ALASKA WORKERS' COMPENSATION BOARD

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

DORIS L. MASSENGALE-DURAN, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201305102
FIRST STUDENT, INC., Employer,	)	AWCB Decision No. 15-0151
and	)	Filed with AWCB Anchorage, Alaska on November 25, 2015
NEW HAMPSHIRE INSURANCE CO., Insurer, Defendants.	)	

First Student, Inc. and New Hampshire Insurance Co.'s (Employer) October 8, 2015 Petition to Compel discovery was heard on November 19, 2015 in Anchorage, Alaska, a date selected on October 26, 2015. Non-attorney representatives Barbara Williams and Harvey Suryan appeared and represented Doris L. Massengale-Duran (Employee). Attorney Krista M. Schwarting appeared and represented Employer. There were no witnesses. The record closed at the hearing's conclusion on November 19, 2015.

ISSUES

At hearing the parties agreed the sole scheduled issue, whether Employee should be compelled to provide information on her current employment, was moot. Employer contended it was not seeking an order, but rather (1) a finding Employee was noncooperative with discovery; and (2) official notice to Employee of the consequences of noncompliance with discovery. Employee contended she initially was hesitant to divulge information about her new employment.

However Employee agreed Employer was entitled to receive the information sought, and contended she has cooperated, and will continue to cooperate, with discovery requests relative to Employee's injury.

Should Employee be found noncooperative with discovery?

Should Employee be advised of the consequences of noncompliance with discovery?

FINDINGS OF FACT

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

1) On April 19, 2013, Employee reported she slipped and fell while working as a school bus driver, injuring multiple body parts. (Report of Occupational Injury or Illness, April 19, 2013.)

2) On March 10, 2014, Employee was found eligible for reemployment benefits. (Eligibility letter, March 10, 2014.)

3) On August 25, 2014, Rehabilitation Specialist Alizon White completed a Reemployment Benefits Plan, beginning in the Mat-Su College 2014 fall semester, to retrain Employee as an Accounting Assistant. (Reemployment Benefits Plan, August 25, 2014.)

4) On August 31, 2015, Employee's non-attorney representative notified Employer's counsel Employee was working. (Williams letter, August 31, 2015.)

5) On September 2, 2015, Employer sent Employee an informal discovery request for the following information:

1. The name and address of [Employee's] employer;
2. The date she applied for this position, as well as the date she started work;
3. The number of hours per week that she works;
4. A job description reflecting the demands of the position, preferably a formal one from the employer and
5. The hourly wage [Employee] receives for this work.

The letter did not state a date by which Employer expected a response. (Schwarting letter, September 2, 2015; observation.)

6) Employee did not petition for a protective order regarding Employee's current employment information. (ICERS computer database.)

7) On September 17, 2015, Employer emailed Employee's representative, "Do you know when you'll be able to get me the information on her work?" Employee's representative responded,

"Working on that and your discovery now." (Schwarting and Williams emails, September 17, 2015.)

8) On October 8, 2015, Employer petitioned to compel discovery of the information sought in the September 2, 2015 letter. The petition stated a response was due on October 1, 2015, but "to date one has not been received." Employer asked the board to compel Employee to produce the requested discovery "within a certain period or face denial and/or dismissal of her claim." (Petition to Compel, October 8, 2015.)

9) At a prehearing conference on October 8, 2015, Employee asked for a continuance and Employer did not object. A prehearing conference was scheduled for October 26, 2015. (Prehearing Conference Summary, October 8, 2015.)

10) On October 19, 2015, Employer wrote the board designee regarding the October 8, 2015 Prehearing Conference Summary:

> I request that the summary be amended to reflect that the employer has been requesting information on [Employee's] current work since the end of August 2015. A formal discovery request on this was sent to Ms. Williams on September 2, 2015, and this was briefly discussed at the prehearing conference since a response was overdue. I have now filed a petition to compel this information.

(Schwarting letter, October 19, 2015.)

11) At a prehearing conference on October 26, 2015, the parties discussed the October 8, 2015 Petition to Compel. The board designee did not make a discovery ruling and the parties requested a hearing date. (Prehearing Conference Summary, October 26, 2015.)

12) At hearing on November 19, 2015, the parties agreed the requested employment information was relevant and discoverable. Employer commended Employee for making a concerted effort to produce the information in recent days, culminating in an email sent at 7:29 p.m. the night before the hearing. Nonetheless, Employer contended it should not have had to wait so long, and the parties should not be at hearing. Employee contended she did not disagree with Employer's entitlement to receive the employment information, but she had hesitated because she was still in a probationary period and did not want to jeopardize her new job. Employee contended she did not anticipate any further discovery delays, including the return of (1) an employment release dated November 17, 2015; and (2) other releases, as yet unprepared, to replace those that expired October 31, 2015. (Record.)

