ALASKA WORKERS' COMPENSATION BOARD

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

EDWARD P IRBY, Employee, Claimant, v. KINROSS GOLD USA INC, Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 199707138 AWCB Decision No. 14- 0095 Filed with AWCB Fairbanks, Alaska On July 3, 2014

Kinross Gold U.S.A.'s (Employer) January 16, 2014 petition to compel was scheduled on the hearing docket on March 6, 2014 and heard in Fairbanks, Alaska on April 10, 2014. Edward Irby's (Employee) widow and beneficiary, Cartrie Irby, did not appear. Attorney Joseph Copper represented Employer. There were no witnesses. Following the hearing's conclusion, the record remained open at the request of a board member, who desired additional information on the case's procedural history for further deliberation. Employee's case file, which had been "purged" from currently available records, was also retrieved. Additional evidence was received in the form of returned mail that had been sent to Ms. Irby. Due to the unavailability of a board member, who had been sent to the North Slope for work, the record closed when the panel next met to deliberate on June 23, 2014.

ISSUES

Since Ms. Irby did not participate in the hearing, as a preliminary issue, this decision will examine whether it was proper to proceed in her absence.

1) Was it proper to proceed with the hearing on Employer's January 16, 2014 petition to compel in Ms. Irby's absence?

Employer's attorney acknowledges he is relatively new to this case and contends his client has been paying survivor benefits to Ms. Irby, who lives in Columbus, Georgia, for many years. Employer contends there was a factual finding "long ago" Ms. Irby was in Georgia for medical treatment, but it cannot ascertain the nature of that treatment. It contends it has more recently sought discovery from Ms. Irby's former attorney, who withdrew from the case before producing the requested discovery. Employer contends it sought discovery via certified mail, but Ms. Irby will not accept the mail. It contends it then sought discovery through process servers, which was also unsuccessful. Employer contends the only items being sent to Ms. Irby that are not returned are the benefit checks. It contends it is attempting to ascertain whether Ms. Irby is still outside Alaska to obtain medical treatment and, if so, for what conditions or treatment. Employer seeks a broad medical release and a social security release so it can determine whether it is entitled to a cost-of-living adjustment (COLA) and a social security offset. Therefore, Employer requests an order compelling Ms. Irby to produce the requested discovery.

Since Ms. Irby did not appear for the hearing or file a hearing brief, her position is unknown. However, it is presumed she opposes Employer's discovery efforts.

2) Should Ms. Irby be compelled to comply with Employer's discovery requests?

Employer contends this decision should "custom-tailor" an order with a "built-in sanction." It contends the order should compel Ms. Irby to produce its requested discovery by a time certain and, if she does not, it should be allowed to apply the COLA. It contends, "given the delays in this case, there would be no sound reason for the Board to not tailor its order in this fashion."

Since Ms. Irby did not appear for the hearing or file a hearing brief, her position is unknown. However, it is presumed she opposes application of the COLA.

3) Should an order to compel include a "built-in sanction" applying a COLA to Ms. Irby's death benefit?

FINDINGS OF FACT

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

1) The introduction to Employer's hearing brief states:

> This is a very simple issue, arising from a very complicated claim.
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> The have been many, many hearings and decisions and orders in this case. There have been appeals and remands. As a result, the employer and carrier have been paying survivor benefits under AS 23.30.215 to Cartrie Irby, the widow of Edward Irby. . . .

(Employer Hearing Brief, March 28, 2014).

2) The following facts are set forth in *Irby v. Fairbanks Gold Mining*, AWCB Decision No. 05-005 (September 2, 2005) (*Irby I*) and are adopted here:

> The employee retired from service as a United States Army Ranger at the rank of Command Sergeant Major on August 31, 1995. The employee began to work for the employer as a truck driver at the Fort Knox Mine on July 31, 1996. On April 13, 1997, the employee was in his third day of training to drive a D10N Caterpillar bulldozer, when his bulldozer rolled backwards down the 152 foot steeply-sloped face of the mine's impoundment dam, breaking through the frozen surface of the impoundment pond, and coming to a stop under the water and broken ice approximately 35 feet from the water's edge. The employee's trainer was driving another bulldozer approximately 300 feet to the south on the dam to the [sic], and did not see the accident.
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> Two Alaska State Trooper divers responded that afternoon, and investigated the wreck, finding the bulldozer upright underwater, with its blade raised. They found the door of the cab latched open, the rear window pushed into the cab, rocks strewn over the seats and the floor of the cab, and rocks on the tracks of the machine. Although visibility was extremely poor in the water, and the water temperature was 35 degrees Fahrenheit, the troopers systematically searched the bottom of the pond between the water's edge and the bulldozer, but failed to find a body. On April 14 and 15, 1997, three Trooper divers returned to conduct tethered searches of the bottom of the pond around the bulldozer. The troopers returned on May 9, 1997, and again systematically searched the same area. They found the water extremely murky, and had to inspect the bottom by feeling. Some

areas of the bottom were so muddy that they could not reach a solid substrate, and at times it seemed to at least one diver that he could not tell if he was swimming above the mud or through it.

The employer retained a private diving company, Alaska Divers and Underwater Salvage, to remove the bulldozer and to search for a body. At our hearing on July 21, 2005, David Mallars, president of the salvage company [sic], testified that he and another of his divers searched the bottom in arcs at 5 foot intervals several times over five or six days. He testified they searched as far from the bulldozer as they believed a person could swim clothed, and in frigid water. He testified there were no discernible currents in the water, that he found the door and side window [sic] open, that he found a large amount of material in front of the blade, and that he found rocks on the floor and seat of the cab. He testified he did not believe the employee's body is in the settling pond.

On April 15, 1997, the State Troopers Sent a PAWS search team, and the dogs found possible scent traces on top of the dam embankment. However, on April 16, 1997 the PAWS search team dogs were unable to locate any scent. On May 13 and 14, 1997, the employer's staff searched the pond in the vicinity of the accident with a metal detector, attempting to find steel-toed boots or a belt buckle on the bottom of the pond. However, they detected such a large number of metal objects that the search was abandoned. On May 18, 1997, the Alaska Department of Fish and Game searched the pond in the vicinity of the accident with a sonar fish finder. This search was unsuccessful. On September 26, 1997, the employer's staff systematically dragged grappling hooks in the pond over 8400 foot by 200 foot grid pattern. The dragging operation was unsuccessful, as well.

