ALASKA WORKERS' COMPENSATION BOARD

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

ANA M. HERRERA, Employee, Claimant, v. TRIDENT SEAFOODS CORP., Employer, and LIBERTY MUTUAL GROUP, INC., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201201114 AWCB Decision No. 14-0008 Filed with AWCB Anchorage, Alaska on January 21, 2014

Trident Seafoods Corp.'s (Employer) September 13, 2013 petition to dismiss Ana M. Herrera's (Employee) workers' compensation claim and recover costs of unattended depositions was heard on January 7, 2014, in Anchorage, Alaska, a date selected on November 12, 2013. Employee appeared telephonically, represented herself, and testified. Attorney Jeffrey Holloway appeared telephonically and represented Employer and Liberty Mutual Group, Inc., its insurer. There were no other witnesses. The record closed at the hearing's conclusion on January 7, 2014.

ISSUES

Employer contends Employee willfully and unreasonably refused to cooperate with discovery and ignored a board designee's order by failing to attend her deposition, resulting in considerable prejudice to Employer. Employer contends Employee's claim should be dismissed.

Employee acknowledges she did not attend the three depositions at issue, but contends she has compelling reasons for not doing so: she had no means to travel to the first two, and she only learned of the third after the fact. Employee contends she has been and remains willing to be deposed and her claim should not be dismissed.

1) **Should Employee's September 21, 2012 claim be dismissed for noncompliance with discovery?**

Employer further contends it incurred considerable, unnecessary expense for the missed depositions. It contends Employee should be ordered to reimburse Employer's costs for three unattended depositions.

Although she did not specifically say so, it is assumed Employee opposes Employer's request for reimbursement.

2) **Should Employer be reimbursed costs for unattended depositions?**

FINDINGS OF FACT

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

1) On January 22, 2012, Employee while working for Employer was injured when crab boxes fell on her. She reported "strain, sprain in wrist from falling on floor" (Report of Occupational Injury or Illness, January 27, 2012).

2) On the injury report, Employee wrote her address of record was 648 Union Avenue, Porterville, CA 93257 (*id.*).

3) Employer paid Employee total temporary disability (TTD) benefits from February 16, 2012 through June 21, 2012, and total partial disability benefits (TPD) from June 22, 2012 through July 4, 2012 (Compensation Report, August 27, 2012).

4) On July 26, 2012, Employee called the Alaska Workers' Compensation Board (board). She inquired about permanent partial impairment (PPI) and the board sent her a copy of "Workers' Compensation and You; Information for Injured Workers" (agency record, events screen).

5) On September 28, 2012, Employee filed a claim for TPD, PPI, medical and transportation costs, compensation rate, penalty, and requested a finding of unfair or frivolous controversion. Employee described how the January 22, 2012 injury occurred:

> While working at the box loft in St. Paul crab plant a co-worker accidently rammed into me while I was turning to stack a box to a pile on my right side. The stacks of boxes were taller than myself so my co-worker didn't see me when she (running) + pushing two stacks of boxes rammed me and I fell twisting my body to left side and instinctively stretched out my left arm awkwardly to break my fall. Plus boxes fell on top of me.

Employee stated she injured her "[l]eft wrist, left shoulder, and mid back. I also got a small cut on my breast from boxes falling on top of me while on floor" (claim, September 21, 2012).

6) Employee included a lengthy statement in her September 21, 2012 claim:

> There are a few reasons for this claim. I never received any documents explaining or notifying me (controversion) why they (Ins Comp.) stopped paying me benefits. I wanted to know about my compensation rate because my job was hourly wages but it was also seasonal, and I live in California as well not Alaska. I faxed my insurance adjuster a mileage reimburstment [sic] form, plus receipts for dr. visits I paid for, and have never received any payment.
>
> Another reason for this claim is that Dr. James the physician I was told to see because "he handles work comp claims" by a nurse advocant [sic] the insurance company assigned to me, stated in a retraining evaluation for rehabilitation benefits that he predicts I will have a permanent impairment greater than zero, yet he has not given me an actual rating. I would like to request a second medical independent evaluation as well. ***I feel lost and confused about what I have to do it's my first dealings with Work Comp and I call the adjuster, and rarely get returned calls, I ask questions and have nobody who answers them, timely if at all.*** I was told by Cascade a third party who placed me in a light duty job that my case was closed and I feel as if they mislead me by telling me I would work hours which TRIDENT my employer would pay me & that the difference was to be paid by ins. company to make what I was making in Alaska prior to injury but never got more than what TRIDENT paid me. I feel that isn't fair nor proffessional [sic] for them to flat out lie to me to comply to the light duty job. I received a letter from Trident asking if I would be interested which I still have because I never signed it or returned it to them. ***I've tried to do all I have been told/asked to do and yet I don't get answers to my questions***. Insurance adjuster told me I should get $60 per diem for each day prior to medical evaluation they sent me to in Oregon. I left Monday a.m. early and returned Wednesday, but got a check for $60 only. I don't believe they should lie to me. ***Since I have had my injury I have been in a financial disaster, I have my mother whom I live with on a fixed***

> ***income that has been lending me money she needs herself due to these issues.*** Thank you for your time to hear me out (*id.*; emphases added).

