ALASKA WORKERS' COMPENSATION BOARD

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

BRIAN J. NESDAHL, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201304771
SILVER BAY SEAFOODS LLC, Employer,	)	AWCB Decision No. 17-0020
and	)	Filed with AWCB Juneau, Alaska On February 15, 2017
EMPLOYERS INSURANCE OF WAUSAU, Insurer, Defendants.	)	

Silver Bay Seafoods LLC and Employers Insurance Company of Wausau's (Employer) September 29, 2016 petition for dismissal and reimbursement was heard on the record on February 7, 2017. This hearing date was selected on December 15, 2016. Attorney Adam Sadoski appeared telephonically and represented Employer. Brian Nesdahl (Employee) appeared telephonically and testified. The hearing proceeded with a two-member panel, a quorum under AS 23.30.005(f). As a preliminary issue, Employee requested a continuance to seek legal representation. The record closed at the conclusion of the hearing. This decision also addresses the preliminary issue on its merits.

ISSUES

Employee contended the hearing should be continued to allow him to seek legal counsel. Employee contended he needs an attorney to represent him because he does not understand what is going on, he has not been able to find an attorney to take his case, and he needs additional time

to retain an attorney. Employee contended the hearing should be continued because he had to work and could not participate for the entire hearing.

Employer objected to a continuance. Employer contended Employee failed to demonstrate good cause to grant a continuance. Employer contended Employee significantly and unnecessarily delayed the case and has had sufficient time to find an attorney. The board issued an oral order denying Employee's request for a continuance.

1. **Was the oral order denying Employee's request for a continuance correct?**

Employer contends Employee's claims should be dismissed for Employee's failure to attend two properly scheduled and noticed depositions, failure to attend multiple prehearing conferences, and failure to follow a board order to attend a properly noticed and scheduled deposition. Employer contends the only appropriate sanction is dismissal of Employee's claims because lesser sanctions are not sufficient to protect Employer's right to investigate and defend against Employee's claims.

Employee opposed Employer's petition to dismiss.

2. **Should Employee's claims be dismissed for failure to comply with a discovery order?**

Employer contends Employee's failure to cooperate fully with discovery has caused unnecessary delay and increased Employer's filings, costs and legal fees to secure Employee's cooperation and compliance and requests reimbursement of costs for the two depositions.

Employee's position is unknown; it is presumed he opposes Employers request for reimbursement.

3. **Should Employee be ordered to reimburse Employer for two depositions Employee failed to attend?**

FINDINGS OF FACT

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

1. On April 6, 2013, Employee reported sustaining a low and mid-back injury while working on March 29, 2013. (First Report of Occupational Injury, April 6, 2013).

2. On September 21, 2013, Employee was seen by Joshua Moss, M.D. for an employer's medical evaluation (EME). Dr. Moss opined Employee was medically stable and no further treatment was necessary regarding the work injury. (Dr. Moss, EME Report, September 21, 2013).

3. On September 27, 2013, Employer filed a controversion denying temporary total disability (TTD), temporary partial disability (TPD), reemployment benefits, permanent partial impairment (PPI) and medical costs based on the September 21, 2013 EME report. (Controversion, September 27, 2013).

4. On March 17, 2014, Employed filed a claim for TTD, medical costs, and unfair or frivolous controversion for a work injury to his thoracic and lumbar spine and bilateral legs. (Claim, March 17, 2014).

5. On April 22, 2014, Employer filed a controversion denying TTD and medical costs based on the September 21, 2013 EME report. (Controversion, April 22, 2014).

6. On April 22, 2014, Employer filed an answer to Employee's claim denying TTD from September 21, 2013 forward and unfair and frivolous controversion. (Answer, April 22, 2014).

