ALASKA WORKERS' COMPENSATION BOARD

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

ELIZABETH FLORES-JENNINGS, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201113452
CHENEGA CORPORATION, Employer,	)	AWCB Decision No. 13-0162
and	)	Filed with AWCB Anchorage, Alaska on December 10, 2013
AMERICAN ZURICH INSURANCE CO., Insurer, Defendants.	)	

Chenega Corporation's (Employer) July 19, 2013 petition to dismiss Elizabeth Flores-Jennings' (Employee) October 19, 2011 claim for failure to comply with discovery orders was heard on the written record on November 26, 2013 in Anchorage, Alaska. This hearing date was selected on October 15, 2013. Employee represented herself. Attorney Jeffrey Holloway represented Employer. The record closed at the hearing's conclusion on November 26, 2013.

ISSUE

Employer contends Employee failed to comply with the order in *Flores-Jennings v. Chenega Corporation*, AWCB Decision No. 13-0048 (May 8, 2013) (*Flores-Jennings II)* by failing to return releases and provide a mailing address. Employer also contends Employee failed to timely sign and return releases. Employee contends she complied with the order and signed and returned the releases, and her claim should not be dismissed.

Should Employee's claim be dismissed?

FINDINGS OF FACT

All findings of fact in *Flores-Jennings v. Chenega Corporation*, AWCB Decision No. 12-0182 (October 19, 2012)(*Flores-Jennings I*) and *Flores-Jennings II* are incorporated herein. The following facts and factual conclusions are reiterated from *Flores-Jennings I*, *Flores Jennings II*, or established by a preponderance of the evidence:

1) On August 20, 2011, Employee reported injuring her right knee on August 8, 2011, while working for Employer as a housekeeper at the Voyager Hotel. (Report of Occupational Injury or Illness, August 20, 2011).
2) On August 18, 2011, Employee sought treatment at Providence Hospital's emergency room. An x-ray was taken, which showed mild osteoarthritis and a small knee effusion, but no fracture. Employee was diagnosed with knee strain, prescribed hydrocodone and Naproxen and given five days off work. (Emergency Department report, August 18, 2011; Imaging report, August 18, 2011).
3) Employee underwent chiropractic treatment for a month. (Collins reports, August 22, 2011 to September 21, 2011).
4) On September 24, 2011, Anthony Woodward, M.D., performed an employer's medical evaluation (EME). Employee's chief complaints were pain in the left shoulder, left back, left knee, right hip, right leg, and left shin. Dr. Woodward diagnosed: 1) Lumbar spondylosis, pre-existing; 2) Possible prior low back pain with chiropractic treatment; 3) Osteoarthrosis, right knee, pre-existing; 4) Contusion, right knee, August 8, 2011, resolved; 5) Possible sprain, right knee, August 8, 2011; 6) Morbid obesity; 7) Diabetes mellitus; and 8) other medical conditions, not assessed. Dr. Woodward opined work was the substantial cause of Employee's right knee contusion and sprain on August 8, 2011 and any contusion or sprain of the right knee had resolved. He thought Employee was medically stable and did not require any further treatment. Dr. Woodward found no knee instability and stated Employee had no permanent partial impairment (PPI) as a result of the injury. (Woodward report, September 24, 2011).
5) On October 13, 2011, Employer controverted benefits based on Dr. Woodward's EME report. (Notice of Controversion, October 13, 2011).