13) Disputed issues are often resolved prior to hearing, rendering them moot. (Experience, observation.)

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of this 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.

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 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 how to pursue that right under law. *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963).

AS 23.30.005. Alaska Workers' Compensation Board.

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

AS 23.30.107. Release of information.

> (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer,

> carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury. . . .

Employers have a constitutional right to defend against claims of liability. *Granus v. Fell*, AWCB Decision No. 99-0016 (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. *Id*., citing AS 21.36.010 *et seq*.; 3 AAC 26.010 - .300. 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 fraud. *Id*., citing *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987).

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
> (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
>
> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing a party's claim, petition or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not

> presented to the board's designee, but shall determine the issue solely on the basis of the written record. . . .

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 rights of the adverse party. *Sandstrom* at 647.

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. RVs Motorhomes*, 51 P.3d 919, 926 (Alaska 2002).

Under AS 23.30.108(c), discovery disputes are initially decided at the prehearing conference level by a board designee. By operation of law under AS 23.30.108(b), an employee's noncompliance with a board-ordered discovery request automatically generates two sanctions lesser than dismissal: (1) the employee's rights to benefits are suspended until the releases are delivered; and (2) those benefits are forfeited during the period of suspension unless the board finds good cause existed for the employee's noncompliance. A third pre-dismissal 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 an employee 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).*

> **8 AAC 45.054. Discovery**. . .
> . . .
>
> (d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.
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> **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;
> . . .

ANALYSIS

Should Employee be found noncooperative with discovery?

This case is distinguishable from others in which an issue becomes moot prior to hearing, because here no proper hearing dispute ever existed. On September 2, 2015, Employer sent Employee an informal discovery request for information regarding Employee's current employment, and on October 8, 2015, Employer petitioned to compel discovery of that information. However at no point did Employee file a protective order or otherwise indicate she would not produce the information sought.

Therefore at the October 26, 2015 prehearing conference, there was no need for the board designee to determine whether the employment information was "relative" to the employee's injury and likely to lead to admissible evidence. AS 23.30.107(a); AS 23.30.108(c). The designee needed only note the parties agreed regarding discoverability and then, under the express language of AS 23.30.108(c) and the authority provided by 8 AAC 45.065(a)(10), direct Employee to produce the employment information. Following the guidance of AS 23.30.108(b), a reasonable deadline would have been 10 days hence, or November 5, 2015. Such an order would have conformed with the legislative intent for process and procedure to be as summary and simple as possible, in the service of quick, efficient, fair, predictable, and reasonably priced delivery of benefits to entitled claimants. AS 23.30.001(a); AS 23.30.005(h).

In the absence of any disagreement over discovery, it was improvident for the designee to grant the parties' request to schedule a hearing. Doing so only prolonged the discovery period; indeed employment information was still being produced on November 18, 2015, the night before the hearing. Moreover, preparing for and participating in the instant hearing was a waste of time and resources, particularly for Employer and the factfinders, and also prevented any other hearing from being scheduled during that time slot.

In summary, Employee was under no legal obligation to provide her employment information by a particular deadline. The October 8, 2015 Petition to Compel was rendered moot prior to hearing. Employee never refused to comply with an order by the board's designee or the board concerning discovery matters under AS 23.30.108(c). Employee is found to have cooperated with discovery.

Should Employee be advised of the consequences of noncompliance with discovery?

At hearing Employee stated she will continue to cooperate with discovery requests relative to her injury, including written releases. The board has a duty to fully advise claimants of "all the real facts" bearing upon their rights to compensation, and instruct them how to pursue those rights under law. *Richard.* Employee's attention is therefore drawn to the "Principles of Law" section above, particularly AS 23.30.107, AS 23.30.108, and 8 AAC 45.054, for a discussion of discovery and the consequences of any future noncompliance with it.

CONCLUSIONS OF LAW

1) Employee should not be found noncooperative with discovery.
2) Employee should be advised of the consequences of noncompliance with discovery.

ORDER

1) No order was requested and none is issued at this time.

Dated in Anchorage, Alaska on November 25, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Amy Steele, Member

Patricia Vollendorf, 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 DORIS L. MASSENGALE-DURAN, employee / claimant; v. FIRST STUDENT, INC., employer; NEW HAMPSHIRE INS. CO., insurer / defendants; Case No. 201305102; 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 November 25, 2015.

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Nenita Farmer, Office Assistant