

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CONRADO GONZALES,)
)
Employee,)
Respondent,) INTERLOCUTORY
v.) DECISION AND ORDER
)
TRIDENT SEAFOODS,) AWCB Case No. 201412761
)
Employer,) AWCB Decision No. 17-0011
and)
) Filed with AWCB Anchorage, Alaska
LIBERTY INSURANCE CORPORATION,) on January 26, 2017
)
Insurer,)
Petitioners.)
_____)

Trident Seafoods' (Petitioner) December 8, 2016 petition to dismiss was heard on January 26, 2017, in Anchorage, Alaska, a date selected on January 5, 2017. Conrado Gonzales (Respondent) did not participate. Attorney Jeffrey Holloway appeared by telephone and represented Petitioner. When Respondent failed to appear at hearing, Petitioner contended the hearing should nonetheless go forward. The panel issued an oral order and the hearing on Petitioner's request to dismiss Respondent's claim proceeded. There were no witnesses. The record closed at the hearing's conclusion on January 26, 2017. This decision examines the oral order to proceed in Respondent's absence and addresses Petitioner's dismissal request on its merits.

ISSUES

Petitioner contended the division properly served Respondent with the January 26, 2017 hearing notice. Petitioner contended the hearing should proceed in Respondent's absence.

Respondent did not appear at hearing. The hearing proceeded in Respondent's absence.

1) Was the oral order to proceed with the hearing in Respondent's absence correct?

Petitioner contends Respondent "willfully and repeatedly" refused to cooperate with discovery resulting in prejudice to Petitioner. Petitioner requests an order dismissing Respondent's claim.

Respondent did not answer the petition to dismiss or otherwise participate in the hearing. His position on the petition is unknown.

2) Should Respondent's claim be dismissed for noncompliance with discovery?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) The division initially listed Respondent's mailing address as Claudia Court in Antioch, California. (First Report of Injury, August 2, 2014).
- 2) On January 4, 2016, Respondent filed a claim for temporary disability and medical costs. His claim listed a new address on O Street in Antioch. (Workers' Compensation Claim, undated).
- 3) On January 5, 2016, the division rejected and returned Respondent's claim to him at the Claudia Court address because he failed to sign the claim. (Letter, January 5, 2016).
- 4) On January 5, 2016, after sending the above-referenced rejection letter to the Claudia Court address the division changed Respondent's address in its database to his O Street Antioch location. (Change of Contact Info, January 5, 2016).
- 5) On March 29, 2016, Respondent refiled the claim, again without signing it, but included a new address in Sun Valley, California. (Workers' Compensation Claim, undated).
- 6) On March 30, 2016, the division again rejected Respondent's claim and returned it to him at the O Street address because he failed to sign the claim. Spanish-speaking division staff spoke to Respondent who has a "language barrier." (Letter; Claim Form Rejected, March 30, 2016).
- 7) English is not Respondent's first language. (Inferences drawn from the above).
- 8) On April 11, 2016, Respondent filed a signed claim otherwise identical to the claim he refiled on March 29, 2016. (Workers' Compensation Claim, undated).

