petition he made for reconsideration, which he served on Employer. It further noted that when a prehearing conference designee ruled against Employee, he "began yelling" and stated, "I oppose everything that has happened in these proceedings," and terminated his telephonic participation. On that occasion, Division staff reconnected Employee with the prehearing conference, and he became evasive when pressed about his availability for his deposition ordered in *McDonald I*. When the designee set Employer's petition for an SIME for hearing, Employee accused the designee of being "biased toward [Employer] with everything." After the designee explained why a hearing had to be scheduled, Employee said, "I oppose. Don't call me back" and hung up again. (Order on Petition for Review and Order on Motion to Stay SIME, April 12, 2019).

77) Included in the April 12, 2019 Commission order was its decision that the Board in *McDonald II*, *IV* and *V* had not impaired Employee's legal right, caused unnecessary delay, expense or hardship to him, had not departed from any accepted and usual course of proceedings, and his petition did not involve an important legal question. The Commission agreed a hearing officer had made misstatements about fraud investigations that it concluded were "just misstatements." It concluded the misstatements were not evidence Employee did not receive a fair hearing in June 2018. The Commission noted Employee failed to articulate "why or how" allegedly discoverable and missing documents would assist him in proving his claim for additional benefits. Although he had stated he needed information to prove criminal wrongdoing, the Commission said "the court system is the proper form" for that because the Board does not have jurisdiction over criminal activity. (Order on Petition for Review and Order on Motion to Stay SIME, April 12, 2019).

78) The Commission's April 12, 2019 order also denied Employee's request for a stay on the SIME. It noted the Act required the Board to ensure "quick, efficient, fair, and predictable delivery of indemnity and medical benefits" at a reasonable cost to Employer. The Commission found moving the SIME process forward was one way to ensure this goal. It advised Employee that his opinions regarding the "deeply flawed" EME reports was an argument to be made at a merits hearing. The Commission rejected Employee's attack on Board findings regarding his credibility. (Order on Petition for Review and Order on Motion to Stay SIME, April 12, 2019).

79) On April 12, 2019, Employee stated, "I cannot make it to the May 29th hearing, I'll be in Washington for the follow-up for dental surgery and I may step down and see Dr. Akizuki. If we could try a different date?" Employer objected to his request for a new hearing date. Nevertheless, Wright again accommodated Employee's request, found good cause for changing the hearing date and ordered an earlier hearing on May 15, 2019, on two Employee petitions and one Employer petition. (Prehearing Conference Summary, April 26, 2019).

80) On April 29, 2019, the parties attended a prehearing conference and Wright at Employee's request clarified the issues for the May 15, 2019 written record hearing to include three Employee petitions and one Employer petition. The parties stipulated to the May 15, 2019 hearing date. Employer withdrew its sleep apnea controversion. Employee requested that former Board member Linda Murphy not participate in any future hearings because she had "a conflict of interest." Wright advised him that Murphy was no longer on the Board. She also noted mutual frustration between Smith and Employee at prehearing conferences, and Employee's repeated objection to Ringel and requested "that he not have to be in the same room as Hearing Officer Ringel or Colby Smith." Wright explained that workers' compensation disputes "put parties in adversarial roles" and eventually all parties must be provided due process and an opportunity to be heard. She suggested Employee consider obtaining a limited guardian for this case. (Prehearing Conference Summary, May 2, 2019).

81) On April 29, 2019, the parties attended a prehearing conference where Wright noticed Employee's petition for a protective order from signing releases for dermatological records was omitted from the April 29, 2019 conference summary. Employer stated it inquired of Employee when it received a bill from a dermatologist, and Johnson had responded stating Employee's blisters were related to the work injury, even though Employee had previously said they were not. Given that response, Smith wrote to the physician asking for her opinion if the skin issues were related to the work injury. The physician responded that she did not believe the dermatological problems were related to his work injury. The designee considered this evidence and denied Employee's petition for a protective order subject to renewal if Employee changed his causation position. (Prehearing Conference Summary, May 2, 2019).

82) At a date prior to May 22, 2019, Employee apparently provided information to the Division's Special Investigations Unit (SIU), alleging fraud and asking for an investigation. The date he submitted this information and made the request is unknown because the SIU maintains a

confidential database not accessible to Division adjudications staff. (Agency file: Judicial, Communications, Email tabs, May 22, 2019; observations).

83) On May 22, 2019, Employee emailed Rhonda Gerharz, former Chief Investigator for the SIU, regarding her apparent response to his request for a fraud investigation. Not satisfied with Gerharz's response, Employee stated, "I have proved nine ways to Sunday that the employer AND the board are committing criminal acts. How dare you try and excuse their crimes." According to Employee's email, Gerharz told him his accusations were "all part of the civil and administrative process." Employee accused Gerharz of "sitting on" his complaint and "covering up" for Employer, Smith and the Board. He further accused her of failing to follow up with his complaint by failing to contact him. Employee contended Gerharz's actions showed her bias to the Board and Employer. He questioned if Gerharz's actions were related to Smith's representation of the State of Alaska. To summarize the tone of his lengthy letter to Gerharz, Employee asked, "Are you serious?" (Agency file: Judicial, Communications, Email tabs, May 22, 2019).

84) On May 22, 2019, Johnson sent an email to the Division stating she had retained a radiology expert. (Agency file: Judicial, Communications, Email tabs, May 22, 2019).

85) On May 23, 2019, Wright on her own motion, and to prevent him from incurring unrecoverable costs for inadmissible expert evidence, sent Employee and Johnson an email advising them that under the Act, an injured worker did not have a right to hire an independent medical expert. (Agency file: Judicial, Communications, Email tabs, May 23, 2019).

86) On June 13, 2019, *McDonald v. Rock & Dirt Environmental, Inc.*, AWCB Dec. No. 19-0066 (June 13, 2019) (*McDonald X*), granted some relief requested by both parties, and denied other requests. It granted Employee's petition for clarification of a statute, and his petition to compel discovery from Employer, which resulted in Employer having to produce eight pieces of evidence. *McDonald X* noted Employee's purpose in filing a petition to cross-examine the EME doctors was so he could question them before an SIME occurred. (*McDonald X*).

87) On June 18, 2019, the parties attended a prehearing conference after which Wright provided a chart of the petitions that had not yet been resolved, and advised Employee that ARHs must be filed for each to bring the issues before the Board for a hearing. She also noted the Commission's order denied Employee's petition to stay the SIME. Wright ordered the SIME to move forward; Employee wanted to make his own travel arrangements for those exams. Wright also noted he petitioned the Alaska Supreme Court for review, but the Court on June 12, 2019, closed his file

because he failed to pay a filing fee. Wright agreed to accept and forward to the provider a medical record release from Employee for his shoulder surgeon's records to avoid any contact between the surgeon and Employer's representatives. (Prehearing Conference Summary, June 18, 2019).

88) On June 23, 2019, Employee emailed Wright an eight-page single-spaced document and complained about questions the Division sent to SIME physicians. He alleged Wright was violating his rights and "being dishonest" about the process. Given the wording in one question, Employee alleged Wright was "lying," and her "bias [was] really showing." (Agency file: Judicial, Communications, Email tabs June 23, 2019).

89) On June 25, 2019, Johnson claimed medical and related costs, an unfair or frivolous controversion, a penalty and interest for out-of-pocket expenses she contended she paid for Employee's medical treatment. (Claim for Workers' Compensation Benefits, June 23, 2019).

90) On June 29, 2019, Employee emailed former Division Director Grey Mitchell and complained about Mitchell's previous email advising Johnson to enter an appearance as Employee's representative, if she was to file documents on his behalf. He accused Mitchell of using certain statutes to improperly "influence" his claim, and suggested Mitchell was "working very hard to help the employer here." Employee determined therefore that he would not adhere to any Board ruling until, in his view, Mitchell did also; thus, Employee unilaterally decided "the SIME is off."

91) On August 13, 2019, the Hon. Eric A. Aarseth, Superior Court Judge, in *McDonald v. Architects Alaska, Inc. & BBFM Engineers, Inc.*, Case No. 3AN-16-07620 (Civil) stated:

> **ORDER GRANTING MOTION TO ENFORCE SETTLEMENT AGREEMENT**
>
> On July 12, 2019 Defendant BBFM Engineers, Inc., (BBFM) moved to enforce the agreed-upon walk-away settlement with plaintiff Eric McDonald (Plaintiff). . . . Defendant Architects Alaska, Inc. (AAI) later joined in BBFM's motion (footnotes omitted).
>
> This court, having considered the evidence, communications, and affidavits submitted by Defendant Architects Alaska, Inc. and Defendant BBFM Engineers, Inc. and all materials, if any, submitted by Plaintiff Eric McDonald, finds the existence of a valid offer encompassing all essential terms, unequivocal acceptance by the offerees, consideration, and an intent to be bound. As such, this court is required to enforce the settlement agreement between all named parties and grants BBFM's motion to enforce the settlement agreement.

> IT IS HEREBY ORDERED that this action shall be dismissed with prejudice, each party to bear its own costs and attorney fees. . . . (Order Granting Motion to Enforce Settlement Agreement, August 13, 2019).

92) On September 23, 2019, Employee in two separate but similar claims, claimed PTD, PPI and PPI benefits, a compensation rate adjustment, an unfair or frivolous controversion, attorney fees and costs, medical and related costs, a penalty, and interest. He contended his injury led to various additional injuries and renewed his contention that Employer had engaged in Social Security fraud. Employee contended the Division mishandled his SIME in innumerable ways including but not limited to deception and criminal fraud, and Employer falsified a related stipulation. (Claims for Workers' Compensation Benefits, September 18, 2019).

93) September 30, 2019, Employee claimed PPI benefits, a compensation rate adjustment, an unfair or frivolous controversions, attorney fees and costs, medical and related costs, a penalty, and interest. He contended Employer, its adjusters and attorneys had falsified the claim, altered or omitted evidence, falsified the meaning or interpretation of the Act, and had given false and misleading evidence to Employee's physicians, all of which he contended interfered with his medical care. (Claim for Workers' Compensation Benefits, September 28, 2019).

94) On October 21, 2019, Employee responded to the RBA's office about recent correspondence he had received regarding his vocational reemployment process. He contended his former reemployment specialist, Forooz Sakata, had provided "misleading" information to the RBA and, the RBA's office was trying to "coerce" him into a retraining plan before he was finished with his treatment. Employee considered this attempt "idiotic." He further contended it was not a matter of "whether the board has committed criminal acts of deception and fraud but how much and when." He concluded, referring to the RBA's office:

> So you go on, write your little letters. I am informing you that I intend to pursue permanent disability through the workers' compensation system. (Employee letter, October 21, 2019).

95) On October 23, 2019, Wright emailed Employee and noted numerous documents, claims and petitions had been recently filed. She reminded him that many of his previously filed petitions could be heard if he filed an ARH identifying those he wanted to go to hearing. (Agency file: Judicial, Communications, Email tabs, October 23, 2019).

96) On October 24, 2019, Employee responded to Wright's October 23, 2019 email and rejected her procedural advice. Rather, Employee reiterated his various accusations that Wright and others had "committed fraud" and were "actively committing criminal acts" to help Employer. (Agency file: Judicial, Communications, Email tabs, October 24, 2019).

97) On December 17, 2019, Employer sought an order dismissing Employee's claims under §015(h), based on Judge Aarseth's August 13, 2019 order. (Petition, December 17, 2019).

98) On March 4, 2020, the parties attended a prehearing conference and gave their positions on Employer's petition to dismiss his claims under §015(h). Wright noted Employee, "was quite angry at the prehearing." Employee stated that dealing with Smith, the Board and his case in general aggravated his PTSD symptoms. "The designee was unable to respond to his questions because he was unable to contain himself long enough to receive an answer." Employee reiterated his previous and continuing arguments regarding the alleged third-party settlement, acknowledged Judge Aarseth's order and said, "The judge screwed me." Against Employee's objections, Wright set a hearing for May 5, 2020, 62 days after the conference. To this, Employee said he will "not allow the board to make a decision on Employer's petition to dismiss." He raised a previous medical opinion from his physician stating he was excused from litigation proceedings. When Wright reminded him the time for that accommodation had passed, Employee "stated he will get another letter from his physician stating that he cannot attend the hearing." (Prehearing Conference Summary, March 4, 2020).

99) On April 14, 2020, Employee having obtained another note from his physician stating he could not participate in a hearing yet, petitioned for an order continuing the May 5, 2020 hearing, based on his post-surgery shoulder limitations, the pandemic and his fear of contracting COVID-19. In respect to his shoulder, Employee said he needed a continuance "due to my work-related injuries and my difficulty in litigating due to my backsliding from my recent shoulder surgery due to being forced to read and type for research in litigating, which cause my shoulders, back and neck to become inflamed, especially after surgery." The pandemic had "prolonged" his "suffering from [his] condition declining after the recent surgery." (Petition, April 14, 2020).

100) On April 15, 2020, Employer non-opposed Employee's petition to continue the May 5, 2020 hearing. Wright immediately informed Employee that the hearing was continued. (Answer; Wright email, April 15, 2020). Based on Employee's representations and Employer's non-opposition, the May 5, 2020 hearing never occurred. (Agency file).

101) Notwithstanding his alleged shoulder difficulties, which he stated made it difficult for him to work on his case, Employee immediately thereafter filed serial petitions beginning April 16, 2020, the day after the May 5, 2020 hearing was continued. He filed 13 petitions for various relief with the Board through September 17, 2020. (Agency file: Judicial, Party Actions, Petition tabs, April 16, 2020 through September 17, 2020).

102) On May 13, 2020, Employee was also able to claim TTD, PTD, PPI benefits, a compensation rate adjustment, an unfair or frivolous controversion, medical and related costs, a penalty, and interest. Attached to his claim were approximately 60 pages with detailed research, text messages, images and explanations from Employee about his injury and claims. (Claim for Workers' Compensation Benefits, April 15, 2020).

103) On May 26, 2020, Employee filed an ARH on his own claim for hernia surgery and PPI benefits only. (ARH, May 22, 2020).

104) On September 23, 2020, Employee in his third-party case filed a response to one third-party's opposition to his request for expedited consideration of his request for an injunction to stay the October 21, 2020 Board hearing on Employer's previous petition to dismiss his claims. In his 23-page pleading with 23 extensive footnotes citing civil rules and case law, Employee told the court, among other things that "AAI and BBFM's fraud upon the court is very apparent in both their deceptive pleadings and their omissions with intent to deceive." (Response to AAI's Opposition to Plaintiff's Request for Expedited Consideration/Request for Injunction to Stay Workers' Compensation October 21, 2020 Hearing, September 21, 2020; Agency file: Judicial, Communications, Email tabs, October 16, 2020).

105) On July 14, 2020, the parties stipulated to a hearing and Wright scheduled another hearing on Employer's December 17, 2019 petition to dismiss, for October 21, 2020. (Prehearing Conference Summary, July 14, 2020).

106) On September 8, 2020, Employee requested an order "postponing" the October 21, 2020 hearing. (Petition, September 8, 2020).

107) On September 28, 2020, Wright scheduled a preliminary hearing for October 6, 2020, on Employee's petition to continue the October 21, 2020 hearing. (Prehearing Conference Summary, September 28, 2020).

108) On October 2, 2020, Employee repeated his past and continuing arguments regarding why a hearing should not be scheduled on Employer's petition to dismiss and how in his view there was

no third-party settlement. He contended attorney Eric Croft was "blocking testimony" by petitioning to not have Employee's former third-party lawyers made parties to his workers' compensation case. Employee contended Employer "failed to assert" its "lien held over the proceedings or with third party liability insurance company, yet is asking the board for a windfall by dismissing EE's entire claim." (Hearing Brief, October 2, 2020).

