

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

ABIGAIL E. CAUDLE (DECEASED),) INTERLOCUTORY
) DECISION AND ORDER
 Employee,)
 Decedent,) AWCB Case No. 201108827
)
 MARIANNE E. BURKE,) AWCB Decision No. 14-0029
)
 Claimant,) Filed with AWCB Anchorage, Alaska
) on March 7, 2014
 v.)
)
 RAVEN ELECTRIC, INC.,)
)
 Employer,)
 and)
)
 LIBERTY MUTUAL INSURANCE CO.,)
)
 Insurer,)
 Defendants.)
)

Marianne E. Burke's (Claimant) October 28, 2013 Petition for Reconsideration of Designee's Discovery Order, her January 23, 2014 Petition for Continuance of Hearing and Raven Electric's (Employer) October 15, 2013 Petition to Exclude Evidence, and November 15, 2013 Petition to Dismiss or Compel were heard on February 19, 2014, in Anchorage, Alaska, a date selected on February 7, 2014. Claimant appeared in person. Attorney Constance E. Livsey appeared on behalf of Employer and its insurer. There were no witnesses. The record closed at the hearing's conclusion on February 19, 2014. This interlocutory (non-final) decision and order will decide only the issues presented at the February 19, 2014 hearing.

ISSUES

Claimant contended she needed more time to prepare for the February 19, 2014 hearing and requested a continuance. Claimant cited generalized hardship in preparing her case, inability to find an attorney to represent her, complexity of workers' compensation law generally, and personal financial hardship as grounds entitling her to a continuance.

Employer opposed a continuance. Employer contended the parties have had ample time to prepare for hearing, the issues have been fully briefed, and no good cause exists for a continuance. After deliberating, the panel orally denied Claimant's continuance request.

1) Was the oral order denying continuance of the February 19, 2014 hearing correct?

Claimant filed a "petition for reconsideration of prehearing summary" of the board designee's October 11, 2013 discovery order requiring her to provide executed income tax releases for herself and Abigail. Claimant vigorously opposes Employer's request for tax releases. Claimant contends dependency cannot be measured in financial terms and compelled disclosure of the tax information violates Claimant's and Abigail's rights to privacy, equal protection, and due process under the state and federal constitutions. Claimant seeks an order denying Employer's petition to compel and desires to proceed to hearing on the merits of her claim.

Employer contends Claimant does not properly assert an appeal of the October 11, 2013 discovery order. Employer contends Claimant offers no argument as to how the designee's order was an abuse of discretion. Employer contends tax records may be relevant to the dependency issue for determining death benefits. Employer seeks an order compelling the tax releases.

2) Did the board designee abuse his discretion in ordering Claimant to provide executed tax releases for herself and Abigail?

Employer contends Claimant refused or failed to cooperate with discovery. It contends Claimant refused to provide executed tax releases for herself and Abigail, after being ordered to do so by the board designee at the October 11, 2013 prehearing conference. It seeks an order dismissing Claimant's claim with prejudice as an appropriate sanction against Claimant for failure to cooperate in discovery.

Claimant contends she has no duty to provide executed tax releases. Claimant vigorously opposes dismissal of her claim.

3) Should Claimant's June 21, 2013 claim be dismissed for failure to provide discovery?

Employer contends evidence filed by Claimant in support of her claim is irrelevant, contains inadmissible hearsay, and has been inappropriately altered or notated. Employer's petition seeks exclusion of evidence proffered by Claimant and filed on Claimant's Notices of Intent dated July 22, 2013 and October 11, 2013.

Claimant contends the evidence filed is relevant and probative of material issues pertaining to her claim. Claimant opposes Employer's petition.

4) Should Employer's petition to exclude evidence be granted?

Claimant raises several state and federal constitutional challenges to the statutory and regulatory scheme of the Alaska Workers' Compensation Act. Claimant contends the Act's death benefits provision violates the state and federal constitutions.

Employer has not taken a position regarding Claimant's constitutional challenges to the Act. It is presumed Employer opposes Claimant's constitutional challenges.

5) Does the board have jurisdiction to determine whether AS 23.30.215 is unconstitutional?

