Alaska Workers' Compensation Appeals Commission

Allison Leigh, Appellant, vs. Alaska Children's Service and Republic Indemnity Company of America, Appellees.	Final Decision Decision No. 287 May 28, 2021 AWCAC Appeal Nos. 20-016, 20-019 AWCB Decision Nos. 20-0071, 20-0082 AWCB Case No. 201503591

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 20-0071, issued at Anchorage, Alaska, on August 18, 2020, by southcentral panel members William Soule, Chair, Bronson Frye, Member for Labor, and Bob Doyle, Member for Industry; and, Interlocutory Decision and Order No. 20-0082, issued at Anchorage, Alaska, on September 25, 2020, by southcentral panel members William Soule, Chair, Nancy Shaw, Member for Labor, and Randy Beltz, Member for Industry.

Appearances: Allison Leigh, self-represented appellant; Colby J. Smith, Griffin & Smith, for appellees, Alaska Children's Service and Republic Indemnity Company of America.

Commission proceedings: Motion for Extension of Time to File Appeal (Petition for Review) in AWCAC No. 20-016 filed September 21, 2020; Notice of Appeal (Petition for Review) in AWCAC No. 20-016 filed November 4, 2020; Notice of Appeal (Petition for Review) in AWCAC No. 20-019 filed November 4, 2020; Appeals (Petitions for Review) consolidated November 13, 2020; briefing completed March 8, 2021; oral argument held March 30, 2021.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

There have been several decisions involving the parties, including the following:

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. Bd. Dec. No. 18-0074 (July 26, 2018) (*Leigh I*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. App. Comm'n Appeal No. 18-014, Order on Petition for Review (Sept. 20, 2018) (*Leigh II*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. Bd. Dec. No. 19-0012 (Feb. 1, 2019) (*Leigh III*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. Bd. Dec. No. 19-0022 (Feb. 21, 2019) (*Leigh IV*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. App. Comm'n Appeal No. 19-005, Order on Petition for Review (May 7, 2019) (*Leigh V*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. Bd. Dec. No. 20-0037 (May 29, 2020) (*Leigh VI*).

Leigh v. Alaska Children's Serv., 467 P.3d 222 (Alaska 2020) (*Leigh VII*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. Bd. Dec. No. 20-0071 (Aug. 18, 2020) (*Leigh VIII*).

Leigh v. Alaska Children's Serv., Alaska Workers' Comp. Bd. Dec. No. 20-0082 (Sept. 25, 2020) (*Leigh IX*).

At issue before the Alaska Worker's Compensation Appeals Commission (Commission) in this appeal are Allison Leigh's appeals from two Alaska Worker's Compensation Board (Board) decisions: *Leigh VIII* and *Leigh IX*. The Board heard the issue of releases for Ms. Leigh's mental health records sought by Alaska Children's Service (insured by Republic Indemnity Company of America) (collectively referred to herein as ACS) on remand from the Alaska Supreme Court (Court). The Court ruled in *Leigh VII* that an employer has the right to obtain an employee's mental health records, with proper restrictions, even though the employee has not sought benefits for a mental health condition. The Board ordered Ms. Leigh to sign modified releases and she petitioned the Commission for review of *Leigh VIII.* Ms. Leigh subsequently filed an appeal from the Board's decision in *Leigh IX* which upheld the Board Designee's discovery order regarding the issuance of subpoenas for witnesses. The Commission, in an Order dated November 13, 2020, consolidated the two petitions for review.[1]

[1] Although the Commission has handled Ms. Leigh's petitions for review as appeals, they were properly petitions for review since both decisions of the Board were interlocutory decisions and orders and, thus, not final decisions from which an appeal may be made. By considering the petitions for review as appeals, the parties briefed the issues and oral argument was held. Thus, the mistake in considering Ms. Leigh's petitions for review as appeals was a harmless error.

Although Ms. Leigh failed to file a brief with the Commission, she did send an email stating that the Commission had the record which, in her opinion, supported her position. ACS filed a brief suggesting that Ms. Leigh had waived her appeals and the appeals should be dismissed and the Board's decisions be affirmed. The Commission heard oral argument on March 30, 2021. The Commission also received a request from Ms. Leigh asking for expedited consideration, which the Commission denied. The Commission now affirms the Board's decisions in *Leigh VIII*, requiring Ms. Leigh to sign releases for her mental health records, and in *Leigh IX*, upholding the Board Designee's granting a protective order to ACS regarding subpoenas requested by Ms. Leigh.

2. *Factual background and proceedings.*[2]

The facts recited here are limited to those necessary for consideration of the mental health records releases ordered by the Court with appropriate modifications provided by the Board, and for consideration of the protective order regarding subpoenas.

On February 20, 2015, Ms. Leigh slipped and fell in an icy parking lot at work and broke her right ankle; she may have suffered other bodily injuries resulting from her fall.[3] In 2015, Ms. Leigh sought a protective order for the releases requested by ACS for her mental health records. The Board granted the protective order. ACS did not appeal the order at that time, because no doctors had indicated Ms. Leigh's recovery might be hampered by her mental health issues.

However, in 2016, Ms. Leigh saw Scot A. Youngblood, M.D., at the request of ACS, who diagnosed, among other things, "disability conviction" with subjective complaints in excess of objective findings, particularly for the right ankle. He also opined Ms. Leigh had multiple psychosocial factors at play, with multiple underlying psychiatric diagnoses. In his opinion, she took "a veritable cocktail of psychotropic medications."[4]

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[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] *Leigh VIII* at 6, No. 2; R. 0001.

[4] *Leigh I* at 2, No. 3.

Ms. Leigh's attending physician, Heath McAnally, M.D., on January 11, 2017, diagnosed her with Complex Regional Pain Syndrome (CRPS) in the right lower extremity related to her work injury. He noted she had minimal benefit from conservative care and he suggested escalated interventional care including possible surgery.[5]

Ms. Leigh then filed a claim for benefits including time loss and medical care.[6] ACS sent her medical releases to sign, including releases for her mental health records.[7] She filed a request for a protective order for the mental health records, asserting she should not have to sign the requested releases because she was not seeking payment for her mental health treatment.[8]

Ms. Leigh saw Thomas L. Gritzka, M.D., for a Second Independent Medical Evaluation (SIME) on February 6, 2018, who said Ms. Leigh has "psychological factors affecting physical condition."[9] Dr. Gritzka, on June 18, 2018, stated Ms. Lee might have Posttraumatic Stress Disorder (PTSD) and CRPS. In his view, PTSD played a role in a person's ability to cope with and adapt to a physical injury. He suggested Ms. Leigh might benefit from treatment at a tertiary care clinic where physicians would treat her with a multidisciplinary approach, and the team would include a psychiatrist, psychologist, neurologist, and pain management specialist. It was his opinion that such a treatment facility would want to have all her medical records, including her mental health records, in order to evaluate her properly. He also opined that psychological treatment was related to her work injury. He did note that people with CRPS usually have some kind of psychological issue pre-existing their injury.