The employer filed a Report of Occupational Injury or Illness, dated April 21, 1997, reporting the accident, but indicating the injury was "unknown" and indicating the employee was a "missing person." The employer filed a Controversion Notice on May 16, 1997, denying all benefits because it was not known whether the employee was deceased, denying his death was caused by an accident, and denying he died in the course and scope of his work.

The employee's wife, Cartrie Irby, petitioned for a Presumptive Death Certificate, and a hearing was held before Superior Court Magistrate William Smith and a coroner's jury on October 30, 1997. A number of the accident investigators testified at that proceeding. Trooper Charles Lovejoy testified he is the dive master for the local technical dive unit. He testified the settling pond was actually a large body of water, which he would consider a lake. He testified they found a large amount of material on the front of the blade and the only way to explain that was that the bulldozer disturbed the ground and bottom enough when it crashed into the lake to bring up the material, which subsequently settled. He testified that if the dirt and debris had been stirred out in the water and several inches settled over the employee's body, that they most likely would not have been able to find him. He testified that one of the divers believed he accidentally moved one of the

bulldozer control levers. He testified that, if the employee had attempted to swim to the surface he would very likely have come up under the ice. He did not believe the employee could swim very far in frigid water. Trooper Susan Acquistapace testified that she had been the first diver to inspect the bulldozer and, that she found only the left side door open. She testified she and the other Troopers searched a 60-foot radius around the bulldozer. Stephen Lang, General Manager of the mine, testified that he inspected the sites on the day of the accident. He indicated the slope of the dam was very steep, about 35 or 40 degrees. He testified that the grounds showed that the blade of the bulldozer may have drug as it went over the berm of the dam, but after that the tracks led down the slope to the water, without marks of the brakes being applied, or the blade or ripper lowered. Stephen Bonham testified that he was training the employee to drive the bulldozer at the time of the accident. He testified he did not know how the accident happened, and that there was no indication the employee had attempted to use the brakes, the blade, or the ripper. He testified that it was conceivable that the employee could jump from the bulldozer as it rolled backwards down the dam, but very precarious. Michael Propst, M.D., Chief Medical Examiner for the state of Alaska, testified that at 35 degrees Fahrenheit, the employee's body would not float or come to the surface, especially if his clothes were impregnated with silt. The employee's wife testified that although their marriage was troubled, the employee had intended to work for three years with the employer, and then to join her in Georgia. She testified she had returned to their home in Georgia in order to have surgery, and to find work as a teacher in anticipation of his return. At the conclusion of that hearing, the jury found unanimously that there was not sufficient evidence to presume the employee dead.

In response to this jury verdict, Donald Eckstein, Director of Workers' Compensation for the employer's parent company, wrote to the employer's workers compensation insurer on November 25, 1997, indicating that the verdict of the corners jury stayed the beneficiaries' claim for death benefits. He provided the insurer a copy of the jury verdict, and a report from the employer's local attorney. Based on the coroner's jury verdict, the employer also filed a Controversion Notice dated December 11, 1997.

In 2003 the employee's son, Edward II, then 19 years old, filed another petition for a determination of presumptive death. The Troopers, Mr. Lang, and Mrs. Irby testified in a second presumptive death proceeding, again before Magistrate Smith, on October 6, 2003. Mr. Lang, now an employee of another mining company, testified extensively concerning the employer's attempts to find the body. He testified there was no explanation of why they could not find the body; however, he also testified there was no indication that the accident had been staged. Mr. Lang also testified that he recollected the employee as a mature, levelheaded, and trustworthy person; and he could not envision that the accident had been planned. At the conclusion of that hearing, the jury unanimously found that it may fairly be presumed that the employee died as a result of a heavy equipment accident on April 13, 1997.

> Based on the October 6, 2003 corner's jury verdict, the State of Alaska issued a Certificate of Presumptive Death on November 7, 2003. The death certificate listed the cause of death as "Mining Heavy Equipment Accident," on "April 13, 1997." The parties stipulated that the employer's attorney, Michael McConahy, attended both presumptive death hearings.
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> In response to the death certificate, the employer wrote to the employee's life insurance company, Standard Insurance Company, sending them a copy of the death certificate and requesting them to process the life claim and determine whether the claim would be eligible for payout under the accidental death and dismemberment policy. This life insurance policy was subsequently paid to the beneficiaries.
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> The employee's wife filed a Workers' Compensation Claim on March 11, 2004, claiming death benefits under AS 23.30.215. . . .

(*Irby I*, at 2-7) (citations omitted).

3) *Irby I* was heard over the course of three days, July 21, 2005, July 22, 2005 and August 5, 2005.

The following additional evidence was adduced over the course of the hearing:

> In the hearing on July 21, 2005, David Mallars testified as noted above. He also testified he had been engaged in six or seven underwater body searches, but had never actually found a body except in a wrecked helicopter. He testified the silt beside the bulldozer was only approximately 6 inches deep, but was at least an arm's length deep in an area near the bulldozer.
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> Kartrie [sic] Irby testified that she called the employer's insurance adjuster in May of 1997 to ask about the death benefits, and was told she needed to get a death certificate. Based on that information, and the negative verdict of the first jury, she did not attempt to file a claim until her son actually secured the presumptive death certificate in 2003. When asked if her family was $115,000.00 in debt at the time of the employee's disappearance, as alleged by the employer, she testified that the debt was much smaller than that, but that they owed $40,000.00 on the house mortgage, and $30,000.00 for two cars that were being paid off, plus miscellaneous minor debt. She testified the employee was regularly sending home of $590.00 a month for the mortgage, as well as money for house repairs, the children's school tuition, and the childrens' [sic] Tae Kwan Do classes. She testified her family could not have lived with the quality of life they enjoyed without his continual financial support. She testified she paid off all their debt subsequent to his death, but that it would have been much easier to do so with her husband's support.
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> Ms. Irby testified that she and her husband had long-term difficulties in their marriage, but planned to stay together. She testified she moved to Atlanta because she needed to have surgery and follow-up care, because the children both suffered asthmatic attacks in Fairbanks, and because she and her husband owned a home in

Atlanta. She testified she did not know Gwendolyn Pugh. She testified that her husband had always been very responsible, and did not run away from problems. She does not believe he would attempt to feign his death to escape. She testified the employee had been pleased with his work and his opportunity to become a bulldozer operator. He just received a bonus and intended to bring the children up to visit him in Fairbanks that summer. She believed he died in the work accident.