FINDINGS OF FACT

The following relevant facts and factual conclusions are either undisputed or are established by a preponderance of the evidence:

- 1) On June 20, 2011, Claimant's daughter, Abigail Caudle, died while working as an apprentice electrician for Employer. (Report of Occupational Injury or Illness, June 24, 2011).
- 2) On December 22, 2011, Employer paid a \$10,000 death benefit on Abigail's behalf. (Compensation Report, January 5, 2012; check from Liberty Northwest, December 22, 2011).
- 3) On June 21, 2013, Claimant filed a Workers' Compensation Claim for "death benefits" in connection with Abigail's death. (Claim, June 21, 2013).

4) On July 8, 2013, Employer answered the June 21, 2013 claim, admitted Abigail was killed on the job while Employer's employee, and asserted certain affirmative defenses:

Claimant's claim is barred by operation of law pursuant to AS 23.30.105(a), which provides 'the right to compensation for death is barred unless a claim therefor is filed within one year after the death.' Employee's death occurred on 6/20/2011 and Claimant's 6/21/2013 claim is untimely.

Claimant is not entitled to death benefits. AS 23.30.215 provides for payment of death benefits to a deceased employee's mother only if the mother was 'dependent upon the deceased at the time of injury. . .' (Answer, July 8, 2013).

5) On July 8, 2013, Employer filed a Controversion Notice. The notice denied specific benefits under AS 23.30.105(a) (asserting Claimant's claim was untimely) and AS 23.30.215 (asserting Claimant was not entitled to death benefits because she was not "dependent upon the deceased at the time of injury." (Controversion Notice, July 8, 2013).

6) On July 22, 2013, Claimant filed a Notice of Intent to Rely containing a letter dated July 5, 2013, which discussed the following:

- A factual background of Abigail's employment and subsequent death on the job while working for Employer.
- Purported findings of an investigation by the Occupational Safety and Health Administration following Abigail's death.
- Claimant's unsuccessful efforts to retain an attorney to represent her with respect to Abigail's death.
- The timeliness of the June 21, 2013 claim.
- Claimant's suggestions for future legislation addressing death benefits paid in Alaska workers' compensation cases. (Letter, July 15, 2013).

7) On August 23, 2013, Employer filed an August 21, 2013 letter sent to Claimant. The letter included unexecuted IRS forms 4506 and stated, in relevant part:

As [the board designee] explained to you during the 8/01/2013 Prehearing Conference, parties are permitted under the Alaska Workers' Compensation Act to engage in discovery in order to obtain information potentially relevant to claims and defenses asserted in the case. To that end, I enclose two release of information forms that will enable me to obtain you and Ms. Caudle's IRS returns for 2010 and 2011. This information is potentially relevant to the claims you have asserted and/or

to the affirmative defenses I have asserted. The Alaska Workers' Compensation Act requires that an employee or other claimant provide written authority to obtain information relative to the work injury and claim. AS 23.30.107 and AS 23.30.108.

Please execute the IRS release form for your own federal tax returns for 2010 and 2011. **As you are asserting entitlement to benefits as a result of the death of Ms. Caudle, please have the appropriate representative of her estate execute the IRS release form for her tax returns.** . . . (Letter, August 21, 2013; emphasis added).

8) On September 5, 2013, Claimant filed a Petition for Protective Order to prevent disclosure of Claimant's and Abigail's taxes. (Petition, September 5, 2013).

9) On October 11, 2013, Claimant filed a 220-page Notice of Intent to Rely, which attached the following:

- An Anchorage Fire Department "prehospital care report" and "prehospital care worksheet," both dated June 20, 2011.
- Anchorage Police Department report of the officers responding to the scene of Abigail's death, dated June 21, 2011.
- An Office of the State Medical Examiner Autopsy Report detailing final pathological findings and diagnoses, dated June 28, 2011.
- An NMS Labs toxicology report, dated July 1, 2011.
- A letter from the Department of Labor, Labor Standards & Safety Division (AKOSH), informing Claimant AKOSH would be investigating Abigail's death, dated July 7, 2011.
- Letter from AKOSH to Claimant and Abigail's father giving an overview of the above-mentioned investigation, both dated November 2, 2011.
- An AKOSH invoice addressed to Employer, dated November 2, 2011.
- An AKOSH Citation and Notification of Penalty and associated forms and documents addressed to Employer, dated November 2, 2011.
- An Occupational Safety and Health Administration (OSHA) Inspection Report, dated September 23, 2011.
- OSHA Inspection Reports including photos of the work accident site and interviews with witnesses, dated October 22, 2011.

