ALASKA WORKERS' COMPENSATION BOARD

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

ELIZABETH ANN HARMON, Employee, Respondent, v. SOUTHCENTRAL FOUNDATION, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Petitioners.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202128065 AWCB Decision No. 24-0063 Filed with AWCB Anchorage, Alaska on November 13, 2024

Southcentral Foundation's (Employer's) August 23, 2024 petition to strike was heard on November 12, 2024, in Anchorage, Alaska, a date selected on October 1, 2024. A September 13, 2024 hearing request gave rise to this hearing. Non-attorney Elizabeth Harmon (Employee) appeared by Zoom, testified briefly and represented herself. Attorney Martha Tansik appeared and represented Employer and its insurer. The record closed at the hearing's conclusion on November 12, 2024.

ISSUE

It is undisputed that Employee filed non-medical records, and medical records including her hand-written notes and other marks, on her August 13, 2024 medical summary. Employer seeks an order striking the medical summary in its entirety from the record. It further said it had requested

clean records from the medical providers listed on the medical summary and will file and serve them upon receipt on its own medical summary.

Employee admitted she filed non-medical records on her medical summary and annotated some medical records for clarity and emphasis. She contends the non-medical records are relevant and important to her case. Employee further contends she is not an attorney, and markings on some medical records were her effort to highlight important portions for the fact-finders' review. Nevertheless, if Employer "won" on this issue, she would comply with the panel's order.

Should Employer's petition to strike records be granted?

FINDINGS OF FACT

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

1) The first confirmed Covid-19 case in the United States occurred on or about January 19, 2020. (Experience; observations).

2) On November 23, 2020, in case 202014066 Employee, while working for Employer, said she was with patients and coworkers who were "positive" for Covid-19. Thereafter, she too tested "positive." (First Report of Injury, December 4, 2020).

3) On November 4, 2021, Employee said she had a scratchy throat that worsened that night. The next day, Employee tested "positive" for Covid-19 for the second time. (First Report of Injury, November 11, 2021).

4) On June 28, 2022, Jared Kirkham, MD, physiatrist, reviewed her past medical records and examined Employee for an employer's medical evaluation (EME). From Employee's history, Dr. Kirkham identified in a March 5, 2020 note, "chronic fatigue" where Employee said she had "daily tiredness, not wanting to get up in the morning." He also identified "chronic stomach pain" recorded in a February 15, 2020 note, "GERD" [gastroesophageal reflux disease] for which she took medication as charted in a July 2, 2020 note, "anemia" reported in a June 3, 2020 note, and "anxiety and psychological stress" stated in a March 6, 2020 note. Dr. Kirkham cited from the latter, "Mother passed away from cancer four months ago. . . . Unexpected death of other family members." From the same note he recorded Employee had "daily anxiousness." He cited from an April 1, 2020 note that Employee was having, "Increasing psychological stress due to COVID.

. . . Panic attacks throughout the day. . . . Fogginess, headaches, and fatigue. . . . Feeling overwhelmed and does not feel safe at work due to fear around exposure to COVID." Employee's November 18, 2020 note indicated, just prior to her first reported "positive" Covid test, "a lot of stress." (Kirkham report, June 28, 2022).

5) Employee reportedly told Dr. Kirkham she had mild symptoms from her first Covid exposure, but she recovered. However, she was "so traumatized" that she "was literally going to quit work." Dr. Kirkham reviewed subsequent medical records, including her second Covid diagnosis, in detail. For example, he reviewed Employee's pulmonary function tests from April 13, 2022, and opined they were "similar" to values from a pre-Covid test she took on June 13, 2019. Dr. Kirkham also reviewed Employee's behavioral health notes. Employee shared a host of complaints with Dr. Kirkham. (Kirkham report, June 28, 2022).

6) Dr. Kirkham diagnosed (1) workplace exposure to Covid-19, resolved with no residual objective findings; (2) multiple somatic complaints without clear physiologic etiology; (3) profound psychosocial influence on her ongoing symptoms, with anxiety, disability conviction, passive coping style and poor improvement expectations; (4) history of chronic pain, severe asthma, stomach pain, chronic fatigue, GERD, anemia, anxiety and psychological stress, all predating her initial November 20, 2020 "positive" Covid-19 diagnosis. (Kirkham report, June 28, 2022).