109) On October 6, 2020, the parties attended a preliminary hearing on Employee's petition to continue the October 21, 2020 hearing on Employer's prior petition to dismiss his claims. Employee primarily contended the Superior Court should be allowed to rule on his then-pending request to vacate Judge Aarseth's August 13, 2019 order before the Board acted on Employer's prior petition to dismiss his claim. His secondary contention was that Employer failed to itemize and assert its lien. Employee testified, he "did not compromise with the third-party defendants in any way." He cited case law from New York stating a "judicial determination" is not the same as a "compromise." Employee testified the Superior Court did not dismiss his case because Judge Aarseth found there was a settlement, but rather dismissed it because he failed to oppose the motion to dismiss timely. He further testified there was no money exchanged as part of the alleged settlement agreement but acknowledged his extensive legal research showed "there doesn't need to be any money exchanged if the employee dismisses the case without the employer's permission." Employee evaded but reluctantly testified "they [Employer] do have a lien," which he said was between "$400,000 to $500,000." (Record, October 6, 2020).

110) On October 7, 2020, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 20-0092 (October 7, 2020) (*McDonald XI*), found and concluded a different Superior Court judge was reviewing Employee's motion to vacate Judge Aarseth's August 13, 2019 order dismissing his third-party case. It found Employee raised many of the same arguments he raised previously and continues to raise to the present time. He also testified Employer was "100 percent at fault" for his work accident. *McDonald XI* further found, in relevant part:

> (8) On October 5, 2020, the court in Employee's civil action issued in brief summary the following:
>
> > . . . Whether a settlement agreement existed between the parties requires further consideration.

> (9) The court did not rule on Employee's September 23, 2020 motion for an injunction and order staying the board's October 21, 2020 hearing and is workers' compensation case. (Observations).
> . . . .
>
> (11) Employee testified Employer has a statutory lien worth at least $400,000; he also testified he received no money from the third parties in the civil action as result of the alleged "settlement," which the superior court enforced as the basis to dismiss his civil action. (Employee).

In its analysis, *McDonald XI* noted Employee's July 2020 interest in going to hearing on Employer's petition to dismiss his claim, so Wright scheduled a hearing for October 21, 2020. He subsequently requested a continuance. *McDonald XI* found Employee failed to provide a basis to continue the hearing. Employee also contended he needed more time to provide the Board with additional "evidence or arguments" under the continuance regulation upon which he relied. Addressing his "additional evidence or arguments" contention, *McDonald XI* stated:

> Unless and until the superior court vacates its existing order dismissing Employee's third-party lawsuit, relevant "evidence or arguments" for the October 21, 2020 hearing include: (1) Does Employer have a workers' compensation lien under §015(g), (i), and if so how much is it? This fact was proven by Employee's testimony at hearing; (2) Did Employee or his agents compromise with third parties in a civil action for an amount less than the workers' compensation lien under §015(h)? These facts were determined in the superior court's existing order, which enforced the settlement agreement, and through Employee's testimony stating he got no money from the compromise; and (3) Did Employer provide written approval for the compromise under §015(h)? This fact will need to be found at the October 21, 2020 hearing. . . .

*McDonald XI* expressly advised Employee that the question of "whether or not third-parties or their attorneys in a dismissed third-party case should be allowed to testify" can and should be "raised and resolved at a prehearing conference" prior to a hearing on Employer's petition to dismiss. It declined to continue the October 21, 2020 hearing. (*McDonald XI*).

111) On October 20, 2020, the Hon. Thomas Matthews, Superior Court Judge issued an order in Employee's third-party case stating ". . . it is still an open question as to whether a settlement agreement existed between the parties." He was concurrently reviewing the third-parties' briefs on that issue. Judge Matthews ordered, "The WC board is hereby enjoined from holding the WC hearing until such time as this Court issues its ruling on whether a settlement agreement exists in

this case." (Order Granting Plaintiff's Request for Injunction to Stay Workers' Compensation October 21, 2020 Hearing, October 20, 2020).

112) On January 25, 2021, Judge Matthews granted Employee's motion to vacate Judge Aarseth's August 13, 2019 decision enforcing the settlement agreement. (Order Granting Motion to Vacate 8-13-2019 Decision Enforcing Settlement Agreement, January 25, 2021).

113) On February 4, 2021, a defendant in Employee's civil case petitioned the Alaska Supreme Court to review Judge Matthews' January 25, 2021 order; the other defendant joined the petition. The Court accepted review. (Supreme Court Case No. S-17995/17996).

114) On April 9, 2021, the parties attended a prehearing conference and the designee, former hearing officer Jung Yeo denied Employee's petition for a protective order against Employee signing an up-dated medical record release Employer had requested. He also denied Employee's petition for a protective order preventing Employer from deposing Employee's surgeon. (Prehearing Conference Summary, April 9, 2021).

115) On June 10, 2021, the parties attended a prehearing conference to review any outstanding petitions and claims. Wright had previously advised the parties on May 26, 2021, to be prepared at this conference to review petitions and claims "so that it could be determined whether any were resolved and, for those that were not, what further must occur to move the petitions and claims forward." Nevertheless,

> Throughout the prehearing [Employee] was speaking very fast and raising his voice. His speaking manner caused his words to become garbled and made it impossible to understand most of what he said. Prior to the prehearing's conclusion, [Employee] hung up the phone.

Before Employee ended his participation, Wright reminded him how to challenge a conference summary, and determined his current request was too late. When commenting on his belief Wright was ruling "in Employer's favor," Employee said he hoped Wright would "have nightmares." At that point, Employee ended his participation. Consequently, because Employee voluntarily left the prehearing conference, Wright could only discuss Employee's petition to strike a conference summary and his claim for hernia surgery and related transportation costs. Employer opposed a hearing on Employee's hernia claim noting that at this conference, before he terminated his participation, Employee said he was not prepared to move forward with his hernia claim, but was

also not willing to withdraw his ARH. Under these circumstances, Wright took no further action. (Prehearing Conference Summary, June 10, 2021).

116) On August 2, 2021, Employee filed an ARH on, "All claims to date," but noted "I have not been able to conduct discovery" and was merely filing to toll the statute of limitations. (ARH, July 31, 2021).

117) On October 19, 2021, following an October 14, 2021 Board meeting where several injured workers, Employee and Johnson had given public testimony, the Division issued an "*Ex Parte* Communication Summary" in this case and served it on Employee and Smith, since it was unknown if Smith was present on the Zoom Board meeting. The Division issues these summaries on occasions when a litigant in an active case makes direct contact with fact-finders and makes comments directly addressing their pending case, without opposing counsel present. In this instance, the summary noted that after being warned not to discuss Employee's active case, Johnson, before all Board members who at that time could decide Employee's case, gave public testimony that Soule had allegedly stated he would "always believe an attorney's word over an injured worker's word." Employee gave public testimony making numerous allegations against Soule including that he was "a liar," was deliberately trying to dismiss Employee's claim, was conspiring with Smith, "falsified" what the Superior Court had said, "lied" when he said Employee had accepted a settlement in his third-party case, had refused to give Employee subpoenas for his case, and "twisted things around." Employee alleged everything the Board says, "is a lie." Additionally, Johnson had sent Board member Sara Faulkner an email during the Board meeting without copying Smith. In her email, Johnson lamented and said she was disappointed that Faulkner had allegedly "sold [her] soul." (*Ex Parte* Communication Summary; Johnson email, October 14, 2021; observations).

118) On March 11, 2022, the parties attended a telephonic prehearing conference to schedule a hearing on Employer's request for an order to reinitiate vocational reemployment plan development for Employee. He opposed the hearing and contended injury compensability should be determined before a reemployment hearing. Employee reiterated his previous allegations against individuals he believes had committed "fraud." Employer asked Employee if his surgery had been scheduled; Employee deflected, stating Johnson's first grandson had been born and was having medical problems. When asked again about his surgery, Employee said he expected it to occur in the next couple of weeks. Employee mentioned he "heard a rumor" that Smith represents

the State of Alaska, and opposed Smith's firm "representing the Board." When Smith asked Employee to be "very clear and precise with his statements," Employee repeated that he had heard a rumor and said, "Fuck you Colby. Fuck you," and hung up. Smith explained that his firm had a contract with the State of Alaska, Department of Law, Torts and Workers' Compensation Division. One attorney in his office, not Smith, worked as an independent contractor to handle a few workers' compensation cases against the State when the Department of Law had insufficient Assistant Attorney General staff to handle the caseload. To give Employee adequate time given his issues, Wright set a hearing for May 10, 2022, on Employer's petition to reinitiate reemployment planning. (Prehearing Conference Summary, March 11, 2022).

119) On October 22, 2021, Employee emailed current Division Director Charles Collins and among other things contended Collins' "accusation," like Soule's decisions, were merely "calculated" to harm his case, "just like" former Division staff member Susan Reishus-O'Brien allegedly "colluded with Colby Smith" to influence his SIME. He suggested Collins "resign immediately." Employee further queried if Collins was on the insurance company's "payroll" or was "accepting grift under the table like everyone else." (Agency file: Judicial, Communications, Email tabs, October 22, 2021).

120) On May 18, 2022, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 22-0032 (May 18, 2022) (*McDonald XII*), on the written record denied Employee's various procedural requests, including striking Smith's representation, Soule's disqualification for allegedly being a "liar" and "dishonest," Faulkner's disqualification for an alleged conflict-of-interest and because she "sided with Soule" in a previous decision, and his implicit request to continue and schedule an in-person hearing on the reemployment issue, and granted Employer's petition to restart the reemployment process for Employee. (*McDonald XII*).

121) On June 10, 2022, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 22-0042 (June 12, 2022) (*McDonald XIII*), denied Employee's request for more time to petition for reconsideration of *McDonald XII*. (*McDonald XIII*).

122) On May 12, 2023, the Alaska Supreme Court in *BBFM Engineers, Inc. v. McDonald*, 530 P.3d 352, 353-54 (Alaska 2023), stated:

> In the months before trial the parties' attorneys discussed the possibility of settlement, and the defendants eventually moved to enforce a "walk-away"

> settlement they claimed had been reached through email correspondence. . . . The superior court granted the defendants' motion and dismissed the case.
>
> Just under a year later the employee moved for relief from judgment under Alaska Rule of Civil Procedure 60(b), contending that he had never given his attorney authority to settle the case. A different superior court judge granted the motion, finding that factual issues precluded summary judgment on whether a settlement agreement existed, that the earlier dismissal was erroneous as a matter of law, and that extraordinary circumstances otherwise entitled the employee to Rule 60(b) relief.
>
> The defendants petitioned for review, which we granted. We now reverse on the ground that the employee's Rule 60(b) motion was not filed within a reasonable time.

*BBFM Engineers, Inc.* set forth Employee's arguments regarding the "settlement" in detail, which for the most part closely parallel those he makes in the instant case. It further found Judge Matthews' relief to Employee under Civil Rule 60(b)(1) and (6) were both an "abuse of discretion," notwithstanding the Court's assumption "for the purposes of this appeal that there were errors in the superior court's August 2019 grant of the defendants' motion to enforce settlement." *BBFM Engineers, Inc.* held Employee failed to move the trial court for relief within a "reasonable time," as required in the rules, which the Court said would typically be "within 30 days of judgment." *BBFM Engineers, Inc.* further held that Employee failed to present "compelling" or "extraordinary circumstances," justifying why it took him over five months, and two days shy of a year, after he became aware of the need to immediately try to set aside Judge Aarseth's ruling, to file his motion with the trial court. Addressing Employee's argument that Judge Aarseth's August 2019 order was not a "final judgment," *BBFM Engineers, Inc.* stated:

> In granting the motion to enforce the settlement, Judge Aarseth wrote, "IT IS HEREBY ORDERED that this action shall be dismissed with prejudice, each party to bear its own costs and attorney['s] fees." The court's intent was clear; the order was a final judgment for purposes of triggering the time for appeal. *BBFM Engineers, Inc*., at 357 n. 13.

The Court concluded, "The order granting McDonald's Civil Rule 60(b) motion for relief from judgment is REVERSED." (*BBFM Engineers, Inc.* at 357-58).

123) On May 22, 2023, Employee moved the Alaska Supreme Court to rehear the third-party defendants' Petition For Review. (Petition for Rehearing, May 22, 2023).

124) On May 22, 2023, given the Court's opinion in *BBFM Engineers, Inc.*, Employer again petitioned the Board to dismiss Employee's workers' compensation claims. It served the petition on Employee by email. (Petition, May 22, 2023).

125) On June 12, 2023, 20 days after filing and serving its petition, Employer, formally requested a hearing on the written record, on its May 22, 2023 petition to dismiss. It served this request on Employee by email. (ARH, June 12, 2023).

126) On June 19, 2023, Employer and Employee attended a prehearing conference. Wright provided several dates for a written record hearing on Employer's May 22, 2023 petition to dismiss, and gave parties a June 30, 2023 deadline to provide her with their "available" hearing dates; if a party did not provide notice by that date, Wright would select the earliest date on the hearing calendar. She advised the parties to file hearing briefs five working days before the hearing and increased the page length from 15 to 20 pages. At the conference, Employee set forth in cogent detail his reasons for opposing a hearing on Employer's May 22, 2023 petition:

> (1) He intends to file another Rule 60(b) motion in his third-party case.
> (2) *BBFM Engineers, Inc*. does not answer whether he agreed to dismissal of his third-party claims against BBFM Engineers and Architects Alaska.
> (3) *BBFM Engineers, Inc*. does not address the "issues" with Judge Aarseth's August 13, 2019 order granting the third parties' motion to enforce settlement.
> (4) A hearing should not be set until the Supreme Court issues an order on his petition for a rehearing.
> (5) There remain "additional battles" in Superior Court, and the Board does not have jurisdiction to address whether he agreed to settle his third-party claims.
> (6) Trying to litigate before three different tribunals is a mistake and could lead to incoherent and illogical decisions. The Board should not step on the Superior Court and Supreme Court's toes.
> (7) There was fraud involved when the third parties alleged a settlement had been reached and he must be able to exhaust his remedies and complete discovery before the Board hears Employer's petition to dismiss.
> (8) The Board said it does not have jurisdiction to determine if fraud between Employer and the third-parties occurred.
> (9) Some type of subrogation agreement existed between Employer and the third parties to circumvent workers' compensation liability.
> (10) He was forced to attend an SIME after he and Employer attorney, Krista Schwarting, stipulated he would not have to attend an SIME.
> (11) He needs to depose all attorneys involved in his matters before the Superior Court and Supreme Court, and needs to take Colby Smith's deposition.
> (12) The Superior Court granted a protective order that prevents any further workers' compensation proceedings on Employer's petition to dismiss.

(13) Supreme Court Justice Maasen drafted *BBFM Engineers, Inc*. and it was not fair and impartial because Justice Maasen worked as an associate attorney for Burr, Pease and Kurtz for 30 years and that firm represented one or more of the third-party defendants.
(14) It is "outrageous and rude" for Employer to file a petition for dismissal and request a hearing right after he had surgery on May 19, 2023.
(15) Employee will request the Superior Court grant another protective order.

Wright accepted Employee's multi-point opposition to Employer's hearing request and advised him that if she had not accurately captured the reasons for his opposition, he could supplement or correct them by asking her in writing to modify or amend the prehearing conference summary, within 10 days of service. Employer contended it was entitled to a hearing on the written record because *BBFM Engineers, Inc.* overturned Judge Matthews' decision leaving Judge Aarseth's August 13, 2019 order as "the only one that stands." Wright stated the issue for hearing as, "The Board will decide if under AS 23.30.015(h) ER is liable for any additional benefits to EE." The summary notified the parties the panel would take "official notice" of payments Employer made to Employee recorded in his agency file. (Prehearing Conference Summary, June 19, 2023).

127) On June 20, 2023, the Division served the June 19, 2023 prehearing conference summary on all parties by mail. (Agency file: Judicial, Prehearings and Hearings, Prehearing Conference Summary Served tabs, June 20, 2023).

128) On June 20, 2023, the Alaska Supreme Court denied rehearing in *BBFM Engineers, Inc.* (Order, June 20, 2023).

129) On June 26, 2023, Employer timely provided Smith's available written record hearing dates to Wright as directed in the June 19, 2023 conference summary. (Agency File: Judicial; Communications; Email tabs, June 26, 2023).

130) Employee did not provide his available written record hearing dates before the June 30, 2023 deadline. (Agency file).

131) On July 6, 2023, based on the only date it had received from a party, the Division selected August 22, 2023, for the written record hearing date and on the same day served the parties with a notice for the written record hearing. (Hearing Notice, July 6, 2023).