6) On October 19, 2011, Employee filed a claim seeking temporary total disability (TTD), medical and transportation costs, penalty, interest, and a finding of unfair or frivolous controversion. (Claim, October 19, 2011).
7) On November 2, 2011, notice for a December 28, 2011 prehearing conference was sent to Employee at an Anchorage P.O. Box address. (Prehearing Conference Notice, November 2, 2011).
8) On November 8, 2011, Employer served an additional controversion based on Dr. Woodward's EME report. (Notice of Controversion, October 13, 2011).
9) On November 18, 2011, Employer sent Employee multiple releases for signature via certified U.S. mail. The releases were delivered; however, the signature on the return receipt does not appear to be that of Employee. (Employer letter, November 18, 2011; observations).
10) On November 23, 2011, a magnetic resonance imaging (MRI) study of Employee's right knee showed complex tears of the bilateral menisci and degenerative changes of the medial compartment. (MRI report, November 23, 2011).
11) On December 8, 2011, Employer controverted all benefits based on Employee's failure to sign releases. It also filed a petition to compel Employee to sign releases. (Notice of Controversion, December 8, 2011; Employer's petition, December 7, 2011).
12) At a December 28, 2011 prehearing conference, the parties discussed the release issue and Employer's December 7, 2011 petition to compel. The parties "confirmed the lines of communication are open but discovery, specifically releases, is currently at issue." Employee had signed releases for Providence Hospital and workers' compensation records, but did not sign a general medical release, a social security release or an employment records release because she felt these releases were overbroad. The designee advised Employee to consult with a workers' compensation technician regarding the "specifics of her case" before deciding whether or not to sign the additional releases. A March 21, 2012 hearing date was set for Employer's petition to compel in the event the parties could not agree on the release issue. (Prehearing Conference Summary, December 28, 2012).
13) On February 21, 2012, notice for the March 21, 2012 hearing was sent via regular and certified mail to Employee at her address of record, an Anchorage P.O. Box. (Hearing Notice, February 21, 2012).

14) On March 16, 2012, Employee emailed the designee for the December 28, 2011 prehearing conference. Her email stated, in entirety:

> To Mr. Pullen or whom it may concern:
>
> There is a conference or hearing schedule [sic] for March 21st. I would appreciate your rescheduling this hearing for the following reasons:
>
> I still have no permanent residence. The copies of the papers that I had at the shelter were thrown out. I presently have no access to a private telephone to participate in the hearing and no way to attend the hearing in Anchorage in person.
>
> The post office box I was using has been closed.
>
> I have a slip that shows that article 70100290000291454091 from Nova Pro was put in the box on December 24th but was sent back before it could be claimed. If any papers have been sent from that date and forward I have not received anything.
>
> My mother has agreed that I may use her home as my current mailing address to receive copies of what may have been sent at [Florida address omitted].
>
> If you could please reschedule the hearing so that I may have time to receive whatever papers have been filed since December 9th I would appreciate it. I was hurt, my knee was injured, the tear as shown on the MRI needs to be fixed.
>
> I was sure that the December hearing with the copy of the MRI provided would clear things up and set my recovery in motion. However, it seems things are much more complicated than that and now it is about forms and filing and I simply don't have the capacity to figure those things out. As my health and the repair of my knee is at stake and I don't have a copy of all the papers to present to an attorney so that they will consider helping me through this maze I respectfully request that you postpone this hearing until I can get the assistance I need to present what is necessary to get my knee fixed.
>
> Thank you for your time and consideration.
>
> I would appreciate any mail and a copy of whatever has been filed or sent since December be sent to me in case [sic] of my mother at [Florida address omitted].
>
> Sincerely, Elizabeth M. Flores-Jennings, [date of birth omitted], claim 201113452 (Employee email, March 16, 2012).

