

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GARY D. LOTT,)
Employee,) INTERLOCUTORY
Claimant,) DECISION AND ORDER
v.)
AWCB Case No. 200810130
COAST INTERNATIONAL INN,)
Employer,) AWCB Decision No. 14-0037
and) Filed with AWCB Anchorage, Alaska
on March 21, 2014
REPUBLIC INDEMNITY OF)
CALIFORNIA,)
Insurer,)
Defendants.)

Coast International Inn's (Employer) November 8, 2013 petition to compel Gary D. Lott (Employee) to sign releases and respond to interrogatories was heard in Anchorage, Alaska, on March 4, 2014, a date selected on January 7, 2014. Employee appeared telephonically, represented himself, and testified. The panel consisted of two members, a quorum under AS 23.30.005(f). Attorney Robert J. Bredeson appeared and represented Employer and Republic Indemnity of California, its insurer. There were no witnesses. The record was held open because Employee testified he would go to Employer's attorney's office and sign the releases the next day. Employee did so, and the record closed on March 5, 2014.

ISSUE

Employer's hearing brief contended Employee's September 6, 2013 workers' compensation claim (claim) should be dismissed with prejudice due to noncompliance with discovery. At

hearing Employer contended it did not seek dismissal at this time, but rather to “elevate” the board designee’s January 7, 2014 prehearing order to a board order directing Employee to sign releases and answer interrogatories, or his claim would be dismissed. Employee contended he had no objection to signing releases, and the parties agreed Employee would do so at Employer’s attorney’s office the following day. On March 5, 2014, Employee signed Employer’s releases and left with the interrogatories to complete and return later.

Did Employee comply with the parties’ hearing agreement regarding discovery?

FINDINGS OF FACT

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

- 1) On June 15, 2008, Employee informed Employer he slipped and fell on a wet bathroom floor at work, incurring lower back pain. (Report of Occupational Injury or Illness, June 20, 2008.)
- 2) On July 14, 2009, Employer mailed Employee ten written releases and a 15-page informal discovery questionnaire, with instructions to execute and return all documents within 14 days. Employer’s documents sought information from 1998 through present for injuries or treatment to the head, upper extremity, back, and lower extremities; and information from March 19, 1983 through present for treatment of substance abuse or drug issues. (Employer letter, releases, and informal discovery requests, July 14, 2009.)
- 3) Employee did not file a petition for protective order within 14 days after Employer’s request for written authority. (Agency record, events screen.)
- 4) On August 13, 2009, Employer petitioned to compel Employee to sign releases and respond to informal discovery. (Petition, August 13, 2009.)
- 5) At a November 5, 2009 prehearing, the board designee denied Employer’s August 13, 2009 petition to compel because no claim had been filed, Employer had not paid benefits since June 22, 2008, and therefore the designee found no disputed issues. (Prehearing conference summary served November 5, 2009.)
- 6) On September 6, 2013, Employee filed a claim stating, “I still have back pain, numbness, and fatigue. The issue just hasn’t resolved. My recent doctor’s visit said that these ongoing problems are related to this injury. He would like to do an MRI to determine the extent of my

problems.” Employee claimed temporary partial disability (TPD) for unspecified dates, review of a reemployment benefit decision regarding eligibility, unfair or frivolous controversion, and an MRI. (Claim, September 6, 2013.)

7) On September 23, 2013, Employer controverted TPD; medical benefits that were unreasonable, unnecessary or unrelated to the work incident; reemployment benefits; and unfair controversion. (Controversion, September 23, 2013.)

8) September 24, 2013 Employer mailed Employee ten written releases and a 15-page informal discovery questionnaire. The cover letter stated, “The reason the medical releases go back to 1998 is that you stated (in a recorded statement on October 10, 2008) you previously treated for back pain in 2000. The Board allows us to request information two years before any related condition.” Employer sought information from 1998 through present for injuries or treatment to the head, upper extremity, back, and lower extremities; and information from March 19, 1983 through present for treatment of substance abuse or drug issues, anxiety, depression and hypertension. Employer instructed Employee to execute and return the releases within 14 days, and the questionnaire within 30 days. (Employer letter, releases, and informal discovery requests, September 24, 2013.)