She testified that after the employee's accident, the children received Social Security survivors benefits in the amount of $1800.00 per month, and that her youngest child, Hannah, continues to receive this benefit. She also testified the family received military annuity benefits, based on the employee's death, in the amount of $1000.00 per month, and recently received $1500.00 in military arrearment pay. She testified the family received $93,000.00 in life insurance benefits from Standard Life Company, and $120,000.00 in death benefits from American Express. Ms. Irby testified her multiple back surgeries had rendered her unable to work full-time, but that she was able to work part-time has as educational consultant, and has been able to continue to raise the children.

Edward Irby, II, testified he is now a pre-law student at Georgia State University, but that his younger sister is still at home with his mother. He testified he and his sister both had severe asthma when they were little. He testified the death or disappearance of his father had been extremely hard on his family, and that his sister had been hospitalized several times for psychological reasons, and gotten into quite a bit of trouble. He testified his mother had been dispirited following her failure to get a presumptive death certificate. He testified he was 12 years old at the time of the accident. He testified that when he got into his later teens, he began to research concerning presumptive death certificates and decided to pursue it on his own, especially to get some resolution for his sister. He testified his parents had a good deal of conflict throughout their relationship, but had stayed in their marriage. He testified his mother was able to manage the family debt before they received the insurance payments. He testified his father took a special interest in their schooling, and frequently spoke with them about that on the telephone while he was working in Alaska. He testified that in their last telephone call his father told him he would be able to bring him on a trip to Alaska in the summer.

Gerald Andrews testified he was formerly the Training Director for the Operating Engineers. He testified the apprenticeship program required 6,000 hours of on-the-job experience. He testified an operator develops an instinctive ability to handle a bulldozer at about 1,000 hours, and that an operator with only 16 hours like the employee would be very inexperienced. He testified that an operator sits approximately 15 feet off the ground while driving a D10, that the bulldozer is over 20 feet long, and the blade is 19 feet wide. He testified the right foot normally operates a decelerator and the left foot operates the brake, which is counter-intuitive to someone who is used to operating a truck or automobile. He testified the engine would overpower the break in low gear. He testified he believed the edge of the top of the impoundment dam was perilous. He testified he does not think the employee

could jump to safety if the bulldozer went over the dam edge backwards. He believes the employee was in the cab when it went into the water, and then attempted to exit.

Gary Allen testified he is presently an operator for the employer, but that he was formerly a 1st Sergeant at Fort Wainright, and that he and the employee frequently rode to work at the mine together. He felt the employee's training as a Ranger prepared him to act without panic in a crisis, and that the training would have enabled him to easily escape from the mine site. He testified the employee told him his wife had an affair and was now living in Georgia, and that he now had a girlfriend named Gwendolyn Pugh and would be staying with her. After the accident, he heard that the employee had been caught and jailed for fraud in the South, and reported that to the employer's Human Resources Manager and to attorney Stone. However, that information turned out to be just a rumor. On cross-examination, he testified that the employee was honorable, and he would not expect the employee to do something dishonorable, like staging his death.

Allan Smith testified he is a mine shift supervisor, and that he assigned the employee his work on the day of the accident. He felt the employee never had to be closer than 80 feet to the edge of the dam slope while operating his bulldozer that day. He testified he is still unable to form an opinion concerning what happened. He testified the employee had been in a good mood that day because of a bonus he had received.

Larry Graham testified he is now a Security Captain with Doyon Universal Services, but that he was formerly a Command Sergeant Major at Fort Wainright, commanding the base M.P.s. He testified the employee was a very capable Ranger, and could easily have escaped from the mine site, undetected. He testified he lived near the Irbys. He testified the M.P.s had to intervene at the Irbys' one night, and that a possible affair led to them living separately. He testified that once, when looking for an A.W.O.L. soldier, the employee told him he would go to Portland if he wanted to disappear. On cross-examination, he testified he believed the employee was very trustworthy.

John Gentry testified he is the Mining and Safety officer for the employer, and that he has been operating bulldozers since the 1980s. He testified he started the bulldozer training program for the employer, and trained its operators. He testified there are six ways the employee could have stopped the bulldozer from its descent down the dam face. He testified the bulldozer weighed 60 to 65 tons. He testified he had never seen rocks thrown into a cab and on the floorboard before, and that the bulldozer had to be going fast. He testified the ice plates broken by the impact of the machine had been displaced up and on top of the surrounding ice. He testified that in 3rd gear in reverse, the bulldozer could go only about 9.7 miles per hour. From the impact, debris, and final resting place of the machine, he felt it may have been in neutral, that it may have been reached 30 m.p.h., and that an average speed of over 20 m.p.h. would be a conservative estimate. He does not believe it would

> have been possible for the employee to set the bulldozer on its way down the hill, and then jump out.
>
> Magistrate William Smith testified that presumptive death hearings are not adversarial proceedings, and that there are no adversarial parties. He testified the employer, police, and family were all given notice of the proceedings, and that the employer wanted to participate and offer testimony in this case.
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> One of the employer's attorneys, Kim Stone, filed an Affidavit on July 19, 2005, asserting the employer had hired a private investigator, Thom Hibshman, who on June 27, 2005 spoke with the employee's former wife, Lamodia Johnson, in Portland, Oregon. Ms. Stone affied that Hibshman informed her that Ms. Johnson saw the employee standing beside a silver Jeep near where she believed he had cousins. Ms. Stone affied that Hibshman informed her Ms. Johnson did not stop to talk to him because of difficulties between them in the past. Ms. Stone affied that Hibshman informed her Ms. Johnson would be willing to testify. Ms. Stone affied that Hibshman is now having difficulty contacting Ms. Johnson. At the conclusion of the hearing, the employer requested that we keep the record open to allow it to obtain dispositive deposition testimony from Ms. Johnson and Ms. Pugh. The employer asserted it anticipates that Ms. Pugh continues to be involved with the employee, and would be able to testify to his survival and whereabouts. At the hearing, and in their pleadings, the beneficiaries argued the employer's affidavit reflects nearly baseless speculation, and offers no credible foundation for its assertions.

(*Id.* at 7-11).

4) *Irby I* states:

> We find Ms. Irby's testimony she moved to Atlanta for medical attention is credible and consistent with the history of her surgeries. If, as the Employer asserts, the employee was living with another woman at the time of his death and intended to leave his marriage, we would find that he had abandoned his wife.

(*Id.* at 19).

5) *Irby I* decided Employee's claim was not barred by a limitations statute, declined to estop Employer from asserting statutory defenses, declined to exclude the presumptive death certificate as evidence, and decided, if the beneficiaries claim for death benefits was compensable, Cartrie Irby, would be Employee's "widow" under AS 23.30.215 and the former AS 23.30.395(33). (*Id.* at 19-20).