7) On October 22, 2012, Employer filed a post-claim controversion and answer denying all claimed benefits including a second independent medical examination (SIME) (controversion and answer, October 22, 2012).

8) On October 26, 2012, Employer served on Employee at her address of record a Notice of Taking Deposition in Fresno, California on November 28, 2012 (Notice of Taking Deposition, October 26, 2012).

9) On November 27, 2012, Employer's counsel travelled from San Diego to Fresno. Employee did not appear at deposition the next day (Alaska Airlines and Veritext invoices; Herrera).

10) On December 4, 2012, Employer petitioned the board for an order "compelling [Employee] to appear for a deposition pursuant to 8 AAC 45.054(a), as well as an order from the [b]oard awarding sanctions including, but not limited to, deposition court-reporter costs, attorney fees, travel and any other costs" associated with the preparation of the November 28, 2012 unattended deposition. The petition stated Employee "failed to cooperate and attend the properly noticed deposition" (Petition, December 4, 2012).

11) On January 31, 2013, Employer served on Employee at her address of record a Re-Notice of Taking Deposition in Fresno, California on March 4, 2013 (Re-Notice of Taking Deposition, January 31, 2013).

12) On March 4, 2013, Employer's counsel travelled from San Diego to Fresno. Employee did not appear at deposition (Alaska Airlines and Veritext invoices; Herrera).

13) On March 5, 2013, Employer petitioned the board for an order

> dismissing [Employee's] entire claim for benefits based on her failure to attend two properly noticed depositions, on November 28, 2012 and March 3 [sic], 2013. Due to the employee's willful delay of the discovery process, [Employer] requests dismissal of [Employee's] claim for benefits. [Employer] also seeks an order that [Employee] reimburse all costs associated with the failure to attend the deposition [sic] (Petition, March 5, 2013).

14) On March 27, 2013, Employer filed an Affidavit of Readiness for Hearing (ARH) on the March 5, 2013 petition to dismiss (Petition, March 27, 2013).

15) On March 29, 2013, the board received a letter from Employee, with a note that a copy was sent to Employer's counsel. The letter read:

> I am answering the petition that I received in the mail. ***I would like to state the fact that I notified Marcia Roadifier over the phone when she called my phone and stated that Fresno, Ca was too far for me to travel and that it wasn't possible due to distance & funds to do so. I even asked if they were able to come closer I would take my transit bus to Visalia, Ca or if they could pick me up to take me to the deposition. I was willing to attend it. My response was that was needed for me to attend that's all.***
>
> I believe that this request to dismiss is unreasonable ***I understand that it's required for me to attend I agree but I notified them over phone before the date of deposition I had no funds to pay to go that far (approximately 70-75 miles one way, or 140-150 m. round trip) from my home. I have received no benefits for so many months that I have no income to even take a greyhound bus.***
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> ***I was never offered any compensation for my travel from the requesting party ever, even after I requested a ride from them*** (Herrera letter, undated; emphases added).

16) On April 4, 2013, Employee called the board because she received the March 27, 2013 ARH and was "curious on what the form was." The board designee explained the form to her, told her about prehearing conferences, and sent her an attorney list (agency record, events screen).

17) On April 25, 2013, Employee attended the first prehearing conference in this case. The summary stated:

> Ms. Herrera explained that she was willing to attend a deposition and she spoke with Marcia, a paralegal at Holmes Weddle, when she received both notices of the scheduled depositions and explained she did not have a car nor the money to pay for any other means of travel to Fresno, which is approximately 70 miles away from her home. Employer agreed to pay transportation costs for participating in the deposition.
>
> Designee explained Employer is entitled to do a deposition as part of the litigation process and ORDERED Employee to attend a deposition. Employer has stipulated to pay for Ms. Herrera's transportation costs to and from the deposition, so as part of the arrangements for the deposition the parties will arrange means of transportation. Designee explained to Ms. Herrera that failure to attend the deposition as ordered may be grounds to have her claim dismissed.
>
> Designee explained to Ms. Herrera that if she does not cooperate and appear for the deposition as ordered, Employer will likely ask the board to schedule a hearing on its petition to dismiss her claim.
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> [Employee] confirmed her phone number and address for Employer. . . . (Prehearing Conference Summary, April 25, 2013; emphasis in original).

18) There is no evidence Employee was ever apprised of her duty to inform the board and Employer if her address for service changed (*id.*; observations).

