ALASKA WORKERS' COMPENSATION BOARD

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

JOHNNY NIE, Employee, Petitioner/Respondent, v. PETER PAN SEAFOOD COMPANY, LLC, Employer, and TOKIO MARINE AMERICA INSURANCE COMPANY, Insurer, Respondents/Petitioners.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202301076 AWCB Decision No. 25-0001 Filed with AWCB Anchorage, Alaska on January 10, 2025

Johnny Nie's (Employee's) October 12, 2024 petition filed on October 14, 2024, and Peter Pan Seafood Company's and its insurer's (Employer's) October 24, 2024 petition, were heard on January 8, 2025, in Anchorage, Alaska, a date selected on November 20, 2024. A November 20, 2024 hearing request gave rise to this hearing. Employee testified and represented himself. Attorney Jeffrey Holloway represented Employer. All participants appeared by Zoom. The record closed at the hearing's conclusion on January 8, 2025.

ISSUES

After some clarifying discussion at hearing, Employee said he seeks an order addressing Employer's request to cross-examine the authors of certain non-medical records, and his attending

physician on two specific medical records. He contends the request delays his claim and Employer had these records for months and could have done whatever it wanted to do sooner.

Employer did not understand the relief Employee sought in his petition, finding it "incoherent." Nonetheless, it seeks an order denying Employee's petition.

1) Shall Employee's documents be admitted over Employer's objection?

Employer's petition seeks a protective order against Employee's October 14, 2024 filing. It contends to the extent Employee seeks discovery, his requests are irrelevant, incoherent, harassing, annoying, and not in accord with applicable regulations. Further, Employer contends Employee has already stated in his October 4, 2024 affidavit that his discovery was complete. It contends Employee's discovery request should therefore be denied.

Employee did not file a hearing brief. But when asked at hearing what his position was on Employer's protective order petition, he stated that Employer continues to violate his rights and he should be able to continue to discover and file evidence at least until the discovery deadline closes, which he understood to be 30 days before a merits hearing.

2) Shall Employer's petition be remanded to the designee for a discovery ruling?

FINDINGS OF FACT

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

1) On October 30, 2022, Employee was reportedly working on the Black Cod gutting line for Employer when he heard a "pop" in his left wrist. (First Report of Injury, January 25, 2023).

2) On August 8, 2023, after Employee had failed conservative treatment, James Fait, MD, orthopedist, operated on Employee's left wrist. (Zahra Surgery Center, August 8, 2023).

3) On October 10, 2023, Dr. Fait saw Employee to perform a "Permanent and Stationary Evaluation (PR-4) by Primary Treating Physician." He used California workers' compensation forms or their equivalents to complete his examination and report. Dr. Fait directed his report to the "Claims Adjuster/Examiner" with Employee's claim number included, and addressed, "Issues of impairment, causation and apportionment. . . ." After reviewing Employee's history and

performing a physical examination, Dr. Fait diagnosed De Quervain's tenosynovitis in Employee's left wrist, and status-post first dorsal compartment release surgery on the left. Dr. Fait opined after reviewing Employee's history and medical records, "it appears that the patient did sustain an injury to left wrist arising out of and caused by the industrial exposure of 10/30/2022." Noting that additional treatment had "apparently" been denied and therapy discontinued, Dr. Fait also determined Employee had reached "maximum medical improvement" and "a permanent and stationary status." Relying upon the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, Fifth Edition and citing tables he thought were applicable, Dr. Fait provided a 10-percent whole-person permanent partial impairment (PPI) rating based on Employee's work injury, with no apportionment. He permanently precluded Employee from using power tools with his left arm and hand, and limited his left hand from repetitive or forceful gripping or grasping. Dr. Fait recommended additional treatment including physical therapy, oral anti-inflammatory medications and possible corticosteroid or platelet rich plasma injections. Included in the "Notes" section was the following:

> We also request consideration for the workers compensation unique work values, as supported by the ACOEM [American College Of Occupational & Environmental Medicine] recommendations, including assessment of causation, apportionment, work status, disability status, functional capacity, applicability of relevant treatment and or disability duration guidelines as well as coordination of care for the treatment of the work-related condition. (Fait report, October 10, 2023).

4) Without considering any weight or credibility assigned to his opinions therein, Dr. Fait's October 10, 2023 report looks like hundreds of routine reports from attending physicians and surgeons the panel has seen in workers' compensation cases over the decades. It bears no indications that it lacks trustworthiness or is not a genuine report from Dr. Fait's office. It is probable that Dr. Fait has issued similar reports as a regular part of his business as an orthopedic surgeon treating patients who have work-related injuries. (Experience; observations; and inferences drawn from the above).

5) On November 7, 2023, Employee requested temporary total and permanent total disability benefits, a compensation rate adjustment, claimed an unfair or frivolous controversion, requested a penalty for late-paid compensation, and sought interest. He also made "other" allegations against Employer including a "fraud" violation under AS 23.30.250. (Claim for Workers' Compensation Benefits, November 7, 2023).

6) On November 24, 2023, Employee amended his previous claim, but requested the same benefits. (Amended Claim for Workers Compensation Benefits, November 24, 2023).

7) On December 11, 2023, Employer, responding to both claims Employee filed, admitted temporary total disability benefits from February 4, 2023, through October 2, 2023. It denied all other requested benefits and sanctions. (Answer to Employee's Workers Compensation Claims, December 11, 2023).

8) On December 19, 2023, Employer filed and served Dr. Fait's October 10, 2023 report on a Medical Summary. (Medical Summary, December 19, 2023).

9) On May 14, 2024, Employee filed and served a Medical Summary without any records attached. Employee listed Dr. Fait's October 10, 2023 report. (Medical Summary, May 14, 2024).

10) On September 27, 2024, *Nie v. Peter Pan Seafood Co*., LLC, AWCB Dec. No 24-0053 (September 27, 2024) (*Nie I*), among other things, gave Employee the following advice:

> Alaska law at AS 23.30.190(b) requires physicians to use the *Guides* 6th Edition to rate permanent impairment. His California physician used the 5th Edition, which though standard in California, is not acceptable as evidence in this Alaska case. Employee should contact his physician and request a re-rating for his work injury, pursuant to the 6th Edition. If his physician declines or is unable to rate using the 6th Edition, Employee should request a written referral from his physician to another specialist familiar with rating his type of injury using the 6th Edition. Employee is directed to Division Bulletin 24-02 for specific information regarding the *Guides* "Sixth Edition 2023" version that must be used to rate any PPI. The Bulletin is cited in this decision and is available on the Division's website, workerscomp@alaska.gov, under "Bulletins" on the "Quick Links." Employee is reminded he can always consult with an attorney and or ask Division staff for additional information should he have any questions.

11) On October 1, 2024, Employee requested a hearing on his Amended November 24, 2023 claim in the wrong venue. (Affidavit of Readiness for Hearing (ARH), October 1, 2024).

12) On October 4, 2024, Employee filed an "Amended" ARH requesting a hearing on his Amended November 24, 2023 claim in the correct venue. (Amended ARH, October 4, 2024). In both ARHs, Employee stated, "Having first been duly sworn, I state that I have completed necessary discovery, obtained necessary evidence, and am fully prepared for a hearing on the issues set forth in the 11/24/2023" claim. (Observations).

13) On October 4, 2024, Employee also filed and served "Proof of Electronic Service" stating that on that date he served a copy of his "foregoing Claim & Master Set Evidence, and Declaration

Document" on Holloway. In his agency file, there is nothing attached to this document. (Proof of Electronic Service, October 4, 2024; observations).

14) On October 4, 2024, Employee's agency file contains only the aforementioned Amended ARH and the "Proof of Electronic Service" documents. The panel could find no other documents including emails that Employee filed on that date. (Agency file). At hearing on January 8, 2025, Employee stated those were the only two documents he filed on October 4, 2024. (Record).

