ALASKA WORKERS' COMPENSATION BOARD

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

JONATHAN B. NUNLEY, Employee, Claimant, v. ALPINE SERVICES, Employer, and LIBERTY NORTHWEST INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201414166 AWCB Decision No. 15-0138 Filed with AWCB Anchorage, Alaska on October 20, 2015

Alpine Services and Liberty Northwest Insurance Company's (Employer) June 17, 2015 petition to dismiss Jonathan B. Nunley's (Employee) September 2, 2015 claim was heard on October 7, 2015, in Anchorage, Alaska, a date selected on August 20, 2015. Attorney Martha Tansik appeared and represented Employer. Employee did not appear and there were no witnesses. The record closed at the hearing's conclusion on October 7, 2015.

ISSUES

Employee did not appear for the October 7, 2015 hearing. The panel determined Employee was properly served notice of the hearing and, after waiting for Employee to call in, proceeded with the hearing in his absence.

1) Was the oral order to proceed with the hearing in Employee's absence proper?

Employer contends Employee's workers' compensation claim should be dismissed under AS 23.30.108(c) for failure to participate in discovery. In the alternative, Employer contends Employee should be given 10 days to contact Employer's counsel to schedule a deposition; if Employee does not do so, his claim should be automatically dismissed.

Employee's position is unknown as he failed to reply to Employer's petition, submit a brief, or appear at hearing. It is assumed Employee opposes Employer's petition and dismissal of his claim.

2) Should Employee's September 2, 2015 claim be dismissed for noncompliance with discovery?

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) On May 23, 2013, Employee was injured when a coworker dropped a trailer on his foot. Employee's claim, filed September 10, 2014, indicated the body part injured was the left foot; however the emergency room chart note from the date of injury indicated Employee had injured his right foot. Employee claimed permanent partial impairment (PPI), medical and related transportation costs, and a compensation rate adjustment. (Providence Emergency Department chart note, May 23, 2013; Workers' Compensation Claim, September 2, 2014.)

2) On October 28, 2014, Employee attended a prehearing conference telephonically. (Prehearing Conference Summary, October 28, 2014.)

3) On January 7, 2015, Employee phoned the Workers' Compensation Division (division) regarding his eligibility for reemployment benefits. This was the last time to date Employee contacted the division in any manner. (Division computer database; observation.)

4) On March 31, 2015, Employee, whose address of record is in Sterling, Alaska, failed to attend a properly noticed deposition in Kenai, Alaska. (Notice of Deposition, served March 19, 2015; Deposition Transcript, March 31, 2015.)

5) On April 1, 2015, Employer filed a petition to compel Employee's attendance at a deposition. (Petition, April 1, 2015.)

6) On June 2, 2015, Employee failed to attend a properly noticed prehearing conference. The prehearing officer attempted to contact him at his number of record and received an automated message stating the number was no longer in service. The designee then attempted to contact Employee at an alternate phone number provided by Employer's counsel, but received no answer and no voicemail. The prehearing conference summary emphasized: "**The Employee shall immediately contact the Board and inform it, along with the Employer's counsel, when he changes any of his contact information.**" The designee granted Employer's April 1, 2015 petition and stated, **"[Employee] is ordered to attend his properly noticed 6/15/15 deposition or face sanctions by the Board. Such sanctions shall be determined at hearing should [Employee] fail to comply with this order."** (Prehearing Notice, May 20, 2015; Prehearing Conference Summary, June 2, 2015, emphases original.)

7) On June 15, 2015, Employee failed to attend a properly noticed deposition in Kenai, as ordered by the prehearing officer. (Notice of Deposition, served May 18, 2015; Deposition Transcript, June 15, 2015.)

8) On June 17, 2015, Employer petitioned to dismiss Employee's claim for failure to cooperate with discovery, stating Employee had failed to contact Employer or appear at any time since the originally scheduled deposition in March 2015. (Petition, June 17, 2015.)

9) On August 20, 2015, Employee failed to attend a properly noticed prehearing conference. The prehearing officer was again unable to reach Employee at either his phone number of record or the alternate number provided by Employer's counsel. An oral hearing was set for October 7, 2015, on Employer's June 17, 2015 petition to dismiss. (Prehearing Notice, May 20, 2015; Prehearing Conference Summary, August 20, 2015.)