19) Neither party objected, verbally or in writing, to the April 25, 2013 Prehearing Conference Summary (record).

20) On May 31, 2013, Employer served on Employee at her address of record a Re-Notice of Taking Deposition in Fresno, California on July 31, 2013 (Re-Notice of Taking Deposition, May 31, 2013).

21) On July 12, 2013, Employee called the board and stated she twice called her adjuster but had not received a return call. The board designee advised her to write Employer about its commitment to pay for her transportation to her deposition, and her need to reschedule due to her mother's doctor appointment (agency record, events screen).

22) On July 23, 2013, Employee failed to attend her second prehearing conference, and could not be reached by phone. The conference summary stated:

> Employer stated that employee's deposition is scheduled for July 31, 2013, at 1:00 p.m., and has been noticed to employee. Transportation arrangements have been made to get employee to Fresno from her home. Employee is reminded that she was ORDERED to attend this properly noticed deposition.
>
> Employee is advised to call a workers' compensation technician at 907-269-4980 if she has questions regarding her case or wishes to schedule another prehearing (Prehearing Conference Summary, July 23, 2013; emphasis original).

23) On July 23, 2013, Employee called the board to state she missed that day's prehearing due to her cell phone being on "airplane mode" (agency record, events screen).

24) On July 31, 2013, Felicia Cassel, Employer's counsel's paralegal, called Employee to inform her the deposition was cancelled because Employer's counsel could not travel due to plane difficulties (Cassel affidavit, December 19, 2013).

25) On July 31, 2013, Employer served on Employee at her address of record a Re-Notice of Taking Deposition in Porterville, California, Employee's home town, on August 6, 2013 (Re-Notice of Taking Deposition, May 31, 2013).

26) On August 5, 2013, Employee called Ms. Cassel to inform her she was unable to attend the deposition scheduled for the next day, and Ms. Cassel cancelled it (Herrera; Cassel affidavit, December 19, 2013).

27) Ms. Cassel later swore Employee stated on August 5, 2013, she would be available to attend a rescheduled deposition at 1:00 p.m. any day, other than August 6th, during the following two weeks (Cassel affidavit, December 19, 2013).

28) On August 6, 2013, Ms. Cassel emailed Employee stating the deposition was rescheduled for August 13, 2013, and details would be forthcoming. In the same email, Ms. Cassel requested Employee to contact her if she did not receive the deposition notice. Employee did not respond (*id.*).

29) On August 6, 2013, Employer served on Employee at her address of record a Re-Notice of Taking Deposition in Porterville, California on August 13, 2013 (Re-Notice of Taking Deposition, August 6, 2013).

30) On August 13, 2013, Employer's counsel travelled from San Diego to Porterville. Employee did not appear at deposition (Alaska Airlines and Veritext invoices; Herrera).

31) On September 13, 2013, Employer petitioned the board to dismiss Employee's claim and order her to reimburse Employer's "costs, including legal fees, mileage and facility rental charges, associated with three unattended depositions": November 28, 2012, March 3, 2013, and August 13, 2013. The petition was served by mail to Employee's address of record (Petition, September 13, 2013).

32) On November 12, 2013, Employee attended a prehearing conference at which a hearing was set for January 7, 2014. Employee verified her correct address was 648 West Union Avenue, Porterville, CA 93257. Both Employer and the division had 648 Union Avenue as her address of record (Prehearing Conference Summary, November 12, 2013).

33) There is no evidence Employee changed her address for service from 648 Union Avenue to 648 West Union Avenue prior to November 12, 2013 (record).

34) The division did not change Employee's address of record in its database following the November 12, 2013 prehearing conference (observations).

35) On December 9, 2013, the division served Employee notice of the January 7, 2014 hearing by both certified and first-class mail, sent to 648 Union Avenue, Porterville CA 93257 (Hearing Notice, December 9, 2013).

36) On December 19, 2013, Employer submitted evidence showing costs associated with the three unattended depositions: airfare, accommodations, rental car, gas, taxis, parking, meals,

certificates of non-appearance, exhibits, room rentals, and shipping and handling, totaling $2,292.89 (hearing evidence, December 19, 2013).

37) On January 6, 2013, the division received Employee's December 9, 2013 certified mail hearing notice, marked "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD" (record).

38) Employee did not submit a brief for the January 7, 2014 hearing (*id.*).

39) At hearing Employee emphasized she had always been and remained willing to be deposed. She testified she told Employer's counsel's office in advance she had no means to travel to Fresno for either the November 28, 2012 or the March 4, 2013 depositions, but Employer made no arrangements to get her there or meet her elsewhere (Employee).

40) Regarding the unattended August 6, 2013 deposition, Employee testified, "I have no problem attending a deposition, you know. I think that I haven't really, you know, done nothing not to attend, you know. That last minute notice the day before it was kind of pushing it a little but as you said it was the day before and it wasn't . . . just for the heck of it," but because she was obliged to take her mother to a doctor's appointment that could not be rescheduled until three months later (*id.*).

