Alaska Workers' Compensation Appeals Commission

ASRC Energy Services and Arctic Slope Regional Corporation, Petitioners, vs. James A. "Drew" Freeman, Udelhoven Oil Field System Services, and ACE Fire Underwriters Insurance Company, Respondents.	MEMORANDUM AND ORDER DENYING PETITION FOR REVIEW Decision No. 219 October 30, 2015 AWCAC Appeal No. 15-019 AWCB Decision No. 15-0073 AWCB Case No. 201003705

Memorandum and Order on Petition for Review of Alaska Workers' Compensation Board (board) Interlocutory Decision and Order No. 15-0073, issued at Anchorage, Alaska, on June 26, 2015, by southcentral panel members William Soule, Chair, and Donna Phillips, Member for Labor.

Appearances: Nora G. Barlow, Burr Pease & Kurtz, PC, for petitioners, ASRC Energy Services and Arctic Slope Regional Corporation; Steven Constantino, Constantino & Associates, for respondent, James A. "Drew" Freeman; Timothy A. McKeever, Holmes Weddle & Barcott, PC, for respondents, Udelhoven Oil Field System Services and ACE Fire Underwriters Insurance Company.

Commission proceedings: Petition for review filed August 12, 2015; respondent James A. "Drew" Freeman's opposition to petition for review filed August 26, 2015; respondents Udelhoven Oil Field System Services and ACE Fire Underwriters Insurance Company's joinder to petition for review filed August 31, 2015.

Commissioners: James N. Rhodes, Philip E. Ulmer, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

ASRC Energy Services and its insurer, Arctic Slope Regional Corporation (collectively, ASRC), filed a petition for review of a decision by the Alaska Workers' Compensation Board (board) denying in part ASRC's petition to exclude certain medical

records pursuant to 8 AAC 45.082(c). For the following reasons, we deny the petition for review.

2. Factual Background.[1]

James Freeman filed a claim for benefits for injuries incurred while employed in 2001 by Udelhoven Oil Field Services (Udelhoven) and on March 30, 2010, while employed by ASRC.[2]

Following the 2010 injury, Mr. Freeman was treated David Decker, PA-C, at an emergency care facility.[3] He was subsequently treated by Jim Marlow, PA-C, at Beacon Occupational Health and Safety (Beacon), an entity selected by ARSC.[4] Beacon referred Mr. Freeman to other medical providers, including Dr. William Mills of Orthopedic Physicians Anchorage (OPA), who provided treatment over the course of the next ten days or so.[5]

On April 12, 2010, Mr. Freeman visited his primary care provider, Dr. McIntosh, and saw Margaret Scrimger, A.N.P.[6] Dr. McIntosh's office referred him to Dr. Peter Ross, who diagnosed a right shoulder SLAP tear.[7] Dr. Ross performed shoulder surgery on August 3, 2010, after which he referred Mr. Freeman for physical therapy.[8]

After a lengthy period of time during which he had some physical therapy,[9] on August 8, 2011, Mr. Freeman was seen again at OPA, this time by Dr. Robert Hall.[10]

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[1] We make no findings of fact. We state facts as set forth in the board's decision, except as otherwise noted.

[2] *See James A. "Drew" Freeman v. ASRC Energy Services*, Alaska Workers' Comp. Bd. Dec. No. 15-0073 at 4-5 (No. 2) (June 26, 2015); Udelhoven Joinder, at 1.

[3] *Freeman*, Bd. Dec. No. 15-0073 at 4-5 (Nos. 2, 3).

[4] *Id.,* at 5 (Nos. 4-6).

[5] *Id.,* at 5-6 (Nos. 7-13).

[6] *Id.,* at 6 (No. 15).

[7] *Id.,* at 6 (Nos. 16-18).

[8] *Id.,* at 7 (Nos. 22-23).

[9] *See id.,* at 7-8 (Nos. 24-31).

[10] *Id.,* at 8-9 (Nos. 32, 35, 36).

Dr. Hall and other OPA providers treated Mr. Freeman on several occasions over the course of the next two months.[11]

Dr. Hall recommended surgery and ASRC asked Tracy Davis, a nurse case manager working for ASRC, to set up an appointment to obtain a second opinion regarding the need for surgery.[12] Ms. Davis contacted Mr. Freeman, suggested he meet with Dr. McNamara, and scheduled an appointment with him.[13] She was present on November 1, 2011, when Mr. Freeman was seen by Dr. McNamara.[14] On that occasion, Dr. McNamara treated Mr. Freeman and, at Ms. Davis's specific direction, Mr. Freeman executed a written document stating "I am ~~requesting~~ changing doc's to Doctor McNamara as of 11/1/11."[15] Dr. McNamara performed shoulder surgery on December 2, 2011.[16] Mr. Freeman continued to treat with Dr. McNamara and other providers referred by him through April 2012.[17]

On January 18, 2013, Mr. Freeman again saw Dr. McIntosh, who then and subsequently provided treatment, advice, a medical opinion, and other medical services

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[11] *Freeman*, Bd. Dec. No. 15-0073 at 9-10 (Nos. 37-46).