- An AKOSH Accident Investigation Report, undated.
- An AKOSH Fatality/Catastrophe Report, dated October 24, 2011.
- An AKOSH Investigation Summary, dated October 22, 2011.
- Affidavits executed by Jeffery Foster, and a transcript of Foster's interview taken by AKOSH on June 29, 2011; July 19, 2011; and August 1, 2011.
- An affidavit and statement of Jon Salegat, who was working near Abigail at the time of her death and detailed his observations, dated June 28, 2011.
- An affidavit and statement of Dean Pratt, dated September 19, 2011.
- An affidavit and statement of Randy Kroon, dated June 29, 2011.
- An affidavit and statement of Andrew Yachtmenoff, dated June 21, 2011.
- An AKOSH document styled "closing conference worksheet," dated September 19, 2011.
- A Department of Commerce business license for Employer for the period December 31, 2009 through December 31, 2011.
- An Internet screenshot of the Division of Corporations license detail for Employer, undated.
- OSHA summaries of Employer's work-related injuries, various dates.
- An email to Claimant from Sheri Sawyer dated June 23, 2011.
- Several pages of screenshots containing comments from anonymous public users on the Anchorage Daily News' Internet article reporting Abigail's death.

10) Several of the foregoing documents include hand-written notes in the margins. None of the foregoing documents as filed appear to be certified, or official, agency reports or records. (Experience, judgment, observations, and inferences from all of the above).

11) On October 11, 2013, the parties attended a prehearing conference. The prehearing conference summary states, in relevant part:

Designee confirmed that the purpose of today's prehearing is to obtain a ruling regarding Claimant's 9.5.13 Petition for Protective Order per AS 23.30.108(c). [Employer] stated that the tax returns in question are reasonably calculated to lead to the admission of evidence relevant to the merits of [Claimant's] claim for additional death benefits. . . . [Claimant] contended that her civil and due process rights are being denied and that the releases in question are infringing on her and her deceased

daughter's privacy. **[Claimant] contended further that the issue to be addressed is not a death benefits issue but a value of life issue** and that she would be willing to discuss a financial settlement. . . .

The claimant's 9/5/2013 Petition for Protective Order is DENIED. [Claimant is ordered to sign, date, and return the referenced tax return releases for both herself and her daughter for the 2010 and 2011 calendar years, within 10 days of the issuance of this prehearing conference summary. . . . (Prehearing Conference Summary, October 11, 2013; emphasis added).

12) On October 15, 2013, Employer filed a petition to Exclude Evidence and Objection to Evidence, and brief in support. Employer's brief set forth several legal arguments in support of its request for exclusion. Additionally, Employer's brief stated, in relevant part:

Employer seeks an Order excluding (1) Claimant's letter dated 07/05/2013, (2) copies of OSHA records containing hand-written comments and other 'marginalia' absent proper authentication, and (3) e-mail and Anchorage Daily News comments, from evidence that may be admitted and considered by the Board at hearing. . . . (Brief, October 15, 2013).

13) On October 28, 2013, Claimant filed a Petition for Reconsideration of Prehearing Conference Summary. The petition attached a brief citing portions of the state and federal constitutions and Claimant's arguments in support stating, in relevant part:

. . . This is an issue of justice and for my daughter's life and **NOT an issue of dependency.** This is the only place that I have been allowed to get any source of justice. . . .

I also stated that dependency should NOT be an issue in regards to death. It is an issue with injury, but insults my daughter's life that workers' compensation is making this about dependency.

I also stated that [if] this case had to go to dependency, what about when I am older and need care? Abigail . . . would take care of me. (Brief, October 28, 2013; emphasis added).

14) On November 15, 2013, Employer filed a petition seeking dismissal of Claimant's claim for failure to comply with the designee's discovery order or in the alternative, to compel Claimant to comply with the designee's October 11, 2013 order. (Petition, November 15, 2013).

15) On January 10, 2014, Claimant filed a document with a brief setting forth grounds under which Claimant believed the February 19, 2014 hearing should be continued. (Affidavit of Opposition to ARH Filed, January 10, 2014).

16) On January 23, 2014, Claimant filed a petition seeking a continuance of the February 19, 2014 hearing. The petition included a brief setting forth grounds for a continuance. The petition included the following attachments:

- An undated newspaper article from the Anchorage Daily News reporting Abigail's June 20, 2011 death while working as an electrician apprentice for Employer.
- Screenshots of public, anonymous reader Internet forum comments related to the Anchorage Daily News report on Abigail's death.
- Emails from individuals opining on the causes and circumstances of Abigail's death.