On February 12, 2018, Ms. Leigh filed her first request for a hearing on her January 11, 2017, claim for benefits.[10] On February 23, 2018, ACS again asked Ms. Leigh

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5 *Leigh I* at 2, No. 4.

6 *Id.* at 2-3, No. 5.

7 *Id.* at 3, No. 7.

8 *Id.*, Nos. 8, 9.

9 *Leigh VIII* at 7, No. 14.

10 *Id.* at 8, No. 15; R. 933.

to sign "Psychological, psychiatric, mental health/counseling records" releases reaching back to 1999.[11]

On March 13, 2018, a Board Designee granted Ms. Leigh's request for a protective order.[12] On March 20, 2018, ACS sought reconsideration or modification of the March 13, 2018, protective order.[13] On July 26, 2018, the Board, in *Leigh I*, ordered Ms. Leigh to sign releases for psychological, psychiatric, and mental health counseling records from 1999 to the present.[14] On August 10, 2018, Ms. Leigh petitioned the Commission to review *Leigh I*, which the Commission denied.[15] Ms. Leigh petitioned the Court for review, and the Court accepted her petition.

Ms. Leigh, on February 15, 2019, filed eight petitions with the Board, which it numbered in the order in which they appear in her electronic file as petitions (1) through (8):

> (1) Petition for a protective order and "other": "No decision shall be placed on the Internet that mentions anything regarding mental health. Request hearing before the board."
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> (2) Petition for a protective order and "other": "The board previously stated that 'No Harm' would be done to myself if it turns out my psych records were irrelevant. Harm has already been done, so what factual basis did the board have? Opposing side has filed an EIME, it was not filed under seal, and apparently their own expert is not good enough for opposing side. Request hearing before the board."
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> (3) Petition for reconsideration or modification and "other": "Request reconsideration of pre-conference decision dated 12.29.18 [sic]. Who attended hearing, why were my due process rights completely ignored? Request hearing: Want to know how this can even happen?"
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> (4) Petition for reconsideration or modification and "other": "Reconsideration of interlocutory decision + order dated 2.1.19 AWCB #19-0012. Request hearing so I may speak freely."

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[11] *Leigh VIII* at 8, No. 17.

[12] *Id.*, No. 19; R. 5561-64.

[13] *Leigh VIII* at 8, No. 20; R. 939.

[14] *Leigh VIII* at 8, No. 21.

[15] *Leigh II*; *Leigh VIII* at 8, Nos. 22, 23.

> (5) Petition to compel discovery and "other": "Ms. Rush (Adjuster). I would like all her notes, bills, correspondence w/ previous ACS to include formal complaints made by present/past Ms. Leighs with Northern Adjusters. Request hearing."
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> (6) Petition to compel discovery and "other": "Alaska Child and Family through their attorneys continue to withhold discovery, *i.e.*, investigational reports that should be in my Ms. Leigh file. In addition I would like previous employer to answer questions that have been avoided. Request a hearing before the board."
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> (7) Petition to compel discovery: "Request to file with the board the cost to defend this claim so far, *i.e.* attorney[']s fees, costs, adjuster[']s cost, mediation, SIME, EIMEs."
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> (8) Petition to compel discovery and "other": "Ms. Paddock has asked for cross-examination of my doctors. Yet she has not scheduled any depositions for them and she single-handedly took away my hearing on the merits. She should have to pay the cost of depositions now."[16]

On February 21, 2019, the Board, in *Leigh IV*, denied Ms. Leigh's February 15, 2019, petition (4) to reconsider *Leigh III*.[17] Ms. Leigh sought Commission review of *Leigh IV*, and on May 7, 2019, the Commission held that since "the issue of release of her mental health records is pending before the Court, the Court retains jurisdiction over any claims for benefits. Therefore, the Board no longer has jurisdiction to hear the merits of Ms. Leigh's claim until the Court resolves the discovery dispute." It further stated, "[u]ntil the Court decides what discovery is allowable with regards to Ms. Leigh's mental health records, the Board does not have jurisdiction to consider the merits of any part of Ms. Leigh's claim." The Commission reasoned that all decisions regarding the benefits at issue were potentially affected by and encompassed within the issue before the Court. It concluded, "The Board was correct in deciding it did not have jurisdiction to hear the merits of her claim for transportation and other benefits."[18]

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[16] *Leigh VIII* at 10-11, No. 32; R. 1856-65.

[17] *Leigh IV* at 11.

[18] *Leigh V* at 11, 12.

On August 12, 2019, the Court denied Ms. Leigh's first motion to treat her then-pending petition for review as "confidential."[19]

The Board found at the hearing on May 27, 2020, that Ms. Leigh offered arguments and testimony generally not relevant to the issues. On Ms. Leigh's appeal from the Board Designee's April 28, 2020, discovery order denying petition (7) seeking discovery of ACS's defense attorney fees and costs, she contended, among other things, that this case had dragged on too long and ACS was deliberately delaying it. She asserted that the percentage of ACS's attorney fees and costs far outweighed anything it has paid her, and everyone except her was getting paid. She added that if anything, her physicians were being underpaid.[20]

ACS contended its defense attorney fees and costs were not relevant to any issue in Ms. Leigh's claims and, therefore, the Board Designee did not abuse his discretion when he denied Ms. Leigh's request. The Board declined to hear Ms. Leigh's January 13, 2017, claim based on *Leigh III* and *Leigh IV* and the Commission's decision in *Leigh V*. The Board reiterated that a pending review before the Court divested the Board of its jurisdiction to decide Ms. Leigh's claim on its merits, because the medical release issue on appellate review was closely intertwined with Ms. Leigh's January 13, 2017, claim. Lastly, the Board agreed to hear and decide Ms. Leigh's appeal from the Board Designee's April 28, 2020, discovery order denying her petition (7), because this issue did not interfere with the Court's jurisdiction.[21]

The parties met with a Board Designee on July 6, 2020, to review the issues, rule on any discovery matters, and schedule a hearing. Ms. Leigh requested a hearing on her February 15, 2019, petitions (1) through (8), and ACS wanted a hearing on its June 12, 2020, petition to dismiss. Ms. Leigh insisted she was entitled to a hearing on the merits of her claim and "declined to present her position with regard" to her eight pending February 15, 2019, petitions. The Designee issued the following orders: Petition (1):

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19 *Leigh VIII* at 11, No. 38.

20 *Id.* at 14, No. 50.