41) Employee acknowledged she received advance notice of all depositions except the August 13, 2013 deposition (*id.*).

42) Employee testified she did not know about the August 13, 2013 scheduled deposition until she received Employer's September 13, 2013 petition for dismissal and reimbursement. When questioned, she acknowledged she "might be wrong" because she didn't have her papers in front of her, but she "really [doesn't] think" she received notice of the last deposition (*id.*).

43) Despite occasional uncertainty about details, Employee's testimony was credible and consistent with her earlier statements on the record, and contained no significant contradictions (judgment, observations, unique or peculiar facts of the case, inferences).

44) Employee testified she does not always receive mail when it is addressed to 648 Union Avenue, instead of 648 West Union Avenue. When asked if the lack of "West" in the address was an obstacle to receiving her mail, Employee responded, "sometimes it is, sometimes it's not." She stated she sometimes goes to the post office to ask if she has any undelivered mail there; "it depends on the driver, I guess. . . . I'm not sure what exactly the reason is why some do go through and some don't" (Employee).

45) Employee also testified she notified Employer's counsel on August 5, 2013, she no longer had access to email because she could not afford internet service (*id.*).

46) Employee twice testified even if she knew about a deposition scheduled for August 13, 2013, she would not have agreed to it because she was attending a court-mandated program at that time. She testified she did not finish her court-ordered classes until "the end of September, I believe." Employee's recollection is that on August 5, 2013, Employer's paralegal told her to call back to reschedule the deposition when she knew her availability (*id.*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> 1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . .
> . . .
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> 4) hearings in workers' compensation cases shall be impartial and fair to all parties . . .

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, 533-34 (Alaska 1987). The Alaska Supreme Court held the board owes a duty to every claimant to fully advise him of "all the real facts" bearing upon his right to compensation, and instruct him how to pursue that right under law. *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963). In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009), the Court held the board's failure to correct an employer's erroneous assertion to a self-represented claimant his claim was already time-barred rendered the claimant's ARH timely. Applying *Richard*, *Bohlmann* stated the board has a specific duty to inform a self-represented claimant how to preserve his claim.

The Alaska Supreme Court also held unrepresented litigants should not be expected to possess an attorney's comprehensive grasp of procedures. *Gilbert v. Nina Plaza Condo Ass'n*, 64 P.3d 126, 129 (Alaska 2003), a case involving civil court discovery difficulties, said:

> It is well settled that in cases involving a pro se litigant the superior court must relax procedural requirements to a reasonable extent (footnote omitted). We have indicated, for example, that courts should generally hold the pleadings of pro se litigants to less stringent standards than those of lawyers (footnote omitted). This is particularly true when 'lack of familiarity with the rules rather than gross neglect or lack of good faith underlies litigants' errors' (footnote omitted).

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

Employers have a constitutional right to defend against liability claims. *Granus v. Fell*, AWCB Decision No. 99-0016 at 6 (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. *Granus* at 5, citing AS 21.36.120 and 3 AAC 26.010 - 300. The board has long recognized a thorough investigation of workers' compensation claims allows employers to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect fraud. *Granus* at 6, citing *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). The scope of admissible evidence in board hearings is broader than in civil courts because AS 23.30.135 makes most civil rules inapplicable. Information inadmissible at a civil trial may be discoverable in a workers' compensation claim if it is reasonably calculated to lead to facts relevant for evidentiary purposes. *Granus* at 14.

Under AS 23.30.108(c), discovery disputes are initially decided at the prehearing conference level by a board designee. *See, e.g., Yarborough v. Fairbanks Resource Agency, Inc.*, AWCB Decision No. 01-0229 (November 15, 2001). If an employee does not comply with a board designee's order regarding discovery matters, AS 23.30.108(c) and AS 23.30.135 grant broad, discretionary authority for the imposition of "appropriate sanctions" including and in addition to benefits forfeiture. Another lesser sanction is found in 8 AAC 45.054(d), which authorizes the exclusion at hearing of any evidence that was the subject of a discovery request a party refused to honor. *Sullivan v. Casa Valdez Restaurant*, AWCB Decision No. 98-0296 (November 30, 1998); *McCarroll v. Catholic Community Services*, AWCB Decision No. 97-0001 (January 6, 1997).

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, 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 adverse party's rights. *Sandstrom* at 647.

"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 Civil Rule 37(b)(3), the factors set forth in that subsection when deciding petitions to dismiss 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).