7) Given this, Dr. Kirkham opined "there is no evidence of residual effects from her COVID infections." "On a more probable than not basis, the majority of her multiple somatic complaints is substantially caused by psychosocial factors." He opined her GERD, which she treats with daily omeprazole, is "the most likely cause of her chronic gastritis and gastrointestinal metaplasia." Moreover, Dr. Kirkham said her recent pulmonary function tests were not "significantly different" than her pre-Covid tests. (Kirkham report, June 28, 2022).

8) Dr. Kirkham referred to 2020 medical literature showing a "significant psychological component to persistent symptoms after COVID-19 infections." One such study found persistent symptoms after Covid-19 infection were more associated "with the belief in having been infected with COVID-19 rather than having laboratory confirmed COVID-19 infection." Dr. Kirkham further stated, "Long Covid is also heavily publicized in the lay press[,] and this has the potential to create negative cognitive priming, meaning that increased attention to long Covid may enhance an individual's perceived intensity of their symptoms." (Kirkham report, June 28, 2022).

9) Dr. Kirkham also responded to specific questions. (Kirkham report, June 28, 2022).

10) On July 6, 2022, Employer's adjuster denied Employee's right to temporary total, temporary partial, permanent total disability, vocational rehabilitation and permanent impairment benefits exceeding zero percent and ongoing medical treatment beyond July 6, 2022, arising from the November 4, 2021 work injury. Employer based this denial on Dr. Kirkham's June 28, 2022 report. (Controversion Notice, July 6, 2022).

11) On June 25, 2024, Employee filed with the Division the first page of her claim. For reasons unclear from the agency file, the Division received only the first page. The last words on the page the Division received on this date are in Block #19, under paragraph "2" where Employee was listing her symptoms and ends with the following: "It hurts and makes me. . . ." (Agency file: Judicial, Party Actions, Claim tabs, June 25, 2024).

12) On July 12, 2024, Employee emailed the Division her three-page claim; the only box checked requested an unfair or frivolous controversion finding. (Claim for Workers' Compensation Benefits, July 12, 2024).

13) On August 5, 2024, Employer responded to Employee's claim and denied unreasonable, unnecessary or unrelated medical costs, and her request for an unfair and frivolous controversion finding. It asserted affirmative defenses including reliance on Dr. Kirkham's EME report to support its controversion, an AS 23.30.105 defense against disability and impairment benefits stating the claim came more than two years after its controversion and last benefit payment, and said its controversions were made in good faith and supported by evidence. (Employer's Answer to Employee's Workers' Compensation Claim Filed July 12, 2024, August 5, 2024).

14) On August 5, 2024, Employer also controverted Employee's claim on the same grounds stated in his July 6, 2022 controversion. Tansik served this notice on Employee by mail on this same date. (Controversion Notice, August 5, 2024).

15) Not including August 5, 2024, two years from that date is August 6, 2026. Adding three days to that period because Tansik served the controversion on Employee by mail is August 9, 2026, which is a Sunday. The next day, which is neither a Sunday nor a holiday, is August 10, 2026. (Experience; judgment; observations).

16) On August 13, 2024, Employee filed and hand-served on Employer a 159-page Medical Summary. Attached to the summary was a text message from the Workers' Compensation Division (Division) demonstrating that she had filed something on time; several medical journal

articles regarding Long Covid-19; and Employee's medical records, some with hand-written marks and annotations. (Medical Summary, August 13, 2024).

17) On August 23, 2024, Employer petitioned for an order striking documents from Employee's August 13, 2024 medical summary. It contended non-medical documents including "journal entries" do not belong on a medical summary. It further requested an order removing medical records containing Employee's hand-written notations from the summary, or at least redacting those annotations. (Petition, August 23, 2024).