6) *Irby v. Fairbanks Gold Mining*, AWCB Decision No. 05-0234 (September 12, 2005) (*Irby II*) rejected Employer's theory Employee has staged his own death for financial or romantic gain and awarded the beneficiaries death benefits, interest and attorney's fees. (*Id.* at 16, 18-19).

7) Litigation before the workers' compensation board continued while Employer pursued an appeal before the Superior Court. (Prehearing Conference Summary, January 5, 2006).

8) The Superior Court issued an order staying payment of past due benefits and attorney's fees pending Employer's appeal while the Employer initiated and continued to pay ongoing death benefits to the beneficiaries. The Superior Court also entered a partial remand for the board to determine the past due benefit amount. (*Irby v. Fairbanks Gold Mining*, AWCB Decision No. 06-0127, at 7, 12 (May 22, 2006) (*Irby III*).

9) In *Irby III*, Employer contended the benefit calculation must be reduced for Social Security Survivors' Benefits paid to the beneficiaries. It contended this offset was "explicit and mandatory, and cannot be waived or barred by estoppel." Employer provided seven award letters from the Social Security Administration, giving notice of initial benefits determinations or re-determinations to each of the beneficiaries. Employer contended it did not believe these were all the benefits notices since, it contended the beneficiaries have not fully cooperated with disclosure. *Id.* at 10.

10) Employer also contended the benefit calculation was subject to a COLA adjustment for Columbus, Georgia, since that was where the beneficiaries had lived since 1996. It contended the adjustment is "automatic, by operation of law and mandatory." The decision states: "The employer also argued that, although we found the employee's wife left Alaska for back surgeries for herself and asthma relief for her children, we did not find the various forms of medical treatment needed were not reasonably available in Alaska." (*Id.*).

11) *Irby III* determined Employer owed the beneficiaries $349,902.77 in past due benefits. Analyzing the Social Security offset issue, the decision states:

> The statute at AS 23.30.225(a) is explicit and mandatory: the weekly compensation "shall be reduced by … as nearly as is practical to one-half of the federal periodic benefits." The record is clear that the beneficiaries have received SSI retirement benefits, and by operation of law the employer may reduce the weekly benefit payment.

The decision did not apply the offset because it found Employer failed to integrate the documentation into a compensation report, as required by regulation. However, the decision went on to instruct Employer:

> If the employer has the requisite documentation, it should proceed under the procedure outlined at 8 AAC 45.225(a). If the employer has not yet been able to secure through informal discovery the appropriate award letters from the Social Security Administration, on which to base a reduction under AS 23.30.225(a) of the beneficiaries' death benefits, the employer may bring a petition to compel

> discovery, in accord with AS 23.30.107 and AS 23.30.108. We will retain jurisdiction to modify this decision, under AS 23.30.130.

Id. at 16.

12) *Irby III* analyzed the COLA issue as follows:

> Although the employer asserts that the treatment needed by the beneficiaries was reasonably available in Alaska, it has, as yet, offered no specific evidence on which to base that argument. Our finding that the beneficiaries left Alaska for medical reasons was made in the context of the employer's assertion that Mrs. Irby was actually leaving because her marriage with the employee had broken down over allegations of infidelity, and should therefore be denied death benefits. Nevertheless, our finding was based on hearing testimony and other evidence in the record. Based on a review of the present record, we do not find evidence sufficient to overturn our September 2, 2005 finding. Consequently, we conclude that, based on the present record, AS 23.30.175(b)(2) prevents the application of a COLA reduction to the death benefits, at present.

The decision also decided Employer had raised the COLA issue in an amended answer, which it "interpreted" as Employer's intent to "develop the record to pursue this issue." *Irby III* explicitly retained jurisdiction over the COLA issue and directed the parties to "arrange any procedure necessary concerning the issues of Social Security offset or COLA adjustment of the beneficiaries' compensation." (*Id*. at 17-18, 25).

13) Throughout the remainder of 2006, numerous additional decisions were issued in the case, including: *Irby v. Fairbanks Gold Mining*, AWCB Decision No. 06-0151 (June 9, 2006), (*Irby IV*) (granting Employer's petition for reconsideration of *Irby III* and expressly stating it would entertain evidence on the Social Security offset and COLA adjustment issues at a later hearing); *Irby v. Fairbanks Gold Mining*, AWCB Decision No. 06-0253, September 11, 2006) (*Irby V*) (upholding designee's order compelling beneficiaries to produce discovery and finding the "present record has substantial evidence and argument from both parties concerning the Social Security and COLA offset issues."); *Irby v. Fairbanks Gold Mining*, AWCB Decision No. 06-0276 (October 10, 2006) (*Irby VI*) (reconsideration of *Irby III*, denying Employer a social security offset because of rate calculation errors, retaining jurisdiction over the social security offset issue, holding the presumption at AS 23.30.120 applies to the COLA adjustment, granting the parties a continuance on the COLA issue and ordering the parties to attend a prehearing conference "to address the proper way to calculate a [social security] benefit reduction ….") and *Irby v. Fairbanks Gold Mining*, AWCB Decision No. 06-0138 (December 1, 2006) (*Irby VII*) (declining

reconsideration of *Irby VI*, retaining jurisdiction of the social security offset issue; and ordering the parties to attend a prehearing conference "to address the proper way to calculate a [social security] benefit reduction").

14) On April 11, 2007, the Superior Court, contrary to *Irby I*, found the limitations statute at issue in that decision had run and entered an order reversing that decision. Employee sought an appeal before the Alaska Supreme Court. (*Irby v. Fairbanks Gold Mining*, AWCB Decision No. 07-0357 at 9-10 (November 21, 2007) (*Irby VIII*).

15) Meanwhile, litigation continued before the workers compensation board. The beneficiaries filed a petition seeking findings Mrs. Irby suffered from depression, anxiety and mental stress to such an extent that she needed and still needs professional help, was involuntarily committed at least once due to threatened suicide in March of 2002 and was likely unable to understand legal proceedings in general and specifically what she had to do and when to obtain benefits under the Alaska Workers' Compensation Act. They also filed a petition seeking board "review" of the Superior Court's April 11, 2007 order and a decision "relieving them of the effect of that order." Employer also filed a "Petition to Deny and Dismiss Claimant's Petitions for Incompetency Determination and Modification." (*Id*. at 10).