> **AS 23.30.115. Attendance and fees of witnesses**. (a) A person is not required to attend as a witness in a proceeding before the board at a place more than 100 miles from the person's place of residence, unless the person's lawful mileage and fee for one day's attendance is first paid or tendered to the person; but the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure.
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> (b) A witness summoned in a proceeding before the board or whose deposition is taken shall receive the same fees and mileage as a witness in the superior court.
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> **AS 23.30.122. Credibility of witnesses.** (a) The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.
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> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure. . . . The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **AS 23.30.155. Payment of compensation.**
> . . .
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> (h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

> **8 AAC 45.054. Discovery**. (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition.
> . . .
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> (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.

The Alaska Workers' Compensation Act (Act) contains no specific statutory provision or regulation concerning cost reimbursement for depositions when a party fails to appear. In *Burke v. Houston NANA, LLC*, 222 P.3d 851 (Alaska 2010), the Court addressed the board's ability to regulate through adjudication. Burke appealed the board's decision, which reversed the Reemployment Benefit Administrator's decision finding Burke was entitled to a reemployment benefits eligibility evaluation. Burke argued the plain meaning of the applicable regulations entitled him to an evaluation and the board's imposition of a "discovery rule" was invalid. He also contended the board failed in its duty to advise him how to pursue his rights and denied him due process and equal protection. *Id.* at 864. Burke argued the statute excused his failure to seek an evaluation within the original ninety-day period under the circumstances of his case and nowhere contained any requirement he act within ninety days of a "retriggering event." *Id.* at n. 45. The Court noted the "board adopted a regulation detailing how an employee should request a reemployment eligibility evaluation." *Id.* at 865. The Court determined "Burke did everything that was required by the new regulations." *Id.*

> This case presents two questions: (1) whether the regulations adopted in 1998, which did not explicitly contain a discovery rule, should be read as continuing the rule despite their silence, and, if not, (2) whether, following the adoption of the regulations, the board had the power to impose a discovery rule by adjudication and thereby hold that Burke's request was untimely. We conclude that the answer in both instances is no. *Id.* at 866.

The Court further noted Burke asserted the board cannot by adjudication "add requirements to the law that neither the legislature nor the executive branch in its rule-making power chose to add to the Act or regulations, respectively," and said, "We agree": "If the board wished to add to the deadlines

it explicitly set in the regulations - via adoption of a discovery rule - it was required to do so by regulation." *Id.* at 867. The Administrative Procedures Act (APA) "requires an agency to follow certain procedures, including public notice and an opportunity for public comment, before it can supplement or amend a regulation." *Id.* This is distinguished from an agency's right to implement internal agency practices, which do "not themselves alter the rights or interests of the parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *Id.* As the new "discovery rule" affected Burke's right to reemployment benefits, it was a "regulation" subject to the APA. The Court concluded:

> Because the board chose to establish by regulation the procedure an applicant for a reemployment eligibility evaluation must use, it is bound by those regulations unless and until it repeals or amends the regulation using the proper procedure (footnote omitted). Administrative agencies are bound by their regulations just as the public is bound by them (footnote omitted). If the board wished to apply a discovery rule to requests that were made after the ninety-day period defined in the statute but which also met the statutory excuse of unusual and extenuating circumstances -- as Burke's request did in this case -- it was obligated to promulgate such a rule under Alaska law. We hold that the discovery rule imposed in this case is invalid because the board did not adopt it as a regulation under AS 44.62.010-.950. We therefore reverse the board's decision that reversed the Reemployment Benefit Administrator's determination finding Burke eligible for a reemployment eligibility evaluation. *Id.* at 868-69.

In *Miller v. Treadwell*, 245 P.3d 867, 873-74 (Alaska 2010), an unsuccessful political candidate challenged the method the state used to count write-in ballots and contended it amounted to a "regulation" never vetted pursuant to the APA. In rejecting this argument, the Court said:

> The APA requires advance notice of a regulation before it can be applied in agency interactions with the public (footnote omitted). Common sense statutory interpretations by agencies do not require regulations (footnote omitted). By contrast, if a statutory interpretation is 'expansive or unforeseeable,' the agency may be required to promulgate its interpretation through a regulation (footnote omitted). The Division's statutory interpretations . . . were common sense interpretations and were not required to be promulgated in regulations. We have previously noted that '[n]early every agency action is based, implicitly or explicitly, on an interpretation of a statute or regulation authorizing it to act. A requirement that each such interpretation be preceded by rulemaking would result in complete ossification of the regulatory state'. . . . (footnote omitted).

8 AAC 45.060. Service. . . .

(b) . . . 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.
. . .

(f) Immediately upon change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.
. . .

Civ. R. 30. Depositions Upon Oral Examination. . . .

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. . . .

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. . . .
. . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to

pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(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.
. . .

(d) Failure of a Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subparagraph (b)(2) of this rule. . . .

Administrative Rule 7. Witness Fees.