15) On March 16, 2012, the designee replied to Employee by email and stated he would update her address of record. He also advised Employee how to request a copy of her file and advised Employee to discuss rescheduling the hearing with Employer's attorney. The designee provided Employee with the telephone number of Employer's attorney and suggested Employee update her address with Employer. He forwarded a copy of Employee's email and his reply to Employer's attorney. (Division email, March 16, 2012).
16) Employer also communicated with Employee via email. (*Flores-Jennings I* at para. 16; Division letter, August 21, 2012).
17) The notice for the March 21, 2012 hearing sent to Employee via certified mail to her address of record, an Anchorage P.O. Box, was returned as "Unclaimed, Unable to Forward." The hearing notice sent via regular mail was returned "Not deliverable as Addressed, Unable to Forward." (Returned Notices, February 21, 2012).
18) On March 21, 2012, the hearing officer cancelled the hearing for that same date on Employer's petition to compel. (*Flores-Jennings I* at para. 17; Prehearing Conference Summary, April 19, 2012).
19) On April 19, 2012, Employee did not participate in the prehearing conference. Employer requested another hearing date on its petition to compel. Instead, the designee ruled on Employer's petition to compel under her authority to do so without a full board panel. She granted Employer's petition and ordered Employee to sign the medical release, the employment release and a modified social security release. The designee attached copies to the medical and employment releases to the summary. (Prehearing Conference Summary, April 19, 2012).
20) Notice for the April 19, 2012 prehearing conference, sent via regular mail to Employee's mother's address in Florida, was returned "Not deliverable as Addressed, Return to Sender." (Returned Prehearing Notice, April 2, 2012).
21) The prehearing conference summary that contained the orders and releases from the April 19, 2012 conference, send via regular mail to Employee's mother's address in Florida, was returned "Forward Time Exp., Rtn. to Send." (Returned Summary, April 19, 2012).
22) On May 15, 2012, Employer sent the modified social security release via regular and certified mail to Employee's mother's address in Florida. (Employer letter, May 15, 2012).

23) On May 22, 2012, Employer's May 15, 2012 letter sent via regular mail was returned to it as "Not Deliverable as Addressed, Unable to Forward." *(Flores-Jennings I* at para. 22).

24) On May 25, 2012, Employer filed a petition to dismiss Employee's claim based on her failure to comply with the April 19, 2012 orders. (Employer's petition, May 24, 2012).

25) On June 11, 2012, Employer's May 15, 2012 letter sent via certified mail was returned to it without notation. *(Id.*).

26) On July 9, 2012, an August 7, 2012 hearing was set on Employer's May 25, 2012 petition to dismiss. (Division letter, July 9, 2012).

27) The division's July 9, 2012 letter, informing the parties of the August 7, 2012 hearing date, and sent via regular mail to Employee's mother's Florida address, was returned "Not Deliverable as Addressed, Unable to Forward." (Returned letter, July 9, 2012).

28) On August 6, 2012, division personnel unsuccessfully attempted to contact Employee by telephone at her number of record. Her telephone number was not in service. (*Flores-Jennings I* at para. 27).

29) On August 7, 2012, Employee did not participate in the hearing. Unaware of the March 16, 2012 email exchange between Employee and the designee, the chair issued an oral decision granting Employer's petition to dismiss. (*Id.* at para. 26, 28).

30) After the August 7, 2012 hearing, the March 16, 2012 email exchange between Employee and the designee were located. (*Id.* at para. 29).

31) On August 21, 2012, a hearing officer wrote the parties to advise them the August 7, 2012 hearing record on Employer's petition to dismiss was being reopened to include the March 16, 2012 emails between Employee and the designee. The hearing officer also invited the parties to supplement the record with "anything additional relating to this correspondence" and set a September 6, 2012 deadline for the record to close. The letter noted items sent to Employee's mother's Florida address were being returned and stated, "[a]s a last resort, the Board is sending this letter and attachments/enclosures to [Employee] by regular mail and email, as well as to [Employer] by the same means." (Division letter, August 21, 2012).

32) The hearing officer's August 21, 2012 letter sent to Employee's mother's Florida address was returned as "Not deliverable as Addressed, Unable to Forward." (Returned letter, August 21, 2012).