7. On May 13, 2014, Employee and Employee attended a prehearing conference. The prehearing conference summary stated:

> Employee was advised he is to contact parties if his contact information changes.
>
> Employee indicated he would like to obtain the services of an attorney for assistance. The board designee will provide Employee with a list of attorneys with this prehearing conference summary. Employer also informed Employee that Thomas M. Geisness, [address omitted], is a Seattle workers' compensation attorney who may be available to assist him. Should Employee wish to retain an attorney and the attorney agrees to take Employee's case, Alaska workers' compensation statutes and regulations provide for the payment of Employee's attorney if Employee prevails at hearing. If Employee does not prevail at hearing, the attorney is precluded by regulation from charging more than $300 total for representation of Employee. Most attorneys on the board's list do not charge an initial consultation fee or waive the fee if employees are unable to pay.

(Prehearing Conference Summary, May 13, 2014).

8. On May 21, 2014, Employer mailed Employee a set of releases by certified mail to his address of record along with a letter stating:

> Under AS 23.30.107(a), an employee must provide written authority, releasing medical and rehabilitation information relating to the injury. You are obligated to sign the releases and return them to our office within 14 days from the date of this letter, which constitutes service.
>
> If you find the releases objectionable, you may seek protection from the Alaska Workers' Compensation Board by filing a Petition for a Protective Order within 14 days from the date of this letter. You may also request a prehearing conference within 14 days following service of this letter. See 8 AAC 45.095. (Employer letter, May 21, 2016).

9. On May 27, 2014, the certified mail containing the May 21, 2014 letter and releases was signed for by Alisa Kitchens. (Certified Mail Return Receipt, May 27, 2014).

10. On August 12, 2014, Employer filed a controversion based on Employee's failure to return signed releases or a petition for a protective order. (Controversion, August 12, 2014).

11. On August 12, 2014, Employer filed a petition to compel Employee to sign the releases and requested a board to order Employee to sign the releases or dismiss Employee's claim. (Petition, August 12, 2014).

12. On September 21, 2015, Employee filed a claim dated April 1, 2015 for permanent total disability (PTD) from March 29, 2013 to the present, medical costs, unfair and frivolous controversion. (Claim, April 1, 2015).

13. On October 6, 2015, Employer filed a petition to compel Employee to sign and return discovery releases and requested a board to order Employee to sign the releases or dismiss Employee's claim. (Petition, October 6, 2015).

14. On October 8, 2015, Employer filed an amended controversion continuing to rely on its defenses in its prior controversion notices and denying PTD and unfair and frivolous controversion. (Amended Controversion, October 8, 2015).

15. On October 8, 2015, Employer filed an answer continuing to rely on its defenses in its prior controversion notices and denying PTD and unfair and frivolous controversion. (Answer, October 8, 2015).

16. On November 12, 2015, Employer and Employee attended a prehearing conference. Employee updated his address to Newport, WA. Employee contended he did not receive the releases Employer mailed him and his sister-in law signed for the releases. After reviewing the releases and determining the releases were likely to produce relevant evidence relative to Employee's injury, the board designee ordered Employee to sign and return the discovery

releases to Employer. Employee was advised he is responsible for notifying the board and parties of any changes in address or other contact information. (Prehearing Conference Summary, November 12, 2015).

17. On November 13, 2015, the division served Employee the notice for the December 17, 2015 prehearing conference by first class mail to Employee's address of record; it was not returned. (Prehearing Conference Notice, November 13, 2015; Record).

18. On November 24, 2015, Employer filed an affidavit of readiness for hearing on the October 6, 2015 petition. (ARH, November 24, 2015).

19. On December 17, 2015, Employer attended a prehearing conference; Employee did not. The board designee noted Employer withdrew the petition to compel and ARH as Employee returned the signed discovery releases. Employee was again advised he is responsible for notifying the board and parties of any changes in address or other contact information. (Prehearing Conference Summary, December 17, 2015).