16) On September 17, 2007, the Alaska Supreme Court issued a remand to the board, which included the following:

> The Alaska Workers' Compensation Board may consider (1) whether there is legally sufficient justification excusing appellant's failure to argue tolling of the statute of limitations when the case was initially before the Board and if so, (2) whether the applicable period of limitations should be tolled.
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> If the Board in consideration of these questions decides that the period of limitations should not be tolled, the Board may so rule.
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> If the Board in consideration of these questions concludes that tolling is appropriate, it should so indicate to counsel, and counsel for appellant may request that this court stay the current appeal and remand this case to the Board for further proceedings.

(*Id.*).

17) On November 21, 2007, *Irby VIII* decided the parties petitions would be heard along with the Supreme Court's remand. (*Id*. at 14-15).

18) On December 5, 2007, Employer filed a petition for reconsideration of *Irby VIII*. (*Irby v. Fairbanks Gold Mining*, AWCB Decision No. 07-0371 at 12 (December 18, 2007) (*Irby IX*).

19) On December 18, 2007, *Irby IX* both confirmed the decision in *Irby VIII* and denied Employer's petition for reconsideration. (*Irby IX* at 15).

20) The board never decided the Court's remand on tolling. (Record).

21) On March 20, 2009, the Alaska Supreme Court decided Employer's appeal and held the limitations period at issue in *Irby I* had been equitably tolled and ordered reinstatement of the decision and order in *Irby II*. (*Irby v. Fairbanks Gold Mining*, 203 P.3d 1138 (Alaska 2009).

22) Litigation continued over the issue of attorney's fees. The issue was subsequently resolved by the parties' stipulation. (Prehearing Conference Summary, April 14, 2014; Injury and Claims Expense Reporting System (ICERS) event entries, June 3, 2010; June 17, 2010).

23) There is no further procedural history until 2013. (Record; observations).

24) On February 19, 2013, new counsel entered an appearance on behalf of Employer. (ICERS event entry; February 21, 2013).

25) On February 20, 2013, Employer wrote to Ms. Irby's attorney requesting a signed Social Security release and an update on the status of her health conditions. (Employer letter, February 20, 2013).

26) On September 17, 2013, the beneficiaries' counsel withdrew as their attorney. (ICERS event entry, September 20, 2013).

27) Ms. Irby's address of record is [personal information omitted], Columbus, Georgia 31907. (ICERS party information).

28) On October 18, 2013, Employer served informal discovery requests on a woman named "Helen," who claimed to be Ms. Irby's sister, at Ms. Irby's address of record. (Johnston Aff., October 18, 2014).

29) Employer's discovery requests that were served on "Helen" included a social security release and general medical interrogatories requesting names and the contact information for Ms. Irby's medical providers and asked her to identify what conditions her providers were treating. (*Id.*; Employer's letters with enclosures, September 27, 2013).

30) On January 21, 2014, Employer filed a petition to compel Mrs. Irby to respond to its "multiple" discovery requests. It contended it had sent discovery requests to Ms. Irby's counsel, who withdrew from representation. Employer contended it attempted to serve Ms. Irby with

discovery requests via process server, who was unsuccessful. It also contended it had unsuccessfully attempted service via both certified and regular U.S. mail. (Employer Petition, January 16, 2014).

31) On January 21, 2014, Employer filed its instant petition seeking a COLA adjustment. It contended Ms. Irby was no longer living outside Alaska for medical treatment that is not available in Alaska. (Employer Petition, January 16, 2014).

32) On February 7, 2014, Employer filed an affidavit of readiness (ARH) on its January 16, 2014 petition to compel. (Employer's ARH, February 5, 2014).

33) On February 11, 2014, notices for a March 6, 2014 prehearing conference were sent to the parties via regular U.S. mail. (Prehearing Conference Notice, February 11, 2011; ICERS event entry, February 11, 2014).

34) Employee's February 11, 2014 notice for the March 6, 2014 prehearing conference, which had been sent to her address of record, was not returned undelivered. (*Id.*; record; observations).

35) On March 6, 2014, a prehearing conference was held. Ms. Irby did not participate. The summary states:

> [Employer attorney] requested that a hearing be scheduled on employer's 1/16/14 Petition to Compel. He stated for the record that at the time of hearing he would ask the board to order Ms. Irby to provide responses to the discovery requests within 30 days from the date of the Decision & Order. If the board orders Ms. Irby to provide discovery requests and she does not comply then, he would request that the board allow his client to take the COLA off-set on the benefits currently being paid.
>
> Ms. Irby is ordered by the chair to provide responses to employer's discovery requests by **March 23, 2014**.

An April 10, 2014, hearing was scheduled on Employer's petition to compel. (Prehearing Conference Summary, March 6, 2014).

36) On March 6, 2014, copies of the prehearing conference summary from the same date were served on the parties via regular U.S. mail. (Irby's Prehearing Conference Summary, March 6, 2014; Employer's letter, March 12, 2014).

37) On March 19, 2014, Employer attempted to serve Ms. Irby with discovery requests and pleadings, via process server, at her address of record in Columbus, Georgia. The process server's affidavit states the following events took place:

> Attempted service at [Ms. Irby's address of record] Columbus, Georgia 31907, Woman with baby answered door and said Irby does not live there. I told her I had talked with her before at this address and she again said Irby does not live at this address. I told her that I knew the car in the driveway belonged to Irby. She then told me to leave her propoerty [sic] and not come back. She called law enforcement on me and I waited until the [sic] arrived to explain the circumstances. She told the police officer that Irby was living in Atlanta, Georgia.

(Johsnton Aff., March 5, 2014).

38) Employer's discovery requests that the process server attempted to serve on Ms. Irby included a medical release for information from October 2011 and a social security release, as well as Employer's September 26, 2013 discovery requests and litigation documents including Employer's petitions to compel, petition for offset, Employer's ARH and the February 11, 2014 prehearing conference summary. (*Id.*; Employer's letters with enclosures, October 15, 2013).

39) On March 27, 2014, notices for the April 10, 2014 hearing were served on the parties. (ICERS event entry, March 27, 2014).

40) On March 27, 2014, Ms. Irby's copy of the March 6, 2014 prehearing conference summary, which had been sent via regular U.S. mail to her address of record, was returned bearing the notation: "Attempted-Not Known, Unable to Forward." (Irby's Prehearing Conference Summary, March 6, 2014).

41) On April 18, 2014, Ms. Irby's copy of the hearing notice, which had been sent via regular U.S. Mail to her address of record, was returned bearing the notation: "Not Deliverable as Addressed, Unable to Forward." (Irby Hearing Notice, April 10, 2014).

42) On April 29, 2014, Ms. Irby's copy of the hearing notice, which had been sent via certified U.S. Mail to her address of record, was returned bearing the notation: "Unclaimed. Unable to Forward." (Irby Hearing Notice, April 10, 2014).