33) On September 5, 2012, Employee replied to the hearing officer's August 21, 2012 email. Her email states, in entirety:

> Thank you for the email. Please do not close the case.
>
> I have not received any mail, do not have a permanent address and the meniscus tear in my knee still needs to be fixed.
>
> I thought once the MRI was obtained that clearly showed why my knee wasn't healing that I would get the treatment needed. That didn't happen.
>
> Then I thought the December hearing was to enter the MRI into the record and the [sic] I would get treatment. That didn't happen either.
>
> Then the last hearing I thought again that would happen but it didnt. [sic]. They simply had more forms for me to sign. I voluntarily signed the forms in the beginning because I assumed they were simply looking to get my injury fixed and back on my feet. When that didn't happen and in fact they paid some guy to follow me and take pictures of me walking instead of going with the medical records that showed I had a tear and that was why I wasn't healing then I realized I couldn't trust them and I started wondering about all the forms they were having me sign.
>
> If I recall right, I guess there is probably a recording, the last thing I recall was that the lawyer said he would revise the forms so they included only the dates and part of the body I injured. Instead of the blanket form that they wanted to send to my employer asking for any and all personnel informationon [sic] me. I didn't see what that had to do with my injury. He may have sent me that revised form and I didn't get it but I have no problem signing the revised ones we talked about. The medical forms I can sign again if needed but they already have them.
>
> Again, thank you very much for contacting me. I do still need to get my knee fixed and the benefits for the weeks that were denied. Thank you.
>
> My address for mail is [general delivery address at Anchorage post office omitted].
>
> i [sic] sometimes get mail at [name of homeless shelter omitted], but it is not very reliable and i [sic] wouldn't know for sure if you sent me anything or not. i [sic] do usually get to check email about once a week. Thank you again for taking the time to locate and contact me instead of just closing the case. I just want to get my knee fixed. (Employee email, September 5, 2012).

34) On September 5, 2012, Employer replied objecting to consideration of Employee's email on numerous grounds, including: Employee's September 5, 2012 email was not submitted in

advance of the August 7, 2012 hearing, Employee's email does not pertain to the March 16, 2012 email documentation, Employee's email was testimonial, Employee's email was hearsay, and Employee was not subject to cross examination. (Employer email September 5, 2012).

35) On October 19, 2012, *Flores-Jennings I* reconsidered the August 7, 2012 oral decision dismissing Employee's claim. It was decided Employee did not have "actual notice" of certain proceedings and, since Employee did not receive the April 19, 2012 order to sign releases, her conduct was not willful. The decision concluded the August 7, 2012 oral order was based on a mistake of fact and vacated the order dismissing Employee's claim. It also denied Employer's May 25, 2012 petition to dismiss, reminded Employee her benefits remained under suspension, ordered Employee to sign and return the social security, employment and medical releases no later than November 25, 2012 and advised Employee her case might be dismissed should she not comply with the decision's order. The decision retained jurisdiction "to address dismissal if Employee fails to comply with this order," and was both mailed and emailed to the Employee, along with the releases to be signed. *(Flores-Jennings I*).

36) On November 23, 2012, Employee filed a signed social security release, medical release and employment release with the workers' compensation division's Anchorage office. (Signed releases, November 10, 2012).

37) The division failed to forward the signed releases to Employer. (Record; observations).

38) On November 29, 2012, Employer filed a petition to dismiss contending Employee failed to sign and return the releases as ordered by *Flores-Jennings I*. (Employer petition, November 28, 2012).

39) On December 20, 2012, Employer filed an affidavit of readiness for hearing (ARH) on its November 28, 2012 petition to dismiss. (Employer ARH, December 19, 2012).

40) The ARH was mailed to Employee "general delivery" at the Anchorage post office address. (*Id.*).

41) Employee did not file an opposition to Employer's December 19, 2012 ARH. (Record, observations).

42) On January 29, 2013, a prehearing conference was scheduled for February 12, 2013. (Prehearing Conference Notice, January 29, 2012).

43) Notice for the February 12, 2013 prehearing conference, sent via regular mail to Employee general delivery at the Anchorage post office was returned as ""Not Deliverable as Addressed, Unable to Forward." (Returned notice, January 29, 2013).

44) On February 12, 2013, Employer participated in the prehearing conference, Employee did not. A February 26, 2013 hearing on the written record was scheduled on Employer's November 29, 2012 petition to dismiss and briefing deadlines were set. (Prehearing Conference Summary, February 12, 2013).