21 *Id.*

denied because the Designee lacked authority to resolve this issue at a prehearing conference; Petition (2): denied as this was not a specific discovery request; Petition (3): denied as moot since a hearing was held on January 29, 2019; Petition (4): denied because *Leigh IV* had reviewed *Leigh III* and denied Ms. Leigh's petition to reconsider *Leigh III*; Petition (5): denied as irrelevant and because ACS stated it had already produced Ms. Leigh's file from ACS in its entirety; Petition (6): denied as it did not present a specific discovery request; Petition (7): denied because *Leigh VI* had reviewed the April 28, 2020, prehearing order and denied Ms. Leigh's appeal from it; and Petition (8): denied as irrelevant. The Board Designee also addressed ACS's June 21, 2019, petition to quash a subpoena and deposition of Dr. Youngblood. He noted ACS had withdrawn its petition and, therefore, the issue was moot because Dr. Youngblood had already been deposed. The issues ultimately set for hearing on August 6, 2020, included: (1) Ms. Leigh's appeal of the July 6, 2020, prehearing conference orders denying her February 15, 2019, petitions (1) through (8); (2) her "appeal" of ACS's withdrawal of its June 21, 2019, petition to quash a subpoena and deposition; and (3) ACS's June 12, 2020, petition to dismiss Ms. Leigh's claim. The Board Designee required the parties to file witness lists and referred them to 8 AAC 45.112 for specific directions.[22]

On July 10, 2020, the Court, in *Leigh VII*, stated: "We hold that the statute permits an employer to access the mental health records of employees when it is relevant to the claim, even if the employee does not make a claim related to a mental health condition." The Court further said, "The Board appropriately decided that Leigh's mental health records were potentially relevant to a defense." *Leigh VII* remanded the case for further proceedings so the Board could consider reasonable limits on the mental health records releases at issue, "particularly with respect to the time period covered by the release." The Court further noted the legislature's intent in respect to medical record releases:

> As set out in the intent section of the bill, the legislature's intent (as relevant to this provision) was that "claimants provide releases of information that allow employers and insurers and their agents to obtain promptly information needed to investigate and adjust claims" and "medical

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[22] *Leigh VIII* at 15-16, No. 53; R. 7430-33.

information relevant to claims be discoverable and promptly provided" (footnote omitted).[23]

On July 16, 2020, a Board Designee set forth the issues for the August 6, 2020, hearing as: (1) "[Ms. Leigh]'s appeal of the July 6, 2020 prehearing orders denying her February 15, 2019 petitions"; (2) "[Ms. Leigh]'s appeal of [ACS]'s withdrawal of its June 21, 2019 petition to quash subpoena and deposition of EME Youngblood"; and (3) "[ACS]'s June 12, 2020 petition to dismiss claim." The Board Designee denied Ms. Leigh's request for signed subpoenas, finding no witness would provide testimony relevant to the hearing issues.[24]

On July 22, 2020, the Court denied Ms. Leigh's unopposed July 20, 2020, motion to use pseudonyms in the Court's decisions and orders and to treat her case as "confidential." This was the second time the Court denied such a request.[25]

ACS again requested a mental health records release. ACS sought a mental health records release back to 2007 based on a neuropsychological report from Paul L. Craig, Ph.D., stating in 2009 Ms. Leigh began regular mental health counseling. Dr. Gritzka stated CRPS frequently has a psychological aspect and that Ms. Leigh had not responded well to orthopedic treatment. Notwithstanding Dr. Gritzka's opinion that a tertiary care facility would need Ms. Leigh's medical records back to childhood, ACS did not, at that time, seek those records. Based on what may be in those records, ACS reserved its right to seek mental health records earlier than 2007.[26]

Ms. Leigh contended Dr. Gritzka did not say a tertiary care facility would need "all psychological records," but said such a facility would need "all records." She contended "no doctors" wanted her mental health records. In response to a question as to whether she would sign the releases, Ms. Leigh stated, among other things, "I object to signing any release at all until I can have a hearing on the merits, because penalty, interest and

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23 *Leigh VII*.

24 *Leigh VIII* at 18, No. 58; R. 7708-09.

25 *Leigh VIII* at 18, No. 59.

26 *Id.* at 20-21, No. 62.

all of these things need to be decided and you cannot order me to sign any a release until the past benefits have been paid, which is HHS, which was actually mentioned in the Supreme Court order." She also stated, "I will not sign any release at all, not even just mental health, any release at all because I am entitled to a hearing on the merits." Ms. Leigh contended if ACS wanted to use Dr. Gritzka's opinion to obtain mental health records, the only "legal" and "logical" release would have to go back to her childhood. She brushed off the suggestion that mental health conditions might affect her disability or need for medical treatment as nonsensical and "vile."[27]

Ms. Leigh also expressed concern that disclosure of her counseling records "might impact" her co-workers. She asserted she suffered retaliation at work and was fired. Therefore, in her view, ACS would retaliate against former co-workers because Ms. Leigh's mental health records mentioned co-workers' names, ACS's alleged wrongdoing including payroll "problems," Medicare fraud, Health Insurance Portability and Accountability Act (HIPAA) violations, and a child's suicide related to ACS's actions.[28] ACS agreed to redact any former co-worker's or third-party's name in Ms. Leigh's mental health records.[29]

ACS objected to serving Ms. Leigh's mental health records on her, prior to filing them with the Board, so she could file for a protective order. It contended this would defeat speed and efficiency and would result in her objecting to every record, which would require additional litigation.[30] Ms. Leigh also objected to this process, although the Board found her reasoning was not clear. However, she said she would agree to release all her mental health records to her treating physicians if they decided they needed them.[31]

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27 *Leigh VIII* at 21, No. 63.

28 *Id.* at 22, No. 65.

29 *Id.*, No. 66.

30 *Id.*, No. 67.

31 *Id.*

ACS objected to any subject matter limitations on Ms. Leigh's mental health records releases. It contended only a trained expert could determine what diagnoses or mental health conditions might be relevant to her pending claims.[32] Ms. Leigh contended ACS first had to demonstrate relevance before it even got a mental health records release. Alternately, "according to law" she contended ACS could only discover mental health records related to "depression," but the Board found she did not explain why.[33]

ACS asserted *Leigh VII* already determined Ms. Leigh's mental health records are potentially relevant to a defense and discoverable. The law requires ACS to put relevant medical records on a medical summary and file them with the Board.[34] Ms. Leigh asserted the Board lacks adequate re-disclosure restrictions because she had received other people's medical records. She also asserted the Board should "secure the records." She further contended HIPAA and other unspecified federal law applied in this case.[35]

ACS contended the language from AS 23.30.095(e) the Court cited in *Leigh VII* applies to all treating doctors, and does not apply only to Employer's Medical Evaluations (EME) and Ms. Leigh's records are not privileged. It contended this interpretation fits with the Court's opinion.[36] Ms. Leigh contended the Court's citation from §095(e) applies only to EMEs.[37]

Ms. Leigh again stated ACS would get "no discovery" until she had a hearing on the merits of her claim.[38]

The parties stipulated the Board could decide Ms. Leigh's remaining eight petitions, the petition withdrawal "appeal," and ACS's petition to dismiss, on the written record.[39]

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[32] *Leigh VIII* at 22, No. 68.

[33] *Id.*

[34] *Id.* at 23, No. 69.

[35] *Id.*

[36] *Id.*, No. 70.

[37] *Id.*

[38] *Id.* at 24, No. 75.

[39] *Id.*, No. 76.