43) The parties, including Ms. Irby, were properly served with notice of the hearing. (*Id.*; Hearing Notice, March 27, 2014; ICERS event entry, March 27, 2014; observations).

44) Employer did not submit evidence Ms. Irby's checks were being sent to her address of record. (Record; observations).

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;
> . . . .
>
> (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.
>
> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) …. Process and procedure under this chapter shall be as summary and simple as possible….

In *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court instructed the board of its duty with respect to an unrepresented claimant:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

More recently, the Court has instructed the board owes a duty to inform an unrepresented claimant how to preserve his claim for benefits. *Bohlmann v. Alaska Const. & Engineering, Inc.*, 205 P.3d 316 (Alaska 2009).

> **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.
> . . . .

AS 23.30.107(a) is mandatory. An employee must release all evidence "relative" to the injury. "Relative to the employee's injury" means the information requested need only have some relationship or connection to the injury. *Smith v. Cal Worthington Ford, Inc.*, AWCB Decision

No. 94-0091 (April 15, 1994). The Alaska Supreme Court encourages liberal discovery under the Alaska Civil Rules with regard to medical evaluation and the discovery process generally. *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 at 4, n.2 (December 11, 1987); *citing United Services Automobile Association v. Werley*, 526 P.2d 28, 31 (Alaska 1974). *See also, Venables v. Alaska Builders Cache*, AWCB Decision No. 94-0115 (May 12, 1994). "If the information sought appears to be 'relative,' the appropriate means to protect an employee's right of privacy is to exclude irrelevant evidence from the hearing and the record, rather than to limit the employer's ability to discover information that may be relative to the injury." *Smith v. Cal Worthington Ford, Inc.*, AWCB Decision No. 94-0091 (April 15, 1994).

If it is shown informal means of developing evidence have failed, we "will consider the relevance of the requested information and the method of discovery to be authorized." *Brinkley v. Kiewit-Groves*, AWCB Decision No. 86-0179 at 5 (July 22, 1986). In attempting to balance the goals of liberal discovery and reasonable protection of injured workers' privacy, discovery is generally limited to two years before the earliest evidence of related symptoms. *See, e.g., Smith v. Cal Worthington Ford*, AWCB Decision No. 94-0091 (April 15, 1994).

Granus v. Fell, AWCB Decision No. 99-0016 (January 20, 1999), provides guidance in discovery matters by defining the term "relevant" and applies it to "information relative to the employee's injury" as set forth in AS 23.30.107(a). *Granus* sets forth a two-step process to determine the relevance of information sought. The first step is to identify issues in dispute. The second is to decide whether the information sought is "reasonably calculated" to lead to facts that will have a tendency to make a disputed issue more or less likely. *Chapman v. Tom Thumb Montessori Schools*, AWCB Decisions No. 09-0209 (December 30, 2009). A release is "calculated" to lead to such facts if the proponent of a release is able to articulate a reasonable connection between the information sought to be released and evidence that would be relevant to a material issue in the case. *Id.* A release is "reasonably" calculated to lead to admissible evidence if both the scope of information within the release terms and the time periods it covers are reasonable. *Id.* Information that may have a "historical or causal connection to the injuries" is generally discoverable. *Granus*.

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
>
> (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
>
> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense….

The law has long favored giving a party his "day in court," *E.g. Sandstrom & Sons, Inc. v. State of Alaska*, 843 P2d 645 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits, AS 23.30.001(2). Dismissal should only be imposed in "extreme circumstances," and even then, only if a party's failure to comply with discovery has been willful and when lesser sanctions are insufficient to protect the rights of the adverse party. *Sandstrom*, 843 P2d 645. However, AS 23.30.108(c) does provide a statutory basis for dismissal as a sanction for noncompliance with discovery, and the Board has long exercised its authority to dismiss claims when it has found employee's noncompliance to have been willful. *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); *Erpelding v. R & M Consultants, Inc.*, AWCB Decision No. 05-0252 (October 3, 2005); *Sullivan*

v. Casa Valdez Restaurant, AWCB Decision No. 98-0296 (November 30, 1998); *Maine v. Hoffman/Vranckaert, J.V.,* AWCB Decision No. 97-0241 (November 28, 1997); *McCarroll v. Catholic Community Services,* AWCB Decision No. 97-0001 (January 6, 1997); *Billy J. Parker v. Power Constructors, Inc.,* AWCB Decision No. 89-0047 (February 24, 1989). Since dismissal of a workers' compensation claim under AS 23.30.108(c) is analogous to dismissal of a civil action under Civil Rule 37(b)(3), the Board has occasionally consulted the factors set forth in that subsection of the Rule when deciding petitions to dismiss. *Erpelding v. R & M Consultants, Inc.,* AWCB Decision No. 05-0252 (October 3, 2005); *Sullivan v. Casa Valdez Restaurant,* AWCB Decision No. 98-0296 (November 30, 1998); *McCarroll v. Catholic Community Services,* AWCB Decision No. 97-0001 (January 6, 1997).

> **AS 23.30.110. Procedure on claims.**
> . . . .
>
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response…. The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail….
>
> **AS 23.30.130. Modification of awards.**
>
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under … 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates … or decreases the compensation, or award compensation.
> . . . .
>
> **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, except as provided by this chapter. 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. . . .

AS 23.30.175. Rates of compensation.

. . . .

(b) The following rules apply to benefits payable to recipients not residing in the state at the time compensation benefits are payable:

(1) the weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated under … 23.30.215 by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state;

(2) the calculation required by (1) of this subsection does not apply if the recipient is absent from the state for medical or rehabilitation services not reasonably available in the state;

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:

. . . .

(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;

. . . .

(f) Except as provided in (g) of this section, the death benefit payable to a widow or widower shall terminate 12 years following death of the deceased employee.

(g) The provisions of (f) of this section do not apply to a widow or widower who at the time of death of the deceased worker is permanently and totally disabled. The death benefits payable to a widow or widower are not subject to reduction under (f) of this section after the widow or widower has attained the age of 52 years.

. . . .

AS 23.30.225. Social security and pension or profit sharing plan offsets.

(a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.

(b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for

an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury.

. . . .

8 AAC 45.050. Pleadings.

(a) A person may start a proceeding before the board by filing a written claim or petition.

. . . .

c) **Answers.**

(1) An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A default will not be entered for failure to answer, but, unless an answer is timely filed, statements made in the claim will be deemed admitted. The failure of a party to deny a fact alleged in a claim does not preclude the board from requiring proof of the fact.