[12] This is the substance of Ms. Davis's testimony. *See id.,* at 10-11, 13 (Nos. 49-56, 62-63). Mr. Freeman's testimony was substantially the same. *Id.,* at 11-12 (No. 57). Their testimony appears to be completely contrary to what ASRC asserted had occurred, in its hearing brief. *See id.*, at 28 (No. 164) ("ASRC's hearing brief . . . said Employee wanted a second opinion on his right shoulder so he approached Davis, who arranged an appointment with Dr. McNamara.").

[13] *See id.,* at 10-12, 13 (Nos. 49-56, 62-63).

[14] *See id.,* at 12-13 (Nos. 58-63), 31-32 (Nos. 170-171).

[15] *Id.,* at 12-13 (Nos. 58-63). The document does not state from whom Mr. Freeman was changing. The board treated it as expressing Mr. Freeman's intent to change his attending physician from Dr. McIntosh (who had not treated Mr. Freeman for some time) to Dr. McNamara. The board apparently did not consider whether Mr. Freeman was, rather, expressing an intent to change his current treating physician (selected by ASRC) from Dr. Hall to Dr. McNamara.

[16] *Id.,* at 14 (No. 72).

[17] *See id.,* at 14-16 (Nos. 69, 73, 75, 78-84).

for his work injuries.[18] Dr. McIntosh also provided information for Mr. Freeman's application for Social Security disability benefits.[19] Mr. Freeman then contacted Dr. McNamara for assistance with his application for Social Security disability benefits, and Dr. McNamara examined him in that connection.[20] Mr. Freeman was treated by Dr. McNamara (and by another provider on referral from Dr. McNamara) in the fall of 2013,[21] and Dr. McNamara performed thumb surgery on December 11, 2013.[22]

On April 29, 2014, Mr. Freeman saw Jacqueline Bock, Ph.D., on referral from Dr. McIntosh for a neuropsychological evaluation.[23] Mr. Freeman continued to treat with Dr. McNamara and other providers referred by him during the spring of 2014, with a final visit with Dr. McNamara on July 8, 2014.[24] He continued to see providers referred by Dr. McNamara for another month after that.[25]

On September 29, 2014, Mr. Freeman returned to Dr. Hall for a second opinion regarding his right shoulder pain.[26] Dr. Hall referred him that fall to other providers, including one, Dr. Jessen, to whom Mr. Freeman had previously been referred by Dr. McNamara.[27]

Mr. Freeman also continued to see Dr. McIntosh into the fall for both work[28] and non-work related matters,[29] and visited Elizabeth Weeks, LCSW, on referral from Dr. McIntosh on January 2, 2015, for treatment of depression.[30]

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18 *Freeman*, Bd. Dec. No. 15-0073 at 18 (Nos. 95-98).

19 *Id.,* at 19 (No. 99).

20 *Id.,* at 19 (Nos. 100-104).

21 *Id.,* at 19 (Nos. 105-106).

22 *Id.,* at 22 (No. 116).

23 *Id.,* 22 (No. 122).

24 *See id.,* at 22-24 (Nos. 123-130).

25 *See id.,* at 24 (No. 136).

26 *Id.,* at 24 (No. 139).

27 *Id.,* at 25-26 (Nos. 142-145, 149)

28 *See Freeman*, Bd. Dec. No. 15-0073 at 24 (Nos. 134, 138), 25 (Nos. 141, 146).

On February 4, 2015, ASRC filed a petition to exclude all medical records for treatment of Mr. Freeman after November 1, 2011, from all providers other than Dr. McNamara and referrals from him.[31] Before the board, ASRC argued that Mr. Freeman's initial attending physician was Dr. Ross, who performed shoulder surgery in August, 2010.[32] ASRC argued that thereafter Mr. Freeman changed his attending physician to Dr. Hall, on August 8, 2011,[33] and that ASRC consented to a second change of attending physician to Dr. McNamara on November 1, 2011.[34] ASRC argued that Mr. Freeman's subsequent treatment by Dr. McIntosh in January 2013 was not allowed under AS 23.30.095.[35]

The board granted the petition in part and denied it in part. It ruled that to characterize Dr. McIntosh as Mr. Freeman's initial attending physician, based on treatment received on April 12, 2010, "would be unfair and would violate [Mr. Freeman's] right to due process."[36] It ruled that Mr. Freeman's November 1, 2011, written designation of Dr. McNamara as his attending physician was "excused through waiver under AS 23.30.195."[37] It identified Mr. Freeman's treatment by Dr. McIntosh on January 18, 2013, as his initial designation of his attending physician, on the ground that it was his first designation of a physician after the effective date of 8 AAC

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29 *See id.,* at 24 (Nos. 132, 135, 138).