20. On January 15, 2016, Employer filed a notice of taking deposition which stated Employee's deposition was scheduled on March 24, 2016 at 1:00 p.m. (Pacific Time Zone) and provided the specific location in Spokane, Washington. Employer served this notice at Employee's address of record. (Notice of Taking Deposition, January 15, 2016).

21. On March 24, 2016, Employer appeared for Employee's deposition; Employee failed to appear. Employer incurred $3,623.16 in fees and costs for scheduling, preparing, traveling to and from and attending the deposition. (Employer Exhibit 18).

22. On March 30, 2016, Employer filed a petition to compel Employee to attend his deposition or to dismiss Employee's claim and reimburse Employer for costs associated with out of state deposition. (Petition, March 30, 2016).

23. On April 25, 2016, Employer filed an ARH on the March 30, 2016 petition. (ARH, April 25, 2016).

24. On May 9, 2016, the division served Employee the notice for the May 26, 2016 prehearing conference by first class mail to Employee's address of record; it was not returned. (Prehearing Conference Notice, May 9, 2016; Record).

25. On May 26, 2016, Employer attended a prehearing conference; Employee did not. The prehearing conference summary stated:

> Pursuant to 8 AAC 45.060(f), a party is responsible for notifying the board and parties of any changes in address or other contact information. The Employee shall immediately contact the Board and inform it, along with the Employer's counsel, when he changes any of his contact information.
>
> 8 AAC 45.054(a) states, "The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure." The Designee is required by 8 AAC 45.065(a)(10) to "exercise discretion in in making determinations" on discovery requests. AS 23.30.108(c) provides in part that, "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 Designee used her discretion to partially grant Employer's March 30, 2016 "Petition to Compel Employee to Undergo Deposition" and orders Employee to attend a properly noticed and scheduled deposition or face sanctions to be determined by the Board at a hearing should he fail to comply.
>
> A petition for reconsideration of a board designee's discovery order under AS 23.30.108 must set out the specific grounds for reconsideration and be filed with the board in accordance with 8 AAC 45.050 no later than 10 days after the date of service of the prehearing summary and discovery order from which reconsideration is sought. The board designee's power to order reconsideration expires 20 days after the date of service of the prehearing summary and discovery order from which reconsideration is sought. If no action is taken on the petition for reconsideration during the time allowed for ordering reconsideration, the petition is considered denied. If a petition for reconsideration was timely filed, a petition to appeal the board designee's discovery order under 8 AAC 45.065(h) must be filed no later than 10 days after service of the reconsideration decision or the date the reconsideration request is considered denied in the absence of any action on the reconsideration request, whichever is earlier.

(Prehearing Conference Summary, May 26, 2016).

26. On May 27, 2016, the division served Employee the notice for the June 23, 2016 prehearing conference and the May 26, 2016 prehearing conference summary by first class mail to Employee's address of record; it was not returned. (Prehearing Conference Notice, May 27, 2016; Record).

27. On June 8, 2016, Employer filed a notice of taking deposition which stated Employee's deposition was scheduled on August 11, 2016 at 1:00 p.m. (Pacific Time Zone) and provided the specific location in Spokane, WA. Employer served this notice at Employee's address of record. (Notice of Taking Deposition, June 8, 2016).

28. On June 23, 2016, Employer attended a prehearing conference; Employee did not. The prehearing conference summary stated:

> Pursuant to 8 AAC 45.060(f), a party is responsible for notifying the board and parties of any changes in address or other contact information. The Employee shall immediately contact the Board and inform it, along with the Employer's counsel, when he changes any of his contact information.
>
> **Employee is reminded** that he was ordered during the prehearing conference on May 26, 2016 to attend a properly noticed and scheduled deposition or face sanctions to be determined by the Board at a hearing should he fail to comply.

(Prehearing Conference Summary, June 13, 2016).