132) On July 10, 2023, Johnson signed the "green card" for the July 6, 2023 hearing notice for the August 22, 2023 written record hearing. (Postal service green card, July 10, 2023).

133) On July 11, 2023, Employee objected to the "[h]earing on the record" being held on August 22, 2023. He contended he "clearly" needed to call witnesses and had the right to be present at a

hearing. Employee again relied on the Superior Court's "previous protection order," opposed the hearing in general and stated the Board "does not have jurisdiction for this issue." (Agency File: Judicial; Communications; Email tabs, July 11, 2023).

134) On August 15, 2023, Cupoli testified by affidavit that she was the Recovery Specialist for Employer's workers' compensation insurer. She handled Employee's case from 2014 through August 13, 2019. Cupoli said she provided Employee's third-party attorney with a lien notice and "never provided written approval" for Employee to settle his third-party case for an amount less than her company's lien. (Affidavit of Lori Cupoli, August 15, 2023).

135) On August 22, 2023, Employee filed a hearing brief, untimely. He wanted to "toll" his workers' compensation case, and contended and alleged:

> (1) The Division ignored his numerous petitions.
> (2) The Division denied his right to discovery.
> (3) The Division refused him hearings.
> (4) The Division also denied his ADA accommodations and "basic human dignity."
> (5) A Board designee set this hearing on the written record against his objection.
> (6) Employer's allegation that he obtained a settlement in his third-party case is "deceptive and collusive."
> (7) Judge Aarseth only enforced a third-party settlement because Employee's opposition was considered late, and it was only late because he was "forced" to attend an SIME and was traveling.
> (8) Employee never signed off on any settlement, making his third-party case "dismissed," not "settled."
> (9) During an appeals process in his third-party case, Employee discovered the third-party defendants had withheld a May 29, 2019 email, which proved they never believed a settlement existed.
> (10) An October 2020 injunction from Judge Matthews staying Employer's previous attempt to dismiss his claim on the same grounds is still in effect.
> (11) Employee found evidence that Employer was indemnifying the third-party defendants.
> (12) The Alaska Supreme Court found there were "problems" with Judge Aarseth's order.
> (13) He has work-related PTSD, which affects his ability to work on his case.
> (14) The SIME physicians' reports are flawed, and Employer failed to include all medical records for his five and one-half week hospital stay post-injury.
> (15) Through his Social Security award, Employee proved there is "something wrong with his brain," and he deserves time to argue his case fully, even though he lives three hours away from Anchorage and does not have the ability to send evidence on short notice and has previously requested ADA accommodations and more time to file evidence and pleadings.

(16) The Alaska Supreme Court "missed" the fact that Employee is a person with disabilities, and did not answer the question of settlement.
(17) Employer mistreated him throughout the course of this matter by improperly denying benefits and treatment and "disrupting" his medical care without reason, hiring a private investigator to follow him around, and spreading "false information" to his physicians.
(18) Employer "falsified" information to Board designees regarding an SIME.
(19) Employer failed to disclose to the Board "specific relationships" it has with the third-party defendants.
(20) Employer and one third-party defendant have the same liability insurance company.
(21) Employer has an indemnification agreement to cover the third-party defendants for any work injury, which makes Employer's claim they had not given permission for any settlement "disingenuous" because it had previously signed a contract to cover any costs to those defendants.
(22) Employer arranged for an out-of-state SIME precisely when Employee's opposition to the third-party defendants' motion to enforce the settlement was due.
(23) Employer failed to place his Social Security disability decision regarding work-related PTSD in the SIME medical binders.
(24) The Division generally mishandled the SIME process.
(25) Employee refused to consent to a "walk-away" settlement and so informed his third-party counsel.
(26) Employer's contention that AS 23.30.015(h) applies is "false," because he never agreed to walk away from his third-party case.
(27) Various parties tried to force Employee into a third-party settlement, but he refused.
(28) His own attorney lied to the third-party defendants who hid a particular email from discovery and apparently from him.
(29) Attorneys for the third-party defendants lied to the Superior Court.
(30) Judge Aarseth's settlement order was obtained by "fraud upon the court" and "should be considered invalid."
(31) Judge Matthews found there was no settlement.
(32) Employer's ability to petition to dismiss his claim under §015(h) "is not supported by case law."
(33) Employer's attorney and a Board designee suggested he sue his attorneys for malpractice.
(34) Case law shows Employee's third-party attorney is not considered a "representative" who has authority to settle his third-party case under §015(h) and therefore Employer's petition should fail.
(35) Since Employer indemnified both third-party defendants at the jobsite where Employee was injured and carried the same insurance carrier as one defendant, they knew about the third-party case and cannot assert they did not give permission to settle.
(36) The third-party settlement resulted from a judgment, not an agreement, and therefore there was no "compromise."

(37) Without showing Employer was prejudiced, Employee's case should not be dismissed.
(38) Dismissal is "harsh."
(39) Employer did not pursue or defend its lien.

Employee asked the Board to defer to the Superior Court's jurisdiction, continue the hearing and deny Employer's petition to dismiss. (Employee Hearing Brief, August 21, 2023).

136) On September 7, 2023, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 23-0048 (September 7, 2023) (*McDonald XIV*), on its own motion, changed the August 22, 2023 written record hearing on Employer's May 22, 2023 petition to dismiss to an oral hearing to allow the parties to present any additional relevant evidence and argument. (*McDonald XIV*).

137) On September 13, 2023, the Division served a hearing notice on the parties for the October 4, 2023 in-person hearing. (Hearing Notice, September 13, 2023).

138) On September 15, 2023, Johnson signed the "green card" for the October 4, 2023 hearing notice giving Employee 18 days' notice of the rescheduled hearing. (Postal Service green card, September 15, 2023).

139) On September 18, 2023, Employee filed a non-conforming witness list and stated seven witnesses were needed for the October 4, 2023 hearing because they either had "extensive knowledge on the issues for hearing," or were attorneys representing a party in his third-party case. The witness list identified the witnesses by name, but not by address or phone number. The list provided a brief description of the subject matter but did not provide the substance of the witnesses' expected testimony. (Witness list, September 18, 2023).

140) On September 21, 2023, Employee requested and received signed subpoenas from Soule for numerous witnesses he intended to call at the October 4, 2023 hearing. The subpoenaed witnesses included: attorneys Peter Ehrhardt; Katherine Elsner; Michael Seville; Laura Barson; Rebecca Houzubin; and Ashton Kirsch; Employee's "advocate and wife" Heather Johnson; and adjuster Maureen Howell. (Agency file: Judicial, Party Actions, Subpoena tabs, September 21, 2023).

141) On September 21, 2023, Employee filed a more complete witness list including those witnesses listed in his September 18, 2023 witness list and adding Smith, and Howell. On this list, Employee gave more detail about the witnesses' expected testimony, which went to whether he agreed to a walk-away settlement with the third-party defendants. None was said to address the question of whether Employer gave written authority for the third-party settlement that Judge Aarseth found and enforced. (Witness List, September 20, 2023).

142) In September 2023, the subpoenaed witnesses either personally or through counsel petitioned for an order quashing the subpoenas. Each witness stated they had no relevant testimony to offer at the October 4, 2023 hearing. (Petition to Quash Subpoenas, September 22, 2023; Joinder in Petition to Quash Subpoenas, September 26, 2023; Petition to Quash Subpoena, September 28, 2023; Joinder in Petition to Quash Subpoenas, September 28, 2023).

143) On September 29, 2023, Setzer held a prehearing conference to address the petitions to quash Employee's subpoenas and granted them, primarily because the witnesses had no relevant testimony to offer. In her analysis Setzer stated, "The issue in dispute in this case is whether Employee or his representative "compromised" with a third-party for an amount less than the compensation he would be entitled to under the Act." She noted Employer relied on Judge Aarseth's order to contend Employee through his representative compromised his case for an amount less than that to which he would be entitled under the Act. During the prehearing conference, Employee objected to the process and contended:

> (1) He was not allowed 20 days to answer the subpoenaed witnesses' petitions to quash.
> (2) Setzer quashed the petitions finding the witnesses' proposed testimony was irrelevant.
> (3) Setzer in an October 15, 2020 order found testimony from several of the same witnesses was not relevant to the same hearing issue on grounds the Board had no jurisdiction over Employee's same third-party case. Employee equated Setzer's prior order as the Board accepting jurisdiction to dismiss his claim but not having jurisdiction to allow him to call witnesses to defend against Employer's petition to dismiss. This perceived contradiction was "unfair and unequal access to the law," violating his constitutional rights.
> (4) Since Setzer stated the issue for hearing on October 4, 2023, was whether he or his representative "compromised" with a third-party for an amount less than the compensation he would be entitled under the Act, "the Board has no ability to decide on the issue which is set" for hearing. Under his analysis, Setzer was wrong, and her refusal to allow him to present evidence or witnesses showing Judge Aarseth's decision "was incorrect and not able to be supported by law."
> (5) His disallowed witnesses would demonstrate Judge Aarseth was mistaken. Employee reasoned if Setzer's order finding his witnesses irrelevant because the Board has no jurisdiction, "then the Board does not have jurisdiction to hold a hearing on the subject either."
> (6) Setzer's order excluding his witnesses on *res judicata*, and collateral estoppel grounds was wrong because, he contended, *res judicata* does not apply "when extrinsic fraud is present."
> (7) The issue of whether he walked away from his third-party case "for purposes of AS 23.30.015(h)" has "never been litigated."

> (8) Employer's adjuster's testimony that is expected to say that neither Employer nor its representatives or the insurance company gave written authority for Employee to settle his case, is similar to his proffered witness Howell who would say that Employer and one third-party defendant in his civil case "held contracts with the same liability insurance company," which he contended would show Employer had knowledge of the third-party case "and issues."
> (9) *McDonald XIV* did not provide Employee with adequate time to prepare and present additional evidence or witness testimony and Setzer would not even allow him to subpoena "his own counsel," who would testify that there "was no third-party settlement."
> (10) Setzer's September 29, 2023 prehearing conference summary was "prejudicial, alludes to false facts and manufacturers information that must be stricken from the record in its entirety."
> (11) Heather Johnson properly served the subpoenas, some in person and some by certified mail and he objected to his inability to "ask questions of the parties" at the prehearing conference.
> (12) "The Board" on September 21, 2023 told Employee he could serve the subpoenas himself; he recorded the conversation and relies on it for the October 4, 2023 hearing.
> (13) Setzer "falsified facts" by stating "Employee contended he never authorized his third-party attorneys to settle his case," when in reality he "did not nor has he ever alluded that his attorneys 'settled his case without his permission.'" To make his position on this clear, Employee stated, "for the record, there was never any settlement agreement. There was no settlement agreement at all."
> (14) There was collusion between Employer and the third-party defendants, which "all parties hid from the Superior Court and the board." "These parties and their counsel" have been dishonest and committed "fraud upon the court."
> (15) Judge Matthews' "no settlement" order still stands as does his order staying the October 21, 2020 hearing.

Employee requested a continuance. (Prehearing Conference Summary, September 29, 2023). 144) Later, on September 29, 2023, Employee filed with the Division his "non-answer" to the subpoenaed witnesses' petitions to quash. He made it clear, "**this by no means should be construed as a complete answer**" (emphasis in original). In his seven-page pleading, Employee contended, in addition to his arguments made at that day's prehearing conference:

> (1) He was "ineffective because of his disabilities," at the time the third-party settlement was "being obtained by fraud."
> (2) An SIME physician diagnosed him with major depression just two days before the third-party defendants filed their motion to enforce settlement. Therefore, his PTSD and major depression were factors preventing him from effectively refuting the third-party defendants' motion.
> (3) Evidence and testimony from the proffered witnesses would show there was never a third-party settlement.

> (4) ADA allegations with extensive footnotes and case law show the Division had a duty to him under the ADA to give him "the time he has needed to adequately plead his case," and implied it did not.
> (5) A Social Security judge's decision in his disability case and related medical records and opinions support his position. (Additional Information Supporting the Need for Testimony by Every Person Subpoenaed, September 29, 2023).

145) On October 2, 2023, Employee objected to and appealed Setzer's September 29, 2023 prehearing conference orders and petitioned to continue the October 4, 2023 hearing. In his pleading, he addressed Employer's petition to dismiss his claims under §015(h), and contended:

> (1) The Superior Court's dismissal of his third-party case, the existence of an alleged settlement agreement and whether Employee made or agreed to a walk-away settlement in his civil action "are *separate issues*" (emphasis in original).
> (2) "While the Supreme Court ruling ultimately put Judge Aarseth's original decision back into place, they [the Supreme Court] did not address the issue of a settlement agreement."
> (3) *BBFM Engineers, Inc.* "merely stated" that he failed to file a timely Rule 60(b) motion.
> (4) Regardless of Employer's and the third-parties' pleadings, and notwithstanding *BBFM Engineers, Inc.*, Judge Matthews is the only judge to decide the settlement issue, and he found there was no settlement agreement.
> (5) "Reverting back" to Judge Aarseth's decision fails to account for evidence that shows Judge Aarseth was incorrect.
> (6) He has pleadings currently pending before Judge Matthews and "therefore, whether or not [Employee] agreed to walk away from his third-party case is not ripe for adjudication in this venue."
> (7) He had inadequate hearing notice and therefore not enough time to properly subpoena witnesses and otherwise obtain evidence for the October 4, 2023 hearing.
> (8) The Division's September 13, 2023 hearing notice was inadequate.
> (9) Setzer violated his due process rights when she failed to provide him the mandatory 20 days to respond to the petitions to quash and instead quashed his subpoenas "based on her finding that the parties testimony was 'irrelevant.'"
> (10) Setzer's statements contradicted a previous designee setting a hearing for "the exact same issue." She stated, "The issue in dispute in this case is whether Employee or his representative "compromised" with a third-party for an amount less than the compensation he would be entitled to under the Act." These statements are inconsistent and "the board has no ability to decide on the issue [for] which it set a hearing."
> (11) The Board's findings effectively allow Employer "to petition to dismiss the case without [him] being able to do anything about it."
> (12) Setzer was wrong when she said *res judicata* and collateral estoppel apply here, because *res judicata* does not apply when "extrinsic fraud is present."
> (13) There was a conspiracy and collusion between Employer and its insurer and the third-party defendants. This included making sure Employee was out-of-state

> when the motion to enforce settlement was brought before the trial court, "hiding" the parties' concurrent liability insurer relationship, and "falsification" that he agreed to walk-away from the third-party case.
> (14) A court order dismissing a case does not mean he "voluntarily" agreed to walk away from the case under AS 23.30.015(h).
> (15) Setzer's order violated *McDonald XIV*, which allowed Employer to call a witness, while Employee's rejected witness would give 'similar" information; namely, his adjuster witness would say Employer and third-party defendant Alaska Architects, Inc., had the same liability insurance company, which would show Employer had knowledge of the third-party case "and issues," which knowledge under various case law prohibited Employer from using AS 23.30.015(h) to dismiss his workers' compensation claims.
> (16) Setzer's order contradicted *McDonald XV*, which allowed for "more evidence."
> (17) The Division's inadequate hearing notice "ensured no new evidence in either written or witness testimony would be had."
> (18) He was not allowed to even subpoena his own former counsel who stated in his former counsel's own petition to quash, "THERE WAS NO SETTLEMENT AGREEMENT."
> (19) Setzer "falsified" her prehearing conference summary, "alludes to false facts" and "manufactured" information about subpoena service that should be stricken from the record.
> (20) Division staff gave him wrong information about serving subpoenas and told him he could do it himself, even though he admitted Johnson told him he could not.
> (21) This all showed dishonesty, fraud upon the court, and unethical behavior from various attorneys, which led to his conclusion, "This issue should be adjudicated within the superior court, not the workers' compensation board."
> (22) Judge Matthews' October 20, 2020 order was a reason to continue the October 4, 2023 hearing.
> (23) The Board was "flagrantly harassing" him and using "abuse of process and discretion" to dismiss his claims.
> (24) The hearing should be canceled for violating his due process rights and rights to equal access and protection under the law.