30 *Id.,* at 26 (No. 151).

31 We do not have a copy of the petition, and ASRC did not identify for us the specific records it wished to exclude. Our understanding of the petition's contents rests on the board's characterization of it. *See id.,* 26 (No. 155). Mr. Freeman's opposition to the petition characterizes ASRC's petition as seeking to exclude all records generated after July 9, 2011, the effective date of 8 AAC 45.082(c), other than those of Dr. McNamara and his referrals. Opposition at 4.

32 *Freeman*, Bd. Dec. No. 15-0073 at 27 (No. 162).

33 *Id.*, at 28 (No. 162).

34 *Id.* (No. 164).

35 *Id.*

36 *Id.,* at 53.

37 *Freeman*, Bd. Dec. No. 15-0073 at 61.

45.082(c).[38] It found that Mr. Freeman was treated by Dr. McNamara on July 29, 2013, on referral from Dr. McIntosh,[39] and it identified Mr. Freeman's treatment by Dr. Hall on September 29, 2014, as an allowable change of attending physician (from Dr. McIntosh to Dr. Hall) on the ground that it was his first change of physician.[40] It identified treatment by Dr. McIntosh after September 29, 2014, as a change of attending physician (from Dr. Hall to Dr. McIntosh) not permitted under AS 23.30.095(a), and it therefore excluded all reports and opinions generated by Dr. McIntosh (and referrals from her) after September 29, 2014.[41]

3. Issues Presented For Review.

ASRC's petition for review identifies three questions for review by the commission: (1) whether the board erred in concluding that to treat Dr. McIntosh as Mr. Freeman's initial attending physician "would be unfair and would violate [Mr. Freeman's] right to due process"[42] because Mr. Freeman first visited Dr. McIntosh prior to the effective date of 8 AAC 45.082(c);[43] (2) whether in disregarding Mr. Freeman's written designation of Dr. McNamara, the board erred in its interpretation of AS 23.30.095(i);[44] and (3) whether in finding that Mr. Freeman's treatment by Dr. McNamara on July 29, 2013, was on referral from Dr. McIntosh, the

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[38] *Id.,* at 61.

[39] *See id.,* at 19 (No. 101), 59.

[40] *See id.,* at 61. There is no indication in the materials before us that Mr. Freeman ever designated Dr. Hall as his attending physician in writing. Accordingly, the board's decision implicitly concludes that 8 AAC 45.082(b)(4)(C) did not apply to this purported change. We express no opinion as to whether such a conclusion is correct.

[41] *See id.,* at 61. We express no opinion as to whether, in the absence of a written designation of Dr. Hall as his attending physician, the board's ruling is correct. *See supra*, note 40.

[42] *Freeman*, Bd. Dec. No. 15-0073 at 53.

[43] Petition at 3-6.

[44] Petition at 6-7.

board erred by relying on hearsay in the absence of direct evidence that Dr. McIntosh made a referral.[45]

4. Reasons Asserted For Granting Review.

We have discretion to grant a petition for review when we conclude that the policy that appeals be taken only from final decisions is outweighed because (1) postponement of review will result in injustice because of impairment of a legal right or because of unnecessary delay, expense, hardship, or other related factors; (2) the decision involves an important question of law on which there is a substantial ground for difference of opinion, and immediate review will materially advance the ultimate resolution of the claim; (3) the board has so far departed from the accepted and usual course of proceedings as to call for our review; or (4) the issue is one that might evade review and an immediate decision for the guidance of the board is required.[46]

As we have repeatedly emphasized, we do not exercise our discretion to grant review lightly.[47] The burden is on the petitioner to persuade us that the circumstances of a particular case are such that, for reasons set forth in our regulations, the policy that appeals must be taken from a final decision is outweighed by the need for immediate review.[48] It is not enough, to meet this burden, to assert (or even to

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[45] Petition at 7-8. The board characterizes ASRC's petition as requesting exclusion of records of all providers after November 1, 2011 other than Dr. McNamara. *See supra*, note 31. Given that characterization, it is not clear whether the board's ruling on this issue is material: as characterized by the board, the petition did not seek exclusion of any records generated by Dr. McNamara, and to that extent it is immaterial whether Dr. McNamara was seen on July 29, 2013, on referral or not.

[46] 8 AAC 57.073(b).