29. On August 11, 2016, Employer appeared for Employee's deposition; Employee did not appear. After waiting for thirty minutes, Employer ended the deposition. Employer incurred $5,173.71 in fees and costs for scheduling, preparing, traveling to and from and attending the deposition. (Affidavit of Filing, February 1, 2017; Employer Exhibit 25).

30. On September 29, 2016, Employer filed a petition to dismiss Employee's claims for failure to attend a board ordered deposition and sought reimbursement for costs associated with Employee's failure to attend two properly scheduled and noticed depositions. (Petition, September 26, 2016).

31. On October 24, 2016, Employer filed an ARH on the petition dated September 29, 2016. (ARH, October 24, 2016).

32. On November 30, 2016, the division served Employee the notice for the December 15, 2016 prehearing conference by first class mail to Employee's address of record; it was not returned. (Prehearing Conference Notice, November 30, 2016; Record).

33. On December 15, 2016, Employer attended a prehearing conference; Employee did not. The prehearing conference summary states:

> Employee did not call in for the prehearing conference. The board designee attempted to contact Employee regarding this prehearing conference at the telephone number in the board's file (509) 808-XXXX and was told by the person that answered Employee was no longer available at that telephone number and was provided another contact number (360) 214-XXXX. The designee attempted to contact Employee at the new contact number twice but there was no answer and the telephone mailbox was not set up. Pursuant to 8 AAC 45.060(f), a party is responsible for notifying the board and parties of any changes in address or other contact information.

> A hearing on Employer's Petition to dismiss dated 09/29/16 was scheduled on February 7, 2017.

(Prehearing Conference Summary, December 15, 2016).

34. On December 15, 2016, Employee called the division after the prehearing conference ended. The following information regarding the call was entered:

> Moments after Employer and the designee terminated the prehearing conference, Employee called the division and updated his address to [ ] Sedro Woolley, WA and his contact number to (360) 214-XXXX. Employee was informed a hearing was scheduled on Employer's petition to dismiss on 2/7/16.

(ICERS Event Entry, December 15, 2016).

35. On December 16, 2016, the division served Employee with the prehearing conference summary and February 7, 2017 hearing notice by certified mail to the new address he provided on December 15, 2016 and it was delivered on December 22, 2016. (Hearing Notice, December 16, 2017; copy of certified mail envelope; USPS tracking 9171082133393756081083).

36. On February 6, 2017, a division workers' compensation technician attempted to telephone Employee at (360) 214-XXXX to confirm Employee's participation in the February 7, 2017 hearing. Employee did not answer and there was no voicemail option. (ICERS Event Entry, February 6, 2017).

37. On February 7, 2017, Employee called the division and left a message asking to reschedule his hearing today. He stated he had no telephone and asked if we could call (509) 808-XXXX. The caller ID indicated Employee called from (360) 610-XXXX when he left the message. (ICERS Event Entry, February 7, 2017).

38. At hearing on February 7, 2017, the designated chair attempted to contact Employee by telephone at his last telephone number of record, (360) 214-XXXX, but received a message stating the wireless customer was not available and there was no option to leave a voicemail. The designated chair attempted to contact Employee at his previous telephone number, (509) 808-XXXX, but there was no answer and the voicemail box was full. (Record).

39. Employer requested to proceed with the hearing in Employee's absence. (*Id*.).

40. After receiving Employee's February 7, 2017 message, the designated chair successfully contacted Employee by calling the telephone number shown on the caller ID from Employee's earlier call. (*Id*.).

41. At hearing on February 7, 2017, the designated chair explained to Employee the hearing had begun, he was on the record in the hearing and explained the issue at the hearing was Employer's petition to dismiss for failure to attend two depositions. The chair asked Employee to explain why he requested a continuance or rescheduling of the hearing. (*Id*.).