17) Much of the foregoing contained redactions, underlined, crossed-out, or emphasized text, and handwritten margin notes. (Petition and evidence, January 23, 2014).

18) On February 7, 2014, the parties attended a prehearing conference on Claimant's January 23, 2014 petition for continuance of the February 19, 2014 hearing. The designee denied the request, citing lack of statutory authority supporting a continuance. (Prehearing Conference Summary, February 7, 2014).

19) On February 13, 2014, Employer filed a hearing brief with supporting exhibits for the February 19, 2014 hearing. In summary, Employer's brief makes the following arguments:

- Dependency for tax purposes is reliable evidence on the question of dependency under the Act; therefore, the releases sent to Claimant are reasonable, relevant, and probative and may lead to discovery of admissible evidence.
- Claimant has not properly appealed from the designee's order requiring Claimant to sign and return the releases.
- Claimant's proffered evidence contains inadmissible hearsay, is irrelevant, and is altered via various margin notes.
- Claimant wants to improperly turn a procedural hearing into a "mini-trial," at which Claimant wants to prove fault or blame on Employer's part.

- If Claimant continues to refuse to sign and return the releases, Employer is entitled to a dismissal of Claimant's claim. (Brief, February 13, 2014).

20) On February 14, 2014, Claimant filed a hearing brief with arguments for the February 19, 2014 hearing. In summary, Claimant's brief makes the following arguments:

- Employer's alleged negligence in connection with Abigail's death should entitle Claimant to benefits.
- Awarding Claimant benefits in this case will deter future negligence from this and similar employers.
- OSHA citations against Employer support awarding Claimant benefits.
- Claimant had difficulty in obtaining an attorney to represent her in this case.
- A right to privacy under the state constitution protects Claimant from disclosing her or Abigail's taxes.
- Related to the above, Abigail's life cannot be "valued" according to tax returns; therefore the returns are not relevant.
- Dependency in a workers' compensation case cannot be measured solely in financial terms.
- Portions of AS 08.18.101, which requires construction contractors and similar businesses to carry workers' compensation and liability insurance, apply here.
- Currently proposed legislation, HB 294, would adjust benefits paid in a workers' compensation case involving death.
- Portions of state and federal constitutions apply here. (Brief, February 14, 2014).

21) At hearing on February 19, 2014, the parties reiterated their positions. (Record, February 19, 2014).

22) Claimant has not alleged Employer was uninsured for workers' compensation liability in connection with Abigail's death. (Record).

23) Nowhere in the supporting pleadings, petitions, testimony, or briefs has Claimant stated she was financially dependent on Abigail at the time of her death. (Record; Observations).

24) On February 26, 2014, Claimant filed a letter setting forth additional contentions and arguments pertaining to the February 19, 2014 hearing. Because the letter was filed after the close of the

record of the February 19, 2014 hearing, it will not be considered in this decision and order. (Letter, February 26, 2014).

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. . . .

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

The board derives its authority and jurisdiction from the Alaska Workers' Compensation Act at AS 23.30.005 through AS 23.30.395, and the Alaska Administrative Procedure Act, AS 44.62.540. An administrative agency can only adjudicate a dispute if it has been given explicit adjudicatory authority by statute. *Far North Sanitation, Inc. v. Alaska Public Utilities Commission*, 825 P.2d 867, 870 (Alaska 1992). The Alaska Supreme Court has recognized the board's equitable powers, but only as necessarily incident to exercise statutory adjudicative responsibilities. *Blanas v. The Brower Co.*, 938 P.2d 1056, 1062 (Alaska 1997).

Applying equitable or common law principles in a specific case is permitted, but the board can only adjudicate in the context of a workers' compensation case, and lacks jurisdiction to decide constitutional claims. The legislature may constitutionally delegate some adjudicative power to an executive agency, but it may not delegate judicial power. One of the policy justifications for the existence of administrative adjudication is, that as a result of their limited jurisdiction, administrative agencies are able to develop expertise in a narrow area. Neither the Alaska Workers' Compensation Appeals Commission nor the board has jurisdiction to hear any action

outside of a workers' compensation claim. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 37 (Alaska 2007) (emphasis added).

AS 23.30.005. Alaska Workers' Compensation Board.

...

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

AS 23.30.045. Employer's liability for compensation. . . .