On August 18, 2020, the Board issued *Leigh VIII* and advised and instructed Ms. Leigh regarding discovery disputes and related prehearing conferences:

> Unfortunately, at the July 6, 2020 prehearing conference where the parties had an opportunity to express their views . . . and provide evidence or arguments supporting them, [Ms. Leigh] refused to present her position on her petitions. The designee noted, "Due to frequent interruptions, arguments and hostilities between the parties," he could not "elicit meaningful information or clarification" from either party and decided the discovery request on the written record. Since [Ms. Leigh] provided no information supporting her request and [ACS] stated she had no right to other people's complaints, the designee's decision to decide this petition on the written record was not an abuse of discretion because the request was irrelevant. *Granus*. . . . On the available record, the designee did not abuse his discretion. AS 23.30.108(c). [Ms. Leigh]'s petition . . . will be denied.[40]
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> This is an appeal from a designee's discovery order and must be decided solely on the written record. AS 23.30.108(c). [Ms. Leigh]'s petition . . . seeks an order compelling discovery from [ACS] including "investigational reports," and states she would like to ask her former employer questions. [Ms. Leigh] may have attempted to clarify this petition at the August 6, 2020 hearing; however, the panel cannot consider any argument or evidence she presented at the hearing because the only evidence and argument the designee considered at the July 6, 2020 prehearing conference addressing petition . . . was stated on the petition itself. At that prehearing, [Ms. Leigh] was too busy arguing with Smith and the designee to present any "meaningful information or clarification." [Ms. Leigh] failed to explain to what "investigational reports" she referred and simply stated she wanted to ask Employer questions "that have been avoided." The designee found this "not a specific request" for discovery and denied petition . . . as not being specific. The designee did not abuse his discretion in denying this request because [Ms. Leigh] provided him with inadequate arguments and evidence. A party must present the designee with evidence and argument to justify a petition to compel discovery. AS 23.30.108(c). [Ms. Leigh] failed to do so and the designee's decision . . . was not an abuse of discretion and will be affirmed.[41]

Leigh VIII cited AS 23.30.108(c) in full and explained to Ms. Leigh that she must provide her evidence and legal arguments supporting her position in a discovery dispute

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[40] *Leigh VIII* at 52.

[41] *Id*. at 52-53.

at the prehearing conference at which the dispute is discussed and the discovery order is issued.[42]

On August 25, 2020, ACS sought a protective order so Ms. Leigh could not obtain subpoenas from the Board before the parties appeared at a prehearing conference.[43] It contended:

> The employer is filing this Petition for Protective Order concerning Ms. Leigh's submission of subpoenas. To date, Ms. Leigh has submitted over 26 subpoenas to the Board. Some of these have been signed and some have not. The employer has been obliged to file petitions to strike each time this occurs for various reasons. Additionally, the Board has addressed the relevancy of Ms. Leigh's request for witnesses at two different hearings, excluding the majority of her requests. The basis for the exclusions is relevancy. The employer is filing this petition to request the Board not to sign any further subpoenas in this matter without having a prehearing conference first. This will give the employer the opportunity to avoid unnecessary expenses filing petitions to strike, ability to determine if material witnesses are available, and voice concerns that the information sought has already been denied by the Board.[44]

On August 27, 2020, ACS sought an order staying subpoenas. It contended:

> Previously, on August 24, 2020 the employer filed a petition to quash five subpoenas the Board had signed, per the request of Ms. Leigh. The employer additionally requested a prehearing conference so these issues could be addressed prior to the scheduled subpoenaed depositions. Ms. Leigh has indicated she is unavailable to attend any prehearing conference prior to these depositions occurring.[45]

On September 1, 2020, the parties appeared telephonically before the Board Designee to address ACS's: (1) August 24, 2020, petition to quash five subpoenas; (2) August 25, 2020, petition for a protective order to prevent Ms. Leigh from submitting subpoenas without first appearing at a prehearing conference; and (3) August 27, 2020, petition to stay subpoenas already issued. ACS argued Ms. Leigh did not always properly serve subpoenas or give adequate notice for deposition testimony. It further contended

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[42] *Leigh VIII.*

[43] *Leigh IX* at 8, No. 17.

[44] *Id.*

[45] *Id.*, No. 18.

she had filed twenty-six subpoenas, and a prehearing conference should occur before any more were ordered. ACS contended Ms. Leigh was abusing the subpoena power provided in the Alaska Workers' Compensation Act (Act) and in the regulations, thereby causing unnecessary expense and litigation for the parties. While ACS did not oppose the Board issuing subpoenas or the parties having depositions, it contended a prehearing conference would allow it to participate to avoid scheduling conflicts. It also contended the Board should quash two of five subpoenas issued on August 21, 2020, because deponents Morris and Fanning had not received a deposition notice. Ms. Leigh contended Mr. Smith lies and she and other injured workers are sick and tired of being called "liars and scumbags." She reiterated other matters not relevant to the discovery dispute pending before the Board Designee; specifically, Ms. Leigh wanted Mr. Smith to explain why a December 2015 controversion notice was still active based on an allegation that she had refused to return to modified work duty, when she states she had returned to work. However, on the prehearing-before-a-subpoena issue, Ms. Leigh contended there is no law that allows the Board Designee to require a prehearing conference before a party obtains a subpoena; to do so in her view would be an "abuse of power." Ms. Leigh said that, while she would not sign Mr. Smith's psychiatric records release, she would sign an appropriate one, which she implied would be of her own making. The written order noted:

> [Ms. Leigh]'s requests for subpoenas without consultation with [ACS] has resulted in numerous disputes, and it is not quick, fair, or efficient for either party to have to deal with repeated petitions and prehearings. Further, there was no evidence the subpoenas were properly served in a timely manner; therefore the designee **GRANTED** [ACS]'s petition for protective order. The designee also partially **GRANTED** [ACS]'s petition to quash the two subpoenas for Mr. Morris and Ms. Fanning as there was no evidence they were properly served.

Ms. Leigh hung up on the Board Designee and the conference ended. The Board Designee's written order states:

> 1. 08/25/2020 ER's August 25, 2020 Petition for Protective Order concerning EE's submission of subpoenas **GRANTED** – A prehearing with a hearing officer will be necessary prior to approving any subpoenas

submitted by the Ms. Leigh to allow parties to find a mutually agreeable date and deposition method.

2. 08/27/2020 ER's August 27, 2020 Petition to stay subpoenas of Custodian of Payroll Records, Susan Daniels, and Jessica Rush.

Moot – details below.

3. 08/24/2020 ER's August 24, 2020 Petition to quash five subpoenas (listed below).

4. **GRANTED in part** – details below. . . .[46]

The Board treated Ms. Leigh's September 1, 2020, teleconference with Ms. Morfield as a request to appeal the Board Designee's September 1, 2020, discovery rulings.[47]

The Board issued *Leigh IX* on September 25, 2020, and found the Board Designee had not abused her discretion when she granted the petition to stay the subpoenas and to require a Board Designee to review any future requests for subpoenas from Ms. Leigh.[48] Ms. Leigh appealed this decision to the Commission which consolidated it with her appeal of *Leigh VIII.*

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[49] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[50] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind

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46 *Leigh IX* at 9-11, No. 19.