42. At hearing, Employee requested a continuance to seek an attorney. Employee testified he needs an attorney to represent him as he does not understand what is happening and he has not been successful in finding an attorney willing to take his case. Employee also requested a continuance because he was at work, he did not have his own telephone and would not be able to participate in the remainder of the hearing if his request for a continuance was not granted. Employee testified he received the hearing notice and December 16, 2016 prehearing conference summary. Employee stated he does not have a current telephone number, his previous telephone number is best telephone number to try to contact him, and he was using his friend's telephone to participate in the hearing. Employee stated his current mailing address is the Sedro Woolley, Washington address, the Newport, Washington address is his father's house. Employee stated he disagrees with the petition to dismiss and he tried to call Employer's attorney and left several messages. (Employee).

43. Employer opposed a continuance and requested the hearing continue in Employee's absence. Employer stated Employee had not updated his contact information with Employer and Employer attempted to contact Employee at the last telephone number and address Employer had from Employee. (Record).

44. After deliberation, the panel issued an oral order denying the continuance and ordering the hearing to proceed should Employee end his participation in the hearing. (Record).

45. Employee stated he had to get back to work and was unable to participate further in the hearing; and he terminated the call. (Employee; Record).

46. Employee is not currently receiving any benefits. (Record).

47. The division never received any returned mail sent to Employee at his addresses of record. (*Id*.).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the Legislature and Construction of Chapter.
It is the intent of the legislature that

> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . . .
>
> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
> (h) … Process and procedure under this chapter shall be as summary and simple as possible. . . .

The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). "[T]he ultimate social philosophy behind compensation liability" is to resolve work-related injuries "in the most efficient, most dignified, and most certain form." *Gordon v. Burgess Construction Co.*, 425 P.2d 602, 604 (Alaska 1967).

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

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

> **8 AAC 45.074. Continuances and cancellations.**
> . . . .

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

(1) good cause exists only when

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

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

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

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

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

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

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

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

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

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

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

hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

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

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

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

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

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). . . .
. . . .

(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.

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. . . .

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.
. . .

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

AS 23.30.108. Prehearings On Discovery Matters; Objections to Requests For Release of Information; Sanctions For Noncompliance.
. . . .

(c) . . . . 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. . . .

8 AAC 45.065. Prehearings.
(a) . . . At the prehearing, the board or designee will exercise discretion in making determinations on

. . . .

(10) discovery requests;
. . . .

> **AS 23.30.115. Attendance and Fees of Witnesses**
> (a). . . the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. . . .
>
> **8 AAC 45.054. Discovery.**
> (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure.
> . . .
> . . . .
>
> (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.
>
> **Alaska Rule of Civil Procedure 30. Depositions Upon Oral Examination.**
> (a) When Depositions May be Taken; When Leave is Required.
>
> > (1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court…
>
> (b) Notice of Examination: General Requirements; . . . .
>
> > (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined…

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 detect any possible fraud. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Employers have a constitutional right to defend against claims. *Rambo v. VECO, Inc.*, AWCB Decision No. 14-0107 (August 5, 2014) at 8 (citing *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), at 6 which cited Alaska Const., Art. I Sec. 7).

AS 23.30.180(c) gives the board designee, frequently a prehearing officer, both the authority and responsibility to decide discovery issues at the prehearing conference level, with the right of both parties to seek board review. *Smith v. CSK Auto, Inc.*, AWCAC Decision No. 002 (January 27, 2006). Although the first sentence of that subsection specifically refers to "releases" and "written documents," the subsection repeatedly uses the broader term "discovery dispute" as the subject

matter of the prehearing conference. In conjunction with 8 AAC 45.065(a)(10), which authorizes a prehearing officer to make determinations on discovery requests, AS 23.30.108 is construed to apply to the general subject of discovery, including depositions. *See, e.g., Herrera v. Trident Seafood Corp.*, AWCB Decision No. 14-0008 (January 21, 2014); *Morgan v. Reliable Transfer Corp.*, AWCB Decision No. 12-0157 (September 12, 2012).