18) On October 22, 2024, Employee filed an email entitled "Brief & Evidence." In it, she asked if she had to send this document to Tansik. It is unclear from the file if Employee ever received a response from the Division, or if she ever served a copy on Tansik. Her email states:

> I am addressing the board about the petition to strike certain documents contained in my medical summary on 08/13/2024.
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> I absolutely do not agree with this petition, because in these documents is the diagnosis in which I was finally given. Information on what was happening to me, my condition, and why I was unable to return to work, and why I feel that the South-Central Foundation Worker's Comp. insurance company dropped me too soon before I was fully diagnosed.
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> Like I said, these documents that I submitted, (which most are my medical documents and some are not) but all very important, and have vital information about my condition that is believed to have derived from having Covid and got worse after having Covid the second time. To the point where I was not able to return to work like they said that I could.
>
> Which actually leads us to the situation that we're in at this very moment.
>
> Included in these other documents are medical studies that have very important information about Covid and things that it does and causes to the human body. These are also very important because this is information that was unknown to everyone at the time and most are just coming to light now. Information that directly pertains to my case in one form or another.
>
> So in my defense I believe that all the documents that I have submitted tie directly in with my case and medical situation.
>
> I also have pictures upon pictures upon pictures, not to mention audio that also pertain to my diagnosis of Ulcerative Colitis. That I can submit at any time, and want to make sure that option stays open.

> Please keep in mind that I am not a lawyer and I am not sure if I have done this correctly or not! But all of this legal, in accordance with, memorandum, numbers, form this, file this, mumbo jumbo is way out of my league. Not to mention my next to nothing memory these days.
>
> I am sending this today, but would like to leave this open until 10/25/2024 & 11/06/2024 for revisal in case I have evidence or other information to include. (Email, October 22, 2024).

19) On October 25, 2024, Employee filed her brief:

> I am addressing the board about the petition to strike certain documents contained in the medical summary that I submitted on 08/13/2024.
>
> I am against this petition because the information gathered and submitted are from prestigious medical study facilities, such as The National Library of Medicine, Harvard Health Publishing, Yale Medicine, Science Direct, and The University of Oklahoma.
>
> The information from these are vital to my case as they show what covid 19 can and has done to hundreds/thousands of people, like myself. People of all ages, and ethnicities. These are things that are just now coming to light, things that in the past doctors could not have known about or put a covid connection to them.
>
> So yes, these are extremely valid and vital to my case. You could even say that it is evidence, and I submit them as so.
>
> As far as the handwritten annotations and journal entries, I also believe that those are very important because who has first hand at how things took place with me and my body, who knows me better then [sic] me and what was happening to my body and when?
>
> I have always been my own advocate, and in tune with my body. The journal entries/annotations are simply a guide, a road map if you will. All of the medical information is already there, I simply drew the map in and highlighted important information about what was happening and when. Information that is vital to my case.
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> If I happened to add anything in it is because there was a typo or they, (the doctors) don't always write or say what was actually said, but instead write their version/opinion and not the patients. Which is fine too, (because I know that's part of what you're after), but my opinion is just as important!
>
> It is vital and important to have All the information to be able to come to an informed decision.

> Basically, I believe it all to be evidence. So, you have the Medical Studies, (Evidence), Dr. Opinions, (Evidence), and My Opinions, (Also Evidence).
>
> So, I do not agree to this petition, because the documents show and add vital information that are tied directly to my case, my condition, & my diagnosis as to why I was still unable to go back to work when I was dropped. (Email, October 25, 2024).

20) On November 6, 2024, Employer contended non-medical documents and tainted medical records "cannot be allowed to remain on the medical summary in the manner they are, as a medical summary serves a specific purpose as part of the evidence record." It contended Employee should be educated on how to use a "Notice of Intent to Rely" form upon which she can file her non-medical documents. Employer stated it recently requested Employee's medical records from the providers listed on the subject medical summary and, upon receipt, it will file and serve those records as "clean" copies. It fears the medical records Employee "tainted" with her editorial comments and annotations may improperly influence the decision-makers or a second independent medical evaluation (SIME) physician. Employer suggests "every record is altered," but specified dozens with which it has particular concerns. As support for its position, Employer cited *Wilson*, *Mitchell*, *Clark* and *Carey* Board decisions. (Employer's Hearing Brief, November 6, 2024).

21) At hearing on November 12, 2024, Employer reiterated and summarized its position from its previous filings. (Record).