[47] *See*, *e.g.*, *Kuukpik Arctic Catering, L.L.C. v. Harig*, Alaska Workers' Comp. App. Comm'n Dec. No. 038 at 3 (April 27, 2007); *Municipality of Anchorage v. Syren*, Alaska Workers' Comp. App. Comm'n Dec. No. 007 at 1 (March 7, 2006); *Berrey v. Arctec Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 009 at 8 (April 28, 2006).

[48] *See*, *e.g.*, *City of Petersburg v. Tolson*, Alaska Workers' Comp. App. Comm'n Dec. No. 096 at 4 (January 22, 2009) ("The movants have the burden to persuade the commission that the reasons for review outweigh the sound policy of allowing appeals only from final decisions.").

establish to our satisfaction) that the board has erred, as the normal appeal process exists, and generally suffices, to correct errors made by the board.[49] In the absence of a clear explanation of the reasons why review should be granted, consisting of more than conclusionary assertions that review is appropriate, we will exercise our considered judgment as to the propriety of granting review, but we will not grant review if we cannot confidently conclude that, for the reasons stated in our regulations, the policy that appeals be taken from final decisions is outweighed.[50]

In this case, ASRC's petition does not include a section addressing the "reasons why review should not be postponed until appeal may be taken from a final decision or order."[51] We find references to those asserted reasons interspersed in its discussion of the board's decision, however, and we address those we have found.

(a) Postponement of Review Resulting In Injustice.

Under 8 AAC 57.073(b)(1), we have discretion to grant review when postponement of review will result in injustice because of impairment of a legal right or because of unnecessary delay, expense, hardship, or other related factors. ASRC has not addressed the reasons why postponement of review will result in injustice to it.

As our regulation recognizes, injustice may result when the board's erroneous ruling impairs a legal right.[52] But, as we have repeatedly pointed out, legal error in a

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[49] *See generally*, *Rockstad v. Chugach Eareckson*, Alaska Workers' Comp. App. Comm'n Dec. No. 100 at 7-8 (February 20, 2009).

[50] *See*, *Municipality of Anchorage v. Syren*, Alaska Workers' Comp. App. Comm'n Dec. No. 007 at 1 (March 7, 2006) ("The commission will grant review if the commission can confidently find that the issue presented . . . is sufficiently compelling to outweigh the sound policy favoring appeals from final decisions. . . .").

[51] 8 AAC 57.075(f)(6) requires that a petition for review include the reasons, but does not expressly require that they be set forth in a separate section of the petition.

[52] 8 AAC 57.073(b)(1). *See*, *Voorhees Concrete Cutting v. Monzulla*, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (August 6, 2009) (petition for extraordinary review of interlocutory order regarding venue); *J. C. Marketing v. You Don't Know Jack, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 132 at 8-9 (March 30, 2010),

board ruling generally does not in itself create injustice, because the error can be corrected on appeal.[53] If we were to conclude that an erroneous ruling by the board on an important question of law is sufficient to establish injustice for purposes of our interlocutory review, we would have grounds to intervene every time we are persuaded that a board's ruling is erroneous. In this case, ASRC has identified no harm to its legal rights that will accrue to it if it is forced to wait for an appeal to correct the asserted error.

Our regulation also recognizes that injustice may result when the board's erroneous ruling will result in unnecessary delay and expense.[54] But this case is complex. The outcome, regardless of the board's ruling on the issues raised in this petition for review, is far from clear. Legal and factual questions abound, and the path to hearing may be lengthy. Even with the additional evidence that ASRC wishes to exclude, the board may in the end deny Mr. Freeman's claim. Resolving the particular issues raised in this petition for review may have no effect on the outcome of the claim or on the speed with which the case proceeds, and is unlikely to avoid an appeal and possible remand or rehearing by the board on other issues. In short, it is entirely speculative that addressing the specific issues raised in the petition will avoid unnecessary delay and expense. In any event, ASRC has not asserted that it will be

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discussing *Alcan Electrical and Engineering, Inc., v. Redi Electric, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 112 (July 1, 2009).

[53] *See, e.g., Hudak v. Pirate Airworks, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 214 at 6 (July 24, 2015) ("[T]hat the board has erred does not establish that it is unjust to proceed without correcting the error: correcting errors is why we provide for appeals."); *BP Exploration Alaska, Inc. v. Stefano*, Alaska Workers' Comp. App. Comm'n Dec. No. 076 at 1-2, 20 (May 6, 2008) ("Although the board's decision reveals a strong possibility of errors of law, . . . the motion for extraordinary review is denied."; "It is not enough to demonstrate that the board may have erred . . . to require immediate review . . . legal error, if it exists, generally will not result in injustice if the error is corrected on appeal."); *Eagle Hardware and Garden v. Ammi*, Alaska Workers' Comp. App. Comm'n Dec. No. 003 at 11 (February 21, 2006) ("A claim of legal error is inherent in any appeal; legal error, if it exists, generally will not result in injustice if it is corrected on appeal.").