Employee acknowledged Setzer had made the same subpoena determination on October 15, 2020, when she found, "The testimony from Laura Barson, Michael Seville, Eric Croft, Ashton Kirsch, Katie Elsner and Pete Ehrhardt is not relevant to the hearing issue as accusations that a civil case was improperly settled are outside the jurisdiction of the Board." He acknowledged Setzer's September 29, 2023 prehearing conference summary, which stated:

> The Board has no jurisdiction over the superior court's orders and consequently, cannot "undo" Judge Aarseth's order enforcing a walk-away settlement and dismissing Employee's civil claim with prejudice. *AKPIRG*. Therefore, Employee's subpoenas seek information on an issue outside the Board's

> jurisdiction. His subpoenas will be quashed for seeking evidence not relative to the issue in dispute. *Granus*; *AKPIRG.*

Among his contentions, Employee did not contend that he paid the required witness fees along with serving the subpoenas. He contended:

> The entire workers' compensation board, including William Soule, Katherine Setzer, Janel Wright and many more have bent over backwards over the years to ensure that the employer won everything, and [he] lost every petition he filed. They moved mountains to make this happen, manufacturing evidence and falsifying prehearing summaries time and time again. They have refused hearings to [him] for years yet granted an emergency hearing that violated [his] due process right to answer within a day. (Petition -- Continue Hearing -- Constitutional Challenge -- Appeal Prehearing Summary, October 2, 2023).

146) On October 4, 2023, the parties appeared for an in-person hearing; but Employee appeared with Johnson by Zoom. Minutes into the hearing, in response to a question from Chair Soule, Employee vaguely admitted he had no document from Employer or its representatives giving written approval for any third-party settlement, nor would he because he was never looking to settle his case. He was "absolutely well aware," he could not settle his third-party case without Employer's permission. Employee began to drift into argument about his subpoenaed witnesses not being allowed to testify. When asked to confirm that he had no written authority, Employee became evasive, and Johnson began providing instructions to him. When Employee and Johnson both became disruptive, the panel on its own motion directed a 15-minute break so Employee and Johnson could regain their composure. The Chair asked Johnson to please not disrupt the proceedings or speak on Employee's behalf, because she did not represent him. Johnson advised, "I will sign up to represent him right now during this 15-minute break, dude." The Chair offered to assist Johnson in obtaining the representation form. Even though the Chair had directed a 15-minute break, Employee insisted on continuing to argue various preliminary issues. Similarly, Johnson read aloud Judge Matthews' October 2020 order in the third-party case. The Chair attempted to interrupt, but Employee and Johnson continued on, with Johnson stating, "I watched you guys just fucking abuse both of us for years." She contended the Chair's question about the existence of written authority to settle the third-party case was asked to "set off" her and Employee's PTSD. Johnson further contended "you guys" sent Employee out-of-state for an SIME so he would miss an email and his third-party case would be dismissed. She concluded,

"you guys are going to hell, I'm pretty sure of it." Just prior to the hearing going off record for the break, Employee stated:

> You all know how outrageous this is. This is fraud. This is abuse of process. This is the Board assisting my employer in dismissing this case for a bullshit, technical reason that the court has already said doesn't exist. There is no reason to hold his hearing, none. (Record).

147) Just after the Chair turned off the recorder, Johnson said words to the effect, "I hate all you fucking people." She subsequently entered her appearance for Employee. (Observations).

148) As the hearing resumed, Johnson immediately asserted control over it and contended she and Employee both suffer from PTSD, which she contended makes it difficult for them to protect Employee's rights. She noted that though some say they are "more than capable," based on the petitions they filed, Johnson said, "if you look at it, we've never followed through with anything." Johnson began quoting at length from a legal decision regarding ADA accommodations and related issues. She contended Employee had asked for time extensions, which she implied were not granted, and stated she and Employee were concurrently dealing with the Superior Court case and were unable to get "everything in that we needed to get in" for this hearing. Johnson contended Employee was not able to plead everything that he needed to plead in his briefing. The Chair allowed Johnson to continue for several minutes, uninterrupted. (Record).

149) Johnson began arguing against *res judicata* applying in Employee's case, and contended "fraud" prevented its application. Stating she and Employee did not have enough time to prepare for the hearing, Johnson contended the panel should grant the requested continuance. Johnson quoted at length but partially from one ADA authority, omitting what cut against her position:

> Another regulation requires public entities to make reasonable modifications, to avoid discrimination on the basis of disability, unless those modifications would entail a fundamental alteration. . . . (Record).

150) When the Chair thanked Employee and Johnson for their argument regarding a hearing continuance, and tried to give Smith time to give Employer's position, Johnson and Employee interrupted again, and began arguing about the quashed subpoenas. Johnson stated she told Employee he had to have someone other than himself serve the subpoenas, but Division staff told him he could do it himself, which was one reason they were quashed. When it appeared Employee and Johnson would not be deterred from their arguments, the Chair asked if they had anything else

they wanted to argue. Employee and Johnson then argued at length about the subpoenas being quashed and repeated their contention that Setzer had "manufactured facts" to support her decision. Taking turns speaking, and often speaking over each other, Employee and Johnson reiterated the arguments set forth in their numerous written pleadings. Johnson seemed to admit there was third-party settlement because she said, "legally, that's what it is." She appeared to blame that settlement on Employee's former attorney who left the case and allegedly "never gave [Employee] those emails," which ultimately resulted in Judge Aarseth's order. Johnson contended had the panel allowed Employee's witnesses, these attorneys would testify that there was no settlement. Those legal experts, in Johnson's view, could have answered the question, "Is this email a settlement if you were representing Mr. McDonald?" Johnson made an offer of proof of what each witness would have said had they been allowed to testify. (Record).

151) After allowing Employee and Johnson several minutes to continue their arguments about the continuance request and their appeal from Setzer's order quashing the subpoenas, the Chair asked if they had anything else they wanted to add. Johnson argued for several more minutes regarding Employee's accident, and her accusations against Smith. After several attempts, the Chair was able to redirect Johnson back to the preliminary issues regarding the continuance and quashed subpoenas. When asked if any of the subpoenaed witnesses would have testified that there was written approval from Employer for any third-party settlement, Johnson answered "no." However, she added that some would have testified that there was no settlement. (Record).

152) The Chair answered Employee's extensive questions regarding the Board's jurisdiction over Employer's petition to dismiss, and various orders and decisions thus far in his third-party case. Employee's primary contention was that since he personally did not agree to settle his third-party case, §015(h) should not apply because the settlement had to be made by "the person" entitled to the compensation, namely himself. He also contended the statute requires "a compromise," and testified he never compromised anything. (Record).

153) Johnson proceeded to re-argue Employee's "fraud" and other allegations and quoted extensively from her written arguments and the Supreme Court's opinion in *Forest*, which she distinguished from this case. Employee, after listening to the Chair's answers to his questions stated he understood the legal premise at hand, but nevertheless affixed a motive to the panel and suggested, "You want to dismiss this case. You're hot and bothered to do it." The Chair attempted to re-direct the hearing, but Johnson again interrupted and continued to read her prepared

arguments. Continuing unabated with her comments, Johnson contended Employer and the Board sent Employee to an SIME knowing it "completely stressed him out to the point he wouldn't be able to function, and that's what they were counting on." She further contended that was when the third-parties filed their motion to enforce a settlement. Citing again to the ADA, Johnson mentioned the Alaska Supreme Court, implied it too did not provide reasonable accommodations to Employee in the *BBFM Engineer, Inc*. case and said:

> The Supreme Court is not immune from suit, and we will probably go there too. (Record).

154) After allowing Johnson to speak for several more minutes, the Chair attempted to redirect the hearing. Again, Johnson interrupted and continued to speak unabated. The Chair eventually gave Johnson an additional four minutes to complete her arguments. She again quoted at length from *Forest* and among other things, contended that in his opposition to the third-parties' motion to enforce settlement, Employee mentioned the "crossover" with workers' compensation but, Judge Aarseth "didn't get it." At this point, the Chair gave Employer an opportunity to respond to Employee's arguments on the preliminary issues. (Record).

155) Employer contended Employee knew from a Board decision in August 2020 that the only factual issue remaining on Employer's petition to dismiss was whether Employer gave written consent for the third-party settlement. It cited the case history and noted Employer's pending petition to dismiss was the same as the petition it filed in 2019. Employer contended continuing the hearing would only prolong the matter while Employer continued to pay significant benefits to Employee. It objected to the recent documents and audio recordings Employee had filed on relevance grounds and because the Board had previously ordered the issue would be decided on the record as it existed on September 6, 2023. (Record).

156) Employee requested and was granted an opportunity to respond to Employer's arguments. He contended his lawyers were not his "representative" under §015(h). Had he been allowed to call them as witnesses, he contended they would support his argument that he never agreed or compromised with the third-party defendants to settle that case. Employee pivoted from his past arguments and contended the hearing panel had authority to decide that he did not settle his third-party case. He based this contention on Setzer's summary that stated the issue for hearing. Employee implied that given Setzer's prehearing conference summary's alleged statement of the

issue for hearing, he was unaware that the only remaining factual issue for hearing was whether he obtained permission from Employer to settle his third-party case. He added that this was another basis for continuing the hearing. (Record).

157) The parties agreed that on October 3, 2023, Judge Matthews denied Employee's motion for expedited consideration of his motion for an order staying the October 4, 2023 hearing. (Record).

158) After deliberating at length, the panel in an oral order denied Employee's continuance request and affirmed Setzer's order quashing his subpoenaed witnesses, "solely because they have no relevant testimony to present to us on the real factual issue" before the panel. At this point, Johnson interrupted the Chair to object and again cited 8 AAC 45.065(c), which Employee again contended required the panel to allow his witnesses to testify. (Record).

159) When the Chair tried to turn time over to Employer to present its case in chief, Employee interrupted and suggested he did not understand what the issue for hearing was, and re-argued Setzer's prehearing conference summary's stated issue. He contended the September 29, 2023 conference summary "governs the issues" for this hearing. Employee cited to Setzer's statement, "The issue in dispute in this case is whether Employee or his representative 'compromised' with third-party for an amount less than the compensation he would be entitled to under the Act." Consequently, he demanded his witnesses be allowed to testify because they would say he never compromised or settled his third-party case. The Chair overruled his objection by citing 8 AAC 45.070(g) and finding "unusual and extenuating circumstances," namely, that Setzer was ruling on discovery and evidentiary issues and was not as familiar with this case as the current Chair. The Chair explained that if Employee appealed from the prehearing conference rulings, and had the current Chair made those rulings, the Division would have to assign a different hearing officer to hear the instant matter and that designee would have little familiarity with this complicated case. Moreover, upon further review the sentence to which Employee referred is in Setzer's "Analysis" section, and was not intended to state the issue for hearing or modify previous prehearing conference summaries. (Record; observation).

160) Eventually, adjuster Cupoli testified in conformance with her affidavit. She was the only person with authority to approve a third-party settlement for less than the insurer's lien, and she never gave it. On Cupoli's cross-examination, Employee and Johnson argued with the Chair repeatedly when he sustained Employer's objections to their irrelevant questions. The Chair advised Employee he would have to mute them on Zoom if they did not ask relevant questions

rather than argue with the witness and the Chair. When Employee and Johnson continued to disrupt the hearing and create an indiscernible record, the Chair muted them and explained why he did so and why the hearing needed to move forward. Thereafter, when un-muted, Johnson requested a 10-minute break, which the designee granted. (Record).

161) After resuming the hearing, the Chair asked Employee if he had any remaining questions for Cupoli. He responded that he had many questions, but felt the Chair would not allow him to ask them so he would "reserve the right to do that for later litigation." Nevertheless, he asked additional questions. Cupoli testified an initial lien letter had been sent to Employee directly, prior to her involvement in his case. An attorney, Robert Stone, acknowledged that letter and sent the adjuster a representation letter advising that he was representing Employee in the third-party case. A lien notice letter Cupoli's office sent to Stone on December 1, 2014, was sent because Stone sent the adjuster a notice of representation. Employee and Johnson discussed Cupoli's testimony and debated between themselves what it meant to them; meanwhile, the Chair repeatedly asked if they had any additional questions for Cupoli; he finally released the witness. (Record).

162) Johnson testified briefly that a Social Security judge found Employee disabled from PTSD from his work injury with Employer. Employer objected to this as a mischaracterization of the basis for the judge's decision whereupon Employee and Johnson began arguing with Smith, talking over each other and over the Chair. The Chair muted them and explained why Johnson's testimony would not be relevant to the issue before the Board. When the designee un-muted Employee, Johnson referred to a page in Employee's brief and reverted to arguing Employee's position on Judge Aarseth's order finding and enforcing a third-party settlement. The Chair muted them again to redirect their testimony. When Employee found he could un-mute himself, and he and the Chair engaged in a button-pushing contest with the Chair muting Employee to gain control over the hearing and redirect his and Johnson's testimony, and Employee unmuting himself so he could control and disrupt the hearing. Employee objected to the Chair muting him and the Chair explained if Employee had basic hearing decorum, "I wouldn't have to mute you." The Chair again told Employee he was giving him an opportunity to present relevant testimony. Employee responded, "You're not giving me a fucking opportunity to do nothing." When asked, the Chair assured Employee he did not think his case was "a joke" and Employee asked, "Then why the fuck are you smiling?" At this point, the Chair called for a 15-minute hearing break. Nevertheless, Johnson continued to argue a point about Medicare. When the Chair tried to advise the parties to

move on to closing argument, Employee accused him of assisting Employer to "commit fraud." When the Chair attempted to let Employer begin its closing argument, Johnson said she had caught the Chair "smiling," and she could not "wait for the jury to hear it." She added "you guys can be expecting the fraud lawsuit this week, so have a very nice day." At this point, Employee and Johnson voluntarily disconnected from the hearing. (Record).

163) Employer in closing cited Employee's past and Cupoli's current testimony, and arguments from its brief, and asked the panel to dismiss Employee's claims under §015(h). (Record).

164) At hearing, when Johnson requested breaks, the Chair granted them quickly. (Record).

165) At most times during the hearing, both Employee and Johnson were cogent and focused on their arguments and testimony. Johnson on one occasion chuckled when she made speaking errors while reading from her prepared remarks. (Record).

166) Over the course of his case, Employee wrote various letters to former Division directors regarding ADA accommodations. The directors repeatedly advised him that the Board does not have jurisdiction over ADA accommodation requests or complaints. If Employee wanted to request ADA accommodations, he had to send the requests either to the director or to the State of Alaska, ADA Coordinator. In most instances where Employee contacted former Director Marx, she advised him that she could not discern what ADA accommodations he was seeking. On several occasions, Director Marx advised Employee that the Division did not grant him additional time to respond to mail sent to him as an ADA accommodation, but that requests for additional time were procedural requests directed to the Board. The letters from Division directors to Employee are not part of his agency file, but are kept separately. (Observations).

167) Employee has done an excellent job representing himself both before the Board and in his third-party case. (Experience, judgment, observations).

## 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 peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987). The party bearing the burden of proof must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). *Shilts v. Young*, 643 P.2d 686, 688 (Alaska 1981), held, "Normally the effect of a reversal is that the judgment is vacated, and the case is put in the same posture in which it was before the judgment was entered."

In *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35-37 (Alaska 2007) (*AKPIRG*), the Court stated, "The legislature may constitutionally delegate some adjudicative power to an executive agency, but it may not delegate judicial power." "Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers' compensation claim."

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
>
> **AS 23.30.015. Compensation where third persons are liable**. . . .
>
> (f) Even if an employee, the employee's representative, or the employer brings an action or settles a claim against the third person, the employer shall pay the benefits and compensation required by this chapter.
>
> (g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A)-(C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. If the employer is allocated a percentage of fault under AS 09.17.080, the amount due the employer under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).

> (h) If compromise with a third person is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.

*State, Department of Fish and Game v. Kacyon*, 31 P.3d 1276 (Alaska 2001), held the fact that a settlement allocation to a minor was court-approved did not mean it was not the result of a "compromise" of the third-person under §015(h). However, *Atkins*, discussed below, distinguished *Kacyon* from the facts in *Atkins*.