...

(b) Compensation is payable irrespective of fault as a cause for the injury.

AS 23.30.105. Time for filing claims. (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, and the right to compensation for death is barred unless a claim therefor is filed within one year after the death, except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under . . . AS 23.30.215.

...

AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance. . . .

...

(c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a 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. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

The law has long favored giving a party her “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 lesser sanctions are insufficient to protect the rights of the adverse party. *Sandstrom*. The extreme sanction of dismissal requires a reasonable exploration of alternative sanctions. *Id.* at 648-49.

“Willfulness” has been established when a party was warned of potential claim dismissal and violated multiple discovery orders. *See, e.g., Sullivan; Garl v. Frank Coluccio Contr. Co.*, AWCB Decision No. 10-0165 (October 1, 2010); *O’Quinn v. Alaska Mechanical, Inc.*, AWCB Decision No. 06-0121 (May 15, 2006). Since a workers’ compensation claim dismissal under AS 23.30.108(c) is analogous to dismissal of a civil action under the civil rules, the factors set forth in those rules have occasionally been applied. *Sullivan; McCarroll*.

Dismissal has been reversed as an abuse of discretion where the board failed to consider and explain why a lesser sanction would be inadequate to protect the parties’ interests. *Erpelding v. R&M Consultants, Inc.*, Case No. 3AN-05-12979 CI (Alaska Superior Ct, April 26, 2007), reversing *Erpelding v. R&M Consultants, Inc.*, AWCB Decision No. 05-0252 (October 3, 2005). “While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless ‘the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal.’” *Hughes v. Bobich*, 875 P.2d 749, 753 (Alaska 1994). “A conclusory rejection of all sanctions short of dismissing an action does not suffice as a reasonable exploration of meaningful alternatives.” *DeNardo v. ABC, Inc. RV Motorhomes*, 51 P.3d 919, 926 (Alaska 2002).

Employers have a right to thoroughly investigate workers’ compensation claims to verify information provided, properly administer claims, and effectively litigate disputed claims. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Under AS 23.30.107(a),

an employee must release all evidence “relative” to the injury. Evidence is “relative” to the claim where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

In *Granus*, the board established a two-step analysis for determining whether information is properly discoverable. The first step is to evaluate what matters are “at issue” or in dispute in the case. The parties’ pleadings and the prehearing conference summaries are the initial source of the specific benefits an employee is claiming and the employer’s defenses to these claims. Next, the elements the employee must prove to establish his entitlement to each benefit claimed and of the employer’s affirmative defenses are examined to determine what propositions are properly the subjects of proof or refutation in the case. It is also necessary to review available evidence to determine if there are specific material facts in dispute. The question then becomes whether the information sought is relevant for discovery purposes, *i.e.*, whether it is reasonably “calculated” to lead to facts that will have any tendency to make a question at issue in the case more or less likely. *Id.*

The main question in determining if the board has the power to compel the signing of a particular release is whether the information being sought is reasonably calculated to lead to the discovery of facts “relevant” to the employee’s injury or a question in dispute. The burden of demonstrating the relevancy of information being sought rests with the proponent of the release, who must “articulate a reasonable nexus between the information sought to be released and evidence that would be relevant to a material issue in the case.” *Granus* at 13-15; *Wariner v. Chugach Services, Inc.*, AWCB Decision No. 10-0075 (April 29, 2010).

AS 23.30.108(c) gives the board designee authority and responsibility to decide all discovery issues at the prehearing conference level, with the right of both parties to seek board review. *Smith v. CSK Auto, Inc.* “The scope of review for an agency’s application of its own regulations . . . is limited to whether the agency’s decision was arbitrary, unreasonable, or an abuse of discretion.” *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) *citing J.L. Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998). A board designee’s decision on releases must be upheld absent “an abuse of discretion.” An “abuse of discretion” is defined as

“issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive,” failing to apply controlling law or regulation, or failing to exercise sound, reasonable and legal discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); The Administrative Procedure Act (APA) includes a “substantial evidence” standard when reviewing decisions for abuse of discretion.