The law has long favored giving a party his "day in court," *e.g. Sandstrom & Sons, Inc. v. State of Alaska,* 843 P.2d 645 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits, AS 23.30.001(2). AS 23.30.108(c) and AS 23.30.135(a) allow for claim dismissal if an employee willfully refuses to comply with a board designee discovery order, although this sanction "is disfavored in all but the most egregious circumstances." *McKenzie v. Assets, Inc.*, AWCB Decision No. 08-0109 (June 11, 2008). 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).

Exercising the extreme, dismissal sanction has been reversed as an abuse of discretion where the board failed to consider and explain why a sanction short of dismissal would be inadequate to protect the parties' interests. *Erpelding v. R&M Consultants, Inc.*, Case No. 3AN-05-12979 CI (Alaska Superior Ct., April 26, 2007), *reversing Erpelding v. R&M Consultants, Inc.*, AWCB

Decision No. 05-0252 (October 3, 2006). "While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless 'the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal.'" *Hughes v. Bobich*, 875 P.2d 749, 753 (Alaska 1994). "A conclusory rejection of all sanctions short of dismissing an action does not suffice as a reasonable exploration of meaningful alternatives." *Denardo v. ABC Inc. RV Motorhomes*, 51 P.3d 919, 926 (Alaska 2002).

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 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).

> **Alaska Rule of Civil Procedure 37. Failure to Make Disclosures or Cooperate in Discovery: Sanctions.** . .
> . . .
>
> (b) Failure to Comply With Order.
> . . .
>
> (2) *Sanctions By Court in Which Action is Pending*. . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> (3) *Standard for Imposition of Sanctions*. Prior to making an order under section[] . . . (C) of subparagraph (b)(2) the court shall consider
>
> (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
>
> (B) the prejudice to the opposing party;

> (C) the relationship between the information the party failed to disclose and the proposed sanction;
>
> (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
>
> (E) other factors deemed appropriate by the court or required by law.

The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

. . . .

AS 23.30.095. Medical treatments, services, and examinations.

. . . .

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . .

8 AAC 45.090. Additional examination.

. . . .

(g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section,

> (1) the employer will pay the physician's fee, if any, for the missed examination; and
>
> (2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds

> (A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or
>
> (B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

AS 23.30.155. Payment of compensation.

. . . .

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.

. . . .

(b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained.

ANALYSIS

1. Was the oral order denying Employee's request for a continuance correct?

Continuances are not favored by the board and will not be routinely granted. 8 AAC 45.074(b). Continuances are only granted for good cause as defined under 8 AAC 45.074(b)(1)(A)-(N). Employee did not demonstrate his situation fit into any of the limited grounds for good cause. Employee's inability to retain an attorney is not necessarily good cause to grant a continuance. The grounds for good cause related to an absent legal representative do not apply because an attorney never entered an appearance on Employee's behalf. 8 AAC 45.074(b)(1)(B)-(D). Employee did not demonstrate how irreparable harm may come from proceeding with the February 7, 2017 hearing without legal representation because Employee did not demonstrate due diligence in attempting to secure representation. 8 AAC 45.074(b)(1)(N). Employee was

informed of his right to seek an attorney and was provided the list of attorneys and the name and contact information of a workers' compensation attorney in Seattle during his first prehearing conference on May 13, 2014, over two years and eight months prior to the February 7, 2017 hearing. Employee received notice of the hearing over one month prior to the February 7, 2017 hearing date. It was Employee's responsibility to secure legal representation; he should have exercised greater diligence to find an attorney in a timely manner. Employee did not demonstrate how irreparable harm may come from representing himself. 8 AAC 45.074(b)(1)(N). Employee requested a continuance and provided arguments supporting his request. Employee had also filed two claims and attended two prehearing conferences without legal representation.