(a) **Amount.** A witness attending before any court, referee, master, grand jury or coroner's jury or upon a deposition in a discovery proceeding, whose testimony is necessary and material to the action, shall receive a witness fee of $12.50 if such attendance, including the time necessarily occupied in traveling from the witness' residence to the place of attendance and returning from that place, requires not more than three consecutive hours. If such attendance requires more than three consecutive hours, the witness shall receive a witness fee of $25.00 for each day of attendance. Any witness who attends at a point so far removed from the witness' residence as to necessarily prohibit return thereto from day-to-day shall receive per diem at the rate allowed for state employees.
. . .

> **(e) Demand of Payment in Advance in Civil Cases.** Witnesses in civil cases, except when subpoenaed by the state, a municipality, a borough, a city, or an officer or agency thereof, may demand the payment in advance of their travel expense and their per diem fee for one day, and when so demanded shall not be compelled to attend until the allowances are paid.
>
> **(f) Parties and Attorneys as Witnesses.** A party to the action or hearing, if a witness, is entitled to receive the same witness fees, per diem and travel expense as any other witness. A person appearing as an attorney for any party to an action or hearing, who also testifies as a witness therein, is not entitled to receive any witness fee, per diem or travel expenses.

ANALYSIS

1) **Should Employee's September 21, 2012 claim be dismissed for noncompliance with discovery?**

Employee asserted multiple times she was always willing to be deposed but was unable to do so due to unfortunate circumstances. Employer scheduled the first two depositions in Fresno, about 70 miles away from Employee's residence in Porterville. Employee asserted both times she notified Employer she had no means to travel to Fresno; as she wrote shortly after receiving the first petition to dismiss, she was "in a financial disaster" since her injury, and was borrowing money from her mother's fixed income. Prior to being ordered to do so by a board designee, Employer initially made no accommodations either to move the deposition closer to Porterville or to arrange Employee's transportation to Fresno.

Employee's hearing testimony regarding the unattended November 28, 2012 and March 3, 2013 depositions was substantiated by her September 21, 2012 claim, her undated letter to the board received March 29, 2013, and the April 25, 2013 prehearing conference summary. Employer did not object to the summary, nor did it produce any evidence contradicting Employee's account of these events.

Employee testified she only learned about the August 13, 2013 deposition after the fact, in Employer's September 13, 2013 petition for dismissal and reimbursement. When questioned at hearing, Employee acknowledged she "might be wrong" but she "really [doesn't] think" she

received the deposition notice Employer served on August 6, 2013, to her last known address, 648 Union Avenue, Porterville CA 93257. She credibly testified she does not always receive mail when it is addressed to 648 Union Avenue instead of 648 West Union Avenue; "it depends on the driver." Employee's testimony is supported by the fact her certified mail hearing notice, which the division mistakenly sent to 648 Union Avenue, was returned marked "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD." Relying on experience and judgment, the majority finds credible Employee's testimony she did not receive advance notice of the August 13, 2013 deposition. *Rogers & Babler*; AS 23.30.122. .

Under 8 AAC 45.060(f), immediately upon a change of address for service, Employee was required to file with the board and serve on Employer a written notice of the change. Employee did not correct her address to 648 West Union Avenue until November 12, 2013, three months after the last unattended deposition. However no evidence indicates Employee was ever made aware of this procedural obligation. Furthermore, the address "change" is more appropriately a correction, as "West" had been omitted. The majority finds Employee's failure to report her address "change" or correct her address did not stem from "gross neglect or lack of good faith," and excuses it as reflecting nothing more than an unrepresented claimant's unfamiliarity with agency procedure. *Richard; Bohlmann; Gilbert.*

The only evidence Employer introduced to contradict Employee's evidence are two declarations Ms. Cassel made in her December 19, 2013 affidavit. First, Ms. Cassel swore Employee said on August 5, 2013 she would be available for deposition any day during the following two weeks. Employee twice denied this at hearing, asserting she would never have made such a statement because she was obligated to attend a court-mandated program until approximately the end of September.

Second, Ms. Cassel swore she told Employee in an August 6, 2013 email the deposition was rescheduled for August 13, 2013, and details would be forthcoming. Ms. Cassel requested Employee to contact her if she did not receive the deposition notice, but never received a response. Employee testified she told Ms. Cassel on August 5, 2013 Employee no longer had access to email because she could not afford internet service. Employee testified consequently she never received

Ms. Cassel's August 6, 2013 email. Employee's recollection is that on August 5, 2013, Employer's paralegal told her to call back to reschedule the deposition when she knew her availability.

Regarding the August 13, 2013 unattended deposition, Employee's and Ms. Cassel's evidence was conflicting and susceptible to contrary conclusions. In choosing between the competing evidence, the majority noted Employee testified telephonically at length, did not contradict herself, and answered numerous panel questions. Ms. Cassel, on other hand, did not appear as a witness or make herself available for cross-examination, but instead submitted only a two-page affidavit. The majority therefore gave more weight to Employee's evidence, and found her consistently credible throughout the 16 months since she was injured. AS 23.30.122. Because Employee had compelling reasons for not attending her deposition, sanctioning her would be unduly harsh, unwarranted and unjust.