47 *Id.* at No. 21.

48 *Id.* at 18.

49 AS 23.30.128(b).

50 *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

is a question of law."[51] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.[52]

However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine the credibility of witnesses.[53] The weight given to the witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[54]

Review of discovery dispute rulings by the Board, including the imposition of sanctions, is made pursuant to an analysis of whether the Board abused its discretion.[55]

4. Discussion.

Ms. Leigh filed points on appeal with both of her notices of appeal. She asserts in AWCAC Appeal No. 20-019 that the Board erred in finding the Board Designee did not abuse her discretion when she withdrew authority for the subpoenas sought by Ms. Leigh and required Ms. Leigh to submit her subpoenas at a prehearing so ACS could raise any objections prior to the issuance of the subpoenas. In her notice of appeal in AWCAC Appeal No. 20-016, Ms. Leigh listed several points, each detailing a point why the Board erred in the modifications of the mental health records releases sought by ACS and in refusing to grant her a hearing on the merits prior to production of the additional discovery sought by ACS.

Ms. Leigh did not submit a brief to the Commission, but emailed the Commission Clerk stating, "Here is my brief. Please review the transcripts, the record including

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[51] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984).

[52] AS 23.30.128(b).

[53] AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

[54] AS 23.30.122.

[55] *See, e.g., Dougan v. Aurora Elec., Inc.*, 50 P.3d 789, 793 (Alaska (2002); *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009).

controversions, EDI Reports, affidavits, the Supreme Court decision (including citations) with the briefings and come up with you (sic) 'order' with your decision ASAP."[56] Under Commission regulations, her appeals could have been dismissed as ACS requested. However, Ms. Leigh is a self-represented litigant and her position was well established at the Board hearing and in *Leigh VIII and Leigh IX*. Therefore, the Commission has allowed her appeals to go forward. Ms. Leigh participated in oral argument, but did not provide any further legal analysis or reasoning as to the Board's alleged errors.

ACS, in its brief, asserts the Board was extremely thorough in its application of *Leigh VII* to the question of whether Ms. Leigh should be ordered to sign releases for her mental health records and what kind of restrictions should be placed on the releases sought by ACS. It, therefore, contends *Leigh VIII* should be affirmed. It also contends *Leigh IX* should be affirmed as the only mechanism that will expedite the issuance of subpoenas in this matter. Ms. Leigh has consistently asked for subpoenas and set deposition times without consultation with ACS as to whether the people would be available at the times in the subpoenas. Moreover, as ACS argued to the Board, most of the subpoenas were improper and should not have been issued in the first place.

a. *Did the Board err in ordering Ms. Leigh to sign releases for mental health records with restrictions?*

The Court, in *Leigh VII*, stated that an employer has the right to obtain mental health records even when the employee has not placed her mental health conditions at issue. The Court looked at AS 23.30.107(a) which states, in part, "Upon written request, an employee shall provide written authority to the employer . . . to obtain medical . . . information relative to the employee's injury." The Court further reminded that under AS 23.30.107(b) medical records in the Board's and the Commission's files are barred from disclosure as public records under AS 40.25.100 – .295 and, thus, the statute provides some privacy protection to injured workers.

The Court further noted that the Board Designee has authority to resolve disputes about releases when an injured worker seeks a protective order regarding a requested

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[56] Email dated February 18, 2021, 3:45 p.m.

release. The Board, in reviewing the Designee's decision, is required to uphold the decision unless the Designee has abused his or her discretion. The Court also looked at the legislative history and noted that the legislature intended releases to authorize only medical information that is applicable to an employee's injury, but the main purpose for the language in the statute and the Board's review of discovery disputes was "to set up 'a simple summary process for employers to obtain reasonable medical releases.'"[57] The Court found that the legislature's intent was that injured workers provide releases of information that would allow employers and insurers "to obtain promptly information needed to investigate and adjust claims" and that "medical information relevant to claims must be discoverable and promptly provided."[58]

The Court further noted that the word "relevant" has the same meaning in Alaska Civil Rule 26(b)(1) as in the Act. Relevant evidence is that evidence which is likely to lead to admissible evidence relative to an employee's injury.[59] The Court noted that both the Board and the Commission relied on the Court's previous statements that discovery rules are to be construed broadly. In civil cases, as well as in workers' compensation claims, pre-existing medical conditions can be relevant to a case even if the specific medical condition is not directly an issue. Moreover, the current causation standard in workers' compensation cases requires the Board to weigh and consider the relative contribution of all causes to determine whether a claim is compensable. Therefore, an employer has the right to develop defenses and discover information relevant to different possible causal factors in response to a worker's written claim. The Court noted that even if Ms. Leigh had not directly made a claim for medical care or disability for her mental health conditions, the medical records "contained numerous references to the impact of her mental health conditions on treatment and possible disability related to her pain complaints. Dr. Gritzka testified that her treatment providers would need all of her medical records, and he deferred 'to the opinion of a psychiatrist or psychologist' when

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57 *Leigh VII*, 467 P. 3d at 228-9.

58 *Id.* at 229.

59 AS 23.30.108(c).

asked whether any 'psychosocial condition' was related to [her] case, even though he himself thought there might be a relationship."

The Court also looked at Ms. Leigh's claim that the Board had previously granted her a protective order for mental health records releases and that protective order should preclude any new releases for mental health records because "nothing changed in her case between 2015" and now.[60] However, the Court found that her condition had indeed changed, noting the diagnosis of CRPS in 2016 and Dr. McAnally's records documenting emotional concerns along with the physical complaints over several visits. Therefore, ACS was now entitled to discover her mental health records to ascertain if her disability is related to her pre-existing mental health issues.[61] To ascertain the substantial cause of her current need for medical treatment, her medical records, including her mental health records, must be considered and evaluated.

The Court remanded the matter to the Board to impose reasonable limits on the mental health records releases sought by ACS. The Court declined to declare "an explicit rule for the Board to follow in limiting medical releases for mental health records. The Board has discretion in ruling on discovery issues and can, if it chooses, limit an employer's access to information in an employee's mental health records as it has done in other cases."[62] The Court directed the Board on remand to scrutinize carefully "the information requested to determine whether it is overly broad, particularly with respect to the time period covered by the release. The Board should also consider restrictions on re-release of the information and should make an appropriate record for further appeal if necessary."[63]

The Board, in *Leigh VIII*, carefully followed the Court's instructions and addressed each of Ms. Leigh's concerns. First, the Board found that the prehearing conference that identified issues for hearing did not include the merits of Ms. Leigh's claim, but was limited

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[60] *Leigh VII* at 229-230.

[61] AS 23.30.010(a).

[62] *Leigh VII* at 230.