Employee's inability to participate in the remainder of the hearing is not necessarily good cause to grant a continuance. In fact, when a party is served with hearing notice and is not present at hearing, the first priority is to proceed with the hearing, take evidence and decide the issue. 8 AAC 45.070(f)(1). Employee was served with and received the hearing notice and was actually present at the hearing. AS 23.30.110(c); 8 AAC 45.060(b); 8 AAC 45.060(f). Employee inability to participate in the remainder of the hearing was not because of an unintended and unavoidable court appearance nor was it because he was ill or deceased. 8 AAC 45.074(b)(1)(B)-(C). Employee's absence from the remainder of the hearing was also not unexpected. 8 AAC 45.074(b)(1)(D). Employee received notice of the hearing over one month prior to the February 7, 2017 hearing date. Employee had adequate time to file a petition to seek a continuance or to contact the division for assistance regarding his inability to attend due to his work schedule prior to the hearing. There is no evidence in the record to demonstrate a satisfactory reason for failing to do so.

Employee did not demonstrate how irreparable harm may come from proceeding with the remainder of the February 7, 2017 hearing without his participation because Employee did not demonstrate due diligence. 8 AAC 45.074(b)(1)(N). Employee failed to attend the December 15, 2016 prehearing conference when the hearing date was set and failed to file a petition seeking a continuance once the hearing date was set. It was Employee's responsibility to participate in the entire February 7, 2017 hearing; he should have exercised greater diligence to

ensure he was available to participate. Furthermore, allowing a continuance in this situation would frustrate the intent of the legislature for quick, efficient, fair, and predictable delivery benefits to Employee, should he be entitled to benefits, at a reasonable cost to Employer. AS 23.30.001(1). Employee did not file a petition seeking a continuance before Employer's attorney prepared for the hearing and Employee failed to participate in proceedings and prosecute his claims for over one year.

Lastly, in the event Employee is dissatisfied with this decision, he has a right to seek prompt appellate review by filing a "petition for review" with the Alaska Workers' Compensation Appeals Commission. The commission, in its discretion, can remedy any errors or infirmities in this decision and can prevent any perceived "irreparable harm." This further protects his due process rights. The oral order denying Employee's request for a continuance was correct.

2. Should Employee's claims be dismissed for failure to comply with a discovery order?

A petition to dismiss requires balancing the strong preference for Employee's "day in court" against Employer's need to investigate and defend against claims. Dismissal should only be imposed in extreme circumstances, and even then, only if a party's failure to comply with discovery has been willful and lesser sanctions are insufficient to protect the rights of the adverse party. *Rogers & Babler*; *Hughes*; *Denardo*; *Erperling*. Employee willfully failed to cooperate with discovery and refused to comply with a discovery order. First, Employee failed to attend a properly scheduled and noticed deposition on March 24, 2016. Second, Employee failed to attend another properly scheduled and noticed deposition on August 11, 2016 after the May 23, 2016 discovery order compelling him to attend. He offered no reason or excuse for his failure to attend. Employee was warned twice he may face sanctions for failure to comply, including possible dismissal of his claims, in the May 26, 2016 and June 23, 2016 prehearing conference summaries. There is no evidence in the record to justify Employee's failure to attend the depositions. Employee never filed a petition for a protective order or a petition for reconsideration of the discovery order. Employee also failed to attend four properly noticed prehearing conferences, of which three pertained to Employee's deposition, and had not

participated in this case for over a year. Based on these facts, Employee willfully failed to cooperate with discovery and refused to comply with a discovery order. *Rogers & Babler*.

Employee filed two claims seeking medical benefits, TTD, PTD and unfair or frivolous controversion. Employer sought to gather evidence in Employee's deposition to assist Employer in investigating and defending against Employee's claims. Discovery depositions of a party are an important part of the discovery process because it allows a party to obtain evidence to prosecute or defend against a claim. *Granus*. Employer has a right to depose Employee for discovery. AS 23.30.115; 8 AAC 45.054; *Granus*.