15) On October 9, 2024, Employer timely requested to cross-examine authors of "various" documents including, "All emails, letters, reports, notes, and documents filed by Employee with AWCB on October 4, 2024." The request specifically included an October 10, 2023 document from James Fait, MD, referenced to "11/7/2023" and "12/19/23" medical summaries. (Request for Cross-Examination, October 9, 2024). Employee filed the November 7, 2023 Medical Summary; Employer filed the December 19, 2023 Medical Summary; Employee's summary lists but does not include Dr. Fait's October 10, 2023 report as an attachment. (Observations).

16) It appears from the agency file and from Employee's testimony at hearing that he served the "October 4, 2024" documents to which Employer objected, on Employer on October 4, 2024. While he may have filed those documents with the Division before or after October 4, 2024, there is no evidence in his agency file that he filed them with the Division on October 4, 2024. Employer apparently believed that he did. (Observations; Request for Cross-Examination, October 9, 2024).

17) On October 14, 2024, in a document dated October 12, 2024, Employee petitioned to "Continue or Cancel Hearing," and requested to "Deny Cross-Examination." Attached to his petition was the following explanation:

> In Respect to my injury, the only documents I filed with AWCB on October 4th was an Amended Affidavit Of Readiness Of Hearing, and a Gmail - Proof Of Electronic Service email. There were no other emails, letters, reports, notes, or documents filed. On October 4th, I forwarded Holloway my Declaration Document. I forwarded Holloway an WrittenAuthoryOriginal.Pdf, FraudulentWrittenauthority.pdf, and the PR-4 forms which blatantly shows the date I filed with AWCB on January 19th 2024, the exact same documents he already had since representing this case through the Insurer, I only sent him copies it. Furthermore I also forwarded my Claim and Master Set Documents, which clearly shows the date I filed those documents with AWCB on November 7th, 2023, and the staff-member responded on November 8th 2023. I forwarded it to Holloway to be sure He had copies, that was the second time I sent Him the Master Set Documents. Those same emails, letters, reports, notes, and documents were already received by Holloway since April 3rd 2024 under Discovery REQUEST FOR

> PRODUCTION OF DOCUMENTS, SET ONE "Production of Documents Set One, Production No.2:"; "Please produce copies of any and all CORRESPONDENCE sent to or received from any and all medical providers(as defined by AS 23.30.395(3) and (32)) by or on behalf of EMPLOYEE from October 30, 2020. . . ." Holloway had five months to cross-examine those same emails, letters, reports, notes, and documents. Furthermore in my (Issues Identified for 9/26/2024 Hearing) the only remaining discovery issue before the panel at hearing was the EME issue, and that it had received signed releases and has deposed Employee. . . . Holloway had scheduled IME for me with Dr. Scott Kitchel on November 5, 2024, at 12:00 pm at 5015 Canyon Crest Dr., Ste. 109 Riverside, Ca 92507, in which I will attend. I request the Hearing before the board continues in good faith. I will attach all objectionable emails, and documents. Holloway intends to further damage, delay, and stricken my claim, and hearing with prejudice, and his Request For Cross-Examination should be denied. I request this petition in good faith and equity.

Employee's explanation that on "October 4th," he "forwarded Holloway my declaration document," supports the inference that he served materials on Employer on that date but did not file those same documents with the Division on that date. While it was initially not entirely clear what Employee sought in his petition, two things can be gleaned from it and from his January 8, 2025 hearing testimony: (1) he misunderstood the term "continue," on the Workers' Compensation Division's (Division's) Petition form; he did not want to postpone the hearing; and (2) he wants documents on which Employer requested cross-examination, admitted as evidence over its request. (Petition, October 12, 2024; record; experience; and inferences drawn from the above).

18) On October 14, 2024, Employee filed with the Division and served on Holloway several documents (or, alternatively, it may be one document divided into several sections): (1) an "Affidavit of Fact Request for Proof of Claim," addressed to Holloway. This document appears to proclaim Employee's societal or governmental beliefs and cites certain federal law, which he "ACCEPTED FOR VALUE," (2) another "Affidavit of Fact Request for Proof of Claim," which is not initially directed to a particular person, but which includes 16 (there are 17 numbered paragraphs, but paragraph 9 is blank) generic questions directed to no specific person, and some specific requests to Holloway's legal associate Matias Paez, and (3) a third "Affidavit of Fact Request for Proof of Claim," which sets forth penalties for the recipients' refusal to respond timely to the requested "Proofs of Claim." The "penalties" include: the non-responding party being "in dishonor," failure to respond becoming "an admission of damage and injury" to Employee in the amount of $3 million "per violation," punishment for "treason," "forfeiture of all assets," and

"expulsion from this continent" within 24 hours. This document also includes Employee's affidavit stating the "above is true and correct." It bears his signature, references to the Uniform Commercial Code (UCC) and includes a Florida notarization. Pertinent to the instant issue are the following requested "Proofs of Claim":

> 1. Provide PROOF OF CLAIM or your "Oath of Office" and your bond as a public servant up to date and in good standing.
> 2. Provide PROOF OF CLAIM that by your words and deeds as a public servant you are adhering to your Oath binding you to your obligation to the People, in that you will protect, preserve, and secure the Rights (birth) of the People in harmony with Article VI of the United States Republic Constitution.
> 3. Provide PROOF OF CLAIM that as a public servant, obligated to protect the Rights (birth) of the People[] [y]ou have the authority delegated to impose and/or apply "statues" [sic] on/to the People.
> 4. Provide PROOF OF CLAIM that the name appearing on any charging instrument, in capital letters: is not a corporate fiction denoting an inanimate object.
> 5. Provide PROOF OF CLAIM that the People to whom you, a public servant is obligated, can contract with the public servant in exchange for any Rights (birth) and produce the lawful contract in support of the sale/negotiation/exchange of the Rights (birth).
> 6. Provide PROOF OF CLAIM that you have Jurisdiction over any Israelite American National Aboriginal Indigenous Natural Divine Being Manifested in Human Flesh to the Americas (Northwest Amexem -- North America -- North Gate).
> 7. Provide PROOF OF CLAIM that you are licensed to practice law in the STATE OF ALASKA.
> 8. Provide PROOF OF CLAIM that the undersigned had a 'meeting of the mind(s)' with Sedgwick on 2/17/23 when they changed the undersigned's **Date of Injury** from **10/30/22** to **1/20/2023** pursuant to the Workers Compensation Claim in respect to full disclosure and that said Claim contained or contains no elements of fraud by Sedgwick under **AS Sec. 23.30.250.**
> 9. [This line left blank in the original].
> 10. Provide PROOF OF CLAIM that MATIAS PAEZ, who practiced and is licensed under Alaska State Law to depose the undersigned during his March 12, 2024, at 8:00 a.m. (Pacific Daylight Time) deposition.
> 11. Provide PROOF OF CLAIM that MATIAS PAEZ who practiced and is licensed under Alaska State Law to represent Employer during undersigned's 5/30/2024 Prehearing.
> 12. Provide PROOF OF CLAIM that Sedgwick by and through its employees and agents, did not violate their Client's Bill Of Rights when the undersigned instructed the NCM that on 4/25/2023 that he no longer requires Nurse Case Managers at his appointments and on 9/12/2023 a random NCM did not appear uninvited to his appointment with Dr. Fait under **AS Sec. 23.30.60**.

> 13. Provide PROOF OF CLAIM that Sedgwick by and through its employees and agents, did not commit fraud on the Worker's Comp Injury Claim in respect to the undersigned below in any capacity.
> 14. Provide PROOF OF CLAIM that Sedgwick by and through its employees and agents, did not file a false and misleading submission, while coercing the undersigned to file fraudulent date of injury affecting payment, and engaged in deceptive leasing practices for the purpose of evading full payment of workers compensation under **AS Sec.23.30.250**.
> 15. Provide PROOF OF CLAIM that Sedgwick by and through its employees and agents, did not breach the limitations of Medical Release signed on 01/20/2023 by undersigned, by producing information that is outside of the limits designated in the release, and Sedgwick did not engage in unauthorized oral communication, and ex parte written information with provider disclosing nature of his examination, care, and treatment under **AS Sec. 23.30.108.**
> 16. Provide PROOF OF CLAIM that there is no penalty nor interest for undersigned's right to benefits for the months of **November**, and **December** of **2022** under **AS Sec. 23.30.255.**
> 17. Provide PROOF OF CLAIM that the public servant bringing forth any answer to the claim can produce written documentation in affidavit form signed under "**Penalty of Perjury**" with all relevant or related evidence over this Israelite American National (blank space and all emphasis in original).