22) At hearing, Employee testified that she is not an attorney and does not know how to do all the things necessary to prosecute her claim. She did the best she could and wanted to make sure that the Board panel hearing her case saw the medical journal entries she submitted on a medical summary; she was uncertain if she would have a chance to elaborate later. Employee confirmed she added "BH" next to a provider's name for the "Behavioral Health" clinic, on which she had also circled the clinic's name on the same reports. Nevertheless, she said if Employer "won" on this issue, she would abide by the panel's decision and would be "fine with it." (Record).

23) The designated chair gave Employee basic information about filing and serving documents on Employer's counsel, where to find useful forms on the Division's website, and advised her to ask the prehearing conference designee questions or call Division offices to speak with a technician if she had any questions. The Division's statutes and regulations can be daunting. (Record; experience; observations).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
> > . . . .
> >
> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and . . . all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

In *Richard v. Fireman's Fund*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court said:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

Bohlmann v. Alaska Construction & Engineering, 205 P.2d 316, 319-21 (Alaska 2009) addressed this same issue and said:

> In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation. We have not considered the extent of the board's duty to advise claimants. . . .
> . . . .
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> Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion. . . .

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When

> determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> (b) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

The Board may base its decision not only on direct testimony and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
>
> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .
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> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. . . .

> . . . .
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> (h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

In *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114, 1119 (Alaska 1994), the Division never advised the injured worker that she had a right to request an SIME. *Dwight* said this omission was reversible error because it affected the case's possible outcome. It further noted, "The Board's error was a violation of a statutory duty mandatory in form." *Dwight* added:

> We hold that (1) in every case the Board is required to give the parties notice of their right to request and obtain a SIME under AS 23.30.095(k) in the event of a medical dispute. . . .
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> **AS 23.30.110. Procedure on claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board . . . and the board may hear and determine all questions in respect to the claim.
> . . . .
>
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.
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> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . .

AS 23.30.185. Compensation for temporary total disability. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.190. Compensation for permanent partial impairment; rating guides. (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent.

(c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. . . .

AS 23.30.200. Temporary partial disability. (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability. . . .

AS 23.30.395. Definitions. In this chapter,
. . . .

(16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

8 AAC 45.020. Transaction of business. . . .

(c) Papers and documents may be filed in person at any of the division's offices, by mail, by facsimile transmission, or by electronic mail.

(d) Papers and documents filed by . . . electronic mail must be in compliance with the following:

(1) a party may file a document by electronic mail with the division or the board by sending the document, as an attachment, to the division's electronic mail

address or by facsimile transmission, except that a party may file a reemployment benefits administrator document by electronic mail with the reemployment benefits administrator by sending the document, as an attachment, to the administrator's electronic mail address or by facsimile transmission;

(2) a document
. . . .

(B) electronically mailed to the division, board, or administrator in an electronic mail submission may not exceed 10 megabytes (MB);
(C) electronically mailed to the division, board, or administrator for filing must be sent as attachments in .pdf format;

(3) the filing party must attach proof of service as required by 8 AAC 45.060 by including it on, or attaching it to, the filed document;

(4) filing of a document by
. . . .
(B) electronic mail with the division or the board is considered complete upon receipt of the entire document at the division's electronic mail address;
(C) electronic mail with the administrator is considered complete upon receipt of the entire document at the administrator's electronic mail address;

(5) a document is considered filed upon receipt unless received on a Saturday, Sunday, a day the board is closed due to a state-recognized closure, or after 5:00 p.m. Alaska time; if the document is filed on a Saturday, Sunday, a day the board is closed due to a state-recognized closure, or after 5:00 p.m. Alaska time, the filing date will be the next working day;

(6) the division, the board, and the administrator are not responsible for verifying that documents filed electronically are received correctly, that all pages were transmitted, that the document is legible, or that receipt was correct in any other respect; the division, the board, and the administrator are not responsible for technological problems that may occur as a party tries to transmit documents electronically; electronic mail that is identified as having a virus will be deleted immediately, the filing party will be informed by the division, and a document attached to the electronic mail will be considered rejected;

(7) original documents of all electronically filed pleadings must be kept by the party to resolve questions pertaining to authenticity; follow-up originals may not be filed, electronically or otherwise, unless specifically ordered by the board, division, or administrator;