[63] *Id.* at 231.

to hearing the Board Designee's orders on her eight petitions, her "appeal" of ACS's withdrawal of its petition to quash a subpoena and deposition, and ACS's petition to dismiss Ms. Leigh's claim. At hearing, the parties agreed orally on the record to add a fourth issue, to wit, the remand to the Board from the Court regarding the mental health records releases. The merits of her claim were not included and, therefore, not ready for hearing pursuant to the Board's regulation, 8 AAC 45.065(a)(1). This regulation provides that the prehearing conference summary governs the issues for a hearing except in "unusual and extenuating circumstances."[64] A prehearing conference to add the issue of the remand in *Leigh VII* was not held due to the unavailability of the various parties. The parties did agree to add this issue at hearing. Moreover, the Board explained to Ms. Leigh that a hearing on the merits of her claim could not be scheduled until after all discovery issues are resolved and evidence is available to be fairly considered.[65]

The Board next looked at whether Ms. Leigh's witnesses should be allowed to testify. The Board noted Ms. Leigh was representing herself and had been since February 7, 2019. Ms. Leigh filed a witness list that identified the parties only by name and identified the issue of their testimony as "Regarding Leigh's case." The witness list did not state whether the persons would testify in person, by deposition, or telephonically and did not include their addresses, telephone numbers, or even a brief description of the substance of the expected testimony. According to the Board's regulation at 8 AAC 45.112, it is necessary to provide all of this information on a witness list so the opposing party has some idea of what to expect from the witnesses' testimony.

Moreover, Ms. Leigh was given an opportunity to call relevant witnesses. However, after extensive questioning by the Chair of the hearing to identify some connection between her listed witnesses and the issues set for hearing, the Board found no relevancy for any of the witnesses listed. The Board then disallowed the witnesses according to 8 ACC 45.120. Since the issues before the Board were all discovery matters, the

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64 8 AAC 45.065(c); 8 AAC 45.070(g).

65 *Leigh VIII* at 38-39.

witnesses' testimony was not necessary nor relevant, and the Board correctly did not admit any testimony.

The remainder of the hearing primarily centered on whether Ms. Leigh should sign and deliver restricted mental health records releases and what restrictions should be placed on the releases. As detailed by the Board in *Leigh I*, the Commission in *Leigh V*, and detailed above by the Court in *Leigh VI.* The Court found that ACS has a right to develop evidence and a defense that something other than Ms. Leigh's work injury is the substantial cause of her ongoing disability and need for medical treatment. Therefore, the question of whether she needed to sign releases was resolved by the Court in *Leigh VII* and so the remaining questions are only what reasonable restrictions should be placed on the mental health records releases.

The Board first looked at what date restrictions, if any, should be placed on the releases. ACS stated it only wanted a release going back to 2007 which is two years before there was an indication that she was obtaining mental health counseling. That is, according to Dr. Craig, Ms. Leigh began obtaining mental health counseling in 2009. 2007 is two years before this treatment and this is the standard practice. Moreover, her injury occurred in 2015 and the requested records are closer in time to the work injury. Ms. Leigh stated this treatment was for attention deficit disorder, depression, and PTSD. Ms. Leigh again asserted that she would not sign a mental health records release going back to 2007, but her position was difficult for the Board to understand. She stated Dr. Gritzka had stated the need for all of her medical records and, according to her, the only "legal" and "logical" release of mental health records should go back to her childhood. She appeared to argue for a mental health records release broader than what ACS sought.

ACS stated a reasonable nexus between a date of 2007 for the mental health records releases and Dr. Gritzka's opinion. Thus, 2007 is a reasonable date for the mental health records as it is closer in time to the 2015 work injury. Dr. Gritzka noted that CRPS frequently has a psychological aspect and that she had not responded to orthopedic treatment. In 2009, she admittedly began mental health treatment. Without a release, ACS is unable to determine how long this treatment continued, whether she is still

receiving it, or whether her pre-existing mental health conditions are disabling and/or affecting her ability to recover.

As the Court and the Board noted, ACS is entitled to develop a defense based on her mental health records. Her work injury must be the substantial cause of her continued need for treatment and disability.[66] This is an issue that will need expert medical testimony either at hearing or through records in order for the Board to decide what is the substantial cause of any need for medical treatment or ongoing disability. Under *Morrison v. Alaska Interstate Construction*, the Board must consider all different causes that might be relevant to identifying the substantial cause.[67] The Board needs to find out which out of all possible causes is, in its judgment, the most important or material cause related to the benefit sought.[68] Moreover, pre-existing conditions which the work injury aggravates, accelerates, or combines with to cause the need for medical treatment or the current disability may still constitute a compensable injury.[69] The Board, therefore, determined that a mental health records release going back to 2007 would be appropriate to provide the best information for discerning the relationship, if any, between her ongoing disability and need for treatment and the work injury.[70]

The Board further decided that since neither party requested nor favored an *in camera* review of her mental health records it was not appropriate in this instance.

Ms. Leigh requested the right to review any mental health records ACS received prior to the filing of the records with the Board. She requested this right of review so she could file a petition for a protective order in order to exclude some or all of the records and to seek an order prohibiting ACS from either filing the records or allowing an adjuster to see them before she could file for the protective order. ACS objected to this process

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[66] AS 23.30.010(a).

[67] *Morrison v. Alaska Interstate Constr., Inc.*, 440 P.3d 224, 237 (Alaska 2019).

[68] *Id.*

[69] *Id.* at 234, 238-239.

[70] *See, e.g., Granus v. Fell*, Alaska Workers' Comp. Bd. Dec. No. 99-0016 (Jan. 20, 1999)

as contrary to the legislature's mandate that hearings be quick and efficient.[71] ACS has further contended that allowing her to see the records prior to their filing with the Board and being sent to its own physicians would require endless litigation.

The Board correctly found that *Leigh I, Leigh V*, and *Leigh VII* had already ascertained that the mental health records were important and relative to any defense developed by ACS. The Board continued that it would "do little good" to allow Ms. Leigh to again object to some or all of her mental health records. Seeking additional protective orders would only require more prehearing conferences and, ultimately, further appeals of the Board Designee's decisions. The Board further stated that depression and other mental health diagnoses, including the level and degree Ms. Leigh sustained, were important to an ultimate determination of the causal connection, if any, between her mental health issues and the work injury. Therefore, prior review by Ms. Leigh is not appropriate.

The Board also reviewed whether there should be any subject matter limitations to the releases. Ms. Leigh argued that only mental health records relating to her depression should be discoverable. She did not identify why depression was the only appropriate mental health condition that might be relevant. This is not a case in which the employee is seeking payment for her mental health treatment. In point of fact, Ms. Leigh is seeking no benefits at this time for her mental health conditions.

However, ACS is seeking Ms. Leigh's mental health records in order to develop its defense to her claim and to enable the Board to ascertain whether there is connection between her ongoing disability and her pre-existing mental health issues. As noted above, all possible causes for ongoing disability and need for medical treatment must be evaluated by the Board. If there were subject matter limitations imposed on the releases, ACS would never know what other mental health issues might be relevant to Ms. Leigh's ongoing claim of disability.

Both parties are entitled to have an opportunity to be heard and to have their arguments and evidence fairly presented and considered. ACS needs to have the mental

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[71] AS 23.30.001(1).

health records releases in order to investigate its potential defenses in this case. Therefore, the Board held that there would be no subject matter limitations on the mental health records releases. This decision was not an abuse of its discretion.