- 9) On April 12, 2016, after sending Respondent the above-referenced second rejection letter to the O Street address the division changed Respondent's address in its database to the Sun Valley location. (Change of Contact Info, April 12, 2016).
- 10) Respondent's current mailing address listed in the division's database remains Sun Valley, California. (ICERS, January 23, 2017).
- 11) On May 5, 2016, Respondent and Petitioner's lawyer attended a prehearing conference telephonically. (Prehearing Conference Summary, May 6, 2016).
- 12) On May 27, 2016, Petitioner mailed a formal request for production to Respondent at his Sun Valley address. (Request for Production of Documents, Set One, May 27, 2016).
- 13) On June 16, 2016, Petitioner took Respondent's deposition. (Notice of Taking Deposition, May 13, 2016; letter, July 14, 2016; Petitioner's hearing argument).
- 14) On July 14, 2016, Petitioner sent a letter and various discovery releases by certified mail with return receipt requested and by first-class mail to Respondent at his Sun Valley address. The letter noted Respondent had previously signed and returned releases, but failed to get at least one notarized. The letter also included notice to Respondent that he had the right to file a petition for a protective order if he found the releases objectionable. (Letter, July 14, 2016).
- 15) On October 4, 2016, Petitioner filed a petition to compel discovery from Respondent. Petitioner requested an order compelling Respondent's response to its request for production and an order compelling him to sign and return discovery releases. (Petition, October 4, 2016).
- 16) On October 27, 2016, the division served a prehearing conference notice on Respondent at his Sun Valley address noticing a November 7, 2016 prehearing conference. (Prehearing Conference Notice, October 27, 2016).
- 17) On November 3, 2016, the United States Postal Service (USPS) returned the October 27, 2016 prehearing conference notice to the division. Hand-written on the envelope was, "Don't Live Here Anymore." The USPS attached a sticker to the envelope stating, "RETURN TO SENDER, ATTEMPTED-NOT KNOWN, UNABLE TO FORWARD." (Envelope, November 7, 2016).
- 18) On November 7, 2016, attorney Holloway attended the prehearing conference telephonically but Respondent did not attend. The designee called Respondent's telephone but was "unable to leave a voicemail message" for unspecified reasons. After discussing Petitioner's request to compel, the designee granted it and gave Respondent 10 days to sign and return releases and

provide requested documents. The designee advised Respondent he could appeal the designee's discovery order within 10 days. (Prehearing Conference Summary, November 7, 2016).

19) By November 7, 2016, Respondent had moved from his Sun Valley address and did not receive the November 7, 2016 discovery order. (Observations; inferences drawn from the above).

20) On December 8, 2016, Petitioner filed a petition requesting an order dismissing Respondent's claim for failing to comply with the designee's November 7, 2016 order requiring him to sign and return discovery releases and documents within 10 days and for failing to file a petition for a protective order after initially receiving the releases. (Petition, December 8, 2016).

21) On December 9, 2016, the division served another prehearing conference notice on Respondent at his Sun Valley address for a January 5, 2017 prehearing conference. (Prehearing Conference Notice, December 9, 2016).

22) On December 15, 2016, the USPS returned the December 9, 2016 prehearing conference notice to the division. Hand-written on the envelope was "Return to Sender." The USPS also attached a sticker to the envelope stating, "RETURN TO SENDER, ATTEMPTED-NOT KNOWN, UNABLE TO FORWARD." (Envelope, December 22, 2016).

23) On January 5, 2017, Petitioner's attorney attended the prehearing conference, but Respondent did not attend. The designee called his phone but was unable to leave a voicemail message for unspecified reasons. At Petitioner's request, the designee set a January 26, 2017 hearing on Petitioner's request to dismiss. The division served the prehearing conference summary on Respondent at his Sun Valley address. (Prehearing Conference Summary, January 5, 2017).

24) On January 5, 2017, the division served Respondent notice for the January 26, 2017 hearing by both first-class and certified mail with return receipt requested at his Sun Valley address. (Hearing Notice, January 5, 2017).

25) On January 15, 2017, the USPS returned the certified January 5, 2017 hearing notice to the division. Hand-written on the envelope was "Does Not Live Here." The USPS also attached a sticker to the envelope stating, "RETURN TO SENDER, ATTEMPTED-NOT KNOWN, UNABLE TO FORWARD." (Envelope, January 19, 2017).

26) On January 15, 2017, the USPS also returned the first-class January 5, 2017 hearing notice to the division. Hand-written on the envelope was "Does Not Live Here Anymore." The USPS also attached a sticker to the envelope stating, "RETURN TO SENDER, ATTEMPTED-NOT KNOWN, UNABLE TO FORWARD." (Envelope, January 19, 2017).