(8) a party filing documents by electronic mail must include in the subject line of the transmitting message

(A) the division's case number for the attached documents; and
(B) a brief description of the documents to be filed;

(9) a party filing documents by facsimile must include a cover sheet with the division's case number and identify the documents to be filed;

(10) the party may not provide extraneous narrative or explanation in the body of the transmitting electronic mail message or on the facsimile cover sheet; information in the electronic mail message or on the facsimile cover sheet is limited to the case name, case number, title of each document that is attached for filing, and the number of pages to be filed;

(11) permission to deviate from the process under this subsection may only be granted for good cause by order of the designee assigned to the case;

(12) failure to adhere to the process under this subsection may result in rejection of the submitted documents.

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,

(1) a claim is a written request for benefits, including compensation, attorney fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits. . . .

(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; . . .
. . . .

(5) a separate claim must be filed for each injury for which benefits are claimed regardless of whether the employer is the same in each case;
. . . .

(e) A pleading may be amended at any time before award upon such terms as the board or its designee directs. . . .

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

8 AAC 45.060. Service. (a) The board will serve a copy of the claim by certified mail, return receipt requested, upon each party or the party's representative of record.

(b) A party may file a document with the board . . . personally, by mail, or by electronic filing through facsimile transmission or electronic mail in compliance with 8 AAC 45.020(d). Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done personally, by facsimile, by electronic mail, or by mail, in accordance with due process. Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

(c) A party shall file proof of service with the board. Proof of service may be made by

(1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party;

(2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or

(3) letter of transmittal if served by mail.

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. . . .

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues;

(2) amending the papers filed or the filing of additional papers;

. . . .

(15) other matters that may aid in the disposition of the case.

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

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request. . . .

8 AAC 45.070. Hearings. . . .

(b) . . . [A] hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee. . . . The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing. . . .

8 AAC 45.092. Second independent medical evaluation. (a) The board will maintain a list of physicians' names for second independent medical evaluations. The names will be listed in categories based on the physician's designation of specialty or particular type of practice and the geographic location of the physician's practice.
. . . .

(g) If there exists a medical dispute under AS 23.30.095(k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and
(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

> (ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;
>
> (2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

8 AAC 45.120. Evidence. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the documents author is filed with the board and served upon all parties at least 10 days before the hearing. . . .
. . . .

(*l*) Unless a genuine question is raised as to the authenticity of the original or, in the circumstances, it would be unfair to admit the duplicate in place of the original, a duplicate is admissible in accordance with this section to the same extent as an original.

> (1) For purposes of this subsection, a duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent techniques that accurately reproduce the original.
>
> (2) The following duplicates are admissible to the same extent as an original:
>
> > (A) duplicates of medical reports or records of any governmental agency. . . .

Wilson v. Eastside Carpet Co., AWCB Dec. No. 09-0029 (February 10, 2009) addressed the injured worker's two-page letter to a physician, and if that document should be included in the medical records sent to an SIME physician under §041(k). *Wilson* determined that while in some cases non-medical documents may be sent to an SIME physician, the letter in question, though clearly not a medical record, would not advance the SIME physician's understanding. The Board granted the employer's request to strike the letter from the SIME records.

Mitchell v. United Parcel Service, AWCB Dec. No. 14-0049 (April 7, 2014) pointed out pitfalls when a party improperly files documents or adds inappropriate comments. It educated the claimant about filing unaltered documents in the future, and where and when to make his arguments. But *Mitchell* also relaxed procedural requirements for the subject documents stating, "the panel can easily examine the documents' contents while ignoring the annotations," and can distinguish improper annotations from the facts.

Patterson v. Matanuska-Susitna Borough School District, AWCB Dec. No. 18-0005 (January 12, 2018), addressed an employer's contention that documentary evidence that included hearsay, editorial comments, marginality, interlineation or was otherwise employee-altered should be stricken. Rather than strike the evidence, *Patterson* decided to address each document on an individual basis at a merits hearing.