In *Atkins v. Inlet Transportation & Taxi Service, Inc*., 426 P.3d 1124, 1132-34 (Alaska 2018), a worker injured in a work-related motor vehicle accident, through his attorney settled a third-party claim for policy limits. The worker's third-party attorney did not obtain written approval for the settlement from either the employer or the Alaska Workers' Compensation Benefits Guaranty Fund (the Fund), which was paying benefits under the Act because the employer was uninsured. The third-party settlement was less than the bills the Fund had paid for the work injury.

The Fund petitioned the Board to dismiss the employee's claim under §015(h). The Board concluded §015(h) was "clear and unequivocal" and dismissed the employee's workers' compensation claim for failure to obtain the employer's written authority to settle. The worker appealed and the Commission affirmed the Board's dismissal under §015(h). The employee appealed to the Alaska Supreme Court.

*Atkins* noted there was no readily available legislative history for §015(h) because it existed since statehood and had undergone only slight changes since then. It further noted "compromise" is not defined in the Act. Nevertheless, *Atkins* found the "more relevant definition of compromise" is "an agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrender something in concession to the other." *Atkins* reasoned that the employee and the third-party defendant had a dispute about liability for the car wreck causing injuries and damages. The defendant gave up something -- money plus prejudgment interest and attorney fees -- in return for a release of liability. The employee surrendered any rights to damages above policy limits -- and got the settlement

funds minus attorney fees and costs. But the injured worker contended he was not "compromising" his case because he was "forced" to accept policy limits because that was all there was to accept. *Atkins*, however, reasoned that no one forced the settlement amount, and nothing prevented the employee from obtaining a larger judgment at trial. The fact there was nothing more than policy limits to collect did not mean the settlement was not a "compromise."

*Atkins* rejected the employee's contention that his workers' compensation claim should not have been dismissed because his employer was not prejudiced. *Atkins* could find no case holding that lack of prejudice alone could relieve a worker from complying with §015(h). It also determined the Commission did not err in deciding the employee had failed to "substantially comply" with §015(h), and the employer was not estopped from using the §015(h) defense. *Atkins* affirmed the Commission's decision affirming the Board's decision and acknowledged that the injured employee bears a "particularly harsh penalty . . . for what [was] undoubtedly an attorney's blunder" and the §015(h) "penalty" for not getting the employer's approval before settling a third-party case, "while harsh, is clear."

*Atkins* distinguished both *Forest v. Safeway Stores, Inc*., 830 P.2d 778 (Alaska 1992), and *Kacyon.* It distinguished *Forest* because its settlement arose in respect to a third-party medical malpractice action against a treating physician, not against a third-party that caused the original injury, which had given rise to the employer's duty to pay compensation benefits. *Forest* held the injured worker's employer's interest in the third-party malpractice action was limited to the amount of compensation attributable to injuries caused by the physician's negligence, and the employee's settlement with that third-party doctor without the employer's consent, did not result in forfeiture of all benefits for the original injury. It distinguished *Kacyon* because the third-party compromise exceeded the collective value of finite death benefits owed to the deceased worker's beneficiaries. Under those facts, §015(h) could not and did not even apply.

*Forest* involved a stipulation between the negligent physician and the injured worker to drop the injured worker's lawsuit against the doctor, "with prejudice," with each party to "bear its own costs and attorney's fees." Based on this stipulation between those parties, the trial court judge issued an order dismissing the case with prejudice. That court-ordered settlement was adequate to

support the injured worker's employer's petition under §015(h) to dismiss that part of the workers' compensation claim attributable to the medical malpractice.

*Forest* also noted the injured worker was under no obligation to pursue a claim for damages against a third-party. He was free to collect workers' compensation benefits, "and leave it at that." However, once he sued a third-party, no rights were assigned to his employer, and his employer's interests in the case "became dependent upon Forest's prosecution of it." In other words, the employer had a "legitimate, albeit dependent," interest in the injured worker's third-party claim against his physician.

> **AS 23.30.110. Procedure on claims**. . . .
>
> (c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

In *Metcalf v. Felec Services*, 784 P.2d 1386, 1389 (Alaska 1990), an employer contended an employee's proffered statutory interpretation would open the door for employees to purposefully drag out hearings by obtaining unnecessary continuances thus enlarging the time during which benefits were still being paid. *Metcalf* stated, "If the Board finds that a request for a delay by an employee is not for good cause, it can and should deny it."

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 44.62.460. Evidence rules**. . . .
>
> (d) . . . Irrelevant and unduly repetitious evidence shall be excluded. . . .
>
> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) For claims and petitions under this subsection,
> . . . .

(2) a petition is a written request for action by the board other than a claim that meets the requirements of (8) of this subsection; the petition may be filed on a form provided by the board;
. . . .

(c) For answers to claims and petitions under this subsection,
. . . .

(2) an answer to a petition must be filed not later than 20 days after the date of service of the petition and served upon all parties;

**8 AAC 45.060. Service**. . . .

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties. . . .

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

(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. . . .

**8 AAC 45.070. Hearings**. . . .

(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**. . . .

(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 deposing 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 45.092. 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; . . .

> **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. . . .

The ADA prohibits discrimination against individuals with disabilities. Moreover, 42 U.S.C. §12181(7)(F) prohibits discrimination by public entities, which must provide accommodations to a disabled individual to allow them access to the facility and service provided unless doing so would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden. 42 U.S.C. §12182(b)(2)(A)(iii). A "fundamental alteration" is a change so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. ADA Title III Technical Assistance Manual, III-4.3600.

## ANALYSIS

In preface to this decision and order, the panel acknowledges and understands fully that Employee adamantly contends in a variety of ways that he never settled his third-party case. Moreover, he contends his attorneys in that case never settled it either. Indeed, he repeatedly contends "there was no settlement." With that in mind, the following issues are examined and decided:

**1) Was the oral order denying Employee's continuance request correct?**

The legislature mandates the Act be interpreted to ensure quick, efficient, fair, and predictable delivery of indemnity and medical benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. AS 23.30.001(1). Hearings must be impartial and fair, and all parties must be afforded due process, an opportunity to be heard and their arguments and evidence fairly considered. AS 23.30.001(4). If there was a reason under AS 23.30.001 or AS 23.30.135(a) to continue the hearing even without "good cause" grounds enumerated in the applicable regulation, it could have been continued. However, excluding irrelevant testimony at hearing is mandated by

law and does not equate to an unfair hearing or a due process violation. "Irrelevant and unduly repetitious evidence shall be excluded. . . ." AS 44.62.460(d).

Hearings are held at the time and place fixed by at least 10-days' notice served, and as stated above continuances may only be granted in accordance with the Act. AS 23.30.110(c); 8 AAC 45.060(e). Employee had more than 10-days' notice of the hearing. AS 23.30.110(c). Continuances are not favored will not be routinely granted. 8 AAC 45.074(b). "Good cause" is required to grant a continuance and 8 AAC 45.074(b)(1) provides situations that constitute "good cause."

At hearing, Employee cited the September 29, 2023 prehearing conference summary as stating the correct issue for hearing where it said, "The issue in dispute in this case is whether Employee or his representative 'compromised' with third-party for an amount less than the compensation he would be entitled to under the Act." He contended this statement means his witnesses are all required to prove he never compromised or settled his third-party case, and must be allowed to testify. Employee contended this summary "governs the issues and the course of the hearing" under 8 AAC 45.065(c). Overruling his objection, the Chair relied on 8 AAC 45.070(g), and noted "unusual and extenuating circumstances" required the panel to overlook this statement because the designee at the prehearing conference was making evidentiary rulings and was not as familiar with the case as the current Chair. A different designee was needed for the prehearing conference given the likelihood that Employee would appeal. If the current Chair had conducted the prehearing conference, when Employee appealed, the Division would have had to assign another hearing officer to chair the hearing, involving a person with less familiarity with his case. Employee presented no "good cause" to continue the hearing under either the statutes or the applicable regulations. Therefore, the oral order denying his continuance request was correct. *Metcalf*. More detailed reasoning addressing all his contentions is included in the following analyses.

**2) Were the prehearing conference designee's order quashing Employee's subpoenas, and the oral order at hearing disallowing Employee's witnesses' testimony correct?**

Employee wanted a continuance primarily because he was not allowed to present the subpoenaed witnesses who had successfully quashed subpoenas. Parties at hearing have a right to call and examine witnesses, provide exhibits, and rebut adverse evidence; but parties' rights to call and

examine witnesses is not without limitation. "Irrelevant and unduly repetitious evidence" not just may, but "shall be excluded. . . ." AS 44.62.460(d). The only legal issue set for hearing is Employer's May 22, 2023 petition to dismiss. Judge Aarseth previously found and enforced a third-party settlement; Employee previously testified Employer had a lien between $400,000 and $500,000 and admitted he received no money from Judge Aarseth's enforced third-party settlement. The only remaining factual issue is whether Employer gave written authority for the third-party settlement Judge Aarseth found and enforced in Employee's civil case.

Before reaching that issue, this decision will address Employee's myriad issues and contentions. Apart from previously making the same arguments back in 2020, when Employer filed its first petition to dismiss under §015(h), Employee had ample opportunity to argue his position on this current petition and did so cogently, repeatedly and exhaustively as discussed below:

A) Employee made his case on June 19, 2023.

At the June 19, 2023 prehearing conference, Employee raised and addressed in detail 15 reasons why Employer's petition to dismiss his claims under §015(h) should not be set for hearing and ultimately should not be granted. The designee listed 13 reasons; this decision breaks these down for clarity and completeness. Each will be fairly considered under AS 23.30.001(4):

*(1) He intends to file another Rule 60(b) motion in his third-party case.*

Employee is free to file motions in the Superior Court; he says he has done so. But until a Superior Court judge issues an order staying this decision, and given *BBFM Engineers, Inc*., there is no reason to delay ruling on Employer's petition. *Metcalf*. The parties agreed at hearing that on October 3, 2023, Judge Matthews denied Employee's request for an expedited ruling on his motion to stay this hearing. Years ago on August 13, 2019, Judge Aarseth found and enforced a settlement agreement between "all named parties" in Employee's third-party case and dismissed that case with prejudice. Employer has paid Employee's benefits under the Act since that time. Even if it prevails in the instant matter, as the third-party case now stands, Employer will have no way to recover a significant -- and continuing -- overpayment. AS 23.30.001(1).

*(2) BBFM Engineers, Inc. does not answer whether Employee agreed to dismissal of his third-party claims against BBFM Engineers and Architects Alaska.*

Employee misunderstands *BBFM Engineers, Inc*. The Supreme Court's opinion did not need to reach the issue of whether Employee agreed to dismiss his third-party suit because the Court determined his request for relief under Rule 60(b) was untimely. Therefore, his ability to attack Judge Aarseth's order under that rule was long gone.

> *(3) BBFM Engineers, Inc. does not address the "issues" with Judge Aarseth's August 13, 2019 order granting the third parties' motion to enforce settlement.*

Employee again misunderstands *BBFM Engineers, Inc*. The Court stated even if it "assumed" for purposes of the Petition for Review that Judge Aarseth made errors in his decision, it would still make no difference because Employee's request for relief under Rule 60(b) was untimely.

> *(4) A hearing should not be set until the Supreme Court issues an order on Employee's Petition For Rehearing.*

On June 20, 2023, the Alaska Supreme Court denied Employee's Petition For Rehearing.

> *(5) There remain "additional battles" in Superior Court, and the panel does not have jurisdiction to address whether he agreed to settle his third-party claims.*

Employee is free to litigate his third-party case in Superior Court. He is correct that given this case's facts this panel has no jurisdiction to address whether he agreed to settle his third-party case or if it was even settled. It has no need to. Judge Aarseth already determined that his third-party case was settled. This decision must rely on Judge Aarseth's order. *AKPIRG*.

> *(6) Trying to litigate before three different tribunals is a mistake and could lead to incoherent and illogical decisions.*

Employee is the only party to the instant matter that is litigating elsewhere. His Alaska Supreme Court case is over. This panel will abide by any relevant order issued by the Superior Court.

> *(7) There was fraud involved when the third parties alleged a settlement had been reached and he must be able to exhaust his remedies and complete discovery before Employer's petition to dismiss is decided.*

This panel has no jurisdiction over Employee's third-party case. His allegation that parties in the Superior Court case committed civil or criminal fraud is an issue he should raise before the Superior Court, the applicable Bar Association or law enforcement authorities. *AKPIRG.*

> *(8) The Board said it does not have jurisdiction to determine if fraud between Employer and the third-parties occurred.*

Assuming only for this petition that this is true, Employee fails to explain how it affects Judge Aarseth finding and enforcing a settlement. Nevertheless, Employee contacted the SIU about his fraud concerns and was unhappy with the response from former Chief Investigator Gerharz.

> *(9) Some type of subrogation agreement existed between Employer and the third-parties to circumvent workers' compensation liability.*

It is unclear how this vague accusation could affect Judge Aarseth's order or Employer's lack of written authority approving that settlement. If an agreement existed between Employer and the third-parties to circumvent Employer's workers' compensation liability, this would have been evidence Employee should have presented to the Superior Court within "a reasonable time" after Judge Aarseth issued his order. *BBFM, Engineers, Inc*.

> *(10) He was forced to attend an SIME after he and Employer attorney, Krista Schwarting, stipulated he would not have to attend an SIME.*

Assuming only for this issue that this contention is true, it should have been brought before the Superior Court within a "reasonable time." *BBFM, Engineers, Inc*.

> *(11) He needs to depose all attorneys involved in his matters before the Superior Court and Supreme Court, and needs to take Colby Smith's deposition.*

The factual issue for this hearing is whether Employer gave "written authority" for what Judge Aarseth found was a third-party settlement. Employee failed to explain why attorney depositions are necessary to prove this fact. Moreover, while attorney depositions may be relevant in his third-party case, they have no relevancy to Employer's petition to dismiss under §015(h). Employee is free to pursue those depositions before the Superior Court.

> *(12) The Superior Court granted a protective order that prevents any further workers' compensation proceedings on Employer's petition to dismiss.*

Employee is mistaken. The "stay" to which Employee refers by its own language was in place only until Judge Matthews ruled on Employee's Rule 60(b) motion. Judge Matthews long ago ruled on that motion. On October 3, 2023, Judge Matthews denied Employee's motion for

expedited consideration of his recent motion to stay this proceeding. There is currently no Superior Court order staying Employer's present petition to dismiss. *Metcalf*.

> *(13) Supreme Court Justice Maasen drafted BBFM Engineers, Inc. and it was not fair and impartial because he worked as an associate attorney for Burr, Pease and Kurtz for 30 years and that firm represented one or more of the third-party defendants.*

Employee's unsupported attack on Justice Maasen, implying his honor engaged in inappropriate and unethical partiality and dishonesty, is a matter Employee may bring before the Alaska Supreme Court, the Alaska Judicial Council or the Alaska Bar Association and not this panel. *AKPIRG.*

> *(14) It is "outrageous and rude" for Employer to file a petition for dismissal and request a hearing right after he had surgery on May 19, 2023.*

It has been five months since Employee's May 19, 2023 surgery. Given the limited evidence required for Employee to succeed on his defense against Employer's petition to dismiss, it is difficult to understand how his May 19, 2023 surgery would prevent him or Johnson from producing written authority from his former attorneys, Employer or one of its representatives consenting to the third-party settlement Judge Aarseth found and enforced. At hearing Employee and Johnson admitted there is no such written authority.

Employee failed to state a legal theory upon which Employer's petition to dismiss should be denied because of its timing. This contention is without merit because the hearing occurred on October 4, 2023, and as shown by these analyses Employee had sufficient time to prepare. He has been preparing for it and presenting his evidence and arguments on this issue for years.

Moreover, if Employee is contending his May 19, 2023 surgery interfered with his ability to prepare for a hearing that occurred on October 4, 2023, his contention has no merit because it is not credible. AS 23.30.122; *Smith*. In the past, Employee used surgery as an excuse to delay Employer's prior petition to dismiss his claim under §015(h). On March 4, 2020, Wright set a dismissal hearing for May 5, 2020; Employee vowed he would "not allow" a decision on Employer's petition to dismiss. He stated he would "get another letter from his physician stating that he cannot attend the hearing." True to his word, on April 14, 2020, Employee having obtained a note from a physician stating he could not participate in a hearing for medical reasons, petitioned

for an order continuing the May 5, 2020 hearing, based on among other things his post-surgery shoulder issues. Employee said he needed a continuance "due to my work-related injuries and . . . my backsliding from my recent shoulder surgery due to being forced to read and type for research in litigating, which cause my shoulders, back and neck to become inflamed, especially after surgery." On April 15, 2020, Employer non-opposed his petition to continue the May 5, 2020 hearing and Wright immediately continued it. Notwithstanding his alleged shoulder difficulties, Employee immediately thereafter filed serial petitions beginning April 16, 2020, one day after the May 5, 2020 hearing was continued. He filed 13 petitions for various relief, and a claim with extensive briefing, through September 17, 2020.