[54] 8 AAC 57.073(b)(1). *See generally*, *City of Petersburg v. Tolson*, Alaska Workers' Comp. App. Comm'n Dec. No. 096 at 6-8 (January 22, 2009).

prejudiced as a result of any additional delay or expense that may result from postponement of review, and absent prejudice to ASRC we do not see that it is unjust to await a final decision before considering the issues it has raised.

(b) Important Questions of Law, Grounds for Disagreement, Advance Resolution.

We consider each of the three issues raised for our review separately, in connection with this criterion, set forth in 8 AAC 57.073(b)(2).

i. Disregard of Designation Occurring Prior to 8 AAC 45.082(c).

The board ruled that to treat Dr. McIntosh as Mr. Freeman's initial attending physician, based on treatment Mr. Freeman received on April 12, 2010, would be unfair and in violation of due process of law, because on that date no exclusionary rule was in effect.[55] ASRC asserts that the board's ruling, which it characterizes as a "do-over" rule,[56] is "an invitation to doctor shopping"[57] that is at odds with multiple other board decisions[58] and is beyond the scope of the board's authority.[59] Thus, ASRC contends, the petition raises an important question of law on which there is a substantial ground for a difference of opinion.[60]

Mr. Freeman argues that the board's ruling is not that a designation of physician occurring prior to the effective date of 8 AAC 45.082(c) is ineffective, but rather that it will be disregarded for purposes of 8 AAC 45.082(c).[61] Disregarding a designation of physician occurring prior to the effective date of 8 AAC 45.082(c) for purposes of the exclusionary rule established by that regulation is appropriate, Mr. Freeman contends, and the board's ruling "would cure [the] recent surge of inconsistent *ad hoc* decisions"

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55 *See Freeman*, Bd. Dec. No. 15-0073 at 53.

56 Petition at 3.

57 Petition at 4.

58 Petition at 4-5.

59 Petition at 5.

60 Petition at 5-6.

61 Opposition at 6-7.

by the board regarding the application of 8 AAC 45.082(c) in similar circumstances.[62] Moreover, Mr. Freeman argues, the board's ruling that ASRC interfered with Mr. Freeman's choice of physicians in November 2011 is sufficient to support the board's ruling, and in that light the purported "do-over" rule is immaterial.[63]

The substance of the board's ruling was that an initial designation of physician occurring before the effective date of 8 AAC 45.082(c) would be disregarded for purposes of the exclusionary rule stated in the regulation, even for medical records generated after the effective date of the regulation. Whether 8 AAC 45.082(c) bars the admission of reports generated by a second or subsequent change of physician that occurs after the effective date of the regulation, when the preceding designation of attending physician occurred prior to the effective date, is an important question of law as to which there is a substantial ground for a difference of opinion. But ASRC has not provided any reason why addressing that specific issue now, rather than on appeal, will advance the ultimate resolution of Mr. Freeman's claim. As is quite apparent from the lengthy history of this case, there are substantial factual issues to be determined, and ASRC has given us no indication of why resolving the evidentiary dispute now will make the case any easier to resolve. We are provided no information regarding the nature of the factual issues in dispute and how the various medical reports ASRC seeks to exclude are likely to affect the board's ruling on the material factual issues. Indeed, we cannot

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[62] Opposition at 6-7.

[63] Opposition at 7-8.

discern precisely what records are at issue.[64] If it were clear that, absent the records ASRC contends should have been excluded, Mr. Freeman's claim would likely be denied, granting review might (if we were to rule in ASRC's favor) hasten the ultimate resolution of his claim. But ASRC made no effort to persuade us that without the records it sought to exclude, Mr. Freeman's claim would likely fail. Moreover, there are multiple alternative grounds on which the board's decision might be affirmed even if its ruling on this issue was erroneous.[65] ASRC has not persuaded us that review of this issue is likely to advance the ultimate resolution of Mr. Freeman's claim.

ii. Interpretation of AS 23.30.095(i).