Ms. Leigh also objected to the release of her mental health records because she was concerned about the impact on her former co-workers. She testified that her counseling records included information that "alleged fraud that was going on at work which when reported to supervisors resulted in retaliation and harassment against her." She was concerned that her former co-workers might receive the same treatment. ACS agreed to redact the names of former co-workers and any third-parties mentioned in her mental health records. The Board found this to be a reasonable restriction and directed ACS's attorney to redact all names of all third-parties appearing in Ms. Leigh's mental health records before disclosing them to anyone, including ACS, the insurer, and the adjuster, and before filing them with the Board on a medical summary.

Another question arose as to why ACS would need her pre-injury mental health bills. ACS agreed that it did not need the pre-injury mental health bills, but reserved its right to discover post-injury mental health bills in the event Ms. Leigh made a claim for post-injury mental health care. The Board ordered that the releases not include language referring to a release for any bills for pre- or post-injury treatment.

The Board's restriction is reasonable and rational and, therefore, this decision is likewise not an abuse of discretion.

Ms. Leigh expressed concern about the release of any records from her childhood. Since the Board restricted the releases to medical records developed from 2007 forward, this is not an issue since she was an adult in 2007.

Ms. Leigh contended her mental health records should be treated like records in a physician's office and, thus, secured. She questioned whether the Act permitted re-disclosure of her records. The Act requires ACS to file relevant mental health records on its medical summaries and to disclose her records for EMEs and SIMEs.

The Board reminded Ms. Leigh that medical records in the Board's file are not open to public inspection. ACS has the right to send her medical records to an EME or an SIME physician. Once a claim has been filed, all parties are required to file and serve all of the

reports in their possession to the Board and to serve them on any adverse party. Ms. Leigh's medical records are not subject to public inspection or copying; nonetheless, a variety of people may release medical records without her consent to a physician performing an SIME, to any party to the claim, or to a governmental agency. At hearing, the attorney for ACS could not confirm that he would never re-disclose her mental health records to a third-party citing hypothetical examples. The Board found that the mental health records releases would be required to include "language limiting re-disclosure of [Ms. Leigh]'s records only in accordance with the Act and applicable regulations," which supersede all other provisions including HIPAA. This restriction is reasonable and is not an abuse of discretion by the Board.

The Board reminded Ms. Leigh that upon filing her claim, she came under the Act's provisions. Other statutes regarding confidentiality, such as AS 08.29.200, AS 08.63.200, and AS 08.86.200, do not apply to workers' compensation claims. The Act contains its own provisions regarding disclosure of relevant medical data.[72]

Ms. Leigh raised a question regarding her right to privacy under the Alaska Constitution, Article 1, Section 22. Neither the Board nor the Commission has authority to consider constitutional issues in most circumstances.[73] Thus, this issue is best left to the Court to decide.

Ms. Leigh requested the Board to keep future decisions confidential. The Court twice denied a similar request. Alaska workers' compensation hearings are open to the public.[74] There is no provision in the Act for closing a hearing to the public. Moreover, the Board files a written order in each case it decides which it is required to do by statute.[75] The Board correctly decided it had no authority to keep past and future decisions confidential and, thus, properly denied Ms. Leigh's request. This decision is supported by the Act.

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[72] *See*, AS 23.30.107(a); AS 23.30.108(c); *Leigh VII.*

[73] *See*, *Burke v. Raven Elec., Inc.*, 420 P.3d 1196 (Alaska 2018).

[74] AS 23.30.135(b).

[75] AS 23.30.110(c).

The Board also considered the eight petitions that Ms. Leigh filed requesting a variety of relief.

These petitions are as follows:

> (1) Petition for a protective order and "other": "No decision shall be placed on the Internet that mentions anything regarding mental health. Request hearing before the board."
>
> (2) Petition for a protective order and "other": "The board previously stated that 'No Harm' would be done to myself if it turns out my psych records were irrelevant. Harm has already been done, so what factual basis did the board have? Opposing side has filed an EIME, it was not filed under seal, and apparently their own expert is not good enough for opposing side. Request hearing before the board."
>
> (3) Petition for reconsideration or modification and "other": "Request reconsideration of pre-conference decision dated 12.29.18 [sic]. Who attended hearing, why were my due process rights completely ignored? Request hearing: Want to know how this can even happen?"
>
> (4) Petition for reconsideration or modification and "other": "Reconsideration of interlocutory decision + order dated 2.1.19 AWCB #19-0012. Request hearing so I may speak freely."
>
> (5) Petition to compel discovery and "other": "Ms. Rush (Adjuster). I would like all her notes, bills, correspondence w/ previous ACS to include formal complaints made by present/past Ms. Leighs with Northern Adjusters. Request hearing."
>
> (6) Petition to compel discovery and "other": "Alaska Child and Family through their attorneys continue to withhold discovery, *i.e.*, investigational reports that should be in my Ms. Leigh file. In addition I would like previous employer to answer questions that have been avoided. Request a hearing before the board."
>
> (7) Petition to compel discovery: "Request to file with the board the cost to defend this claim so far, *i.e.* attorney[']s fees, costs, adjuster[']s cost, mediation, SIME, EIMEs."
>
> (8) Petition to compel discovery and "other": "Ms. Paddock has asked for cross-examination of my doctors. Yet she has not scheduled any depositions for them and she single-handedly took away my hearing on the merits. She should have to pay the cost of depositions now."[76]

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[76] *Leigh VIII* at 10-11, No. 32; R. 1856-65.

Petition (1) is discussed above. Petition (2), as the Board stated, appears to be a duplicate of petition (1) and does not raise a new discovery issue. It seems to raise the same objections to releasing her mental health records. The Board, having already discussed her objections to the mental health records release, was correct in denying petition (2). There was no abuse of discretion.

Petition (3) sought reconsideration of a prehearing held in apparently 2018; as such it was untimely and, therefore, the Board declined to reconsider it. The Board further found that the issue of a merits hearing had been raised and decided in *Leigh III* and *Leigh VI*. A hearing on the merits of Ms. Leigh's claim cannot be heard until she signs the modified releases for her mental health records. The Board properly denied Petition (3).

Petition (4) sought reconsideration of *Leigh III.* The Board correctly found that *Leigh III* had been reviewed by *Leigh IV* at Ms. Leigh's request and denied it.

Petition (5) sought an order compelling discovery from ACS of a variety of items, including bills, correspondence, and formal complaints made by past and present employees. The Board Designee found the materials sought by Ms. Leigh to be irrelevant to her claim and denied the petition. Ms. Leigh presented no basis for her request at the prehearing and the Board, by regulation, decides an appeal of a discovery order in a prehearing on the record before the prehearing.[77] The Board did not abuse its discretion in denying this petition.

Petition (6) was another request by Ms. Leigh for discovery of materials from her former employer. Again, at the prehearing, Ms. Leigh did not clarify the basis for her requests. Since no specific request could be identified, the Board Designee denied the petition. As above, the Board must review this decision based on the record at the prehearing. Since Ms. Leigh failed to provide evidence and argument to justify a petition to compel discovery, the Board did not abuse its discretion by affirming the denial of this petition.