*(15) Employee will request the Superior Court grant another protective order.*

This panel will abide by any relevant order the Superior Court may issue.

B) Employee made his case on August 22, 2023.

In his August 22, 2023 hearing brief, which the panel considered even though it was late for the initial written record hearing, Employee raised the following objections and contentions, similar to others addressed above and below, which will be fairly considered under AS 23.30.001(4):

*(1) The Division ignored his numerous petitions.*

Employee does not explain how, assuming his contention is true, his petitions had any bearing on Judge Aarseth's order in his third-party case, or how they would prove Employer gave or did not give written authority for the third-party settlement Judge Aarseth found and enforced. Moreover, his contention is false. Division staff at multiple prehearing conferences, as discussed in detail in the factual findings above, attempted to clarify and set Employee's petitions for hearing on numerous occasions. In most instances, Employee at these prehearing conferences was non-cooperative, disruptive and spent his time arguing with Smith and hurling invectives at Smith and the designees, which usually resulted in him terminating his participation voluntarily. Employee filed 24 claims and nearly 200 petitions ; yet he filed only17 ARHs. He failed to pursue relief and when hearings were scheduled on his petitions, Employee repeatedly obtained continuances. Moreover, at hearing Johnson admitted quite correctly that even though Employee had filed hundreds of pleadings, "if you look at it, we've never followed through with anything."

*(2) The Division denied his right to discovery.*

It is not clear what discovery Employee contends the Division denied him. If he is referring to Setzer's refusal to allow him to subpoena and call irrelevant witnesses, this contention is discussed in detail elsewhere in this decision. If Employee is referring to deposing Employer's physicians, he is mistaken. The only time Employer has an obligation to depose its witnesses or present them for cross-examination at Employer's expense, is at Employer's depositions of these witnesses or when they are called as its witnesses at a hearing. If he is referring to his attempts to depose other Employer witnesses, the record shows these efforts were denied for the reasons stated. Employee had a remedy in each instance -- if a prehearing conference designee denied his request, he had a right to appeal to a hearing panel; if a hearing panel denied his requests, he had a right to seek appellate review from the Commission and from the Alaska Supreme Court.

*(3) The Division refused him hearings.*

It is unclear what hearings Employee contends the Division refused to allow him. The above factual findings provide details addressing this issue. Assuming only for purposes of Employer's petition to dismiss that this contention is true, it is unclear how any hearing Employee requested but never had could affect Judge Aarseth's decision, or the factual issue addressed in this decision. Further, to quote Johnson, Employee "never followed through with anything."

*(4) The Division denied his ADA accommodations and "basic human dignity."*

Employee did not specify what ADA accommodation he believes the Division denied him, and when. As reflected in the Commission's order in this case, of the two, out of dozens of accommodations he requested that Director Marx granted, Employee waived the one keeping private from Employer the fact he has two ADA accommodations, by filing Director Marx's letter granting that accommodation as evidence for reconsideration and serving it on Employer.

If Employee is referring to specific requests for additional time to file pleadings or to express himself at prehearing conferences or hearings, he is mistaken. First, Director Marx granted no accommodation for this and repeatedly advised Employee that requests for more time were not an ADA accommodation, but a procedural function. Second, in reference to the instant hearing, Employee's tardy hearing brief for the original written-record hearing was accepted for the

October 4, 2023 hearing, as were his various subsequent pleadings setting forth new, cogent and detailed arguments, over Employer's objection and even though *McDonald XIV* prohibited the parties from submitting additional briefing.

The Division as a public entity, has a duty to not discriminate against disabled persons and to provide them accommodations for their disabilities. However, accommodations are not without limitation. 42 U.S.C. §12181(7)(F) does not require accommodations when providing them would "fundamentally alter" the nature of the good, service, facility, privilege, advantage, or accommodation being offered or result in an undue burden. 42 U.S.C. §12182(b)(2)(A)(iii). A "fundamental alteration" is a change so significant that it alters the essential nature of the Division's services. ADA Title III Technical Assistance Manual, III-4.3600. Employee cannot use disability as a means to obtain an unwarranted hearing continuance because he wants to extend benefits or does not like the expected result from the hearing. *Metcalf*. Using a disability in this fashion fundamentally alters the Division's workers' compensation prehearing conferences and hearings because any time Employee disagreed with a ruling or wanted more time to prepare his case, or wanted a continuance to enlarge the time during which he would receive benefits, he could simply claim that his disability prevented him from participating properly. *Metcalf*.

Prior Division directors gave Employee only two ADA accommodations. He has not alleged the Division, or its staff, violated either. Thus, his contention that the Division or the instant hearing panel denied any ADA accommodation is without merit.

Employee failed to explain how and when the Division or this panel denied him "basic human dignity." By contrast, at the October 4, 2023 hearing, Employee and his non-attorney representative Johnson were both disrespectful to the hearing panel, repeatedly talked over the Chair, unmuted themselves on Zoom when the Chair muted them to gain control over the hearing, and hurled invectives at other participants. Johnson became frustrated with a question the Chair asked Employee and, after the Chair on his own motion directed a break so Employee and Johnson could regain their composure, Johnson made an off-record comment to the effect of, "I hate all you fucking people. . . ." Employee later used similar language on the record. Employee and Johnson denied the panel basic human dignity and respect. *Rogers & Babler*.

Employee spared no person's dignity who touched his case and did not agree with his positions. From his perspective: Dr. Chandler made a "false statement"; RBA Kemberling's summary was "wrong" in every respect; Dr. McNamara "colluded" with the adjuster; the adjuster's statements were "false"; Employer was "corrupting and hiding evidence"; Schwarting and Smith were "harassing" him; all defendants were committing "insurance fraud" and "criminal acts"; Employer "tainted" SIME records; Grashin made "false statements," was "unethical," and "prejudiced" against him, "stifled" him and "provided misleading information"; Smith made "fraudulent and criminal" controversions; the entire Division staff was "fraudulent and biased"; Chief Eklund "intruded" to help Smith "obstruct a subpoena," "colluded" with Smith and "retaliated" against Employee; Tashjian and Slodowy "falsely claimed" the Division did not investigate fraud; Employer's criminal "accomplices" including the entire Board, Grashin, Tashjian, Schwarting, Marx, medical providers, the insurer and its lawyers, all "discriminated" against him; Tashjian "represented" Employer; Ringel committed "tortious acts" against him; Ringel's decisions were "criminal acts"; Ringel, Tashjian and Slodowy "all lied"; Ringel could have Employee killed; Murphy had a conflict-of-interest; Gerharz was "excusing" Employer's and the Board's "crimes" and "covering up"; Wright was "biased," "lying," and "committing fraud and criminal acts"; Mitchell was working to help Employer; Sakata "misled" the RBA; Judge Aarseth "screwed him"; the third-party defendants committed "fraud on the court"; Croft was "blocking testimony"; Soule always believed lawyers over injured workers and is "a liar" who was "conspiring with Smith"; everything the Board says "is a lie"; Faulkner "sold her soul"; Collins calculated to "harm his case" and was taking "grift"; Reishus-O'Brien "colluded" with defense counsel to influence his SIME; Justice Maasen was "not fair" or "impartial," and engaged in unethical conduct; Employee's third-party lawyers lied to the third-parties' lawyers; the third-parties' lawyers lied to the Superior Court; Setzer created "false facts" and "manufactured information"; and the entire Board, Soule, Setzer, Wright "and others," "bent over backwards" to allow Employer to "win everything."

*(5) A designee set this hearing on the written record against his objection.*

Wright set the August 2023 dismissal hearing on the written record because Employer asked for a hearing on the written record. Regardless, since Employee vehemently objected to it, albeit untimely, *McDonald XIV* on its own motion changed the original hearing from a written-record hearing to an in-person hearing as Employee requested. Notwithstanding *McDonald XIV*'s change

to favor Employee with an in-person hearing, he chose to not come to the Division's hearing room for the hearing, but to attend by Zoom.

> *(6) Employer's allegation that he obtained a settlement in his third-party case is "deceptive and collusive."*

Employee is skilled at unnecessarily invoking subtle nuance to anything a designee, prehearing conference summary, decision and order, or Employer states or writes in this case. No matter how Employee views Employer's contentions, its position is based on Judge Aarseth's decision finding and enforcing a third-party settlement in his civil case. Anything "deceptive and collusive" about that settlement must be dealt with in the Superior Court. *AKPIRG*.

> *(7) Judge Aarseth only enforced a third-party settlement because Employee's opposition was considered late, and it was only late because he was "forced" to attend an SIME and was traveling.*

This contention is not true, and Employee is not credible for making it. AS 23.30.122; *Smith*. Judge Aarseth's order finding and enforcing a settlement says nothing about an untimely opposition from Employee. He found and enforced a contract. As for the SIME, Employee is the party who requested it, stipulated to it, and repeatedly refused to attend it for years. Assuming the SIME interfered with Employee's ability to respond in the third-party case, that was an issue for the Superior Court to decide. According to *BBFM Engineers, Inc*., Employee failed to appeal Judge Aarseth's decision, and untimely moved for relief from judgment.

> *(8) Employee never signed off on any settlement, making his third-party case "dismissed," not "settled."*

This contention addresses the legal bases underpinning Judge Aarseth's decision, which *BBFM Engineers, Inc*. said Employee failed to challenge timely.

> *(9) During an appeals process in his third-party case, Employee discovered the third-party defendants had withheld a May 29, 2019 email, which proved they never believed a settlement existed.*

Again, this panel has no jurisdiction over this allegation, and it must be resolved by the Superior Court, subject to *BBFM Engineers, Inc*. *AKPIRG*.

*(10) An October 2020 injunction from Judge Matthews staying Employer's previous attempt to dismiss his claim on the same grounds is still in effect.*

This contention is also not true, and Employee is again not credible. AS 23.30.122; *Smith*. Judge Matthews' stay order on its own terms was in effect only until he ruled, which he did long ago. *BBFM Engineers, Inc*. subsequently reversed his substantive order.

*(11) Employee found evidence that Employer was indemnifying the third-party defendants.*

Assuming for this issue's sake this is true, Employee failed to explain how this could be relevant in the instant matter. As he has repeatedly pointed out, this panel has no jurisdiction to overrule a Superior Court order finding and enforcing the third-party settlement in his civil case. *AKPIRG*. Oddly, at hearing Employee contended the panel has authority to determine he did *not* settle it.

*(12) The Alaska Supreme Court found there were "problems" with Judge Aarseth's order.*

*BBFM Engineers, Inc*. did not "find" there were problems with Judge Aarseth's order. Rather, it assumed for its analysis in the third-parties' Petition for Review that there were problems with it. Notwithstanding that presumption, the Alaska Supreme Court still overruled Judge Matthews' contrary decision because Employee sought relief from Judge Aarseth's order too late.

*(13) He has work-related PTSD, which affects his ability to work on his case.*

If Employee is referring to his PTSD as a hindrance in the Superior Court or Supreme Court cases, that matter should be addressed in those forums, and may have been addressed already. If he is referring to how PTSD affects the instant matter, his creative, detailed and cogent pleadings show his PTSD did not affect his ability to set forth his contentions with vigor and clarity. To the extent Employee relies on his PTSD to account for his disruptive behavior at prehearing conferences and hearings, the Division and designees have repeatedly accorded him opportunities to take breaks to "cool down," even when Employee did not expressly ask for one. Furthermore, PTSD cannot be used as a tool to fundamentally alter how the Division conducts prehearing conferences and hearings. 42 U.S.C. §12181(7)(F).

> *(14) The SIME physicians' reports are flawed, and Employer failed to include all medical records for his five and one-half week hospital stay post-injury.*

This contention is irrelevant to Judge Aarseth finding and enforcing a third-party settlement in Employee's civil case. It does not address the remaining factual issue in this case.

> *(15) Through his Social Security award, Employee proved there is "something wrong with his brain," he deserves time to argue his case fully, and has previously requested ADA accommodations and more time to file evidence and pleadings.*

In the instant hearing the panel accepted Employee's untimely initial hearing brief, subsequent pleadings, and prehearing conference and hearing arguments, notwithstanding Employee's and Johnson's lack of basic hearing decorum. When they were not screaming obscenities, their arguments were consistently albeit repetitively creative, detailed and cogent. No Division director granted Employee an ADA accommodation for more time to file evidence and pleadings.

> *(16) The Alaska Supreme Court "missed" the fact that Employee is a person with disabilities, and did not answer the question of settlement.*

Johnson at hearing stated Employee would probably be suing the Alaska Supreme Court for its alleged failure to acknowledge his and Johnson's PTSD issues. That lawsuit would be the time and place to raise this contention, but it is not relevant for the issue decided here. *AKPIRG*.

> *(17) Employer mistreated him throughout the course of this matter by improperly denying benefits and treatment and "disrupting" his medical care without reason, hiring a private investigator to follow him around, and spreading "false information" to his physicians.*

Employee failed to show why these allegations, even if assumed true, would affect his third-party case, the settlement Judge Aarseth found and enforced and Employer's petition to dismiss.

> *(18) Employer "falsified" information to Board designees regarding an SIME.*

Again, assuming only for Employer's pending petition that this allegation is true, it has nothing to do with its petition to dismiss based on Judge Aarseth's order and on Employee's testimony.

> *(19) Employer failed to disclose "specific relationships" it has with the third-party defendants.*

> *(20) Employer and one third-party defendant have the same liability insurance company.*

Presumably, Employee is referring to his allegation that Employer and one defendant in his third-party case share the same liability insurer. He does not explain how that fact, if true, would enable this panel to alter Judge Aarseth's order finding and enforcing a third-party settlement, or how it could affect the present issue.

> *(21) Employer has an indemnification agreement to cover the third-party defendants for any work injury, which makes Employer's claim they had not given permission for any settlement "disingenuous" because it had previously signed a contract to cover any costs to those defendants.*

As the Chair explained to Employee at hearing, his time to raise these issues, according to *BBFM Engineers, Inc*., has passed. Thus, even assuming truth in this assertion, it does not affect this panel's reliance on Judge Aarseth's order or the law regarding Employer's dismissal petition.

> *(22) Employer arranged for an out-of-state SIME precisely when Employee's opposition to the third-party defendants' motion to enforce the settlement was due.*

The Division has a designee in Juneau who arranges SIME appointments. 8 AAC 45.092(h). The appointments are often out-of-state. Employee requested an SIME, stipulated to one, and then for various reasons repeatedly delayed attending it not just for months, but for years. Employer asked for and obtained an order requiring him to attend, to move the process forward. Employer did not "arrange" an out-of-state SIME; the Division did. Assuming the SIME hampered his ability to oppose a motion in his Superior Court case, Employee has presented no evidence to show that this is anything but a coincidence. Even if he had presented such evidence, this panel has no jurisdiction over that issue. *AKPIRG*. He had to bring this information before the Superior Court timely, and *BBFM Engineers, Inc*. held he did not. If Employee is suggesting Division staff colluded with Employer on the SIME timing, his contention is not supported by any evidence.

> *(23) Employer failed to place his Social Security disability decision regarding work-related PTSD in the SIME medical binders.*

This contention is irrelevant to Employer's §015(h) petition to dismiss Employee's claim. Moreover, 8 AAC 45.092(h)(1) limits the documents the Division sends to an SIME physician to

"medical records, including medical providers' depositions." A Social Security judge's decision is not a medical record and was correctly not included in the SIME records.

*(24) The Division generally mishandled the SIME process.*

Again, the SIME process has no relevance to Judge Aarseth's order upon which Employer's petition to dismiss is based, or Employer's petition to dismiss.