Clark v. Kenaitze Indian Tribe, AWCB Dec. No. 23-0064 (November 7, 2023) addressed an employer's request to strike medical records on which the employee made "alterations" including highlighting, bracketing or circling information on numerous pages. On some pages, the employee had added marginality intended to correct errors she perceived in the records. The employer contended the alterations would improperly influence the decision-makers or an SIME physician, thus prejudicing the employer. The claimant contended she did not have unaltered medical records and, since she gave the employer a medical release, it could obtain clean copies at minimal cost. She further contended the alterations were minimal and meaningless and would not alter either decision-makers' or an SIME physician's opinions. *Clark* noted, "Either party could have obtained, filed and served a copy of the 35 pages of medical records in dispute at a fraction of the cost to litigate this issue." It further educated the claimant on where and when to make her legal

arguments, which do not belong on medical records. However, relying on *Mitchell*, and considering the employer's argument regarding those records showing up in an SIME record binder, *Clark* stated, "it would not be quick or efficient to strike the altered medical records and require employee to obtain, re-file and serve unaltered pages in this case when the alterations are of negligible influence and employer will not be prejudiced by their inclusion in the record." The Board denied the employer's petition to strike.

Carey v. VECO, Inc., AWCB Dec. No. 14-0101 (July 29, 2014), addressed a claimant who had filed non-medical evidence, such as photographs, on medical summaries. The worker had "repeatedly been advised how to properly file and serve non-medical documents," but continued to "struggle with this concept." *Carey* educated her again how to use the Division's website to obtain forms such as the "Notice of Intent to Rely" on which to file her non-medical evidence. *Carey* directed the claimant to use that form or her home-made equivalent "from this point forward." The Board did not strike any documents from the file.

ANALYSIS

Should Employer's petition to strike records be granted?

A) Employer's petition to strike.

A party's right to examine, cross-examine or impeach witnesses, and rebut contrary evidence, in some instances may be compromised when otherwise self-authenticating and admissible exhibits contain handwritten annotations, as did several medical records Employee submitted. In some cases, altered or tainted documents may disrupt orderly processes and procedures when a party's annotations, editorial comments and arguments are interspersed on documentary evidence rather than confined to legal memoranda and oral argument, where they belong. For these reasons the marginalia and other marks contained on Employee's medical records were inappropriate.

On the other hand, the majority of marks Employee placed on her medical records were underlining, brackets or circles around providers' names or clinics, which neither added to nor detracted from the medical record. In some instances, she added abbreviations that signified the specialty for the physician or clinic; for example, she added "BH" next to a provider's name for

the "Behavioral Health" clinic, on which she also circled the clinic's name on the same report. These markings are redundant and unnecessary. In one instance, Employee editorialized a record to highlight medical conditions she contends she had before, during and after her work exposure for Employer. This too was unnecessary, as she will have a full opportunity at a merits hearing to testify and explain this same information. AS 23.30.001(4).

Frequently, procedural requirements are relaxed for self-represented litigants. In this instance, the fact-finders can easily examine the documents' contents while ignoring improper marks and annotations, and can distinguish irrelevant, repetitious and hearsay statements from facts or evidence offered at hearing. *Mitchell*. Employer provided no evidence or convincing argument suggesting the marks or comments were prejudicial to its case. Moreover, it would not be "quick" or "efficient" to require Employee to refile all the subject documents. AS 23.30.001(1); *Clark*. Employer already stated it has requested a clean copy of the disputed medical records and will file them on its own medical summary.

Moreover, cases Employer cited do not support its position. In no relevant case did a panel strike medical records or other documents improperly filed. *Mitchell*, *Clark* and *Carey* struck no records from the claimants' files. *Wilson* granted the employer's request to strike an employee's letter to his physician from SIME records. However, there is no SIME currently pending in this case; if an SIME becomes a reality, only "clean" medical records will go to the SIME physician. In a similar case to Employee's, *Patterson* declined an employer's invitation to strike records but decided to address each document individually at a merits hearing. Therefore, Employer's petition to strike the offending medical records, or redact and resubmit them, will be denied.

B) The panel's duty to inform Employee.