. . . .

(3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that a lay person knows what proof will be required at the hearing and, when applicable, state:

. . . .

(H) whether the employee’s compensation rate should be adjusted under AS 23.30.175(b).

(5) The evidence presented at the hearing will be limited to those matters contained in the claim, petition, and answer, except as otherwise provided in this chapter.

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 45.060. 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. . . .

. . . .

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties.

(f) Immediately upon a 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.

(g) If after due diligence, service cannot be done personally, electronically, by facsimile, or by mail, the board will, in its discretion, find a party has been served if service was done by a method or procedure allowed by the Alaska Rules of Civil Procedure.

8 AAC 45.070. Hearings.

(a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

(b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

. . . .

> (B) On the written arguments and evidence in the board's case file regarding a claim or petition, a party must file an affidavit of readiness for hearing in accordance with (2) of this subsection requesting a hearing on the written record. If the opposing party timely files an affidavit opposing a hearing on the written record, the board or designee will schedule an in-person hearing. If the opposing party does not timely file an affidavit opposing the hearing on the written record, the board will, in its discretion, decide the claim or petition based on the written record. If the board determines additional evidence or written arguments are needed to decide a claim or petition, the board will schedule an in-person hearing or will direct the parties to file additional evidence or arguments.
>
> (C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.
> . . . .
>
> (2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first….
>
> (3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

(c) To oppose a hearing, a party must file an affidavit of opposition in accordance with this subsection. If an affidavit of opposition to a hearing on a claim for compensation or medical benefits is filed in accordance with this subsection, the board or its designee will, within 30 days after the filing of the affidavit of opposition, hold a prehearing conference. In the prehearing conference the board or its designee will schedule a hearing date within 60 days or, in the discretion of the board or its designee, schedule a hearing under (a) of this section on a date stipulated by all the parties. If the affidavit of opposition is not in accordance with this subsection, and unless the parties stipulate to the contrary, the board or its designee will schedule a hearing within 60 days, and will exercise discretion in holding a prehearing conference before scheduling a hearing….
. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

> (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing.

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

8 AAC 45.095. Release of information.

(a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 14 days after service of the request, petition for a prehearing under 8 AAC 45.065.

(b) If after prehearing the board or his designee determines that information sought from the employee is not relevant to the injury that is the subject of the claim, a protective order will be issued.

(c) If after prehearing in order to release information is issued and employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the request to release was unreasonable, the board will, in his discretion, refuse to order or award compensation until the employee has signed the release.

8 AAC 45.095 refers to information which is "relevant to the injury." The use of the word "relevant" in 8 AAC 45.095 does not impose a burden on Employer to prove beforehand the information sought in its investigation is relevant to the nature and cause of Employee's injury. In many cases, the party seeking information has no way of knowing what evidence is relevant to the merits of a case until an opportunity to review it has been provided. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

The Board has long recognized it is important for employers to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims and to detect fraud. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). The Board finds the statutory duty of employers to adjust claims fairly and equitably necessarily implies a responsibility to conduct a reasonable investigation. An employer's right to develop evidence that may support a good faith controversion serves its direct

financial interest. The Board also finds employers' resistance of unmeritorious claims is an essential component to maintaining the integrity of the Alaska workers' compensation benefits system. *Hyder v. Fortson*, AWCB Decision No. 04-0185 (July 29, 2010).

> **Civ. R. 4. Process.**
> . . . .
>
> (d) **Summons - Personal Service. . . . .**
>
> (1) *Individuals.* Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein …..
> . . . .
>
> (h) **Service of Process by Mail.** In addition to other methods of service provided for by this rule, process may also be served within this state or the United States or any of its possessions by registered or certified mail, with return receipt requested, upon an individual other than an infant or an incompetent person…. Service of process by mail under this paragraph is complete when the return receipt is signed.
> . . . .
>
> **Civ. R. 5. Service and Filing of Pleadings and Other Papers.**
> . . . .
>
> (b) **Service - How Made.** …. Service upon the attorney or upon a party shall be made by delivering a copy to the … party, by mailing it to the … party's last known address …. Delivery of a copy within this rule means … leaving it at the … party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Mailing of a copy means mailing it by first class United States mail. Service by mail is complete upon mailing. Service by a commercial delivery company constitutes service by delivery and is complete upon delivery.
> . . . .

ANALYSIS

1) Was it proper to proceed with the hearing on Employer's January 16, 2014 petition to compel in Ms. Irby's absence?

Parties to workers' compensation cases are entitled to due process, which includes an opportunity for their positions to be fairly heard. AS 23.30.001(4). In this case, the record shows Ms. Irby did

not participate in the March 6, 2014 prehearing conference when Employer's petition was set for hearing. The record further shows both the hearing notices sent to Ms. Irby's address of record via regular U.S. mail, and certified U.S. mail, were returned as not deliverable and unclaimed, respectively. On April 10, 2014, Ms. Irby also did not appear for the hearing, yet the panel proceeded in her absence. Was it proper for the panel to have done so?

Service of documents in workers' compensation proceedings may be accomplished by personal delivery, facsimile, electronically or by mail. 8 AAC 45.060(b). When service is done by mail, it is deemed complete when it is deposited in the mail, with sufficient postage and properly addressed to a party at their last known address. *Id.* In this case, Ms. Irby was properly served with notice of the hearing in the form of the March 6, 2014 prehearing conference summary, as well as the two hearing notices sent to her, one via regular U.S. mail and the other via certified U.S. mail. *Id.* Service was completed upon Ms. Irby. *Id.*

The regulations additionally provide, even when service cannot be done, a party can be found to have been served so long as it was served according a procedure set forth in the Alaska Rules of Civil Procedure. 8 AAC 45.060(g). Since the Rules afford service by both regular, Civ. R. 5(b), and certified U.S. mail, Civ. R. 4(h), and since Ms. Irby was served by these methods, she is further found to have been served under 8 AAC 45.060(g), as well.

The Act is intended 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. AS 23.30.001(1). Process and procedure under the Act shall be as summary and simple as possible. AS 23.30.005(h). Here, Ms. Irby was afforded opportunities to participate in the process and for her positions to be heard. Yet, she chose not to avail herself. The regulations provide guidance on how to proceed when a party has been served with notice of a hearing and does not appear. 8 AAC 45.070(f). In descending order of priority, a panel may proceed with a hearing in a party's absence, dismiss the case without prejudice or continue the hearing. *Id.* Since it was Employer's petition that was scheduled to be heard; since it was Ms. Irby who failed to appear after being properly served; since Employee's beneficiaries have a history of not cooperating with discovery and were ordered to produce discovery early in this case; since the

record, including the process server's affidavits, suggest Ms. Irby may intentionally be refusing to participate in the current proceedings; and since Ms. Irby has violated another recent discovery order, dismissing Employer's petition or continuing the hearing would have been inappropriate, in addition to being the least preferable course of action under the regulation. AS 23.30.001(1); AS 23.30.001(4). Therefore, the decision to proceed in Ms. Irby's absence was proper. *Id.*; AS 23.30.005(h); 8 AAC 45.070(f).