*(25) Employee refused to consent to a "walk-away" settlement and so informed his third-party counsel.*

*(26) Employer's contention that §015(h) applies is "false," because he never agreed to walk away from his third-party case.*

*(27) Various parties tried to force Employee into a third-party settlement, but he refused.*

Judge Aarseth already found and enforced a third-party settlement. *BBFM Engineers, Inc*. stated allegations like this one should have been made in a Rule 60(b) motion within 30 days, but in any event long before Employee made them in his civil case. This panel does not have authority or jurisdiction to overrule Judge Aarseth's findings and order. *AKPIRG*.

*(28) His own attorney lied to the third-party defendants who hid a particular email from discovery and apparently from him.*

*(29) Attorneys for the third-party defendants lied to the Superior Court.*

Employee has a remedy to file complaints with the Alaska Bar Association against any attorney who he believes withheld or concealed evidence, committed a crime or otherwise behaved unethically. He may also contact appropriate law enforcement.

*(30) Judge Aarseth's settlement order was obtained by "fraud upon the court" and "should be considered invalid."*

Employee has a new Rule 60(b) motion pending in the Superior Court before Judge Matthews. If Judge Matthews again vacates Judge Aarseth's order this panel will abide by any relevant order.

*(31) Judge Matthews found there was no settlement.*

*BBFM Engineers, Inc*. reversed Judge Matthews' order, and reinstated Judge Aarseth's. *Shilts*.

*(32) Employer's ability to petition to dismiss his claim under §015(h) "is not supported by case law.*

To the contrary, Alaska Supreme Court case law supports Employer's petition to dismiss Employee's claim under §015(h). *Forest*; *Kacyon*; *Atkins*.

*(33) Employer's attorney and a Board designee suggested he sue his attorneys for malpractice.*

Employee alternates between contending his former attorneys know the truth and have important testimony, and contending one or both are liars. Regardless, assuming all these allegations are true they do not affect this panel's duty to rely on Judge Aarseth's order. Assuming anyone suggested Employee should sue his attorneys for malpractice, it is irrelevant here.

*(34) Case law shows Employee's third-party attorney is not considered a "representative" who has authority to settle his third-party case under §015(h) and therefore Employer's petition should fail.*

Judge Aarseth already found and enforced a settlement in the third-party case. Legal arguments such as this one should have been made before he issued his order, or in a timely appeal, or in a timely Rule 60(b) motion. This contention is also at odds with *Atkins* and *Forest*.

*(35) Since Employer indemnified both third-party defendants at the jobsite where Employee was injured and carried the same insurance carrier as one defendant, they knew about the third-party case and cannot assert they did not give permission to settle.*

Any alleged indemnification agreement between Employer and any third-party defendant, and how that would affect the pending issue here, is a matter for the Superior Court to determine if Employee retains a basis to raise it there in his new Rule 60(b) motion. Moreover, Employer's knowledge of Employee's third-party suit has never been questioned. In fact, subrogation adjuster Cupoli's hearing testimony revealed that attorney Robert Stone sent her a representation notice on Employee's behalf. In return, Cupoli sent Stone a December 1, 2014 initial lien notice. Employee failed to explain how Employer's knowledge of a third-party lawsuit automatically equates to Employer knowing about the settlement that Judge Aarseth found and enforced, and giving written authority for it. It does not.

*(36) The third-party settlement resulted from a judgment, not an agreement, and therefore there was no "compromise."*

This is a legal argument Employee should have made before Judge Aarseth issued his order, raised in a timely appeal, or argued in a timely Rule 60(b) motion for relief. *BBFM Engineers, Inc*. held he did not appeal or raise a timely Rule 60(b) motion. This panel has no jurisdiction to overturn *BBFM Engineers, Inc*. or Judge Aarseth's decision. *AKPIRG*.

*(37) Without showing Employer was prejudiced, Employee's case should not be dismissed.*

*Atkins* already addressed this contention and rejected it. There is no requirement for Employer to show prejudice under §015(h).

*(38) Dismissal is "harsh."*

On this point, Employee is correct. Dismissal under §015(h) is harsh, and as *Atkins* stated given the facts in that case, it is a "particularly harsh penalty . . . for what [was] undoubtedly an attorney's blunder." This decision cites *Atkins* not to suggest Employee's lawyers blundered, but to show *Atkins* has already addressed the harshness of this remedy, even when the lack of written approval was not the injured worker's fault, and enforced §015(h) anyway.

*(39) Employer did not pursue or defend its lien.*

This is not true, and Employee's contention is not credible. AS 23.30.122; *Smith*. At hearing, Cupoli testified her predecessor gave Employee a lien notice, and she gave Employee's former attorney Stone her initial notice of Employer's lien in December 2014. Thereafter, *Cupoli* sent January 17, 2019 and March 14, 2019 letters to Employee's former attorneys at Ehrhardt, Kelley & Cooley updating Employer's statutory lien. Employer had no obligation to file its own suit against the third-party defendants or to intervene in Employee's lawsuit against them. Employee has not suggested anyone forced him to sue the third-parties. He was free to collect workers' compensation benefits, "and leave it at that." *Forest*. But as *Atkins* stated, once Employee through counsel filed a lawsuit against those defendants, Employer's right to recover benefits paid to Employee or on his behalf "became dependent upon [Employee's] prosecution of it."

C) Employee made his case on September 27, 2023.

Employee took many more opportunities to plead and argue his position. In a September 27, 2023 email to a potential witness for this hearing, Employee while addressing his third-party case stated, "The hearing being held in [sic] 10-4-23 concerns the employer attempting to dismiss my claim based on their allegation that I agreed to dismiss my third-party case without their permission." In his email, Employee admitted he "never asked for permission to dismiss the case." Employee never asked Employer for authority to settle his third-party case, because in his view he did not settle it and neither did anyone else. Nevertheless, the only remaining factual issue is whether Employer gave written authority for the settlement Judge Aarseth found and enforced. Since the consent must be "written approval," if Employee had such a document, he should have and would have filed it long ago. There is no such document in his agency file. At hearing, after first admitting and then evading the question repeatedly, Employee admitted he did not have a document providing written authority from Employer or its agents or representatives consenting to any third-party settlement, even if a settlement never happened, as he adamantly maintains.

D) Employee made his case on September 29, 2023.

Employee argued his points again at a prehearing conference on September 29, 2023, where Setzer determined none of the witnesses Employee subpoenaed and intended to call at the October 4, 2023 hearing had personal knowledge to address the remaining factual issue. Employee's listed witnesses could not testify that, contrary to the adjuster's written records and expected hearing testimony, Employer or its agents gave written authority for any settlement. This is true even if Judge Aarseth's order was wrong and Employee was correct. Employee overlooks Judge Aarseth's order finding a binding agreement "between all named parties." *Kacyon*. Judge Aarseth already found the "compromise with a third-person" that was "made by the person entitled to compensation or the representative of that person." Therefore, Employee's witnesses' testimony was not relevant to the remaining factual issue. Employee's witness list stated, and Johnson at hearing, admitted they would not address that issue. AS 44.62.460(d) requires their irrelevant testimony "shall be excluded." Setzer's September 29, 2023 prehearing conference order, and the oral order at hearing disallowing Employee's witnesses were correct.

While Employee's witnesses may have been able and willing to testify about the third-party settlement, or lack thereof, any testimony they may have given here could not affect Judge

Aarseth's 2019 order enforcing a settlement or *BBFM Engineers, Inc*. reversing Judge Matthews' decision vacating Judge Aarseth's order. As Employee correctly pointed out, this panel has no jurisdiction to decide under these circumstances if "all named parties" settled his third-party case, because Judge Aarseth ruled there was a settlement and enforced it. *AKPIRG*. *BBFM Engineers, Inc*. overruled the only Superior Court order stating there was no settlement, leaving Judge Aarseth's order as the "last one standing." *Shilts*. This panel has the same duty to rely upon Judge Aarseth's order, which found and enforced a settlement, as it did Judge Matthews' order until *BBFM Engineers, Inc*. reversed it.

During the September 29, 2023 prehearing conference, Employee raised the following contentions, which will be fairly considered under AS 23.30.001(4):

*(1) By regulation, he had 20 days to respond in writing to the filings.*

At the September 29, 2023 prehearing conference, Setzer correctly determined that some petitions need to be addressed prior to hearing. She asked Employee if he could file and serve written arguments by Monday, October 2, 2023. Employee stated that was not enough time to file a written response as he is not an attorney and "is disabled."

A person starts a proceeding by filing a written claim or petition. 8 AAC 45.050(a). A request for action other than for benefits is through a petition. 8 AAC 45.050(b), (2). An answer to a petition if one is filed must be filed within 20 days after the petition is served. 8 AAC 45.050(c), (2). However, there is no penalty for a party not filing an answer to a petition; in other words, an answer to a petition is optional, albeit helpful. Regardless, answering a petition is a procedural requirement, which may be "waived or modified" if manifest injustice to a party would result from strictly applying the regulation. 8 AAC 45.195. Moreover , the 20 days afforded a party to answer a petition is the maximum time to answer, not the minimum. A party is free to answer a petition as soon after receiving it as they desire.

Employee's objection to not being given 20 days to answer subpoenaed witnesses' petitions to quash subpoenas has no merit. As was the case on October 21, 2020, Employee did not want the October 4, 2023 hearing to occur. Employee once vowed to prevent it from ever happening. But

allowing him 20 days to answer the petitions to quash would render them a nullity. That process would not have been summary and simple and would have caused manifest injustice to Employer, who had a relevant witness waiting for a hearing that Employee contended could not occur until after he answered the petitions -- when the hearing would have been over. AS 23.30.005(h).

Holding the hearing in abeyance until Employee had his full 20 days to answer the petitions to quash would have also manifestly and unjustly affected the subpoenaed persons, because the hearing would have gone forward before his time to answer had expired, unless it was continued, which is really what Employee wanted. In other words, using Employee's logic the subpoenaed witnesses would have no choice but to appear at hearing either representing themselves or with counsel and argue why they or their attorney clients should not be required to testify when they could provide no relevant evidence. Even then, apparently Employee would have objected to that process because his 20 days to answer the petitions to quash would still not have run. Had the witnesses been required to appear at the October 4, 2023 hearing, the result would have been exactly the same as determined by the designee at the September 29, 2023 prehearing conference -- they would not have been allowed to testify. The difference would be that everyone's time and money would have been wasted. AS 23.30.001(1); AS 23.30.005(h).

Conversely, again applying Employee's reasoning, neither the hearing panel on October 4, 2023, nor this decision could decide his October 2, 2023 petition to continue the hearing until Employer had 20 days to answer it. Strictly applying 8 AAC 45.050(c), Employer had until October 22, 2023, to answer Employee's petition to continue the hearing. If Employee's logic prevailed, the hearing would have to go forward, and the panel could only decide the continuance petition well after the hearing was over. Hearings would become unpredictable. AS 23.30.001(1).

In short, some petitions have to be decided before a hearing notwithstanding the normal rule allowing 20 days for a party to respond. Employee's approach is nonsensical and is not quick, efficient, or fair and it is contrary to the legislature's mandate. AS 23.30.001(1). Given this analysis, Employee's contention is without merit and Setzer and the Chair modified 8 AAC 45.050(c) out of necessity and evenhandedly to address both the witnesses' petitions to quash

subpoenas and Employee's petition to continue, without affording either party the full 20 days to file an answer. 8 AAC 45.195.

> *(2) Employee did not have enough time to prepare for the October 4, 2023 hearing because the short notice affected his ability to subpoena witnesses and obtain evidence.*

As shown in detail by the above factual findings, Employee has been preparing for a hearing on Employer's identical past and current petitions to dismiss for years. The legal issue has never changed since Judge Aarseth issued his August 13, 2019 order, and the remaining factual issue has never changed since Employee acknowledged three years ago at a prior hearing that Employer had a large lien, and he never received any money from a settlement.

Employee was entitled to 10-days' notice of the hearing. AS 23.30.110(c). At the June 19, 2023 prehearing conference, Employee knew Wright was going to set a hearing on Employer's May 22, 2023 petition to dismiss. She offered him seven dates in August 2023 for that hearing. Employee never responded to Wright's deadline for him to select an available hearing date from those provided. Consequently, Wright set a written record hearing for August 22, 2023. In partial deference to Employee's objections to the written record format, *McDonald XIV* on its own motion on September 7, 2023, changed the written record format to an in-person hearing. *McDonald XIV* gave Employee six additional dates from which to choose in September and early October 2023 for the instant hearing. On September 13, 2023, the Division served the October 4, 2023 hearing notice on Employee by certified mail, as required. Johnson signed the "green card" on September 15, 2023. Employee had at least 18 days' notice for the in-person hearing. AS 23.30.110(c).

> *(3) He filed motions with the Superior Court, including a motion to relieve him from Judge Aarseth's order based on newly discovered evidence and for an injunction to stay this hearing, which are still pending.*

This contention has previously been addressed above.

> *(4) The issue for hearing is whether he compromised his third-party case; he did not, and Erhardt, Elsner, Seville, Barson, Hozubin, Kirsch, and Howell have extensive knowledge of the issue and would state he did not settle it.*

This too has been addressed above.

> *(5) His former attorneys in the third-party case improperly settled his case without his permission.*

This contention is inconsistent with Employee's other arguments. Nevertheless, it is a contention that *BBFM Engineers, Inc*. said he should have made within a "reasonable time" after Judge Aarseth's order, but did not.

> *(6) He was unable to adequately deal with the third-party case when his attorneys withdrew their representation because he was attending an SIME in this case.*

This decision has already addressed this contention.

> *(7) Judge Aarseth made his decision without his participation and without testimony from the people he subpoenaed for this hearing.*

This contention has already been partially addressed. Testimony and other evidence from the persons Employee subpoenaed for this hearing should have been provided to the Superior Court within a "reasonable time" pursuant to *BBFM Engineers, Inc*. This decision cannot overrule Judge Aarseth's order or *BBFM Engineers, Inc*. *AKPIRG.*

> *(8) He requested an extension of time in the Superior Court and this case should be equitably tolled while litigation occurs in the third-party case.*

Presumably, Employee is referring to his pending request for a Superior Court order staying the hearing that occurred on October 4, 2023. It seems unlikely Judge Matthews intended to stay this hearing as he did in 2020, because had that been his intention, he would have enjoined the hearing from proceeding. The panel will adhere to any relevant order from the Superior Court.

> *(9) He is not a lawyer, is disabled and is unable to litigate two cases at one time.*

This decision has already addressed this contention. In addition, Employee has done an admirable and effective job litigating his workers' compensation and third-party cases. *Rogers & Babler*.

> *(10) It is unfair to proceed with a hearing on Employer's petition to dismiss when he is still litigating Judge Aarseth's order.*

This decision has addressed this contention too. Moreover, it is unfair for Employer to continue to pay Employee's benefits under the Act given Judge Aarseth's order and *BBFM Engineers, Inc*. AS 23.30.001(1); AS 23.20.015(h).

> *(11) The Superior Court issued an injunction preventing this panel from deciding Employer's May 22, 2023 petition to dismiss.*

This decision has already addressed this untrue statement. AS 23.30.122; *Smith*. There is no order enjoining this panel from proceeding on lawyers petition to dismiss.

> *(12) There is collusion and fraud in his workers' compensation case because Employer had the same insurer as Architects Alaska, Inc. in his third-party civil case.*
>
> *(13) He did not ask for Employer's permission to compromise his third-party civil case because he did not compromise it.*

This decision has already addressed these two contentions.

> *(14) Employee subpoenaed Kirsch to obtain testimony on his communications with Ehrhardt and Elsner.*

As already analyzed above, Employee failed to demonstrate that Kirsch's testimony was relevant to the factual issue addressed in this decision.

E) Employee made his case a second time on September 29, 2023.

Although he declined Setzer's offer to give him until October 2, 2023 to oppose the petitions to quash, on September 29, 2023, in addition to above arguments made at the September 29, 2023 prehearing conference, Employee filed a seven-page "non-answer" with additional detailed contentions supporting the need for testimony from every subpoenaed witness. Employee carefully crafting his pleading to state, "**This is NOT an answer to the multiple petitions to quash**" (emphasis in original). These contentions will be fairly considered under AS 23.30.001(4).