AS 23.30.215. Compensation for death. (a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:

- (1) reasonable and necessary funeral expenses not exceeding \$10,000;
- (2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased:
 - (A) 80 percent for the widow or widower with no children;
 - (B) 50 percent for the widow or widower with one child and 40 percent for the child;
 - (C) 30 percent for the widow or widower with two or more children and 70 percent divided equally among the children;
 - (D) 100 percent for an only child when there is no widow or widower;
 - (E) 100 percent, divided equally, if there are two or more children and no widow or widower;
- (3) if the widow or widower remarries, the widow or widower is entitled to be paid in one sum an amount equal to the compensation to which the widow or widower would otherwise be entitled in the two years commencing on the date of remarriage as full and final settlement of all sums due the widow or widower;
- (4) if there is no wider or widower or child or children, then for the support of father, mother, grandchildren, brothers, and sisters, if dependent upon the deceased at the time of injury, 42 percent of the spendable weekly wage of the deceased to such beneficiaries, share and share alike, not to exceed \$20,000 in the aggregate;
- (5) \$5,000 to a surviving widow or widower, or equally divided among surviving children of the deceased if there is no widow or widower;

(b) In computing death benefits, the spendable weekly wage of the deceased shall be computed under AS 23.30.220 and shall be paid in accordance with AS 23.30.155 and subject to the weekly maximum limitation in the aggregate as provided in AS 23.30.175, but the total weekly compensation may not be less than \$75 for a widow nor less than \$25 weekly to a child or \$50 for children.

(c) All questions of dependency shall be determined as of the time of injury, or death. . . .

AS 44.62.460. Evidence rules.

. . .

(d) Irrelevant and unduly repetitious evidence shall be excluded.

AS 44.62.570. Scope of review. . . .

. . .

Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record. . . .

On appeals to the Alaska Workers' Compensation Appeals Commission or the courts, decisions reviewing board designee determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570, incorporating the "substantial evidence test." Concerned with meeting that standard on appeal, the board also applies a substantial evidence standard when reviewing a board designee's discovery determination. *Augustyniak v. Safeway Stores, Inc.*, AWCB Decision No. 06-0086 (April 20, 2006). When applying a substantial evidence standard, "[the reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order ... must be upheld." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978).

8 AAC 45.054. Discovery. . . .

. . .

(d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on

...

(6) the relevance of information requested under AS 23.30.107(a) and AS 23.30.108;

...

(10) discovery requests. . . .

(c) After a prehearing . . . the designee will issue a summary of the actions taken at the prehearing. . . . The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

8 AAC 45.074. Continuances and cancellations.

...

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095 (k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041 (d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or

malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

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

(1) to call and examine witnesses;

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and;

(5) to rebut contrary evidence.

...

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

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

...

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. . . .

Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure.

...

(b) Discovery, Scope and Limits. . . .

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

...

(3) Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

The Alaska Workers' Compensation Act creates a system through which employers compensate employees injured on the job, irrespective of fault or injury. *Nickels v. Napolilli*, 29 P.3d 242, 247 (Alaska 2001). Workers' compensation statutes base damages entirely on wages, essentially eliminating *all* noneconomic damages. *C.J. v. State, Dept. of Corrections*, 151 P.3d 373, 382 (Alaska 2006) (emphasis in original).

The right to workers' compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and for the most part, fault, are not in issue and cannot affect the result. Tort litigation is an adversary contest to right a wrong between contestants; workers' compensation is a system, not a contest, to supply security to injured workers. 1 Larson, *The Law of Workmen's Compensation* §§1.03-1.04 (2008).

ANALYSIS

1) Was the oral order denying continuance of the February 19, 2014 hearing correct?

Claimant cited generalized hardship in preparing her case, inability to find an attorney to represent her, complexity of workers' compensation law generally, and personal financial hardship as grounds entitling her to continuance of the February 19, 2014 hearing. Employer objected to the request, stating no good cause existed for a continuance. Employer contended this case was set for procedural hearing at the December 3, 2013 prehearing conference, two and a half months prior, and the issues are ripe to be argued and decided.

Continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). Claimant has not articulated specific factual bases entitling her to a continuance of the February 19, 2014

hearing, such as inability to timely obtain relevant evidence or necessary witnesses to be presented at the hearing. Therefore, under these facts, Claimant provided no “good cause” to continue the hearing and the oral order denying her request was correct. *Id.*

2) Did the board designee abuse his discretion in ordering Claimant to provide executed tax releases for herself and Abigail?