Employee's third document also states that non-response within the given 10-day time period, with a one-day grace period, would constitute Employer's "acquiescence relative to this presentment." (Affidavit of Fact Request for Proof of Claim, October 13, 2024).

19) On October 23, 2024, the parties attended a telephonic prehearing conference with a Board designee. The resultant summary for this conference listed the parties' pleadings to date, including Employee's October 14, 2024 petition requesting denial of Employer's request for cross-examination. The "Discussions" section in this conference summary stated in full:

> Parties confirmed Employee's upcoming Employer Medical Evaluation (EME) scheduled for 11/5/2024 at 12:00pm. Employee requested a Merits Hearing be scheduled on his 11/24/2023 Workers Compensation Claim (WCC). Designee inquired about Employee's 10/14/2024 Petition requesting the denial of Employer's cross-examination request. Employee explained that Employer already has all the information needed and he is seeking fair settlement of his claim for benefits. Designee explained that the procedural issue brought by Employee's 10/14/2024 Petition will need to be adjudicated prior to proceeding to a Merits Hearing in this case. Employer representative confirmed that he will be responding to Employee's 10/14/2024 Petition shortly. Employee advised that he will be filing an Affidavit of Readiness for Hearing (ARH) on the 10/14/2024 Petition in anticipation that Employer's Answer to the same will not result in a resolution of the issue. Designee elected to hold Employee's 10/1/2024 ARH in abeyance and

> schedule a follow-up prehearing to address Employee's 10/14/2024 Petition and anticipated ARH. Designee reminds parties to discuss the results of the 11/5/2024 EME as the same may allow for settlement discussions to take place. (Prehearing Conference Summary, October 23, 2024).

20) On October 23, 2024, Employee requested a hearing on his October 12, 2024 "Petition." (ARH, October 23, 2024).

21) On October 24, 2024, Employer answered Employee's October 14, 2024 "filings." It contended they were "incoherent," and Employer did "not understand the relief sought." If the Division or the Workers' Compensation Board (Board) determined these filings to be a "petition," Employer requested an order denying it. (Answer to Employee's October 14, 2024 Filings).

22) On October 24, 2024, Employer also sought a "Protective Order" on Employee's October 14, 2024 filings to the extent they were construed as discovery requests. It contended the filings and requests were "irrelevant, incoherent, harassing, annoying, and not in accord with 8 AAC 45.054." Employer contended that since Employee filed an October 4, 2024 affidavit stating he was ready for hearing and had completed all discovery, he should be barred from any further discovery. Attached to Employer's petition were the three, above-mentioned "Affidavit of Fact Request for Proof of Claim" documents dated October 13, 2024. (Petition, October 24, 2024).

23) On November 1, 2024, Dr. Fait saw Employee again and revised his October 10, 2023 report. In the "Addendum" section of his new report, written in the same format at his October 10, 2023 report, Dr. Fait stated:

> [Employee] returns to clinic today for evaluation of his left wrist. It should be known that he was seen approximately 1 year ago. He sustained a traumatic injury to the left wrist with de Quervain tenosynovitis and underwent a 1st dorsal compartment release. The patient had reached permanent and stationary status on October 10, and I issued an opinion with respect to permanent impairment with respect to the residual constrictive tendinitis of the left thumb and the restricted range of motion of the wrist following the 1st dorsal compartment release. The patient returns to clinic today requesting an updated impairment rating under the 6th edition of the guides as he states that his case is now being adjudicated in Federal court system. He denies new or additional injuries. Overall, he does admit that the range of motion of his left wrist is improved slightly. He no longer has triggering in the thumb, but does have stiffness in the thumb and limited flexion and difficulty with repetitive gripping and grasping. There is also weakness. He denies new or additional injuries and he has not returned to work.

After re-examining Employee, Dr. Fait again diagnosed de Quervain's tenosynovitis in Employee's left wrist, and status-post first dorsal compartment release surgery on the left. He applied the rating criteria from the *Guides* 6th Edition, and derived an eight percent permanent impairment of Employee's left thumb; he did not adjust this to the whole-person. Dr. Fait reiterated his first opinion permanently precluding Employee from using power tools and limited his left hand to no repetitive forceful gripping or grasping, and released him from care. (Fait report Addendum, November 1, 2024).

24) In this panel's experience, attending physicians' routine medical chart notes in workers' compensation cases contain comments, explanations and requests from injured workers in respect to their compensation claims. Similarly, opinions, diagnoses, plans and recommendations for additional medical care, work status and related restrictions as well as PPI ratings are also routine. (Experience; observations).

25) On November 5, 2024, Scott Kitchel, MD, orthopedic surgeon, saw Employee for an employer's medical evaluation (EME). Employee reported that overall, his left-wrist pain was getting worse and starting to go up his left forearm. After reviewing Employee's records and examining him, Dr. Kitchel diagnosed a left-wrist strain/sprain and left-wrist de Quervain's tenosynovitis, both causally related to his October 30, 2022 work injury with Employer. In his opinion, the October 30, 2022 work injury was "the sole substantial cause" of Employee's disability. The wrist was medically stable effective November 5, 2024. Dr. Kitchel opined that the work injury was "the most significant" cause of Employee's need for left-wrist treatment. He was aware of no additional "curative treatment" available to Employee. Using the *Guides* Sixth Edition (2023 version) Dr. Kitchel provided Employee with a one percent whole-person permanent impairment rating. He also recommended a one-day formal physical capacity evaluation (PCE) to objectively assess his residual functional capacities. Dr. Kitchel said Employee could work at the "medium level of physical demand" but "could do no left-handed work." He reserved his right to modify his restrictions based upon a PCE. (Kitchel report, November 5, 2024).

26) On November 20, 2024, the parties attended a telephonic prehearing conference with a Board designee. The summary for this conference listed the parties' pleadings including Employer's "10/24/2024 Petition for Protective Order-Regarding Employee's 10/14/2024 Petition." The summary's "Discussions" section stated in full:

> The parties stipulated to an oral hearing to be held on 1/8/2025, for approximately 2 hours on which date they will be on a trailing calendar. The parties are ordered to serve and file legal memoranda by 1/1/2025 and evidence by 12/13/2024 in accordance with 8 AAC 45.060, 8 AAC 45.112, 8 AAC 45.114, and 8 AAC 45.120. Briefs with attachments or exhibits must be sent by e-mail to workerscomp@alaska.gov concurrently with filing. Any request for a continuance, postponement, cancellation, or change of the hearing date will be reviewed in accordance with 8 AAC 45.074.

The only issues identified for the January 8, 2025 procedural hearing included Employee's October 14, 2024 petition requesting denial of Employer's request for cross-examination, and Employer's October 24, 2024 "Petition For A Protective Order." (Prehearing Conference Summary, November 20, 2024).

27) On November 21, 2024, Employee filed and served on Holloway, along with other things, Dr. Fait's October 10, 2023 report and his November 1, 2024 Addendum report. (Electronic Certificate of Service, November 21, 2024). At hearing on January 8, 2025, Employee conceded that he forgot to attach, file and serve these reports on a Medical Summary. (Record).

28) On November 21, 2024, at Employer's request, Dr. Kitchel provided an addendum report. In it, he reviewed the statutory "medical stability" definition provided and agreed Employee reached medical stability no later than October 10, 2023. Dr. Kitchel was not aware of any additional treatment for Employee's left wrist. After reviewing job descriptions for Automobile Detailer, Receptionist, Furniture Salesperson, Carpenter Apprentice, Carpenter, Fish Cleaner, Seafood Processor, Crab Butcher, Fish-Machine Feeder, Fish-Egg Packer and Freezing Room Worker, Dr. Kitchel reiterated his previous medium-level physical exertion restriction "with no use of the left arm." Nonetheless, he opined Employee could work in a sedentary or light-duty position and thus "could be released to full regular duty work as a receptionist or a salesperson." (Kitchel Addendum report, November 21, 2024).