Employer incurred $8,796.87 in costs for the two depositions Employee failed to attend. Employee is not currently receiving any benefits. The lesser sanctions of benefit forfeiture and exclusion of the evidence sought at hearing are inadequate to protect Employer's right to quick, efficient, and fair delivery of benefits, if Employee is entitled to benefits, at a reasonable cost to Employer and for process and procedure to be as summary and simple as possible. AS 23.30.108(c); 8 AAC 45.054(d); AS 23.30.001(1); AS 23.30.005(h). Employee's willful failure to cooperate with discovery and refusal to comply with the discovery order prejudiced Employer's right to fully investigate and defend against Employee's claims and forced Employer to incur unreasonable costs related to the unattended depositions and prehearing conferences addressing discovery.

Another alternative would be to order Employee a second time to participate in an additional deposition. However, this is an insufficient remedy as Employee already demonstrated a clear failure to cooperate with discovery when he failed to attend two properly noticed and scheduled depositions with no justification; he failed to follow a previous discovery order despite a reminder of the discovery order at the June 23, 2016 prehearing conference and two warnings of possible sanctions for failure to comply; he failed to attend three prehearing conferences related to his failure to cooperate with his deposition; he failed to contact the board and Employer for his failure to comply with a board order until a hearing on sanctions was imminent; and he failed to fully participate in the February 7, 2017 hearing regarding his failure to cooperate with discovery

without good cause. Employee's March 17, 2014 and September 21, 2015 claims will be dismissed.

3. Should Employee be ordered to reimburse Employer for two depositions Employee failed to attend?

Employer argued Employee should be ordered to reimburse Employer for the costs of the two depositions Employee failed to attend because the Workers' Compensation Act (the Act) provides means for reimbursement of costs when Employee fails to comply with an order to attend an examination by a physician without good cause, and like an examination by a physician, depositions are indispensable means of obtaining information to investigate and defend against claims. AS 23.30.095(e); 8 AAC 45.090(g).

However, the Act does not include a statutory provision or regulation regarding reimbursement for depositions when a party fails to appear. The Act includes only two circumstances when an employer may receive reimbursement from an employee: (1) when advance payments or overpayments of compensation have been made, or (2) when an employee obtains benefits by fraudulent or misleading acts. AS 23.30.155(j); AS 23.30.250(b); *Rogers & Babler*. Because 8 AAC 45.054(a) provides depositions may be taken in accordance with the Alaska Rules of Civil Procedure, it could be argued the Act permits an order directing a party to reimburse reasonable expenses for an unjustifiable failure to attend a deposition under Alaska Rule of Civil Procedure 37(b)(2). 8 AAC 45.054(a) provides only the process in which depositions are to be taken and the Act clearly specifies the sanctions for refusal to comply with a discovery order are forfeiture of benefits, dismissal of the party's claim, petition or defense, and exclusion of the evidence sought at hearing. AS 23.30.108(c); 8 AAC 45.054(d). Employer's request for reimbursement for costs incurred for the two depositions Employee failed to attend is denied.

CONCLUSIONS OF LAW

1. The oral order denying Employee's request for a continuance was correct.
2. Employee's March 17, 2014 and September 21, 2015 claims should be dismissed for failure to comply with a discovery order.

3. Employee should not be ordered to reimburse Employer for costs incurred for two depositions Employee failed to attend.

ORDER

1. Employer's September 29, 2016 petition is granted in part and denied in part.
2. Employee's March 17, 2014 and September 21, 2015 claims are dismissed.
3. Employer's request for reimbursement for costs incurred for two depositions is denied.

Dated in Juneau, Alaska on February 15, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley Austin, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of BRIAN J NESDAHL, employee / claimant; v. SILVER BAY SEAFOODS LLC, employer; EMPLOYERS INSURANCE OF WAUSAU, insurer / defendants; Case No. 201304771; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 15, 2017.

/s/ _____
Dani Byers, Workers' Compensation Technician