The board will uphold a board designee’s decision except where the designee abused his discretion. AS 23.30.108(c); *Smith*. An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, stems from an improper motive, fails to apply controlling law, or fails to exercise sound, reasonable and legal discretion. While the board designee memorialized Claimant’s contention that “the issue to be addressed is not a death benefits issue but a value of life issue,” the designee nevertheless ordered Claimant to provide executed tax releases, presumably for the purpose of determination of Claimant’s dependency at the time of Abigail’s death. However, Claimant has not alleged she was financially dependent on Abigail at the time of her death. The designee failed to apply the *Granus* analysis to the parties’ respective claims and defenses. He failed to apply controlling law and thus abused his discretion.

To promote the quick, fair and efficient application of the Act, the *Granus* two-step analysis is applied to determine whether the information Employer seeks through the tax releases is properly discoverable:

A) What matters are “at issue” in this case?

Claimant seeks unspecified, additional death benefits in connection with Abigail’s tragic June 20, 2011 death while working as an apprentice electrician for Employer. Employer contends financial dependency status can be revealed by disclosure of Claimant’s and Abigail’s 2010 and 2011 tax releases. However, Claimant has not asserted she was *financially* dependent on Abigail at the time of her death. To the contrary: Claimant has repeatedly argued throughout her pleadings and petitions that dependency in this case should be measured in terms of emotional ties to family and community, and not in pecuniary terms alone. Finally, while Claimant indicated the possibility she may have become financially dependent on Abigail at some point in the *future*, her October 28, 2013 petition clearly stated, “This is an issue of justice for my daughter’s life and NOT an issue of dependency.” (Petition, October 28, 2013) (emphasis in original). Therefore, the sole issue

remaining to be decided in this case is whether Claimant is entitled to additional death benefits in connection with Abigail's June 20, 2011 death where Claimant has not alleged financial dependency at the time of death.

B) Is the information sought reasonably calculated to lead to facts that have any tendency to make a question at issue in the case more or less likely?

The burden of demonstrating the relevancy of information being sought rests with the proponent of the release, who must articulate a reasonable nexus between the information sought to be released and evidence relevant to a material issue in this case. *Wariner*. The question then becomes whether Claimant's and Abigail's tax records are reasonably calculated to lead to admissible evidence. Since Claimant is not claiming financial dependency on Abigail at the time of her death, and dependency at the time of death is the relevant dependency, tax records pertaining to Claimant or Abigail are not relevant. Therefore, the board designee abused his discretion in ordering Claimant to provide the executed 2010 and 2011 tax releases in the October 11, 2013 prehearing conference summary.

3) Should Claimant's June 21, 2013 claim be dismissed for failure to provide discovery?

Recognizing dismissal is an extreme sanction, the Alaska Supreme Court established a two-part test to determine when dismissal may be ordered: 1) Has a party's non-compliance with discovery been wilful? 2) After an exploration of all possible and meaningful alternatives prior to dismissal, can lesser sanctions adequately protect the parties' interests and deter future violations? *Sandstrom; Hughes; DeNardo*. As discussed above, while it might be found Claimant's refusal to provide executed tax releases for herself and Abigail was indeed "wilful," since this decision and order finds the discovery request was not proper in the context of this case, the remainder of the dismissal analysis is moot. Therefore, Employer's request for case dismissal will be denied. *Sandstrom; Erpelding*.

4) Should Employer's petition to exclude evidence be granted?

Employer objects to certain documents filed by Claimant, and upon which Claimant intends to rely to support her claim. Employer objects to Claimant's July 22, 2013 and October 11, 2013 Notices of Intent to Rely. Employer makes various arguments against the proffered evidence,

including, but not limited to: that the evidence is not relevant in a “no-fault” workers’ compensation case; that it contains inadmissible hearsay; that many of the documents include handwritten annotations and redactions of an unknown source; and that the evidence is irrelevant, repetitious, or unreliable. Employer also objects on the grounds that Claimant’s July 22, 2013 Notice of Intent to Rely contains no substantive evidence, but rather argument.

Employer’s arguments are well-taken. Claimant’s July 22, 2013 Notice of Intent to Rely, which attaches a letter written by Claimant and dated July 5, 2013, contains no substantive evidence. Rather, Claimant’s letter provides a chronological history of the events leading to Abigail’s tragic accident, results of a purported OSHA investigation, Claimant’s unsuccessful efforts to retain an attorney and her frustrations with current workers’ compensation procedure, and Claimant’s proposed changes to existing law. To be admissible at hearing, evidence must be relevant. *Granus*. Claimant has not sufficiently explained how any of the foregoing documents are relevant in a material sense to her claim for death benefits under the Act in connection with her June 21, 2013 claim. Therefore, the July 22, 2013 Notice of Intent to Rely and accompanying July 5, 2013 letter will be excluded as irrelevant. 8 AAC 45.120.