29) On December 3, 2024, Employer requested to cross-examine authors of "various" documents Employee filed on November 21, 2024. These included, "All correspondence and alleged bank statement from "Chime" filed by Employee." It specifically included "10/10/23-11/1/24" documents "allegedly" from Dr. Fait filed on November 21, 2024 addressing, "Alleged impairment rating, comments on future medical care, etc." (Request for Cross-Examination, December 3, 2024).

30) In its December 30, 2024 hearing brief, Employer contended the panel should grant its petition for a protective order against Employee's October 13, 2024 "Proofs of Claim." It construed Employee's filing as an informal discovery request. Employer first contended Employee should be entitled to no additional discovery since he filed an ARH stating and testifying that his discovery was complete, and he was fully prepared for a hearing. It contended Employee cannot attest that discovery is complete and then serve a completely new discovery request. Employer cited no legal authority for this proposition. Second, Employer contended the "Proofs of Claim" are objectionable because they are not "standard" and seek irrelevant information. In Employer's view, the "Proofs of Claim" are not interrogatories, and Employer does not have to prove anything to Employee. Rather, Employer contends that to be successful it must convince the Board to adopt its position at a hearing when evidence and testimony are presented. Third, Employer objected to any discovery from its attorneys because they are not witnesses. Lastly, Employer objected to Employee's requests and contended they are "irrelevant, vague, ambiguous and harassing." (Brief of Peter Pan Seafood Co., LLC, December 30, 2024).

31) Employer also argued that the Board should deny Employee's petition to deny its right to cross-examine authors of documents Employee filed including Dr. Fait. It contended it has a fundamental, constitutional and statutory right to cross-examine Dr. Fait. Employer argued Dr. Fait's two reports "were prepared for purposes of litigation." It pointed to the October 10, 2023 report that contains permanent work restrictions, a PPI rating, opinions for future medical care and a comment about Employee's physical therapy being canceled and denied as support for this contention. Employer demanded the right to cross-examine Dr. Fait about his opinions in his October 10, 2023 and his November 1, 2024 Addendum, which incorporated a new PPI rating under the *Guides* Sixth Edition. Employer concluded:

> As these records were prepared at the request of the employee in furtherance of litigation, the employer has a right to cross examine the doctor. This cannot be denied prior to hearing. (Brief of Peter Pan Seafood Co., LLC, December 30, 2024).

32) Non-attorney, self-represented litigants often do not understand legal language or procedural processes. Nevertheless, Board designees at prehearing conferences can often resolve many issues informally prior to a merits hearing by explaining procedural and substantive law to a non-attorney litigant. This often reduces litigation costs. (Experience; judgment; observations).

33) At hearing on January 8, 2025, Employee explained what he meant when his petition said, "Request to Deny Cross-Examination." He said he had previously filed and served on Employer the documents upon which he intended to rely at a merits hearing. Employee contended Employer had at least eight months to do whatever it needed to do in respect to his documents, excluding Dr. Fait's November 1, 2024 report, which he had recently obtained. He was not trying to block cross-examination, but implied he did not want his case resolution delayed any further by Employer's objections. Employee further explained that he had filed approximately 120 pages of non-medical records as well as Dr. Fait's two "PR-4 reports." Employee said he first saw his eventual surgeon Dr. Fait in April 2023 when Sedgwick or its adjuster Jacqueline Salas either referred him there or provided options; he was vague on this point. (Record).

34) As for Dr. Fait's October 10, 2023 report, Employee said he went to see Dr. Fait on that date because he already had a follow-up appointment set from a previous visit. He did not know he was going to obtain a PPI rating or that Dr. Fait would give him other recommendations when he went that day. On October 10, 2023, Dr. Fait discussed with him the opinions he gave in his same-dated report, except for the rating part, which Employee understood took Dr. Fait time to prepare. Prior to his October 10, 2023 visit with Dr. Fait, Employee had no idea what a "PR-4" form was. When asked how the November 1, 2024 visit with Dr. Fait came about, Employee explained that *Nie I* said he needed to ask Dr. Fait to re-rate his PPI according to the *Guides* Sixth Edition used in Alaska. Employee followed that advice and what he considered an "order" and saw Dr. Fait who gave him the Sixth Edition rating. When he saw Dr. Fait on November 1, 2024, Employee said he "told him what I needed for my claim." (Record).

35) Employee agreed he had filed two ARHs in October 2024 and affied in both that he had completed discovery and was fully prepared for a hearing. When asked why, 10 days later, he propounded what the panel and Holloway considered a discovery request, Employee explained he understood there was a "30 day" deadline before a hearing during which parties can still obtain and file evidence. He intended to use the answers to his 16 questions as evidence at a future hearing. Employee queried "how can I prove my claim" without obtaining discovery, when in his view Employer continued to violate his rights even after he filed his ARHs. He also had issues with Employer deposing him. (Record).

36) When asked for Employer's position on Employee's statement that he had no objection to Employer cross-examining Dr. Fait Holloway replied, "That's fine." (Record).

37) At hearing, Employer had no questions for Employee and referred the panel its hearing brief. However, upon the chair's questioning Employer clarified the documents to which it demanded the right to cross-examine authors. These included non-medical records and Dr. Fait's two reports. As for non-medical records, Employer further clarified that it did not want to cross-examine Employee regarding releases he signed for Employer or the authors of letters from the Division to Employee or from the Division to Employer or its representatives. However, Employer wanted to cross-examine Employee on wage information he provided for 2020 and 2021, on "screen shots" from Employee's cell phone text messages and Employee's various emails, statements, letters and "declarations" he filed with the Division and served on Employer. Employer did not want to cross-examine authors of Concentra medical records. That left Employer's demand to cross-examine Dr. Fait on his two specified reports. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
>
> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . 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, 533-34 (Alaska 1987).

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

Granus v. Fell, AWCB Dec. No. 99-0016 (January 20, 1999) gave a two-step analysis to determine if information is discoverable: (1) identify matters in dispute; this requires the Board's designee

to, at a minimum, review the claims (which generally state the issues from Employee's perspective) and the answers and controversions (which generally state the issues from Employer's perspective); and (2) decide (*i.e*., analyze) whether the information sought is relevant; or in other words, is it "reasonably calculated" to lead to admissible evidence that will tend to make a disputed fact or issue, identified in step (1) more or less likely.

Gorospe v. Net Systems, Inc., AWCB Dec. No. 08-0229 (November 21, 2008) used the two-step *Granus* analysis and noted the "scope of discovery" is case- and fact-specific.

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .
> . . . .
>
> (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 [EME], the board may require that a second independent medical evaluation [SIME] be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . . .

Richard v. Fireman's Fund Insurance Co., 384 P.2d 445, 449 (Alaska 1963) stated, "[A] workmen's compensation board . . . owes to every applicant for compensation the duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, . . . and of instructing him on how to pursue that right under the law." *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114, 1119 (Alaska 1994) said, "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 [§095(k)] in the event of a medical dispute. . . ."

> **AS 23.30.108. Prehearings on Discovery Matters; Objections to Requests for Release of Information; Sanctions for Noncompliance**. . . .

> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. . . . If a discovery dispute comes before he board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. . . . The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

An agency's failure to apply controlling law properly may be an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884 (Alaska 1962). A substantial evidence standard is applied to review the Board designee's discovery determination. A designee's decision on releases and other discovery matters must be upheld, absent "an abuse of discretion." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985).