9) Employee did not file a petition for protective order within 14 days after Employer’s request for written authority. (Agency record, events screen.)

10) On October 9, 2013, Employee attended a prehearing conference. In the prehearing conference summary, the board designee stated: “[Employer] will be sending [Employee] new releases limited to his low back. Designee explained that [Employer] was entitled to releases limited to the body part at issue in the case and going back two years prior to the earliest known treatment to that body part or the date of injury, whichever is earliest.” (Prehearing conference summary served October 25, 2013.)

11) On October 10, 2013, Employer mailed Employee eleven written releases and a 15-page informal discovery questionnaire. The cover letter stated, “The reason the medical releases go back to 1998 is that you stated (in a recorded statement on October 10, 2008) you previously treated for back pain in 2000. The Board allows us to request information two years before any related condition.” Employer sought information from 1998 through present for injuries or treatment to the head, upper extremity, back, and lower extremities; and information from March 19, 1983 through present for treatment of substance abuse or drug issues, anxiety, depression and

hypertension. Employer instructed Employee to execute and return the releases within 14 days, and the questionnaire within 30 days. (Employer letter, releases, and informal discovery requests, October 10, 2013.)

12) Employee did not file a petition for protective order within 14 days after Employer's request for written authority. (Agency record, events screen.)

13) On November 12, 2013, Employer controverted all benefits after October 8, 2013, due to Employee's failure to either sign and return the releases or file for a protective order. (Controversion, November 8, 2013.)

14) On November 12, 2013, Employer petitioned the board to direct Employee to respond to Employer's September 24, 2013 and October 10, 2013 letters with releases and informal discovery requests. (Petition to compel, November 8, 2013.)

15) On January 7, 2014, Employee did not appear at a prehearing conference. In the prehearing conference summary, the board designee stated:

Releases were discussed at the 10/9/2013 prehearing. [Employee] has not filed a petition for a protective order or called a technician to discuss the releases. [Employee] is ORDERED to sign and deposit in the mail the releases and respond to the interrogatories (questions) which are attached to this prehearing conference summary within 10 days of issuance of this prehearing conference summary.

Employee's agency file does not include copies of the releases and interrogatories ordered served with the prehearing conference summary. (Prehearing conference summary served January 15, 2014, emphasis original; agency record, events screen.)

16) On January 7, 2014, the board designee set a hearing on Employer's November 8, 2013 petition to compel releases and interrogatories. (Prehearing conference summary served January 15, 2014.)

17) On January 10, 2014, Employer mailed Employee eleven written releases, but did not include an informal discovery questionnaire. The cover letter stated, "The reason the medical releases go back to 1998 is that you stated (in a recorded statement on October 10, 2008) you previously treated for back pain in 2000. The Board allows us to request information two years before any related condition." Employer sought information from 1998 through present for injuries or treatment to the head, upper extremity, back, and lower extremities; and information from March 19, 1983 through present for treatment of substance abuse or drug issues, anxiety, depression and

hypertension. Employer instructed Employee to sign and return the releases within 14 days. (Employer letter and releases, January 10, 2014.)

18) The releases sent on January 10, 2014 are broader than authorized at the October 9, 2013 prehearing conference, when the board designee limited the body part to the low back and the time period to two years prior to the work injury or the earliest known treatment of the low back. (Observation.)

19) On March 3, 2014, board staff called Employee's phone number of record and left a voicemail informing him the time his hearing was scheduled. (Agency record, events screen.)

20) On March 4, 2014 Employee called the board because he thought that he had an appointment to talk to a workers' compensation technician, who noted Employee "[d]id not understand that he had a Hearing. Has been homeless for several months. He has access this morning to a phone 907-248-9071. I told him to call in for the Hearing @ 11:30, but that I would give the Hearing Officer his phone number inc (sic) case they decided to start sooner." (Agency record, events screen.)