10) On September 8, 2015, Employee was properly served notice of the October 7, 2015 hearing by both first-class and certified mail. The return receipt for the certified mail was signed by René Nunley on September 10, 2015. To date no first-class mail sent to Employee's address of record has been returned to the division as undeliverable. (Hearing notice, September 8, 2015; certified mail return receipt, filed September 14, 2015; Division computer database; observation.)

11) At hearing on October 7, 2015, the hearing officer attempted to contact Employee at his phone number of record and received an automated message stating the number was no longer in service. The officer then attempted to contact Employee at the alternate phone number provided

by Employer's counsel, and left a voicemail instructing Employee to call the division within 10 minutes. Employee did not do so, and the panel proceeded in his absence. (Record.)

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 . . .
>
> (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.

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

The board may base its decision not only on 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 23.30.108. 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. . . .

Employers have a constitutional right to defend against liability claims. *Granus v. Fell*, AWCB Decision No. 99-0016 at 6 (January 20, 1999), citing Alaska Const., art. I sec. 7. Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Granus* at 5, citing AS 21.36.120 and 3 AAC 26.010 - 300. The board has long recognized a

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

Under AS 23.30.108(c) and 8 AAC 45.065(a)(10), discovery disputes are initially decided at the prehearing conference level by a board designee. *See, e.g., Yarborough v. Fairbanks Resource Agency, Inc*., AWCB Decision No. 01-0229 (November 15, 2001). If an employee does not comply with a board designee's order regarding discovery matters, AS 23.30.108(c) and AS 23.30.135(a) grant broad, discretionary authority for the imposition of "appropriate sanctions" including and in addition to benefits forfeiture. Another lesser sanction is found in 8 AAC 45.054(d), which authorizes the exclusion at hearing of any evidence that was the subject of a discovery request a party refused to honor. *Sullivan v. Casa Valdez Restaurant*, AWCB Decision No. 98-0296 (November 30, 1998); *McCarroll v. Catholic Community Services*, AWCB Decision No. 97-0001 (January 6, 1997).

The law has long favored giving a party his "day in court," *see, e.g., Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645, 647 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits. AS 23.30.001(2). Dismissal should only be imposed in "extreme" circumstances and even then, only if a party's failure to comply with discovery has been willful and when lesser sanctions are insufficient to protect the adverse party's rights. *Sandstrom* at 647. Since a workers' compensation claim dismissal under AS 23.30.108(c) is analogous to dismissal of a civil action under Civil Rule 37(b)(3), the factors set forth in that subsection when deciding petitions to dismiss have occasionally been applied. *Sullivan; McCarroll*.

Dismissal has been reversed as an abuse of discretion where the board failed to consider and explain why a lesser sanction would be inadequate to protect the parties' interests. *Erpelding v.*

R&M Consultants, Inc., Case No. 3AN-05-12979 CI (Alaska Superior Ct., April 26, 2007), *reversing Erpelding v. R&M Consultants, Inc.*, AWCB Decision No. 05-0252 (October 3, 2005). "While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless 'the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal."' *Hughes* v. *Bobich*, 875 P.2d 749, 753 (Alaska 1994). "A conclusory rejection of all sanctions short of dismissing an action does not suffice as a reasonable exploration of meaningful alternatives." *DeNardo v. ABC Inc. RV Motorhomes*, 51 P.3d 919, 926 (Alaska 2002).

Recognizing that dismissal is an extreme sanction, the board has given *pro se* employees 10 post-decision days to comply with a board designee's discovery order before dismissal with prejudice. *See, e.g., McKenna v. Wintergreen*, AWCB Decision No. 15-0125 (September 28, 2015), in which the employee called the board a few minutes after his hearing was concluded, indicating a desire to participate in his case; and *Herrera v. Trident Seafoods Corp.,* AWCB Decision No. 14-0008 (January 21, 2014), in which the employee was found not to have willfully failed to participate in depositions, based on her hearing testimony, and no lesser, pre-dismissal sanctions had been imposed.

> **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 in 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. . . .

> **8 AAC 45.054. Discovery**.
> (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition.
> . . .
> (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. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .

. . .

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

. . .

8 AAC 45.065. Prehearings.

(a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on

. . .

(10) discovery requests;

. . .

8 AAC 45.070. Hearings. . .

. . .

(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.

Civ. R. 37. Failure to Make Disclosure or Cooperate in Discovery.

. . .

(b) Failure to Comply with Order.

. . .