[77] AS 23.30.108(c).

Petition (7) is also a request for discovery and the Board must rely on the prehearing record. The Board Designee determined this issue had been decided by *Leigh VI* and denied the petition. The Board affirmed. This affirmation is not an abuse of discretion. The issue had been decided in *Leigh VI.*

Petition (8) is Ms. Leigh's request for ACS to pay for depositions of doctors for which ACS requested the right to cross-examine or had filed *Smallwood* objections. The Board explained the process in detail. The Board noted the *Smallwood* objection pertains to the medical records and not to a doctor's testimony.[78] If a party objects to a specific record within the time constraints following the filing of an affidavit of readiness for hearing (ARH), the party wishing to rely on the specific record must make the author available for cross-examination. Here, ACS objected to two specific reports: Dr. Chang's May 17, 2017, report and Dr. McAnally's September 12, 2017, report. However, ACS did not refile a *Smallwood* request after the ARH was filed. Thus, Ms. Leigh did not have an obligation to make the doctors available for cross-examination. Furthermore, this issue was moot in that ACS had already deposed these two doctors.

If Ms. Leigh were to incur expenses presenting medical testimony of her doctors at hearing and prevails on the issues, she will be entitled to submit a cost bill and seek reimbursement of those costs. Until then, as the Board carefully explained to her, ACS is not obligated to pay in advance the costs of deposing her doctors or pay for their testimony at hearing. Therefore, the Board properly denied her petition because there is no outstanding *Smallwood* objection from ACS, and there is no procedure for requiring the employer to pay in advance for testimony from treating doctors.

The primary issue in *Leigh VIII* is a discovery issue, i.e., whether the Board properly applied *Leigh VII* in ordering Ms. Leigh to sign releases allowing ACS to obtain Ms. Leigh's mental health records. The Commission reviews discovery issues under the abuse of discretion standard. The Court has stated, "[a]n abuse of discretion exists when

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[78] *See, Commercial Union Ins. Cos. v. Smallwood,* 550 P.2d 1261 (Alaska 1976).

we have a definite and firm conviction a mistake has been made."[79] The Board thoroughly reviewed the criteria suggested by the Court for limiting the releases and it made rational restrictions in order to protect Ms. Leigh, but expedite the discovery process. The Commission is definite and firm in its conviction a mistake was not made in *Leigh VIII.*

b. Did Leigh IX properly uphold the denial of Ms. Leigh's requested subpoenas and the requirement of a prehearing prior to the issuance of any new subpoenas requested by Ms. Leigh?

The issue before the Board in *Leigh IX* was whether the Board Designee abused his discretion when he granted ACS's petition for a protective order from the numerous subpoenas requested by Ms. Leigh. This issue was a discovery matter and, as such, is reviewed under the abuse of discretion standard.

Ms. Leigh sent several subpoenas for witnesses she intended to appear at hearing. ACS's attorney emailed Ms. Leigh in reference to her subpoenas and the setting of depositions, advising her that the time selected for the depositions did not work for the parties. He suggested that she contact him to set up mutually agreeable times.

At the prehearing on September 1, 2020, the Board Designee granted ACS's petition for a protective order, quashing several subpoenas because they had not been properly or timely served and the dates of some of the proposed depositions had passed, and requiring a prehearing conference prior to the issuance of any future subpoenas to enable the parties to find mutually agreeable dates and deposition methods. Following the prehearing, Ms. Leigh called the Board to demand a hearing. The Board construed this telephone call to be a request for an appeal of the Board Designee's order. A hearing on the written record was scheduled.

Since the issue was a discovery matter, the Board was precluded from considering any evidence not before the Board Designee at the time of the prehearing.[80] The Act provides for a Board Designee to decide discovery disputes and provides for an appeal to

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[79] *Seybert v. Cominco Alaska Exploration,* 182 P.3d 1079, 1089-1090 (Alaska 2008).

[80] AS 23.30.108(c).

the Board of those decisions.[81] ACS presented evidence and argument at the prehearing supporting its contention that Ms. Leigh failed to coordinate depositions and failed to give timely notice of the place and time for the depositions. Ms. Leigh refused to provide any contrary evidence to the Board Designee, stating she would provide it at hearing. She likewise did not give any evidence refuting ACS's contentions in her appeal brief.

The Board found the Board Designee had not abused her discretion in granting the protective order. The Act, by legislative mandate, must be interpreted quickly, efficiently, fairly, and predictably, in a way to make costs reasonable for an employer.[82] By requiring a prehearing prior to issuing subpoenas, a process is in place to assist Ms. Leigh in appropriately getting her witnesses subpoenaed. The prehearing process will also alleviate the need for ACS to file petitions to quash subpoenas which are inappropriate, irrelevant, or improperly scheduled. This process is fair and efficient for all parties. This decision was not an abuse of discretion by either the Board Designee or the Board.

c. Did the Board err in holding that there may be no merits hearing without discovery of mental health records?

Ms. Leigh has emphatically stated more than once that she will not sign any releases until she has a hearing on the merits of her claim. However, she seems not to understand that no hearing on the merits may be scheduled until ACS has been able to obtain the mental health records it needs to develop its defense. AS 23.30.110(a) provides that a hearing may be scheduled only after an ARH has been filed, stating all necessary discovery has been completed. Although Ms. Leigh may be able to state that for her all necessary discovery has been completed, that is not the case for ACS. The Court, in *Leigh VII*, made clear that ACS is entitled to the discovery of mental health records in order to prepare its defense to her claim for benefits. More importantly, AS 23.30.010 (a) requires the Board to discern whether "in relation to other causes, the

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[81] AS 23.30.135(a); *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987).

[82] AS 23.30.001.

employment is the substantial cause of the disability . . . or need for medical treatment."[83] Since there is some evidence Ms. Leigh's mental health issues may have some relationship to her ongoing ankle complaints, both ACS and the Board will need to consider her mental health records. Thus, as the Board held in *Leigh VIII*, no hearing on the merits would be held without Ms. Leigh releasing her mental health records with the protections the Board ordered. The Board did not abuse its discretion by requiring Ms. Leigh to sign the releases for her mental health records. *Leigh VIII* and *Leigh IX* are affirmed.

5. Conclusion.

The Commission finds no evidence the Board abused its discretion in deciding *Leigh VIII* and *Leigh IX.* The Commission AFFIRMS *Leigh VIII* and *Leigh IX.*

Date: *28 May 2021* Alaska Workers' Compensation Appeals Commission

Signed
Michael J. Notar, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

[83] AS 23.30.010(a).

<u>RECONSIDERATION</u>

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 287, issued in the matter of *Allison Leigh v. Alaska Children's Service and Republic Indemnity Company of America*, AWCAC Appeal Nos. 20-016, 20-019, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 28, 2021.

Date: *June 7, 2021*

Signed

K. Morrison, Appeals Commission Clerk