21) At hearing on March 4, 2014, board member Dave Kester disclosed at he was formerly Employer's insurance broker. Mr. Kester stated the professional relationship ended in 2007, and he believed he could be fair and impartial at the hearing. Both parties stated they had no objection to Mr. Kester's participation. (Kester; Lott; Bredeson.)

22) Employee credibly testified he was homeless and his address of record was his mother's post office box. He stated she saved up mail and gave it to him in a bundle when she saw him, but he did not possess the releases and did not know about the hearing until the day before, when board staff left a message on his mother's voicemail. (Lott.)

23) At hearing Employee changed his address of record to his mother's street address: Employee testified he could more reliably receive mail there, because he could go by and take it directly from the mailbox, instead of waiting for his mother to give it to him. (*Id.*)

24) Employee testified he intended to get a new, prepaid cell phone that day, and would give the phone number to Employer and the board. (*Id.*)

25) Employee apologized for his noncompliance and offered to have his mother drive him to Employer's attorney's office the following day to sign "whatever I need to sign." Employee asked Employer's attorney, "I can read through it and sign it there, I don't have to leave with it,

right?” Employer’s attorney replied, “That’s true and we could actually give you copies to take home.” (Lott; Bredeson.)

26) On March 5, 2014 Employer’s attorney’s paralegal sent the board an email:

Mr. Lott came into our office today around 4:15 p.m. to sign the releases. He signed all the releases and I gave him a copy of them. He took the Informal Discovery Requests to complete and return to us. Please let the hearing officer know he did come in. He also provided us a new cell number: 907-793-0055. . . . (Teresa Reed email, March 5, 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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . .

2) workers’ compensation cases shall be decided on their merits except where otherwise provided by statute;

. . .

4) hearings in workers’ compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

AS 23.30.005. Alaska Workers’ Compensation Board. . . .

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

. . .

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

. . .

AS 23.30.107. Release of information. (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee’s injury. The request must include notice of the employee’s right to file a petition for a protective order with the division and

must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury. . . .

Employers have a constitutional right to defend against claims of liability. *Granus v. Fell*, AWCB Decision No. 99-0016 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 statute authorizes Employers to obtain information reasonably calculated to lead to facts relevant for evidentiary purposes. *Granus* at 14.

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

(b) . . . At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. . . .

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

Under AS 23.30.108(b) and (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 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. See, e.g., *Sullivan v. Casa Valdez Restaurant*, AWCB Decision No. 98-0296 (November 30, 1998).

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.

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.

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. . . .

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.

ANALYSIS

Did Employee comply with the parties’ hearing agreement regarding discovery?

At hearing Employee apologized and provided a credible explanation for his noncompliance with the January 7, 2014 discovery order. Employee volunteered to go to Employer’s attorney’s office the following day to sign “whatever I need to sign.” Employee asked Employer’s attorney, “I can read through it and sign it there, I don’t have to leave with it, right?” Employer’s attorney replied, “That’s true and we could actually give you copies to take home.”

On March 5, 2014, Employer travelled to Employer's attorney's office, signed the releases and retained copies of them. He also took with him Employer's informal discovery requests to complete and return later. Employee thereby complied with the agreement regarding discovery made at hearing. If Employee does not complete and return Employer's discovery questionnaire, Employer is entitled to petition the board again to compel Employee to respond to interrogatories.

CONCLUSION OF LAW

1) Employee complied with the parties' hearing agreement regarding discovery.

ORDER

1) Employer's November 8, 2013 petition to compel Employee to sign releases and respond to interrogatories is denied as moot.

2) Employer is ordered, within seven days of this decision and order, to file with the board copies of all releases signed by Employee.

Dated in Anchorage, Alaska on March 21, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Dave Kester, 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 accord 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 accord 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 Final Decision and Order in the matter of GARY D. LOTT, employee / claimant; v. COAST INTERNATIONAL INN, employer; REPUBLIC INDEMNITY OF CALIFORNIA, insurer / defendants; Case No. 200810130; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 21, 2014.

Kimberly Weaver, Office Assistant