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action

> is pending may make such orders in regard to the failure as are just, and among others the following:
> . . .
>
> > (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof. . . .
> > . . .
>
> **(3) Standards for imposition of Sanctions.** Prior to making an order under sections (A), (B), or (C) of subparagraph (b)(2) the court shall consider
>
> > (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
> >
> > (B) the prejudice to the opposing party;
> >
> > (C) the relationship between the information the party failed to disclose and the proposed sanction;
> >
> > (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
> >
> > (E) other factors deemed appropriate by the court or required by law.
>
> The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.
> . . .
>
> **(d) Failure of a Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subparagraph (b)(2) of this rule. . .

ANALYSIS

1) Was the oral order to proceed with the hearing in Employee's absence proper?

Where a party does not appear at hearing, but was served with notice of the hearing, the first option in order of priority under 8 AAC 45.070(f) is to proceed with the hearing in the party's absence.

Here the August 20, 2015 prehearing conference summary informed Employee of the October 7, 2015 hearing. On September 8, 2015, he was served notice of the hearing by both first-class and certified mail. Throughout the course of this case, no first-class mail from the division to Employee was returned to the division as undeliverable. The hearing notice's certified delivery receipt was signed by René Nunley and returned to the division. There is no evidence Employee's address for service is no longer valid; in any case, as emphasized in the June 2, 2015 prehearing conference summary, he had an obligation to immediately notify the board and Employer if he changed any contact information. 8 AAC 45.060(f). On October 7, 2015, the designated chair telephoned Employee at his number of record, which had been disconnected, and also left a voicemail at an alternate number, but received no return call. Employee was properly served notice of the hearing and did not appear. The decision to proceed in his absence was correct. AS 23.30.001; AS 23.30.135(a); 8 AAC 45.070(f); *Rogers & Babler*.

2) Should Employee's September 2, 2015 claim be dismissed for noncompliance with discovery?

A petition to dismiss requires balancing the strong preference for an employee's "day in court" against an employer's need to investigate and defend against claims. AS 23.30.108(c); *Sandstrom.* Dismissal should only be imposed in extreme circumstances and even then, only if (1) a party's failure to comply with discovery has been willful; and (2) lesser sanctions are insufficient to protect the rights of the adverse party. *Id.; Hughes; Denardo; Erpelding.*

Here Employee failed to participate in two properly noticed prehearing conferences, on June 2, 2015 and August 20, 2015. He failed to attend two properly noticed depositions, on March 31, 2015 and June 15, 2015, even though a board designee had ordered him to attend the latter or face sanctions. Employee then failed to appear for the properly noticed October 7, 2015 hearing. There is no evidence Employee did not receive all mail sent to him by the division, and he has not contacted the board in any manner since January 7, 2015. Employee's repeated noncompliance was willful. AS 23.30.001; AS 23.30.135(a); Civ. R. 37(b)(3); *Sandstrom*; *Rogers & Babler.*

The law requires lesser sanctions be considered before dismissal is an appropriate remedy for noncompliance with discovery. Civ. R. 37(b)(3); *Sandstrom; Hughes; Denardo; Erpelding.*

However, Employee is not receiving any benefits and, unlike the claimants in *McKenna* and *Herrera*, has demonstrated no desire to participate in his claim for more than half a year. The lesser sanctions provided by AS 23.30.108(c) (benefits forfeiture) and 8 AAC 45.054(d) (exclusion at hearing of any evidence that was the subject of the discovery request Employee refused to honor) are inadequate to protect Employer's rights to quick, efficient and fair dispute resolution at a reasonable cost, and for process and procedure to be as summary and simple as possible. AS 23.30.001(1); AS 23.30.005(h). Employee's willful noncompliance unjustly thwarted Employer's right to fully investigate and defend against liability, and forced Employer to incur sunk costs related to the unattended depositions (including travel to Kenai), prehearing conferences and hearing. Employee's September 2, 2015 claim will be dismissed.

CONCLUSIONS OF LAW

1) The oral order to proceed with the hearing in Employee's absence was proper.

2) Employee's September 2, 2015 claim should be dismissed for noncompliance with discovery.

ORDER

Employee's September 2, 2015 claim is dismissed for noncompliance with discovery.

Dated in Anchorage, Alaska on October 20, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____

Margaret Scott, Designated Chair

_____

Michael O'Connor, Member

_____

Pamela Cline, 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 Jonathan B. Nunley, employee / claimant v. Alpine Services, employer; Liberty Mutual Insurance Co., insurer / defendants; Case No. 201414166; 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 October 20, 2015.

_____

Nenita Farmer, Office Assistant