Claimant’s October 11, 2013 Notice of Intent to Rely raises similar evidentiary concerns. The bulk of the filing consists of documents purportedly produced by AKOSH, OSHA, the Anchorage Fire Department, the Anchorage Police Department, and the state medical examiner in connection with Abigail’s death. Many of the documents are redacted or altered via margin notes of unknown origin. Also included are transcripts of interviews with electricians purportedly familiar with Employer’s safety history and worksite practices. Claimant has attached a newspaper article from the Anchorage Daily News reporting Abigail’s death and screenshots of anonymous Internet forum reader comments related to the article. Claimant also attached emails from individuals apparently not connected to this case, opining on the causes and circumstances of Abigail’s death. None of the foregoing proffered evidence speaks to issues of dependency under the Act. None of the foregoing evidence goes to any material issue of this case, *i.e.*, whether Claimant is entitled to additional benefits under the Act in connection with Abigail’s death.

Compensation under the Act is payable irrespective of fault as a cause for the injury or death. AS 23.30.045. Employer has already accepted compensability and paid death benefits in

connection with Abigail's tragic and untimely death, so causation is not an issue. AS 23.30.010. Since none of the purported evidence attached to Claimant's October 11, 2013 Notice of Intent to Rely is relevant to the remaining issue of whether Claimant is entitled to additional death benefits, it is not relevant. Therefore, Claimant's October 11, 2013 Notice of Intent to Rely will be excluded. 8 AAC 45.120.

5) Does the board have jurisdiction to determine whether AS 23.30.215 is unconstitutional?

Finally, Claimant raises several state and federal constitutional challenges to the statutory and regulatory scheme of the Alaska Workers' Compensation Act. Claimant contends the Act's death benefits provision violates the state and federal constitutions.

The board can only adjudicate a dispute if it has been given explicit adjudicatory authority by statute. *Far North Sanitation, Inc.* The board's equitable powers are limited as necessarily incident to exercise statutory adjudicative responsibilities. *Blanas*. Equitable or common law principles may be applied in a specific workers' compensation case, but it is well-established that the board lacks jurisdiction to decide Claimant's constitutional challenges. *Alaska Public Interest; Dougan*.

Lacking jurisdiction to decide constitutional claims, this decision will not address Claimant's contentions that the Act's death benefits provision violates her constitutional rights under the state and federal constitutions. While the board is tasked with ensuring due process is provided to all parties in this case, it is without authority to consider or decide constitutional challenges to the Act. *Alaska Public Interest*, 167 P.3d at 36-37.

CONCLUSIONS OF LAW

- 1) The oral order denying continuance of the February 19, 2014 hearing was correct.
- 2) The board designee abused his discretion in ordering Claimant to provide executed tax releases for herself and Abigail in the October 11, 2013 prehearing conference summary.
- 3) Claimant's June 21, 2013 claim will not be dismissed.
- 4) Employer's petition to exclude will be granted.
- 5) The board lacks jurisdiction to decide Claimant's constitutional challenges.

ORDER

- 1) Claimant's January 10, 2014 petition styled, "Affidavit of Opposition to ARH Filed" and seeking continuance of the February 19, 2014 hearing is denied.
- 2) Employer's October 15, 2013 Petition *In Limine* to Exclude Evidence and Objection to Evidence and Documents Files with Claimant's Notices of Intent to Rely Dated July 7, 2013 and October 11, 2013 is granted.
- 3) Employer's November 15, 2013 Petition to Dismiss is denied.
- 4) Claimant's October 28, 2013 Petition for Reconsideration of Designee's Prehearing Summary is denied as moot.
- 5) Claimant will not be required to provide Employer with executed income tax releases for either herself or for Abigail prior to hearing on the merits in this case.

Dated in Anchorage, Alaska on March 7, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Matthew Slodowy, Designated Chair

Amy Steele, Member

Pamela Cline, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Abigail E. Caudle (deceased), et al. v. Raven Electric Inc., employer; Liberty Northwest Insurance, insurer / defendants; Case No. 201108827; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 7, 2014.

Pamela Murray, Office Assistant