45) On February 26, 2013, Employer filed its hearing brief. (Employer's brief, February 26, 2013).

46) Employee did not file a hearing brief. (Record, observations).

47) On March 1, 2013, the February 26, 2013 hearing notice sent to Employee via regular mail was returned. (Workers' Compensation Division electronic database event entry, March 1, 2013).

48) On March 8, 2013, the February 26, 2013 hearing notice sent to Employee via certified mail was returned. (Workers' Compensation Division electronic database event entry, March 8, 2013).

49) The decision and order in *Flores-Jennings II* issued on May 8, 2013 denied Employer's petition to dismiss Employee's claim, and ordered Employee to "provide a valid mailing address; or, in the alternative, deliver signed, written consent for service by email before June 5, 2013." The order did not state whether Employee was to provide the address or consent to the board, to Employer, or to both. (*Flores-Jennings II*).

50) On June 4, 2013, Employee filed a letter with the board which included a valid mailing address in Florida and a consent to service by email. (Employee letter, June 3, 2013). It is unclear whether Employee sent a copy of the letter to Employer. (Record).

51) On June 26, 2013, Employer sent more releases to Employee at general delivery in Anchorage, Alaska. (Employer letter with releases, June 26, 2013).

52) On July 22, 2013, Employer filed a petition to dismiss because Employee had not complied with *Flores-Jennings II* or returned the releases sent June 26, 2013. (Petition, July 19, 2013).

53) Both Employee and Employer participated in the October 15, 2013 prehearing conference. Employer was given the address Employee had provided the board on June 4, 2013 and informed of her consent to service by email. The prehearing conference summary does not

state whether Employee received the releases sent on July 26, 2013. The board designee set the instant written record hearing, and informed the parties of the deadlines for their briefs. (Prehearing Conference Summary, October 15, 2013).

54) Also on October 15, 2013, Employee filed a letter to Employer's attorney. Enclosed with Employee's letter were the signed releases Employer had requested on June 26, 2013. Employee also requested discovery from Employer. (Employee letter, October 15, 2013).

55) Both Employee and Employer timely filed briefs for the November 26, 2013 hearing. (Record).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision not only on direct testimony and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

AS 23.30.005. Alaska Workers' Compensation Board.

. . .

(f) Two members of a panel constitute a quorum for hearing claims . . . .

(h) The department shall . . . adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

. . .

> **AS 23.30.107. Release of information.**
>
> (a) Upon written request, an employee shall provide written authority to the employer . . . to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.
> . . .

Employers have a constitutional right to defend against claims of liability. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999)(citing Alaska Const., art. I sec. 7). Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Id*. (citing AS 21.36.010 *et seq*.; 3 AAC 26.010 - .300). The Board has long recognized it is important for employers to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims and to detect fraud. *Id*. (citing *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987)). The statute authorizes employers to obtain information relevant to an employee's injuries. *Id*.

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
>
> (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
>
> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the

> recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense.
> . . .

The law has long favored giving a party his "day in court," *See, e .g. Sandstrom & Sons, Inc. v. State of Alaska,* 843 P.2d 645 at 647 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits. AS 23.30.001(2). Dismissal should only be imposed in "extreme circumstances," and even then, only if a party's failure to comply with discovery has been willful and when lesser sanctions are insufficient to protect the rights of the adverse party. *Id*. The extreme sanction of dismissal requires a reasonable exploration of alternative sanctions. *Id*. at 648-49.