The board discussed its decision to excuse Mr. Freeman's written designation of Dr. McNamara on November 1, 2011, at some length.[66] ASRC characterizes the board's decision as finding that ASRC's representative interfered with Mr. Freeman's selection of a physician in violation of AS 23.30.095(i), and that this violation justified a waiver of Mr. Freeman's written designation.[67] According to ASRC, the board's decision in this regard "involves an important question of law because violation of AS 23.30.095(i) is a

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[64] It appears that the medical records that ASRC seeks to exclude are primarily those generated by Dr. McIntosh (and referrals from her) beginning January 13, 2013. *See supra*, notes 20, 23, 30. The motion apparently also seeks to exclude records generated beginning September 29, 2014, by Dr. Hall (and referrals thereafter from him, including, apparently, records generated by Dr. Jessen, to whom Mr. Freeman had previously been referred by Dr. McNamara), notwithstanding that Dr. Hall was selected by ASRC and was never designated in writing as Mr. Freeman's attending physician. *See supra*, notes 26-27, 29. It is not clear to us whether the motion seeks to exclude records generated in connection with Mr. Freeman's application for Social Security benefits, or records generated in connection with his mental health treatment, nor is it clear which of the medical records at issue fall into either of those categories. *See Gianni v. Pfeifer Construction*, Alaska Workers' Comp. Bd. Dec. No. 08-0184 at 11 (October 10, 2008) ("Records not produced as a result of medical benefits under the Alaska Workers' Compensation Act are still admissible in our proceedings").

[65] *See supra*, note 63. In addition, the board specifically declined to address alternative grounds (equitable estoppel and substitution physician) upon which it might have declined to apply 8 AAC 45.082(c). *See Freeman*, Bd. Dec. No. 15-0073 at 59. Were we to reverse the board's ruling, those issues would remain to be determined.

[66] *See Freeman*, Bd. Dec. No. 15-0073 at 54-59.

[67] Petition at 6.

misdemeanor."[68] ASRC references a prior decision in which the board concluded that an employer may not attempt to influence the employee's selection of a physician by withholding benefits, but that an employee's freely given consent to a change is permissible.[69] According to ASRC, the board interpreted the term "interference" in AS 23.30.095(i) to mean "meddle", and "rejected the idea that some form of mens rea is required for . . . violation [of] AS 23.30.095(i)."[70]

ASRC asserts that the correct interpretation of AS 23.30.095(i) is an important question of law and that review should be granted because of the likelihood the issue will evade review, two board cases addressing it have provided "significantly different

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[68] Petition at 6.

[69] Petition at 6, *citing Brewster v. Davison and Davison*, Alaska Workers' Comp. Bd. Dec. No. 95-0218 (August 24, 1995). In its petition for reconsideration, ASRC also referenced AS 23.30.097(b). *See* Petition Ex. 2, at 7.

[70] Petition at 6-7.

definitions"[71] and because the board's decision will have a chilling effect on employer representatives, making them unwilling to provide information to employees.[72]

Mr. Freeman responds that the board made no finding that Ms. Davis had violated AS 23.30.095(i).[73] According to Mr. Freeman, the board simply referred to AS 23.30.095(i) as supporting its decision to disregard Mr. Freeman's written designation of Dr. McNamara as his attending physician on November 1, 2011.[74] The board's use of the dictionary definition of "interfere" in that context was not inappropriate, Mr. Freeman asserts.[75]

The proper interpretation of AS 23.30.095(i) for purposes of a criminal prosecution does not present an important legal issue for our resolution. We have no

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[71] Petition at 7. It is not clear what two cases ASRC is referring to: the petition references only one case, *Brewster*. *See also*, *Fondren v. Houston Contracting Company*, Alaska Workers' Comp. Bd. Dec. No. 89-0257 at 10 (September 20, 1989) ("The more pressure Insurer puts on Employee to accept treatment from another physician, the more it begins to look like interference under subsection 95(i).").

In its petition for reconsideration ASRC referred to *Bay v. Kendall Dealership Holdings, LLC*, Alaska Workers' Comp. Bd. Dec. No. 13-0030 (March 26, 2013). *See* Petition Ex. 2, at 6-7. ASRC characterized that case as an example of the board's consistent holding that "employers and insurers may contact employee doctors for the purpose of exchanging information." *Id.* *Bay* involved an allegation that the employer had improperly attempted to influence a doctor's opinion. This case involves an allegation that the employer had interfered with the employee's selection of a physician. AS 23.30.095(i) prohibits both types of conduct, but they are factually quite distinct. In any event, even in the context of selection of a physician, the board's holding in *Bay* is not inconsistent with *Brewster*, or with the board's decision in *Freeman*. Ms. Davis did not merely provide factual information about Dr. McNamara (and Dr. Hall) to Mr. Freeman. *See Freeman*, Bd. Dec. No. 15-0073 at 11-12 (Nos. 54, 57, 59); Petition Ex. 2, at 8 ("Ms. Davis provided [Mr. Freeman] with her opinions about Drs. Hall and McNamara").

[72] Petition at 7.

[73] Opposition at 8.

[74] *See* Opposition at 8-9.