The Division has a duty of "fully advising" Employee "as to all the real facts which bear upon" her claim, to "assist" her by "advising" her "of the important facts" of Employee's case "and instructing her" how to "pursue" her right to compensation. In most instances, this should and does happen at a prehearing conference where the designee fulfills his or her role to "identify and simplify the issues," "amend" papers and handle "other matters that may aid in the disposition of

the case." *Richard*; *Bohlmann*; 8 AAC 45.065(1), (2), (15). This decision will provide general information to assist Employee as required:

Employee is advised that should she file additional medical summaries with medical records attached, she should not place any marks on those records. 8 AAC 45 120(*l*); *Richard*; *Bohlmann*. In fact, she has an ongoing duty to file medical records on medical summaries, as she obtains new records. AS 23.30.095(h); 8 AAC 45.052(a). If Employee wants to file non-medical evidence, she should use either a simple transmittal letter, or the "Notice of Intent to Rely" form available on the Division's website, under "Forms" on the menu. In both cases, Employee is reminded to serve a copy of any documents she files with the Division on Tansik with proof of how, and the date on which, she served them (with exception of an amended claim, which the Division will serve). 8 AAC 45.060(a), (b), (c)(1)-(3). Failure to serve documents with proof of service may result in Employee's documents not being considered as evidence at hearing. She is further directed to review 8 AAC 45.020 when filing documents with the Division. Though the electronic filing regulation is rather daunting, if Employee chooses to use it she must follow it carefully or risk that her filings may not be considered. 8 AAC 45.020(c), (d)(1)-(12); *Rogers & Babler*.

Hearings must provide parties due process and an opportunity to be heard and for their arguments and evidence to be fairly considered. AS 23.30.001(4). In conducting a hearing, fact-finders are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as specifically provided in the Alaska Workers' Compensation Act (Act) and its implementing regulations. 8 AAC 45.120(e).

To ensure a fair hearing, all parties have a right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter, impeach witnesses and rebut contrary evidence. 8 AAC 45.120(e). Documents submitted 20 days or more before hearing will, in the panel's discretion, be relied upon in reaching a decision. 8 AAC 45.120(f). However, this rule does not pertain to medical records, which must follow a different procedure using a medical summary. 8 AAC 45.052(a). Documents Employee files with the Division must include proof of service on Tansik and she must serve them on the date stated in that proof. 8 AAC 45.060(a), (b), (c)(1)-(3). All relevant evidence is admissible if it is the sort of evidence on which responsible

persons are accustomed to rely in the conduct of serious affairs. 8 AAC 45.120(e). Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is insufficient alone to support a factual finding under most circumstances. *Id.*

Employee used a Division form to file her claim, which is the preferred method. However, although she included a lengthy narrative, Employee did not check any boxes on the form disclosing the benefits she was seeking, if any. The claim form is designed to provide non-attorney claimants an easy way to identify benefits claimed. Currently, it is unknown precisely what benefits Employee is claiming or for what time periods. AS 23.30.110(a). She is directed to file an amended claim without lengthy narrative, but with appropriate benefit boxes checked. 8 AAC 45.050(a), (b)(1)-(2), (5), (e); *Richard*; *Bohlmann*. Prehearing conferences are the parties' opportunity to clarify issues and defenses, and provide greater detail if needed for an eventual merits hearing. Proper issue identification on claim forms and clarifications at prehearing conferences will inform both parties about the benefits Employee is seeking, and the defenses Employer raises to them. This allows each party to determine the evidence they need to present at a hearing to either make Employee's case or defend against it. 8 AAC 45.065(a)(1), (2), (15).

This decision in the "Principles of Law" section set forth potential benefits available to Employee, should she qualify for them. AS 23.30.041(c); AS 23.30.180(a); AS 23.30.185; AS 23.30.190(a)-(c); AS 23.30.200(a). She is directed to review these sections and if she believes she is entitled to one or more benefit, she is directed to file an amended claim and check the applicable boxes. The claim form is primarily intended to give notice of the benefits sought; a lengthy narrative on the claim form is unnecessary and frankly unhelpful. 8 AAC 45.050(e).