- 27) Respondent has not received notice, service or correspondence from the division since at least November 3, 2016, because he no longer lives at the Sun Valley address. (Inferences drawn from all the above).
- 28) Respondent has never filed a formal address change notice in this case. (ICERS).
- 29) Respondent's addresses on his serial claims were the only genesis for the division's address changes. (Change of Contact Info, January 5, 2016; Change of Contact Info, April 12, 2016).
- 30) Division staff recently called Respondent's last known phone number and it is no longer in service. He did not appear at hearing and calling him was not an option. (Official notice).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature. . . . 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 on not only direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.110. Procedure on claims. . . .

(c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. . . .

AS 23.30.107. Release of information. (a) Upon written request, an employee shall provide written authority to the employer, carrier . . . to obtain medical and rehabilitation information relative to the employee's injury. . . .

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 . . . 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 . . . the employee's rights to benefits under this chapter are suspended until the written authority is delivered.

(b) . . . At a prehearing . . . the board's designee has the authority to resolve disputes concerning the written authority. If the . . . board's designee orders delivery of the written authority and if the employee refuses to deliver it . . . after being ordered to do so, the employee's rights to benefits . . . 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 . . . determines that good cause existed for the refusal to provide the written authority.

(c) At a prehearing on discovery matters . . . the board's designee shall direct parties to sign releases or produce documents, or both. . . . If a party refuses to comply with an order by the board's designee . . . 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. . . .

8 AAC 45.060. Service. . . .

. . . .

(b) . . . 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.

. . . .

(f) Immediately upon a change of address for service, a party . . . 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.

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board. . . .

. . . .

(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.

“Refusal” means “the declination of a request or demand, or the omission to comply with some requirement of law, as a result of a positive intention to disobey.” *Black’s Law Dictionary*, Abridged Fifth Edition, (1983) at 666.

ANALYSIS

1) Was the oral order to proceed with the hearing in Respondent’s absence correct?

The division properly served Respondent with a hearing notice by certified and first-class mail at his last known address with more than 10 days’ notice. AS 23.30.110(c); 8 AAC 45.060(b). Hearings occur when they are scheduled. 8 AAC 45.070(a). When a served party does not appear at the hearing, the law provides factfinders with prioritized choices: (1) proceed in the party’s absence and after taking evidence, decide the issue; (2) dismiss the case without prejudice; or (3) adjourn, postpone or continue the hearing. 8 AAC 45.070(f). An oral order issued to proceed to hearing on Petitioner’s dismissal request in Respondent’s absence. 8 AAC 45.070(f)(1).

Respondent never expressly changed his mailing address with the division. 8 AAC 45.060(b), (f). Address changes in the division’s database resulted from an administrative assistant noticing a different address on Respondent’s pleadings. Mail returned to the division by the USPS shows why Respondent did not appear at the prehearing at which this hearing was scheduled or at the hearing -- he does not live at his last-known address any longer. *Rogers & Babler*. Though properly served in accordance with the statutes and regulations, Respondent received no notice of this hearing. Nevertheless, the onus is on Respondent to update his mailing address and he has not. In such circumstances, the first priority is to proceed with the hearing, take evidence and decide the issue. The oral order to proceed with the hearing in Respondent’s absence was correct. 8 AAC 45.070(f)(1).

2) Should Respondent’s claim be dismissed for noncompliance with discovery?

Petitioner contends Respondent “willfully and repeatedly” refused to cooperate with required discovery. AS 23.30.107(a). The facts do not support this contention. First, Respondent initially signed and returned discovery releases. He failed to get at least one release notarized. Petitioner sent him more releases with instructions to sign and return them. Second, Respondent attended his deposition. Third, returned mail from the USPS shows Respondent no longer lives at his last-

known address. He did not receive the prehearing conference notice or attend the prehearing at which the designee ordered him to sign and return releases and provide other discovery within 10 days or face possible consequences. Similarly, because he had moved Respondent did not receive the prehearing conference summary memorializing this order. There is no evidence Respondent knows the designee ordered him to sign and return releases or provide documents. To the contrary, returned USPS mail shows he never received the designee's discovery order.