[75] *See* Opposition at 9-10.

jurisdiction over any criminal proceedings.[76] The legal issue of importance, from our perspective, is not what type of conduct is a violation of AS 23.30.095(i), but whether an employee's purported change of physician may be disregarded (for purposes 8 AAC 45.082(c)) on the ground that the employer interfered with the employee's selection of an attending physician.[77]

With respect to that issue, we do not read ASRC's petition as presenting for our review the question whether the exclusionary rule stated in 8 AAC 45.082(c) must be applied, regardless of whether the employer interfered with the employee's selection of an attending physician.[78] Rather, we read it as presenting for our review the question whether the board applied the correct test for determining whether an employer has interfered with an employee's designation of an attending physician. The proper test, ASRC suggests, is the same test that would be used to determine criminal liability under AS 23.30.095(i).[79]

That, we think, is patently not correct. At issue before the board is not an employer's criminal liability, but the circumstances under which the exclusionary rule stated in 8 AAC 45.082(c) should be waived due to the employer's alleged interference with the employee's selection of an attending physician. This is a highly fact-specific

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[76] *See*, *e.g.*, *Dougan v. Aurora Electric, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 99-0113 at 3 (May 14, 1999).

[77] AS 23.30.095(i) prohibits "[i]nterference . . . with the selection by an injured employee of an authorized physician to treat the employee[.]" We need not address at this time whether "an authorized physician" within the meaning of AS 23.30.095(i) is the same as an "attending physician" (8 AAC 45.082(b)(2)) or as a "treating physician" (8 AAC 45.900(a)(12)). *See Hudak*, App. Comm'n Dec. No. 214 at 11-12 (July 24, 2015).

[78] The board relied on 8 AAC 45.195 as permitting it to waive the procedural requirements of 8 AAC 45.082(b)(2) and (4). *See Freeman*, Bd. Dec. No. 15-0073 at 59. The board had previously relied on 8 AAC 45.195 to excuse the requirements of 8 AAC 45.082(b) with respect to an employer's designation. *See Freeman*, Bd. Dec. No. 15-0073 at 45, *citing Miller v. NANA Regional Corporation*, Alaska Workers' Comp. Bd. Dec. No. 13-0169 at 18-23, (December 26, 2013). ASRC's petition does not assert that 8 AAC 45.195 does not provide authority for the board to rule as it did.

[79] *See* Petition at 6-7.

inquiry. In this particular case, the board's findings indicate that Dr. McNamara was seen at Ms. Davis's request, to obtain a second opinion for purposes of ASRC's evaluation of the case.[80] At the time, Mr. Freeman's designated attending physician was Dr. McIntosh, although for some period of time Mr. Freeman had been treating with physicians selected by ASRC (Dr. Hall and his referrals), none of whom had been designated in writing as his attending physician. Absent a signed designation by Mr. Freeman, being treated by Dr. McNamara would not have been have been considered a change in Mr. Freeman's attending physician.[81] Thus, the effect of Mr. Freeman's written designation was to eliminate a right to change his attending physician which he otherwise would have retained. The board found that Ms. Davis's conduct, in that context, constituted interference with Mr. Freeman's selection of his attending physician for purposes of application of the exclusionary rule. We view the board's decision on that issue, because it is highly fact-specific, as more appropriately reviewed on appeal in the context of the complete record than on the limited record presented by a petition for review. Moreover, as previously observed, ASRC has not persuaded us that review of this issue is likely to advance the ultimate resolution of Mr. Freeman's claim.[82]

iii. Finding Based on Hearsay.

The board found that Mr. Freeman visited Dr. McNamara on July 29, 2013, on referral by Dr. McIntosh (according to the board, Dr. McIntosh was his attending physician at that time).[83] According to ARSC, that finding is unsupported by any non-

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80 *Freeman*, Bd. Dec. No. 15-0073 at 10 (Nos. 49-51).

81 *See* 8 AAC 45.082(b)(4)(C).

82 *See supra*, at 11-12.

83 The board's factual finding that Dr. McIntosh referred Mr. Freeman to Dr. McNamara on that occasion is set forth in a chart. *Freeman*, Bd. Dec. No. 15-0073 at 30 (No. 167). The board's decision states, in the course of its discussion, that Dr. McIntosh referred Mr. Freeman to Dr. McNamara on that date. *See Freeman*, Bd. Dec. No. 15-0073 at 51 ("Dr. McIntosh subsequently [*i.e.*, after January 18, 2013] referred [Mr. Freeman] to Dr. McNamara, whom he was already seeing for the work injury."), 59 ("Dr. McIntosh referred [Mr. Freeman] back to Dr. McNamara").

hearsay evidence and is therefore invalid pursuant to 8 AAC 45.120(f).[84] According to ASRC, reversing the board's finding on this point will materially advance resolution of Mr. Freeman's claim.[85]