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

> 11) The December 15, 2020 PHC summary did not list all the arguments and evidence presented by the parties and considered by the designee. Nor did it include an analysis, which reflects the designee's discretion. . . . Employee's requests for protective orders was denied.
> . . . .
>
> The designee's analysis merely states, the releases are standard, relevant, and likely to lead to discoverable information. With no further information regarding the issues in dispute and how the requested releases will lead to relevant evidence regarding those issues, the analysis does not reflect the designee's discretion, and it is impossible to determine if it was abused. *Granus*.
>
> This decision will remand Employee's requests for protective orders to the appropriate designee. The designee shall make rulings on Employee's petitions for protective orders that includes each parties' arguments and lists each parties' evidence presented at the December 15, 2020 prehearing. . . .
>
> **8 AAC 45.052. Medical summary.** . . .
> . . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

(1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination, together with the affidavit of readiness for hearing and an updated medical summary and copies of the medical reports listed on the medical summary, if required under this section.
(2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.
(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

(A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and
(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.
(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.
(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

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

(1) identifying and simplifying the issues;
. . . .
(6) the relevance of information requested under AS 23.30.107 and AS 23.30.108;
. . . .
(10) discovery requests;
. . . .
(15) other matters that may aid in the disposition of the case.
. . . .

(h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition . . . that sets out the grounds for the appeal. . . .

8 AAC 45.082. Medical treatment. . . .

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) . . . or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

8 AAC 45.120. Evidence. . . .
. . . .

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;
. . . .

(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, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the

parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

(g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.

(h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that (1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible; (2) the document is not hearsay under the Alaska Rules of Evidence; or

. . . .

(k) The board favors the production of medical evidence in the form of written reports, but will, in its discretion, give less weight to written reports that do not include

(1) the patient's complaints;
(2) the history of the injury;
(3) the source of all facts set out in the history and complaints;
(4) the findings on examination;
(5) the medical treatment indicated;
(6) the relationship of the impairment or injury to the employment;
(7) the medical provider's opinion concerning the employee's working ability and reasons for that opinion;
(8) the likelihood of permanent impairment; and
(9) the medical provider's opinion as to whether the impairment, if permanent, is ready for rating, the extent of impairment, and detailed factors upon which the rating is based.

(*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. . . .

8 AAC 45.900. Definitions. (a) In this chapter

. . . .

> (11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976); . . .

Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 824 (Alaska 1974) held the statutory right to cross-examination is absolute and applicable to Board hearings, and the Board erred in denying a party the opportunity to cross-examine a witness. In *Schoen*, the employee introduced a hospital record that causally related the employee's heart attack to his work. The employer first received the document moments before hearing and objected to it. The Board accepted the discharge summary without allowing the employer an opportunity to cross-examine the document's author. *Schoen* held "the denial of the right to cross examine a doctor whose equivocal statements are the entire medical evidence supporting an award cannot be regarded as harmless error." *Schoen* did not reverse the Board's decision, but remanded it to the Board to permit the employer an opportunity to cross-examine the employee's treating doctor.

Commercial Union Companies v. Smallwood, 550 P.2d 1261, 1265-67 (Alaska 1976) gave name to the "*Smallwood* objection." It reiterated that "the statutory right to cross-examination is absolute and applicable to the Board" but noted "the better reasoned, and weight of, authority is to the effect that the right of cross-examination does not carry a price tag." *Smallwood* stated:

> It is apparent that this case illustrates the compelling need for the [Board] to promulgate rules which will effectuate the [Act's] policy of providing inexpensive and expeditious resolutions of claims for compensation while affording due process to all concerned parties. We therefore strongly recommend that the Board adopt procedures which will fill the present procedural void relating to medical reports and the right of cross-examination.

As directed by the Alaska Supreme Court, the Board adopted regulations addressing the "*Smallwood* objection" issue. Regulation 8 AAC 45.052 requires parties to file medical summaries listing each medical record which is or may be relevant to a claim or petition, with specific filing deadlines to avoid the situation in *Smallwood*, where a party introduced medical records for the first time just before the hearing began. Subsection 052(c)(2) requires parties to file a request for cross-examination on medical records, the authors of which they want to cross-examine within 10 days of certain events. Subsection 052(c)(4) states the Board will rely on medical reports listed

on medical summaries if the parties expressly waive their right to cross-examination, or if the Board determines the records are admissible under a hearsay exception in the Alaska Rules of Evidence. The Board also adopted 8 AAC 45.120(h), which permits non-medical documents into evidence if they come within a hearsay exception or are not hearsay.

Frazier v. H.C. Price/CIRI Const. JV, 794 P.2d 103, 106-08 (Alaska 1990) upheld 8 AAC 45.120(h)'s hearsay exception rule, and limited the instances where *Smallwood* objections could be filed on medical records. In *Frazier*, the employee saw an EME who found he was suffering from work-related physical and psychological injuries. The employee introduced these records into evidence and the employer requested the right to cross-examine the author of its own EME report. *Frazier* relied on 8 AAC 45.120(h), which was written in response to *Smallwood*, and found the EME report was an "admission," was not hearsay, and the employee was not obligated to pay for the employer's cross-examination of its own expert. The Division had filed a brief inviting the Supreme Court to re-examine *Smallwood* "with a potential goal of restoring the principles of informality . . . to board proceedings." While the Court decided to not reassess *Smallwood*, Justice Rabinowitz, *Smallwood*'s author, joined Chief Justice Matthews in a concurring opinion, stating:

> [A] strict reading of *Smallwood* does not compel a conclusion that the Board must construe its regulations governing the admission of documentary evidence to require a party relying on the documentary evidence to pay the initial cost of cross-examination by the opponent. . . .
>
> [*Smallwood*] may also be read broadly to mandate cost shifting even after regulations are promulgated. I do not favor such a reading for two reasons.
>
> First it is wrong to say that cross-examination may not carry a price tag. In general, civil litigation, deposition and witness costs are shifted to the losing party after judgment as a matter of course. Civ. R. 79. On the tilted playing field of workers' compensation, the employer must reimburse the employee "for the costs in the proceedings" when the employee wins. AS 23.30.145(b) (the employee does not have a similar obligation when the employer fails.) The costs for which the employer must reimburse the employee include the costs of cross-examination paid by the employee under the Board's interpretation of *Smallwood*. Thus, when a litigant, or, in workers' compensation, an employer, loses, cross-examination has a price.

> Second, according to the Board, it's interpretation of *Smallwood* has led to needless depositions resulting in delay, oppression of the economically weaker party -- generally the employee -- and economic waste. . . .
>
> The Board's position, based on more than a decade of experience, is persuasive. The cost disincentive inherent in the normal rule which makes the deposer pay is apparently of considerable importance in deterring needless depositions.
>
> For the above reasons, I would not interpret *Smallwood* to require cost shifting. A party desiring to depose or examine the author of a report should bear the initial cost of the deposition or examination. Thus, I concur in the result of today's decision.

Following *Frazier*, the Board issued many decisions addressing cross-examination rights, expanding rather than limiting admissible evidence at Board hearings:

In *Parker v. Power Constructors*, AWCB Dec. No. 91-0150 (May 17, 1991) the employer sought to rely on three documents to which the employee had filed *Smallwood* objections: (1) a summary prepared for the employee's discharge from a nursing home; (2) a physical examination report prepared during the employee's residence at the nursing home; and (3) a letter from the employee's physician to his counsel. *Parker* permitted the employer to introduce all three. It found the nursing home summary, and the physical examination report prepared during the employee's residence at the nursing home were "trustworthy enough to permit admission under the business records exception to the hearsay rule," and said, "If the employee wishes to present evidence supporting his challenge to the trustworthiness of these documents at hearing he will be permitted to do so." *Parker* found "no support in law for [the employee's] first argument, [that] the medical reports cannot be considered business records under the 'business records' exception to the hearsay rule." It also permitted into evidence the responsive letter, harmful to the employee's position, from his physician to his lawyer, finding that "by soliciting [the doctor's] opinion, the employee authorized the report and vouched for its author's credibility and competence."

In *Amundson v. M-I Drilling Fluids*, AWCB Dec. No. 00-0018 (February 1, 2000) an employer introduced records from the employee's physicians regarding his prior workers' compensation claims in Washington and Oregon. The employee filed *Smallwood* objections to those documents.