> *(1) Employee was "ineffective because of his disabilities," at the time the third-party settlement was "being obtained by fraud."*

This contention should have been and perhaps was raised before the Superior Court and the Alaska Supreme Court in Employee's third-party case. Employee's September 29, 2023 pleading did not

explain why, within 30 days of Judge Aarseth's order, he could not have raised this point, or within a "reasonable time" as set forth in *BBFM Engineers, Inc*. and perhaps he did; the Division is not privy to all pleadings in the Superior Court. In any event, this contention is not relevant here.

> *(2) An SIME physician diagnosed him with major depression just two days before the third-party defendants filed their motion to enforce settlement.*

Employee contended his PTSD and major depression were factors preventing him from effectively refuting the third-party defendants' motion. Again, this contention is not relevant here as this decision cannot overrule Judge Aarseth's order. *AKPIRG.*

> *(3) Employee contended evidence and testimony from the proffered witnesses would show there was never a third-party settlement.*

This decision has addressed this contention. Assuming it is true, this testimony and evidence would not give this decision a basis to overrule Judge Aarseth. *AKPIRG.*

> *(4) Employee raised the ADA, contended the Division had a duty to him under the ADA to give him "time he needed to adequately plead his case," and implied it did not.*

This decision has addressed this contention. Moreover, given the above factual findings, Employee had ample opportunities to put forth his positions on his subpoenas, request for a hearing continuance and Employer's petition to dismiss his case under §015(h). He took those opportunities cogently and repeatedly, and as reflected by the instant analyses, the panel fairly considered his contentions and addressed each.

> *(5) Employee relied on a Social Security judge's decision in his disability case, and related medical records and opinions.*

This decision has already addressed this contention.

F) Employee made his case on October 2, 2023.

Employee was still not done presenting and arguing his case. In his October 2, 2023 petition to continue the hearing, he raised numerous objections, some similar to those already addressed, which will also be fairly considered under AS 23.30.001(4):

> *(1) He was not allowed 20 days to answer the subpoenaed witnesses' petitions to quash.*

This contention has already been addressed.

> *(2) The hearing officer quashed the petitions finding the witnesses' proposed testimony was irrelevant.*

The above analysis addresses this contention in detail. Employee admitted why he wanted to questions these witnesses and stated, "Each of these can testify that [he] never spoke to them one time prior to Judge Aarseth enforcing a settlement that never existed." He said these attorney witnesses can also look at an email between Employee's former lawyer and the third-party defendants and "give their honest opinion as to whether or not that email constituted the settlement." Employee also wanted to use these witnesses' testimony to prove one third-party lawyer lied to Judge Aarseth. At no time in writing or at hearing did Employee contend that any subpoenaed witness would testify there was written authority from Employer, its insurer or its representatives for a third-party settlement. Had all the subpoenaed witnesses been forced to appear at the hearing, the result would have been the same and the subpoenas would have been quashed, as the Chair explained at the October 4, 2023 hearing.

> *(3) The same hearing officer in her October 15, 2020 order made a similar ruling and Employee perceived a contradiction that was "unfair and unequal access to the law," violating his constitutional rights.*

This contention is difficult to follow. The same designee's two orders, three years apart, are consistent. The proffered witnesses' testimony was irrelevant in 2020 and is still irrelevant in 2023. To the extent Employee raises constitutional concerns, this decision has no jurisdiction over constitutional issues. *AKPIRG*. Employee has not explained why prohibiting irrelevant testimony and witnesses violated his due process rights, when the orders are in conformance with the controlling statute. AS 44.62.460(d).

> *(4) If the witnesses Employee wanted to call have no relevant testimony, then this panel has no jurisdiction to decide the issue set for hearing.*

This contention is also difficult to understand. Employee misconstrues the issue for hearing by failing to understand that all but one element of the legal test under §015(h) have already been resolved at previous hearings. The instant hearing arises under the Act, not under Employee's third-party case or related statutes.

> *(5) The designee's order excluding his witnesses on res judicata and collateral estoppel grounds was wrong because res judicata does not apply "when extrinsic fraud is present."*

Employee is accusing one or more parties or their representatives of fraud upon the court. This panel is not "the court." Any such arguments will have to be made and addressed by the Superior Court in Employee's third-party case. In the event the Superior Court issues an order affecting the instant matter, this panel will abide by such relevant order. This decision need not reach *res judicata* or collateral estoppel grounds to exclude his proffered witnesses, because none had any relevant testimony to offer, as thoroughly analyzed above. *AKPIRG.*

> *(6) The issue of whether he walked away from his third-party case "for purposes of AS 23.30.015(h)" has "never been litigated."*

Employee is partly correct on this one. Contrary to his contention, Judge Aarseth found a "walk-away" settlement and enforced it, dismissing Employee's third-party case with prejudice. He is correct that the implications of that third-party settlement under §015(h) has never been litigated; it is being litigated and decided here and now.

> *(7) Employer and one third-party defendant in his civil case "held contracts with the same liability insurance company," which would show Employer had knowledge of the third-party case "and issues."*

At an April 8, 2019 prehearing conference, Wright expressly advised Employee concerning the law in respect to his "Third-Party Litigation," and its effect on his right to continuing workers' compensation benefits. The factual issue decided here is whether Employer gave written authority for the settlement. Employer has never denied knowing about the third-party case. But just because Employer knew about the third-party case, does not create an inference that it also gave written authority for the third-party case settlement that Judge Aarseth found and enforced. Employee offered and presented no contrary evidence because there is none.

> *(8) McDonald XIV did not provide Employee with adequate time to prepare and present additional evidence or witness testimony.*

These analyses belie that contention. *McDonald XI* expressly advised Employee three years ago what the remaining factual issue was for Employer's previous petition to dismiss his claims under §015(h). The issue remains the same. The only relevant evidence or witness testimony he could

provide at hearing was evidence of Employer's written authority consenting to a third-party settlement Judge Aarseth found and enforced in August 2019. If Employee had such evidence, he or his former attorney would have provided it years ago.

> *(9) The designee's September 29, 2023 prehearing conference summary is "prejudicial, alludes to false facts and manufacturers information that must be stricken from the record in its entirety."*

The September 29, 2023 prehearing conference designee, as does the instant panel, operated from the premise that Judge Aarseth already found and enforced a third-party settlement in Employee's third-party case. Employee's umbrage at the terminology Setzer used in her prehearing conference is without merit. To the extent he contends she incorrectly recorded his service efforts, those efforts are irrelevant because even assuming Employee served all witnesses properly and timely, with the witness fees, none had any relevant testimony or evidence to provide at this hearing.

> *(10) Heather Johnson properly served the subpoenas, some in person and some by certified mail. He objected to his inability to "ask questions of the parties" at the prehearing conference.*

Assuming only for purposes of Employee's appeal from the designee's September 29, 2023 prehearing conference orders and the panel's oral order at hearing, that Johnson or someone else on Employee's behalf properly served each subpoena on each prospective witness properly, and notwithstanding the lack of evidence that Employee gave the witnesses the proper witness fee, it would make no difference to the outcome. The witnesses' testimony is not relevant to the remaining factual issue. Even if they were properly served with the subpoenas and required witness fees, the witnesses would not be allowed to testify. AS 44.62.460(d).

> *(11) The Division on September 21, 2023 told Employee he could serve the subpoenas himself; he recorded the conversation and relies on it for the October 4, 2023 hearing.*

Again, assuming only for purposes of Employee's appeal from Setzer's order and the panel's order at hearing, that a Division staff person gave him bad advice on how to serve his subpoenas, or even assuming for the same purposes that Employee misunderstood her advice, it would make no difference. The witnesses' testimony is not relevant to the issue before the panel. Therefore, even had Division staff given him perfect advice about subpoena service, the witnesses would be

precluded from testifying at hearing because their testimony is irrelevant. AS 44.62.460(d). Moreover, Johnson told him how to properly serve the subpoenas.

> *(12) The prehearing conference designee falsified facts by stating "Employee contended he never authorized his third-party attorneys to settle his case," when in reality he contends he "did not nor has he ever alluded that his attorneys 'settled his case without his permission.'" To make his position clear, Employee stated, "for the record, there was never any settlement agreement. There was no settlement agreement at all."*

Employee's position on the third-party settlement, or in his view the lack thereof, is repeated frequently and is well understood. Assuming only for purposes of Employer's petition that Employee is correct on all his allegations about the third-party suit never being settled, it would make no difference in the instant case. This panel has no authority to overrule Judge Aarseth's decision finding and enforcing a third-party settlement. *AKPIRG.*

> *(13) There was collusion between Employer and the third-party defendants, which "all parties hid from the Superior Court and the board." "These parties and their counsel" have been "dishonest" and committed "fraud upon the court."*

It is unclear to what "collusion" Employee refers. But, to the extent anyone has committed "fraud upon the court," that is an issue for Employee to take before the court, which has jurisdiction over such things. *AKPIRG.* In the event the Superior Court issues an order affecting the instant matter, this panel will abide by such relevant order.

> *(14) Judge Matthews' "no settlement" order still stands as does his order staying the October 21, 2020 hearing.*

Employee is incorrect; the Alaska Supreme Court on May 12, 2023, in *BBFM Engineers, Inc*., expressly stated, "The order granting McDonald's Civil Rule 60(b) motion for relief from judgment is REVERSED." "'Reversed'" means that the judgment is annulled or vacated." In other words, "the case is put in the same posture in which it was before the judgment was entered." *Shilts*. As Employer contended in its brief and Employee conceded in his October 2, 2023 petition, "the Supreme Court's ruling ultimately put Judge Aarseth's original decision back into place. . . ." Therefore, Judge Matthews reversed order is of no force or effect.

Employee is also incorrect about the current status of Judge Matthews' October 20, 2020 order staying a prior hearing on Employer's previous petition to dismiss under §015(h). Judge Matthews' order expressly stated it was in effect "until such time as this Court issues its ruling on whether a settlement agreement exists in this case." On January 25, 2021, Judge Matthews granted Employee's motion to vacate Judge Aarseth's August 13, 2019 decision enforcing the settlement agreement. Therefore, Judge Matthews' October 20, 2020 order expired on January 25, 2021. The previous stay order is of no force or effect. Judge Matthews did not stay the instant hearing.

G) Employee made his case on October 4, 2023.

Employee at hearing had an opportunity to make his case. He, with Johnson's assistance, reiterated many of the same arguments made previously. Only when they became disruptive did they lose their opportunity to continue arguing Employee's case unabated, and they eventually ended their opportunity by leaving the hearing voluntarily. Given all the above, Employee's contention that the Division or the panel denied his right to due process and for an opportunity to be heard and his evidence and arguments fairly considered, has no merit. Based upon the above analyses, Setzer's September 29, 2023 ruling quashing subpoenas will be affirmed, *solely* because the proffered witnesses for whom the designee quashed the subpoenas had no relevant testimony for the issue decided here. Likewise, Employee's October 2, 2023 petition to continue the hearing and his oral request made at hearing for a continuance were also properly denied. Employee's request to call irrelevant witnesses at hearing was correctly denied. AS 44.62.460(d).

**3)Should Employee's claims be dismissed under AS 23.30.015(h)?**

Employer contends Employee, the person entitled to compensation under the Act, or his representative, compromised with third-parties in Superior Court case No. 3AN-16-07620 (Civil), in an amount less than the compensation to which Employee would be entitled, without Employer's written approval. Consequently, Employer contends it is no longer liable for compensation under the Act pursuant to §015(h). It seeks an order dismissing Employee's workers' compensation claims. Employee opposes dismissal on numerous grounds, but primarily on his adamant assertion that neither he nor his attorneys ever settled his third-party case and on other grounds that this panel lacks jurisdiction to address, as discussed above. *AKPIRG*.

Employer bears the burden of proving its contentions. The elements Employer must prove under §015(h) include (1) a compromise with a third-person was made; (2) by Employee or his representative; (3) in an amount less than the compensation to which Employee or his representative would be entitled; and (4) without Employer's written approval.

As alluded to above, based upon the evidence provided including an email from Employee's former lawyer, Judge Aarseth on August 13, 2019, found the "existence of a valid offer encompassing all essential terms, unequivocal acceptance by the offerees, consideration, and an intent to be bound." Consequently, Judge Aarseth enforced "the settlement agreement" between the "named parties" Eric McDonald, Architects Alaska, Inc., and BBFM Engineers, Inc. He concluded, "IT IS HEREBY ORDERED that this action shall be dismissed with prejudice, each party to bear its own costs and attorney fees." This satisfies element (1).

Judge Aarseth's August 13, 2019 order also satisfies element (2). He based his order primarily on an email sent by Employee's former attorney, and on the two third-party defendants' attorneys' emails accepting what Judge Aarseth found was a valid contract.

On October 6, 2020, Employee testified and conceded at a prior hearing that there was no money exchanged as part of the settlement agreement but acknowledged his extensive legal research showed "there doesn't need to be any money exchanged if the employee dismisses the case without the employer's permission." He also conceded "they [Employer] do have a lien," which he estimated was between "$400,000 to $500,000" for "meaningful care." While Employee understated Employer's lien, which now well over $1.0 million, his testimony satisfies element (3) under §015(h), because zero dollars is less than Employer's lien.

That leaves element (4): Did Employer or its agents or representatives give written approval for the walk-away settlement that Judge Aarseth found and enforced? Employee conceded in briefing that he never asked for approval, based upon his adamant assertion that he never settled his case. His agency file does disclose any written authority from Employer or its agents or representatives consenting to or approving the settlement that Judge Aarseth eventually enforced. Employee evaded, but reluctantly admitted at the October 3, 2023 hearing that he had no such evidence.

Adjuster Cupoli testified she sent Employee's former third-party case attorney Stone a lien notice in December 2014. On January 17, 2019 and March 14, 2019, Cupoli sent to Employee's subsequent third-party attorneys at Ehrhardt, Kelley & Cooley, "as previously communicated," an "updated" notice of Employer's lien, then $1,064,490.69 and $1,075,787.29, respectively. On August 15, 2023, she provided an affidavit stating from 2014 through 2020, she was the claims recovery agent for Employer's insurer. Cupoli testified by affidavit that she was responsible for Employee's subrogation issues from June 3, 2014, through August 13, 2019, the date Judge Aarseth enforced the walk-away settlement agreement. She provided notice of a workers' compensation lien to Employee and his third-party attorneys. Cupoli said, "I never provided written approval for Mr. McDonald to settle his third-party case for an amount less than our lien."

At hearing on October 4, 2023, Cupoli reiterated her affidavit testimony, and added that no one else on Employer's behalf gave written authority for any settlement either. Her January 17, 2019 and March 14, 2019 letters, August 15, 2023 affidavit and her hearing testimony were all credible and are given significant weight. AS 23.30.122; *Smith*. The lack of a written document showing Employer, or its agents or representatives, provided written approval for the walk-away settlement Judge Aarseth found and enforced, coupled with Cupoli's credible hearing testimony and her written documents, satisfy element (4) under §015(h). Employer met its burden. *Saxton*.

The above analyses address all bases Employee presented to defer action on Employer's petition to dismiss, or to deny it. None have any merit. Given the facts and law as analyzed in this decision, Employer and its insurer are no longer liable for compensation under the Act pursuant to §015(h) for Employee's injury, and consequently, his claims will be dismissed.

## CONCLUSIONS OF LAW

1) The oral order denying Employee's continuance request was correct.
2) The prehearing conference designee's order quashing Employee's subpoenas, and the oral order at hearing disallowing Employee's witnesses' testimony were correct.
3) Employee's claims will be dismissed under AS 23.30.015(h).

## ORDER

1) Employer is no longer liable for any benefits for Employee's work injury with Employer.
2) Employee's claims are dismissed.

Dated in Anchorage, Alaska on October 24, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Mark Sayampanathan, Member

/s
Anthony Ladd, Member

## APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

## 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 Final Decision and Order in the matter of Eric Mcdonald, employee / claimant v. Rock & Dirt Environmental, Inc., employer; Ins. Co. of the State of Pennsylvania, insurer / defendants; Case No. 201410268M, 201410610J; 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 October 24, 2023.

/s

Rachel Story, Law Office Assistant I