Respondent failed to sign and return the second informational releases and did not provide Petitioner's requested documents. Respondent failed to object to Petitioner's discovery requests and did not file a petition seeking a protective order. Therefore, his "rights to benefits" under the Act "are suspended" until he delivers the written authority. AS 23.30.108(a). This is Petitioner's initial, self-executing remedy. However, there is a difference between "failing" to do something and "refusing" to do it. The statute, upon which Petitioner relies, AS 23.30.108, does not use these words interchangeably. Any further sanction under the Act requires Respondent's "refusal" to comply. AS 23.30.108(b), (c). "Refusal" in this context means "a positive intention to disobey." *Black's Law Dictionary*. Thus, "refusal" requires a volitional choice.

Benefit forfeiture requires Respondent's "refusal" to provide written authority without good cause. AS 23.30.108(b). "Appropriate sanctions in addition to . . . forfeiture," such as claim dismissal only apply if Respondent "refuses to comply with an order by the board's designee . . . concerning discovery. . . ." AS 23.30.108(c). Since Respondent never received the designee's order, it follows he could not have refused to comply with the order. The record does not disclose why Respondent has not provided the division or Petitioner with his current mailing address. Though Respondent must update his mailing address, the sanction for failing to do so is not claim dismissal. Dismissing Respondent's claim at this point would be tantamount to sanctioning him with a litigation ending order based solely on his failure to update his address. The legislature wants cases fairly heard and decided on their merits. AS 23.30.001(1), (2), (4). Since Respondent's "rights to benefits" are currently suspended, Petitioner is not prejudiced. Petitioner has not shown how it bears an unreasonable cost. AS 23.30.001(1). Dismissing Respondent's claim for his failure to provide an address change does not promote the legislature's intent.

This case is distinguishable from cases in which a party received prehearing conference summaries and hearing notices, and those cases where notices simply went unclaimed. This case also differs from those in which a party unequivocally refused to attend a hearing and no longer wanted to proceed with their claim. By contrast, Respondent participated in discovery early on by returning initial releases and participating in his deposition. The record does not disclose why Respondent failed to update his mailing address or further participate in these proceedings. However, there is no “willfulness” or “refusal” on Respondent’s part evidenced in the record. For these reasons, Respondent’s claim will not be dismissed for failure to comply with discovery.

CONCLUSIONS OF LAW

- 1) The oral order to proceed with the hearing in Respondent’s absence was correct.
- 2) Respondent’s claim will not be dismissed for noncompliance with discovery.

ORDER

Petitioner’s December 8, 2016 petition to dismiss Respondent’s claim is denied.

Dated in Anchorage, Alaska on January 26, 2017.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Pam Cline, Member

CONCURRENCE & DISSENT BY LINDA HUTCHINGS, MEMBER

The dissent concurs with the decision to proceed with the hearing in Respondent's absence. The division properly served Respondent at his last known address and he did not appear. Therefore, it was proper to proceed and decide the issue presented in the petition. 8 AAC 45.070(f)(1).

However, the dissent does not agree with the majority's decision on the petition's merits. First, Respondent initially complied with discovery and even participated in his deposition. His initial compliance indicated a desire to participate in the litigation process. It also evidenced adequate knowledge and ability to participate in this case. Second, his early participation, especially in his deposition, raises an inference he knew or should have known his active participation in litigation, including cooperation with discovery, was required. *Rogers & Babler*. However, without explanation Respondent subsequently failed to sign and return properly propounded releases and failed to produce requested documents. Third, when faced with a petition to compel, Respondent did not answer and no longer participated in his claim. Fourth, he failed to update the division and Petitioner with his current mailing address. Fifth, Respondent did not obey the designee's discovery order. Taken together, Respondent's actions or lack thereof evince his understanding that no evidence supports his claim and he was abandoning it. For whatever reason, Respondent has not fulfilled his requirements under the law and Petitioner has been unreasonably prejudiced with unreasonably increased litigation costs. AS 23.30.001(1). The dissent would dismiss Respondent's claim for refusing to comply with the designee's discovery order.

_____/s/_____
Linda Hutchings, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 Conrado Gonzales, employee / claimant v. Trident Seafoods, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201412761; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on January 26, 2017.

/s/

Vera James, Office Assistant I