Amundson held the records were admissible under the business record exception under Rule 803(6) and the "catch all" provision of Rule 803(23).

Brown-Kinard v. Key Services Corp. and Arctic Slope Telephone Association & Cooperative, AWCB Dec. No. 00-0190 (August 31, 2000) addressed the business records exception to the hearsay rule. It found no evidence that the subject medical records had "lack of trustworthiness." The records included PPI ratings referenced to pages and tables in the *Guides*. Each report stated opinions, diagnoses and conditions and were written by medical professionals who had treated the employee in their regular business activities. *Brown-Kinard* found these records trustworthy and relevant to the employee's claim. It noted the records were written by treating physicians, "not physicians hired merely for the purpose of litigation." There was no evidence the physicians were "in any way beholden to issue reports" on the employee's behalf. *Brown-Kinard* concluded the documents were admissible and "the employers have ample opportunity to cross-examine any of the authors of these reports, at their own expense, if they choose to do so, thereby preserving their rights to cross-examination." It further noted opinions from the employee's treating physicians are more probative than any other evidence the employee could procure through reasonable efforts. *Brown-Kinard* stated, "To deny an injured worker the right to proceed in her claim because she does not have the thousands of dollars it would cost to depose her own doctors hardly seems fair to us." Lastly, distinguishing *Schoen* where the employer received the subject medical records minutes prior to a hearing, *Brown-Kinard* said the employer had adequate time to prepare rebuttal evidence and cross-examine the employee's physician.

Jensen v. Dames & Moore, AWCB Dec. No. 00-0198 (September 14, 2000) held that a treating physician's medical records were admissible over the employer's objection under Rule 803(6) and the "catchall" provision in Rule 803(23).

Dobos v. Ingersoll, 9 P.3d 1020, 1028 (Alaska 2000) stated in a civil court matter:

> The purpose of Civil Rule 36 is to expedite and streamline discovery and litigation by establishing facts over which there is no real dispute. . . . Requiring testimony that medical records were made and kept in the regular course of business is a waste of time unless there is some reason to believe that the records are not genuine or trustworthy.

> . . . .
>
> Dobos conceded at oral argument that he had no reason to believe that the medical records were inauthentic. He explained that the reason he denied the request to admit was so Ingersoll would put the doctors on the stand, as Dobos wished to cross-examine them about some of their medical conclusions. However, if Dobos wished to question Ingersoll's doctors, he could have called them to the stand himself. . . .
>
> Because Dobos had no reason to deny the admissibility of the medical records, he should have been subjected to Rule 37(c)(2) sanctions for these denials. The failure to sanction him was error. On remand, the court should award reasonable fees and costs for calling witnesses who testified to the facts needed to admit Ingersoll's medical records.

In *Cedeno v. Inlet Tower Suites*, AWCB Dec. No. 01-0054 (March 21, 2001) the parties stipulated that medical records in question were "genuine and authentic," and the Board reviewed the records and found them "sufficiently trustworthy to allow their admission into evidence." *Cedeno* admitted the records, which included a "To Whom It May Concern" letter from an attending physician, which *Cedeno* found was merely an overview of what was contained in the physician's medical chart notes. Relying on *Frazier* and *Dobos*, *Cedeno* concluded, "The employer has the opportunity to depose [the attending physician] at its own expense."

Gravelle v. Pacific Detroit Diesel-Allison Co., AWCB Dec. No. 06-0205 (July 26, 2006) came to the same conclusion on facts similar to *Parker*, *Amundson*, *Brown-Kinard*, *Jensen*, and *Cedeno*. It further found that accepting the employer's argument and rejecting the attending physician's letter, would "complicate practice before the Board" contrary to AS 23.30.005(h), which requires Board procedure to be as "summary and simple" as possible. *Gravelle* also noted that to follow the employer's approach would cause parties to incur unnecessary fees and costs. "The employer will have an opportunity to depose the treating physician at its own expense."

Geister v. Kid's Corps, Inc., AWCAC Dec. No 045 (June 6, 2007) cited *Dobos* stating "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule." If there was ever any doubt as to admissibility of hospital records, *Dobos* said, "Noting that entries in the form of opinions are 'commonly encountered with respect to medical diagnoses, prognoses, and test results,' the commentary states . . . 'the rule

specifically includes both diagnoses and opinions as . . . proper subjects of admissible entries.'" *Geister* also said while *Dobos* held "medical records kept by hospitals and doctors" are business records, which are a hearsay exception, this holding is qualified by *Liimatta v. Vest*, 45 P.2d 310 (Alaska 2002), and *Municipality of Anchorage v. Devon*, 124 P.3d 424 (Alaska 2005). *Liimatta* and *Devon* held that a physician's "letters" written to a party or its representative to express an expert medical opinion on an issue before the tribunal are not admissible as business records unless the requisite foundation is established.

Freeman v. ASRC Energy Services, AWCB Dec. No. 16-0013 (February 25, 2016) determined that the "Smallwooded" medical records were "routine records of the type medical providers prepare for and submit in workers' compensation cases on a daily basis." *Freeman* noted *Smallwood* was issued before the Board's current regulations. "*Frazier* and subsequent decisions have not abrogated the *Smallwood* doctrine. But they have also not overruled subsequent regulations allowing admission of medical records as exceptions to the hearsay rule." As for "foundation," *Freemen* citing *Dobos* noted, "The Alaska Supreme Court said such foundational objections, absent a reason to doubt the records' authenticity, are a waste of time and result in sanctions in civil cases." *Freeman* noted, "The Act and its regulations are not intended to be more complicated than rules accorded litigants in civil actions." They are supposed to be less complicated.

> **Alaska Rules of Evidence Rule 803, Hearsay Exceptions - Availability of Declarant Immaterial**.
> . . . .
>
> **(6) Business Records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
> . . . .
>
> **(23) Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of

> trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

ANALYSIS

1) Shall Employee's documents be admitted over Employer's objection?

There are two categories of documentary evidence on which Employer demands its right to cross-examine the documents' authors -- Employee's (A) non-medical documents; and (B) two specific medical records from Dr. Fait dated October 10, 2023, and November 1, 2024.

(A) Non-medical records.

Employer timely requested its right to cross-examine the authors of various non-medical records Employee filed previously. 8 AAC 45.052(c)(2). Although it failed to identify the non-medical documents "specifically" on its request for cross-examination forms, (8 AAC 45.120(g)), at hearing Employer clarified that it wanted to cross-examine Employee on his wage documents, photographs, emails, statements, letters and "declarations." Since Employer already deposed Employee, the panel assumes these documents were all filed post-deposition, because Employer already had an opportunity to cross-examine Employee during that deposition. In any event, it is highly likely that Employee will appear at and testify at a merits hearing at some point, and as a witness he will be subject to Employer's cross-examination at that time. 8 AAC 45.120(c)(1). Alternately, Employer can re-depose Employee to update cross-examining him on documents he filed after his first deposition. To this extent, Employee's October 12, 2024 petition to "Deny Cross-Examination" will be denied as to non-medical documents as he will be required to respond to Employer's questions at a merits hearing. If Employee declines or refuses to testify at a merits hearing, which is unlikely, the non-medical documents on which Employer demanded its right to cross-examine Employee will not be admitted as evidence at that hearing, unless they are found to

be admissible under a hearsay exception to the Alaska Rules of Evidence, or the documents are found to be not hearsay under those same rules. 8 AAC 45.120(h).

(B) Dr. Fait's October 10, 2023 and November 1, 2024 reports.

A party's request to cross-examine a medical record's author is known as a "*Smallwood*" objection. 8 AAC 45.900(a)(11); *Smallwood*. This issue has a long legal history. A "*Smallwood*" objection is "an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician." *Brown-Kinard.* The seminal *Smallwood* decision found "the statutory right to cross-examine is absolute and applicable" to these agency hearings; see also *Schoen*. *Smallwood* recommended agency procedures to "fill the [then]-present procedural void relating to medical reports and the right of cross-examination." In response, agency amendments to 8 AAC 45.052(c) and 8 AAC 45.120(f)-(j) provided for notice and the opportunity for cross-examination; the former for medical records and the latter for non-medical records. No adopted regulation has ever shifted cross-examination costs to the party seeking to introduce evidence. Technical rules do not apply in these proceedings except as otherwise stated in applicable regulations. 8 AAC 45.120(e). These proceedings are supposed to be as "summary and simple" as possible. AS 23.30.005(h).