The Alaska Supreme Court held that the Division failed to properly notify an injured worker of her possible right to an SIME, "in every case." *Dwight*. Employee should review AS 23.30.095(k), the SIME statute above. If she believes her attending physicians disagree with Dr. Kirkham's EME report on any of the listed disputes, she may file a petition form (not a claim form) with the Division requesting an SIME, and file an SIME form with attached medical records showing the disputes, subject to Employer's defenses. 8 AAC 45.050(b)(2); 8 AAC 45.092(a), (g)(1)(A)-(B),

(2). A petition form and an SIME form are available on the Division's website on the menu under "Forms" for this purpose.

Under the Act, there is a difference between "physical" injuries and "mental" injuries. Employee's filings allege her second Covid-19 infection at work is the cause for her numerous "physical" ailments. Before a hearing on her claim's merits, she will need to file and serve medical evidence, including opinions from her own physicians, stating her Covid-19 infection at work was and still is "the substantial cause" of any past or future disability, impairment or need for treatment she is seeking to support her claim for "physical" symptoms. AS 23.30.010(a); *Richard*; *Bohlmann*.

Her filings also imply her Covid-19 exposure at work also caused or aggravated "mental health" issues such as anxiety and stress. This is where workers' compensation cases become more complicated and nuanced; clarity on Employee's part is needed. If she is contending her Covid-19 exposure at work caused or aggravated her mental health symptoms, Employee must prove her physical symptoms from Covid-19 exposure at work are "the substantial cause" of whatever mental health benefits she seeks, past and ongoing. AS 23.30.010(a); AS 23.30.395(16).

However, if she claims "stress" or "fear" of Covid-19, *i.e.*, "mental stress" while at work before she actually tested positive for it or mental stress associated with contracting it again, caused a "mental injury" by "mental stress," there is a different burden of proof she must meet. She is directed to the "mental injury caused by mental stress" statute §010(b), which requires among other things the work stress be the "predominant cause" of any mental injury. Employee should also note the other requirements set forth in that section. The point is that Employee's current claim does not clarify or specify her claims, which makes it difficult for Employer or this panel to understand exactly what she is seeking and why. She is directed to clarify this on her amended claim; she may choose to argue both injury types in the alternative. Whatever she chooses to claim, she must present medical opinions to support her positions. *Richard*; *Bohlmann*.

Lastly, Employee must be aware of the AS 23.30.110(c) statute of limitations in more than just general terms. Employer's July 6, 2022 controversion is irrelevant for §110(c) purposes; that controversion simply denied her "right" to benefits. For §110(c) purposes, Employer controverted

(denied) Employee's "claim" for benefits on August 5, 2024. According to the Controversion Notice, Tansik served that controversion on Employee by mail on that same date. Employee, therefore, has two years plus three added days because Tansik served the notice on her by mail, to either request a hearing on her claim, or ask for more time to request one. Not including August 5, 2024, two years from that date is August 6, 2026. 8 AAC 45.060(b). Three days from that date is Sunday, August 9, 2026. *Rogers & Babler*. By regulation the due date for her hearing request moves to August 10, 2026. 8 AAC 45.063 (a). She needs to ask the Division for a hearing and ask that one be scheduled, or request more time to do so, on or before August 10, 2026. Employee is advised that an SIME request by either party and an associated order for an SIME may extend the time she has to request a hearing.

When Employee has obtained all evidence to support her amended claim, and thinks she is fully ready to go to a hearing, she may request a hearing by filing an Affidavit of Readiness for Hearing form, found on the Division's website under "Forms." If for any reason the deadline date is drawing close and Employee cannot honestly swear that she is ready for hearing, she must file a petition with the Division seeking additional time to request a hearing be scheduled and giving her reasons for not yet being fully prepared. Failure to request a hearing timely or request more time to schedule a hearing may result in Employee's claims being denied. AS 23.30.110(c).

CONCLUSION OF LAW

Employer's petition to strike records will not be granted.

ORDER

1) Employer's August 23, 2024 petition to strike records and other documents is denied.
2) Employee is directed to proceed in her case in accordance with this decision.

Dated in Anchorage, Alaska on November 13, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Marc Stemp, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Elizabeth Ann Harmon, employee / respondent v. Southcentral Foundation, employer; Alaska National Insurance, insurer / petitioners; Case No. 202128065; 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 November 13, 2024.

/s/
Rochelle Comer, Workers' Compensation Technician