The majority also questions whether Employer made good faith efforts to depose Employee. The majority's concerns are based on the following:

- If Employer wanted Employee's timely testimony, why did it twice schedule the deposition in Fresno, a mutually inconvenient venue, rather than in Employee's home town?
- Employee lives less than 100 miles from Fresno, and evidence indicates she at least "requested," though not "demanded" payment up front. Why did Employer not facilitate the deposition process and make it quick, efficient, fair and predictable at a reasonable cost to Employer by advancing Employee funds to travel to Fresno, in the spirit of AS 23.30.001(1), AS 23.30.115(b) and Alaska Administrative Rule 7(a)(e),(f)?
- Under 8 AAC 45.054, Employee's testimony was to be taken in accordance with the Alaska Rules of Civil Procedure. Those rules require "reasonable" notice of a deposition. While not directly applicable here, 8 AAC 45.060, which requires three days be added to a prescribed period when a document is served by mail, can be consulted for guidance regarding timely service and "reasonable" notice. On August 6, 2013, Employer served Employee by mail, notice of the August 13, 2013 deposition. Given the law's assumption it normally takes three days for first class mail to reach its destination, was one week "reasonable notice" under Civil Rule 30(b)?

The majority further questions the extent to which Employer was prejudiced by Employee's nonparticipation in discovery. Employer submitted proof of $2,292.89 in costs arising from three unattended depositions, but the majority's determination Employee had credible and compelling excuses for her nonparticipation absolves her of any fiscal responsibility. Furthermore, as discussed below, the law does not provide authority to make Employee responsible for these costs. Employer did not demonstrate the deposition delay caused it any other detriment. For example, there was no showing Employee's memory has faded, or Employer could not otherwise investigate her claim by interviewing witnesses, if it desired. Moreover, Employer has not paid Employee benefits since July 4, 2012, so there is no issue of Employer's losing its ability to recover ongoing benefits because there are none being paid.

Even if the above analysis of adequate notice, credibility, and fairness is set aside, the majority finds controlling law compels it not to dismiss Employee's claim. Recognizing dismissal is an extreme sanction, the Alaska Supreme Court established a two-part test to determine when it may be ordered: (1) the party's noncompliance with discovery must be willful; and (2) after an exploration of all possible and meaningful alternatives prior to dismissal, it must be found lesser sanctions will not adequately protect the parties' interests and deter future violations. *Sandstrom; Hughes; DeNardo.*

Here neither test prong was satisfied. First, Employee's conduct did not rise to the level of willfulness. Though twice warned of potential claim dismissal in prehearings, Employee violated only a single discovery order, not multiple orders. *Sullivan; Garl; O'Quinn.* Second, no lesser, pre-dismissal sanctions have been imposed. *Erpelding; Hughes; DeNardo.*

Employee's frustration and bewilderment were evident beginning with her claim: "I feel lost and confused about what I have to do it's my first dealings with Work Comp and I call the adjuster, and rarely get returned calls, I ask questions and have nobody who answers them, timely if at all. . . . I've tried to do all I have been told/asked to do and yet I don't get answers to my questions." Currently, the failure to be deposed is harming Employee more than Employer, because her claim will not move forward unless and until the deposition is provided.

Employee has never been represented by counsel. She may not comprehend either the critical importance discovery has to furthering her case, or the full legal weight under AS 23.30.108(c) of the order contained in the April 25, 2013 Prehearing Conference Summary. This decision and order hereby educates Employee on "all the real facts" bearing upon her right to compensation, in accordance with the Court's mandate to advise and instruct her how to pursue and preserve her claim. *Richard; Bohlmann.* Employee's claim will not be dismissed, and she will be given one final opportunity to cooperate with discovery.

Employee will be ordered to contact Employer within 10 days of the date of issuance of this decision and order to arrange to have her deposition taken. The deposition will be take place in Porterville, California no later than February 28, 2014. Employer will be ordered to serve Employee with the deposition notice at 648 West Union Avenue, Porterville, CA 93257. If Employee fails to fully comply with the February 28, 2014 discovery deadline, and does not demonstrate good cause for noncompliance, her claim will be dismissed with prejudice.

1) Should Employer be reimbursed costs for unattended depositions?

Employer's requested relief relies on sanctions provided in Civ. R. 37. However under AS.23.30.135, workers' compensation hearings are not bound by the Alaska Rules of Civil Procedure. The Act provides only two circumstances under which an employer may receive reimbursement from an employee: when advance payments or overpayments of compensation have been made, or when an employee obtains benefits via fraudulent or misleading acts. AS 23.30.155(j); AS 23.30.250.