The procedure for submitting medical reports as evidence and requesting the opportunity to cross-examine the author of a medical report is outlined in 8 AAC 45.052(c). This regulation and 8 AAC 45.120(h) for non-medical evidence allow for admission over a request for cross-examination if the documents in question are admissible under Alaska evidence rules. The objecting party can still cross-examine the author at its own expense. The regulations adequately protect the parties' absolute right to cross-examination. *Shoen*; *Smallwood*.

The panel construes Employee's October 12, 2024 petition as his request to admit Dr. Fait's subject reports over Employer's *Smallwood* objection. As it applies to Dr. Fait's medical records, Employee's petition is what used to be referred to as a "*Parker*" petition. Parties regularly filed such petitions to resolve admissibility issues such as this one *prior* to a merits hearing to save time and costs. AS 23.30.001(1). Although Employee probably did not understand exactly what he was requesting in his October 12, 2024 petition, upon questioning at hearing, Employee said he

did not intend to deprive Employer of its right to cross-examine Dr. Fait. Rather, he wanted the panel to consider Dr. Fait's reports and take them at face-value as his evidence.

Employer objects to Employee's petition on grounds that Dr. Fait's two reports are not admissible over its objection because they were prepared at Employee's request "in furtherance of litigation." For support, Employer points to Dr. Fait's opinions regarding permanent work restrictions, PPI ratings, recommendations for future medical care, and a comment from Employee about why his therapy was allegedly denied.

Notably, when asked Employer's position on Employee's statement that he did not intend to prevent Employer from cross-examining Dr. Fait Holloway said, "That's fine." While it may disagree with Dr. Fait's opinions, Employer did not raise any foundational objections or question the authenticity of Dr. Fait's two reports. 8 AAC 45.120(*l*). Agency decisional law and Supreme Court precedent on this issue expands the evidence upon which this panel may rely in deciding a claim. *Shoen* and *Smallwood* were both decided before the Division took the Court's recommendation in *Smallwood* and promulgated new regulations. The new regulations in 8 AAC 45.052 were designed to prevent parties from showing up at a hearing with new medical records its opponent had never seen before as occurred in *Shoen*. Under §052(c), parties have specific time deadlines to request cross-examination dependent upon if and when an ARH was filed. Here, Employer timely filed its *Smallwood* objections to Dr. Fait's two reports. 8 AAC 45.052(c)(2).

But Employer's contention that Dr. Fait's reports were prepared at Employee's request to further litigation and therefore are not admissible is not supported by the facts or the law. First, there is no evidence that Dr. Fait's first report resulted from Employee's request. At hearing, Employee testified someone referred him to Dr. Fait or to his office and he did not know Dr. Fait before he first saw him in April 2023. Dr. Fait's October 10, 2023 report looks like a routine report he completes in any workers' compensation case. *Freeman*. Dr. Fait called his October 10, 2023 report a "Permanent and Stationary Evaluation (PR-4) by Primary Treating Physician." He addressed it to the claim adjuster or examiner, included Employee's insurance claim number and addressed "impairment, causation and apportionment." Dr. Fait reviewed Employee's history, performed a physical examination, made a diagnosis, gave a causation opinion, and found

Employee medically stable. He reviewed the *Guides*, albeit the wrong edition for Alaska, cited applicable tables and provided a PPI rating, with no apportionment. He also provided permanent physical restrictions and other recommendations. Dr. Fait has clearly done this before; this was a routine medical report in a workers' compensation case. *Freeman*; *Rogers & Babler*.

Second, although Employee admitted he asked Dr. Fait to provide a *Guides* Sixth Edition PPI rating, because California uses the Fifth Edition and Dr. Fait relied on that edition to rate Employee initially, this is understandable and does not render Dr. Fait's second report inadmissible. Employee correctly recalled that *Nie I* advised and directed him to contact his physician and obtain a PPI rating under the correct *Guides* edition that would be admissible under Alaska law. He did exactly what *Nie I* told him to do. The November 1, 2024 Dr. Fait report is still a "business record" because Dr. Fait's first report shows that he routinely does PPI ratings, just under a different *Guides* edition for a different jurisdiction. Employee does not have an attorney; therefore, unlike in *Liimatta* and *Devon* where a physician answered a letter from a lawyer to the physician, Employee need not establish a "foundation" by deposing a records custodian.

Third, nothing in Dr. Fait's two medical reports suggest any lack of genuineness or trustworthiness. *Parker*; *Amundson*; *Cedeno*; *Gravelle*. Employer did not raise foundational objections at hearing. Even if it had, in civil cases, demanding a party to "lay a foundation" on records with no lack of genuineness or trustworthiness will subject an attorney to sanctions. Demanding a right to cross-examine a physician simply to force a party to present that physician so the opposing party can cross-examine the physician at the proffering party's expenses is also inappropriate. *Dobos*.

Fourth, Dr. Fait's two reports include information this panel favors in written form including Employee's (1) complaints, (2) his injury history, (3) the source of facts set out in the report, (4) the doctor's findings on examination, (5) treatment indicated, (6) causation, (7) the provider's opinion concerning Employee's working ability, (8) the likelihood of permanent impairment, and (9) the provider's opinion as to whether the impairment if permanent is ready for rating and the extent thereof. 8 AAC 45.120(k)(1)-(9). These are "routine" records. *Freeman*.

Fifth, it is well-settled law that physicians' and hospitals' medical records and reports are "business records" and thus "hearsay exceptions" and admissible evidence under Evidence Rule 803(6). *Frazier*; *Geister*. Rule 803(6) states in relevant part:

> **(6) Business Records.** A . . . report, record . . . in any form, of . . . conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . .

Thus, simply because Dr. Fait's reports include permanent work restrictions, PPI ratings, provisions for future medical care and a comment about why Employee stopped physical therapy, does not mean the reports were prepared in furtherance of litigation. Indeed, most if not all medical records contain "conditions, opinions, or diagnoses" made by a physician at the time the examination is done. Historical information from the patient, including why he allegedly stopped physical therapy is also routinely found in medical records and reports. It is common for an injured worker to ask his or her physician to address a primary issue in a case. Dr. Fait's reports look like routine medical records this panel has seen in thousands of case files for decades. *Freeman*; *Rogers & Babler*. If Employer's theory was correct, no medical record would fall under the "business records" exception rule and litigation costs will greatly increase. *Gravelle*.

Sixth, since Employee is limited in how he may obtain an expert opinion on any issue in his case under AS 23.30.095(a), asking his attending surgeon for a PPI rating under the *Guides* edition used in Alaska is not only reasonable and necessary, but is required and is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." *Brown-Kinard*. Employee cannot "doctor shop." 8 AAC 45.082(c). Under §095(a) he cannot hire a medical expert to give opinions. There is no way for him to "procure" medical opinions outside the Act's limits; Employee must rely on his attending physicians for this information. Alternately, Dr. Fait's reports would be admissible over objection, under "Other Exceptions" even if the "Business Records" exception did not apply. *Jensen*; Rule 803(23).

Employer has not waived its right to cross-examine Dr. Fait; it does not have to. The records are admissible under the "Business Records" exception; alternately, they are admissible under the catch-all "Other Exceptions" rule. A panel may still rely on the records and Employer still has the right to question Dr. Fait at its own cost. *Frazier*; *Jensen*; *Cedeno*; *Geister*. Dr. Fait's records are prepared under California workers' compensation reporting rules, and he has incorporated a "PR-4" form into his report. This shows that Dr. Fait routinely creates these reports in his regularly conducted business activity as a physician treating injured workers and it is his regular practice to do so to comply with California workers' compensation reporting requirements.