However, AS 23.30.108(c) does provide a statutory basis for dismissal as a sanction for noncompliance with discovery, and the Board has long exercised its authority to dismiss claims when it has found employee's noncompliance to have been willful. *O'Quinn v. Alaska Mechanical, Inc.,* AWCB Decision No. 06-0121 (May 15, 2006); *Erpelding v. R & M Consultants, Inc.,* AWCB Decision No. 05-0252 (October 3, 2005); *Sullivan v. Casa Valdez Restaurant,* AWCB Decision No. 98-0296 (November 30, 1998); *Maine v. Hoffman/Vranckaert, J.V.,* AWCB Decision No. 97-0241 (November 28, 1997); *McCarroll v. Catholic Community Services,* AWCB Decision No. 97-0001 (January 6, 1997). "Willfulness" has been established when a party has been warned of the potential dismissal of his claim and has violated multiple discovery orders. *Erpelding*. It has also been established when a party has been warned of the potential dismissal of her claim and has refused to participate in proceedings and discovery multiple times. *Sullivan*. Since dismissal of a workers' compensation claim under AS 23.30.108(c) is analogous to dismissal of a civil action under Civil Rule 37(b)(3), the Board has occasionally consulted the factors set forth in that subsection of the Rule when deciding petitions to dismiss. *Erpelding*; *Sullivan*; *McCarroll*.

8 AAC 45.060. Service

. . . .

(b) A party shall file a document with the board, other than the annual report under AS 23.30.155 (m), either personally or by mail; the board will not accept any other form of filing. Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

Civ. R. 37. Failure to Make Disclosure or Cooperate in Discovery.

. . .

(b) Failure to Comply with Order.

. . .

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof. . . .

. . .

(3) Standards for imposition of Sanctions. Prior to making an order under sections (A), (B), or (C) of subparagraph (b)(2) the court shall consider

(A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;

(B) the prejudice to the opposing party;

(C) the relationship between the information the party failed to disclose and the proposed sanction;

(D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and

(E) other factors deemed appropriate by the court or required by law.

> The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

ANALYSIS

Should Employee's claim be dismissed?

The contention in Employer's petition that Employee failed to comply with *Flores-Jennings II* is not persuasive. *Flores-Jennings II* ordered Employee to provide a valid mailing address or consent to service by email before June 5, 2013. The order is vague in that it does not state to whom Employee is to provide the address and consent. However, on June 4, 2013, within the time allowed, Employee timely filed that information with the board. Employee complied with *Flores-Jennings II*.

Employer's hearing brief suggests Employer is also contending Employee's claim should be dismissed because Employee did not serve it with a copy of the June 4, 2013 letter that she filed with the board. Under 8 AAC 45.060(b) a party is required to serve any other parties with copies of documents filed with the board. Employee is unrepresented in her case. While a more sophisticated litigant would have been aware of that requirement, there is no indication that Employee was ever apprised of that obligation. Dismissal is only appropriate where an employee's noncompliance was willful and no lesser sanctions are available. Here, Employee's failure to comply was not willful, and a less severe remedy is available. Employee's claim will not be dismissed for failure to comply with *Flores-Jennings II*, but she will be ordered to serve Employer with any document she may file with the board.

Employer also contends Employee's claim should be dismissed because she failed to timely sign and return the releases sent on June 26, 2013. Those releases were sent to general delivery in Anchorage. Employer was apparently unaware that Employee had changed her address of record to the Florida address on June 4, 2013. As used in 8 AAC 45.060(b), "last known address" means the board's last address of record. There is no evidence the releases were served on Employee prior to October 15, 2013, the same day she signed and returned them to Employer. Employee's claim will not be dismissed for failure to timely sign and return the releases.

CONCLUSION OF LAW

Employee's claim will not be dismissed.

ORDER

1) Employer's July 22, 2013 petition to dismiss Employee's claim is denied.
2) Employee is ordered to serve Employer with a copy of any document that she files with the board.

Dated in Anchorage, Alaska on December 10, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
Ronald P. Ringel, Designated Chair

_____
Patricia Vollendorf, Member

_____
Ronald Nalikak, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of ELIZABETH FLORES-JENNINGS, employee / claimant; v. CHENEGA CORPORATION, employer; AMERICAN ZURICH INSURANCE CO., insurer / defendants; Case No. 201113452; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 10, 2013.

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Pamela Murray, Office Assistant