Mr. Freeman responds that the board did not err in this regard, for three reasons: (1) ASRC failed to raise a hearsay objection to the document prior to the hearing;[86] (2) Mr. Freeman, the author of the document, testified at the hearing and therefore the document was not hearsay;[87] and (3) the document is admissible as a business record.[88]

It is unclear how addressing this issue will advance the ultimate termination of the claim. As best we can determine, ASRC's petition did not seek to exclude any medical records prepared by Dr. McNamara.[89] Accordingly, if we were to conclude that the board's ruling on this issue was erroneous, the admission of Dr. McNamara's records would not be affected. In any event, we do not view the proper application of this routine evidentiary rule as an important question of law warranting our immediate review. Moreover, we are not persuaded that the board's ruling is so clearly erroneous as to call for our intervention.

(c) Departure from Usual Course.

ASRC asserts that the board's decision to disregard an employee's designation of a physician occurring before the effective date of 8 AAC 45.082(c) was made without due process of law because ASRC "had no notice this issue would be decided at

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[84] Petition at 7-8.

[85] Petition at 8.

[86] Opposition at 10-11. *See* 8 AAC 45.120(f).

[87] Opposition at 11. Evidence Rule 801(d)(1) provides that under specified circumstances a prior statement by a witness is not hearsay.

[88] Opposition at 11. The business records exception to the hearsay rule is set forth in Evidence Rule 803(6). *See also* Evidence Rule 803(4), 23(c).

[89] *See supra*, notes 31, 45, 64.

hearing" and "[t]he lack of notice departed so far from the accepted and usual course of proceedings as to call for commission review."[90]

We disagree. The issues to be decided at the hearing clearly included which doctor visits constituted a physician designation. That the board's rationale with respect to one such visit was novel and unanticipated does not mean that the board's ruling was made absent due process of law. ASRC had the opportunity to request reconsideration of the board's ruling, and it did so. ASRC can contest the merits of the board's rationale on appeal. The board did not so far depart from the accepted and usual course of proceedings as to call for our review.

(d) Evade Review.

ASRC argues that the interpretation of AS 23.30.095(i) is a matter that "could escape review."[91] As we have explained, the legal issue of significance for our purposes is not the proper interpretation of AS 23.30.095(i), but whether, and if so under what circumstances, the exclusionary rule as 8 AAC 45.082(c) may be waived based on the employer's interference with an employee's selection of attending physician. That is an issue that will likely surface on appeal in this case, or in another.

5. Conclusion.

The proper interpretation and application of 8 AAC 45.082(c) in the context of designations and changes of attending physicians occurring before and after the regulation's effective date raises numerous issues, and has been a source of conflict before the board. However, we exercise our discretion to hear cases prior to a final decision sparingly, and in accordance with 8 AAC 57.073(b). In this particular case, ASRC has provided only conclusionary assertions that the standards for granting review have been met, and it has provided no description of the injustice that will accrue to it in the event interlocutory review is denied. We do not have before us ASRC's petition or the parties' hearing briefs. We do not know what specific medical records are at issue, much less what the underlying factual disputes are and how the medical records

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[90] Petition at 5.

[91] Petition at 7.

that ASRC seeks to exclude relate to them. ASRC has failed to persuade us that injustice will result if review of any of the issues it has raised is delayed until entry of a final decision, or that granting review is likely to materially advance the ultimate resolution of Mr. Freeman's claim. There has been no showing that the board has departed from the accepted and usual course of proceedings, or that the issues raised are likely to evade review. For these reasons, the petition for review is **DENIED**.

Date: __*October 30, 2015*____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair

This is a not a final commission decision or order on the merits of an appeal from a final board decision or order on a claim. This is a non-final order of the commission on the merits of a petition for review of a non-final board decision. The effect of this order is to allow the board to proceed toward a hearing on the merits of the employee's workers' compensation claim. The petitioner may still appeal a final board decision when it is reached on the claim.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started).[92] For the date of distribution, see the box below.

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[92] A party has 10 days after the distribution of a non-final decision or order of the commission to petition for review to the Alaska Supreme Court. If this non-final decision or order was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time after Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this order's[93] distribution.[94]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

This is a not a final decision issued under AS 23.30.128(e). It is not an appealable decision, so reconsideration is not available.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the Memorandum and Order Denying Petition for Review, Decision No. 219, issued in the matter of *ASRC Energy Services and Arctic Slope Regional Corporation vs. James A. "Drew" Freeman, Udelhoven Oil Field System Services, and ACE Fire Underwriters Insurance Company,* AWCAC Appeal No. 15-019, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 30, 2015.

Date: *December 2, 2015*

Signed
K. Morrison, Appeals Commission Clerk

[93] *See* Appellate Rule 403.

[94] *See* n. 91, *supra*.