What this preliminary issue is really about is who has to pay for Employer's right to cross-examine Dr. Fait. Neither Employee nor this decision can abrogate Employer's right to depose other otherwise cross-examine Dr. Fait. However, as stated in *Smallwood*, "the better reasoned, and weight of, authority is to the effect that the right of cross-examination does not carry a price tag." Employer has the right to depose and cross-examine Dr. Fait at its own expense. *Geister*. The October 10, 2023 and November 1, 2024 reports will be admitted over Employer's objection.

2) Shall Employer's petition be remanded to the designee for a discovery ruling?

Employer's general contention that Employee is no longer entitled to any discovery because he filed an ARH is not well taken. It cited no law in support and the panel found none. Employee understood he could obtain and file discovery until "30 days" before a hearing, apparently referring to the 20-day pre-hearing date mentioned in 8 AAC 45.120(f); relevant discovery continues.

Nearly 25 years ago, the Alaska legislature implemented a statutory process to expedite workers' compensation hearings by reducing and resolving discovery disputes before merit hearings. Resolving discovery disputes before a merits hearing helps prevent unnecessary hearing continuances or cancellations. *Rogers & Babler*. This discovery process includes a party's right to petition for a protective-order against discovery requests that the party finds irrelevant or otherwise improper. Once a prehearing conference is convened to resolve "discovery matters," the designee at the prehearing conference "shall direct parties" to among other things "produce documents," if parties have "documents that are likely to lead to admissible evidence relative to an employee's injury." AS 23.30.108(c). It is the designee's duty at a prehearing conference on

"discovery matters" to review a petition for a protective order regarding discovery issues and make a ruling. AS 23.30.108(c) states the designee "shall direct parties" if appropriate to provide discovery; 8 AAC 45.065(a) states the designee "will exercise discretion in making determinations." The designee's duty to make an order, one way or the other, on a protective order petition is not optional. Parties have a right to appeal from a designee's discovery order recorded in the resultant prehearing conference summary. AS 23.30.108(c); 8 AAC 45.065(h).

Here, Employee who is not an attorney filed an October 13, 2024 "Affidavit of Fact Request for Proof of Claim," which though unconventionally worded clearly requests Employer or its representatives to produce documents and answer questions that Employee considers relevant to his claims or to Employer's defenses. Recognizing that Employee was probably seeking discovery, Employer filed its October 24, 2024 protective order petition. The Division convened a prehearing conference. The Workers' Compensation Officer who was the designee for this prehearing conference listed Employer's October 24, 2024 petition for a protective-order in his November 20, 2024 prehearing conference summary. This prehearing conference was the first one held after Employer filed its October 24, 2024 petition. Therefore, Employer's October 24, 2024 petition for a protective order was ripe for the designee's review, analysis, decision and order at the November 20, 2024 prehearing conference, or in the resultant summary.

The instant case is in a peculiar procedural posture. According to the prehearing conference summary, the designee made no order. There is no discussion about Employer's protective order petition. The parties' positions on it are not listed or analyzed. *Goemer*. This panel has no idea why Employee thinks his requested discovery is relevant to his claims or to Employer's defenses. The designee failed to exercise his discretion on Employer's October 24, 2024 petition by failing to make an order. Therefore, there is no discretionary order for this panel to review.

Nevertheless, the matter is before this panel, which must affirm the designee's discovery actions absent "an abuse of discretion." AS 23.30.108(c). The November 20, 2024 prehearing conference summary includes no explanation for why the designee chose not to exercise his discretion in ruling on Employer's protective-order petition. *Goemer*. The prehearing conference summary lacks substantial evidence upon which to discern his actions. *Sheehan*. The above statutes,

regulations and analyses explain the designee's duty to rule on discovery issues at prehearing conferences. An agency's failure, through its designee, to apply controlling law properly may be an abuse of discretion. To the extent the designee exercised his discretion by deciding not to exercise his discretion on the protective order petition, he abused his discretion. *Manthey*.

To address a discovery dispute at a prehearing conference, the designee must apply the two-step *Granus* analysis: (1) The first step is to identify matters in dispute; this requires the designee to, at a minimum, review the claims (which generally state the issues from Employee's perspective) and the answers and controversions (which generally state the issues from Employer's perspective). The parties can also share their arguments, evidence and legal authorities at the prehearing conference. (2) The second step is to decide (*i.e.*, analyze) whether the information sought is relevant; or in other words, is it "reasonably calculated" to lead to facts that will tend to make a disputed issue, identified in step one, more or less likely. *Granus*. Each case is fact-specific. *Gorospe*. This panel will not insert its discretion in place of the designee's. *Sheehan*.

Therefore, this matter will be remanded to the designee to issue an order on Employer's October 24, 2024 petition for a protective order. *Goemer*. The Division will be directed to convene a prehearing conference promptly. At that conference, the designee should list Employee's claims, list Employer's defenses, and then list Employee's 16 discovery requests from his October 13, 2024 filing. The designee will have to ask Employee to explain how each listed discovery request relates to his claims or to Employer's defenses. He will have to ask Employer why they do not. The designee should record the answers in summary form, analyze the requests under *Granus* and make a discovery order. AS 23.30.108(c).

When a designee at a prehearing conference explains why discovery is or is not relevant to a claim or defense, the discovery issue is often resolved; there may not even be an order or an appeal. *Rogers & Babler*. Among the things the designee "will exercise discretion in making determinations on" at a prehearing conference are "identifying and simplifying the issues," "the relevance of information requested," "discovery requests," and "other matters that may aid in the disposition of the case." 8 AAC 45.065(a)(1), (6), (10), (15). If this issue is not resolved, the designee "shall" make a discovery order. AS 23.30.108(c). This process helps ensure "quick,

efficient, fair, and predictable" delivery of benefits to injured workers at a "reasonable cost" to employers. It provides due process and gives parties an "opportunity to be heard and their [*relevant*] arguments and evidence fairly considered." AS 23.30.001(1), (4) (emphasis added).

Lastly, in accordance with the panel's general "duty of fully advising" Employee under *Richard*, and under *Dwight*'s specific holding, Employee is noticed that he has a right to "request and obtain" an SIME under AS 23.30.095(k), cited in the Principles of Law section above. An SIME request is made by filing a petition with supporting documentation including the completed SIME form available on the Division's website and by attaching the medical records reflecting any medical disputes between Employee's attending physicians and Employer's EME doctor. Employee must serve on Holloway identical copies of any document he files with the Division and provide proof of service on the same date he filed it. Requesting an SIME does not mean one will automatically be ordered. However, a hearing on any petition a party files for an SIME will be scheduled and held if the parties do not otherwise stipulate to an SIME.

CONCLUSIONS OF LAW

1) Employee's documents will be admitted over Employer's objection in accordance with this decision and order.
2) Employer's petition shall be remanded to the designee for a discovery ruling.

ORDER

1) Employee's October 12, 2024 petition is granted in part and denied in part.
2) Dr. Fait's October 10, 2023 and November 1, 2024 medical records are admitted into evidence over Employer's objection.
3) Employer may depose Dr. Fait or call him as a witness at hearing at Employer's expense.
4) Employee's non-medical documents to which Employer objected will not be admitted at a merits hearing unless Employee allows Employer to cross-examine him on any non-medical records he authored and submitted as evidence after his initial deposition, unless a panel at a later hearing determines that the non-medical evidence Employee authored is admissible as a hearsay exception or are deemed not hearsay.

5) Employer's October 24, 2024 petition is denied as moot in accordance with this decision.

6) Employer's October 24, 2024 petition is remanded to the prehearing conference designee for the designee to issue a discovery order in accordance with this decision.

Dated in Anchorage, Alaska on January 10, 2025.

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 n 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 Johnny Nie, employee / claimant v. Peter Pan Seafood Company, LLC, employer; Tokio Marine America Insurance Company, insurer / defendants; Case No. 202301076; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 10, 2025.

/s/
Rochelle Comer, Workers Compensation Technician