Agency decisional law cannot "add requirements to the law that neither the legislature nor the executive branch in its rule-making power chose to add to the Act or regulations, respectively." The APA "requires an agency to follow certain procedures, including public notice and an opportunity for public comment, before it can supplement or amend a regulation." This is distinguished from an agency's right to implement internal agency practices, which do "not themselves alter the rights or interests of the parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *Burke.* Furthermore, if a statutory interpretation is "expansive," the agency may be required to promulgate its

interpretation through a regulation. *Miller*.

Here ordering Employee to reimburse Employer for unattended deposition costs would clearly be expansive, as it would transfer property. It would not be a simple procedural change, but rather a statutory interpretation affecting Employee's substantive rights and interests. If the legislative or executive intent of the Act or the agency was to authorize civil sanctions, the Act or regulations would have included such a provision. Hearing panels do not have authority to make *ad hoc* rules or regulations implementing Employer's requested remedy. Granting Employer's petition for reimbursement would be an abuse of discretion, as it would amount to an improper promulgation of a regulation through adjudication. Employer's petition for an order requiring Employee to reimburse Employer's deposition costs will be denied.

CONCLUSIONS OF LAW

1) Employee's September 21, 2012 claim will not be dismissed for noncompliance with discovery.
2) Employer will not be reimbursed costs for unattended depositions.

ORDER

1) Employer's September 13, 2013 petition to dismiss Employee's claim and order reimbursement of deposition costs is denied.
2) Employee is ordered to contact Employer's counsel, Holmes, Weddle & Barcott, at 907-277-4657 within 10 days of the issuance of this decision and order to schedule a deposition to take place in Porterville, California no later than February 28, 2014.
3) Employer is ordered to serve Employee a Notice of Taking Deposition to 648 West Union Avenue, Porterville, CA 93257.
4) Employee is ordered to participate in Employer's deposition by February 28, 2014. If she does not, and fails to demonstrate good cause for her noncompliance, Employee's claim will be dismissed with prejudice.

Dated in Anchorage, Alaska on January 17, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Margaret Scott, Designated Chair

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Pam Cline, Member

CONCURRENCE AND DISSENT OF MEMBER KESTER

The dissent concurs with the majority's conclusion Employer will not be reimbursed costs for unattended depositions. However the dissent respectfully disagrees with the majority's refusal to dismiss Employee's claim.

Discovery, including employee testimony, is vital to workers' compensation cases. Discovery clarifies an employee's issues, assists employers in defending against claims, and helps fact-finders ascertain the parties' rights. An employer's right to investigate, controvert or otherwise defend its case arises with the report of injury. Timeliness is essential because over time memories may fade, witnesses become unavailable, and evidence lost.

Here Employer properly served on Employee five deposition notices, including the three at issue, at her address of record. 8 AAC 45.060. Employee concededly received the first four notices, all sent to 648 Union Avenue, instead of 648 West Union Avenue. The dissent does not find credible Employee's testimony she learned of the August 13, 2013 deposition only after the fact, particularly since she claimed this knowledge came from a petition also mailed to 648 Union Avenue. AS 23.30.122. Experience, judgment and observations regarding postal practices and procedures lead the dissent to conclude Employee consistently received mail, whether or not the "West" was included in the address. Similarly, based on experience, judgment and observations concerning standard recordkeeping protocol in law offices, the dissent finds credible Ms. Cassel's affidavit swearing Employee indicated she would be available for deposition on August 13, 2013. *Rogers & Babler*; AS 23.30.122. The dissent therefore would find Employee received advance notice of the August 13, 2013 deposition, and knowingly failed to attend.

Employer demonstrated good faith by timely paying compensation in accordance with the Act, and scheduling the August 6th and August 13th depositions in Employee's home town for her convenience. By not complying with discovery, Employee unjustly thwarted Employer's efforts to fully investigate her case. Furthermore, Employer expended $2,292.89 on unattended depositions, costs unfairly sunk unless reimbursed by Employee.

Employee's nonparticipation cannot be excused due to the board's failure to advise and instruct her how to pursue her legal rights. *Richard; Bohlmann.* On April 25, 2013, a board designee ordered Employee to attend a deposition and warned her of possible claim dismissal if she did not. The July 23, 2013 prehearing conference summary reminded her of this order, which she subsequently violated.

Employee's noncooperation and noncompliance prejudiced Employer, both temporally and financially, multiple times. Her repeated failures to be deposed contravene the Act's fundamental intent to ensure quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). Employee's claim for benefits should be dismissed.

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Dave Kester, 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 ANA M. HERRERA, employee / claimant; v. TRIDENT SEAFOODS CORP., employer; LIBERTY MUTUAL GROUP, INC., insurer / defendants; Case No. 201201114; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on January 21, 2014.

_____
Kimberly Weaver, Office Assistant