2) Should Ms. Irby be compelled to comply with Employer's discovery requests?

The Act requires Employee to provide Employer with written authority to obtain information "relative" to the injury. AS 23.30.107(a). In this case, it has been determined Employee died as a result of an industrial accident in 1997. Since that date, Employer has been paying Employee's widow, Ms. Irby, survivor's benefits under AS 23.30.215. More recently, Employer has served or attempted to serve Ms. Irby with a social security release, a general medical release and interrogatories requesting information on her medical providers and any medical conditions for which she may treat. It now seeks an order compelling Ms. Irby to provide its requested discovery.

The term of art "relevant" has been used to define the statute's language "information relative to the employee's injury," and a two-step process has been used to determine the relevance of information sought. *Granus*. The first step is to identify issues in dispute. The second is to decide whether the information sought is "reasonably calculated" to lead to facts that will have a tendency to make a disputed issue more or less likely. *Id.*; *Chapman*.

The Act provides for application of a COLA adjustment to benefits paid to recipients living outside Alaska, AS 23.30.175(b)(1). The COLA does not apply only if the recipient is "absent from the state for medical or rehabilitation service not reasonably available in the state." The Act also affords employers a social security offset when benefits are also being paid under that program. AS 23.30.225. Beginning nearly ten years ago, Employer has long sought application of a COLA and social security offsets. These issues were the subjects of not less than five board decisions. Here, Employer renews its efforts. The interrogatories asking Ms. Irby about her medical providers and conditions for which she treats, and general medical release, as well as the

social security release, are directly related to long-disputed issues in this case and will allow Employer to investigate its potential entitlement to the statutory adjustments. Therefore, Employer's petition will be granted. AS 23.30.107; AS 23.30.108; *Granus*.

3) Should an order to compel include a "built-in sanction" applying a COLA to Ms. Irby's death benefit?

In this case, Employer contends this decision should custom-tailor an order with a built-in sanction allowing it to apply the COLA in the event Ms. Irby does not produce its requested discovery within a time certain. Employer's requested relief cannot be granted for two interrelated reasons. First, the Act requires a filing of an ARH before a hearing will be scheduled. AS 23.30.110(c); 8 AAC 45.070(a)-(c). Employer's February 5, 2014 ARH was on its January 16, 2014 petition to compel, not its January 16, 2014 petition seeking a COLA. Additionally, prehearing conference summaries govern issues for hearing. 8 AAC 45.070(g). In this case, the March 6, 2014 prehearing conference summary expressly indicates the issue for hearing was Employer's petition to compel, not its petition for a COLA. Therefore, Employer's petition for a COLA was not properly the subject of the hearing and its request for a custom-tailored order with a built-in sanction will be denied. *Id.*; As 23.30.110(c); 8 AAC 45.070(a)-(c).

Second, notwithstanding Ms. Irby's apparent reluctance to participate in recent proceedings, she is still, nevertheless, entitled to due process under the Act. AS 23.30.001(4). The hearing procedures set forth above constitute some of those due process rights. Incidentally, even though Employer seeks its requested relief on the basis of alleged delays in this case, it is noted Employer has not pursued the COLA and social security offset issues since 2007. Nevertheless, although Employer contends there is "no sound reason" not to fashion the remedy it requests, the procedural requirements of the Act and Ms. Irby's dues process right are thought reasons sound enough to now deny its request.

As ancillary matters, the Alaska Supreme Court has stated the workers' compensation board owes a duty to inform claimant of the "real facts" of their case and to instruct them on how to preserve their claim for benefits. *Richard*; *Bohlmann*. Therefore, under the authority of those cases, Ms. Irby is instructed as follows:

(a) The regulations require Ms. Irby to provide immediate written notice to both the Board and Employer of any change in her address of record, 8 AAC 45.060(f);

(b) In the event Ms. Irby does not comply with the order to compel set forth below within 10 days, the statute states Ms. Irby's continuing benefits are suspended by operation of law and those benefits may later be ordered forfeited, AS 23.30.108(b);

(c) Repeated discovery violations may result in sanctions, which potentially could include termination of benefits, AS 23.30.108(c); AS 23.30.130(a); 8 AAC 45.095(c);

(d) If Ms. Irby is properly served with a future discovery request and feels the information requested is not relevant to Employee's death, she must petition for a protective order within 14 days of service of the request; AS 23.30.108(a); 8 AAC 45.095(a);

(e) In the event Ms. Irby neither complies with discovery requests nor petitions for a protective order, evidence that was the subject of a discovery request may be excluded at future hearings, 8 AAC 45.054(d);

(f) Ms. Irby's failure to answer Employer's petitions may be deemed an admission of the statements in the petitions, 8 AAC 45.050(c)(1);

(g) Ms. Irby is encouraged to contact a workers' compensation technician, who can assist her in understanding board procedures and the Act's requirements. She may reach a workers' compensation technician at 907-451-2889 or toll free at 1-877-783-4980.

CONCLUSIONS OF LAW

1) Proceeding with the hearing on Employer's January 16, 2014 petition to compel in Ms. Irby's absence was proper.

2) Ms. Irby will be compelled to comply with Employer's discovery requests.

3) An order to compel will not include a built-in sanction applying a COLA to Ms. Irby's death benefit.

ORDERS

1) Employer's January 16, 2014 petition to compel is granted.

2) Ms. Irby is ordered to sign and return the social security release, the general medical release and the interrogatories requesting information on her medical providers and any medical

conditions for which she may treat, within 10 days of this decision and order. For Ms. Irby's convenience, these documents are enclosed along with this decision and order.

Dated in Fairbanks, Alaska on July 3, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

Unavailable for signature _____
Zeb Woodman, 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 EDWARD P. IRBY, employee / respondent; v. KINROSS GOLD U.S.A. INC., employer; OLD REPUBLIC INSURANCE COMPANY, insurer / petitioners; Case No. 199707138; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on July 3, 2014.

/s/_____
Darren R. Lawson, Office Assistant II