ALASKA WORKERS' COMPENSATION BOARD

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

ESMERALDA T. AVALOS, Employee, Claimant, v. GREAT ALASKA BOWL COMPANY, Employer, and BERKSHIRE HATHAWAY HOMESTATE INSURANCE. CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201325464 AWCB Decision No. 16-0015 Filed with AWCB Fairbanks, Alaska on February 29, 2016

Great Alaska Bowl Company's June 25, 2015 petitions were heard on November 5, 2015 in Fairbanks, Alaska. This hearing date was selected on September 14, 2015. Attorney Adam Sadoski appeared and represented Great Alaska Bowl Company and Berkshire Hathaway Homestate Insurance Co. (Employer). Esmeralda T. Avalos (Employee) appeared telephonically, represented herself, and testified. No other witnesses testified. The record closed at the hearing's conclusion on November 5, 2015.

ISSUES

At the November 5, 2015 hearing, Employee requested the hearing be continued because she was not prepared. Employer opposed the continuance. Employee's request was orally denied.

1. Was the oral decision denying the requested continuance correct?

Employer contends Employee claims should be dismissed for failing to comply with discovery, particularly her failure to return a Social Security release as ordered in *Avalos v. Great Alaskan*

Bowl Company, AWCB Decision 15-0056, May 12, 2015 (*Avalos I*) and her failure to attend a deposition. Employee contends her failure to return the release was not intentional, but was due to her numerous changes in address.

2. Should Employee's claims be dismissed for failing to comply with discovery?

Alternatively, Employer contends Employee should be ordered to attend a properly noticed deposition. Employee stated she had not received notice of the deposition she missed, and was not opposed to attending a deposition.

3. Should Employee be ordered to attend a properly noticed deposition?

Employer contends Employee failed to attend a properly noticed deposition without good cause, and should be ordered to reimburse it for the cost of the deposition. Employee contends her failure to attend the deposition was not willful, but occurred because she had changed addresses and did not get the notice.

4. Should Employee be ordered to reimburse Employer the cost of the missed deposition?

FINDINGS OF FACT

All findings of fact in *Avalos I* are incorporated herein. The following facts and factual conclusions are reiterated from *Avalos I*, or are established by a preponderance of the evidence:

1) On October 24, 2013, Employee reported sustaining left hand injuries when her glove got caught in a drill press while working for Employer as a production worker. (Report of Occupational Injury or Illness, October 24, 2013).

2) On March 4, 2014, Employee filed a claim seeking permanent partial impairment (PPI) benefits, medical and related transportation costs, a reemployment eligibility evaluation, penalty and interest. She also sought a prospective determination of the compensability of future medical treatment. (Claim, March 4, 2014).

3) On March 20, 2014, Employer answered Employee's March 4, 2014 claim and admitted all benefits, but denied owing penalty and interest. (Employer's Answer, March 20, 2014).

4) On September 11, 2014, Employer controverted disability benefits on the basis of Employee's refusal of alternative employment. (Controversion Notice, September 11, 2014).

5) On October 7, 2014, Employee filed a claim seeking reinstatement of her disability benefits. The address on her claim is different that than the address on her March 4, 2014 claim. (Claim, October 7, 2014; Claim, March 4, 2014; observations).

6) On October 24, 2014, Employer sent medical, employment, workers' compensation and social security releases via regular and certified mail to Employee at the address listed on her October 7, 2014 claim. (Employer letter and releases, October 24, 2014).

7) On October 27, 2014, Employer answered and controverted Employee's October 7, 2014 claim for reinstatement of her disability benefits on the basis of Employee's refusal of alternative employment. (Employer's Answer, October 27, 2014; Controversion Notice, October 27, 2014).

8) On December 2, 2014, Employer sent medical, employment, workers' compensation and social security releases via regular and certified mail to another address Employee had recently provided. (Employer's letter, December 2, 2014).

9) On December 31, 2014, Employee updated her address of record with the Fairbanks Workers' Compensation Division office. (Employee's Notice of Change of Contact Information, December 31, 2014).

10) On December 31, 2014, the Fairbanks Workers' Compensation office sent a copy of Employee's December 31, 2014 change of contact information notice via regular mail to her updated address as a "trial run." (Returned Mail, January 8, 2015; Incident Claims and Reporting System (ICERS) event entry, January 8, 2015).

11) On January 8, 2015, the December 31, 2014 Fairbanks Workers' Compensation office's mail to Employee was returned "Attempted – Not Known, Unable to Forward." (*Id.*).

12) On January 12, 2015, Employer filed a petition to compel Employee to sign its releases. (Employer's Petition, January 8, 2015).

13) On February 5, 2015, Employer filed an affidavit of readiness for hearing (ARH) on its January 8, 2014 petition. (Employer's ARH, February 3, 2015).

14) At a February 25, 2015 prehearing conference, Employee confirmed her address was the one she provided on December 31, 2015, but stated she would be moving soon and would again update her address. The designee set Employer's January 8, 2015 petition to compel for hearing on April 30, 2015, and also ordered Employee to either sign Employer's releases, or file a petition for a protective order, within 14 days. (Prehearing Conference Summary, February 25, 2015).

15) On February 26, 2015, Employee was served via regular mail with the February 25, 2015 prehearing conference summary sent to the address that she had confirmed at the conference. The summary was not returned undelivered. (ICERS event entry, February 26, 2015; record; observations).

16) On March 1, 2015, Employer sent medical, employment, workers' compensation and social security releases via regular and certified mail to Employee at the address she provided on December 31, 2014 and February 25, 2015. (Employer letter, March 1, 2015).

17) On March 19, 2015, Employee signed Employer's medical, employment and workers' compensation releases. She did not sign Employer's social security records release, but rather drew a line through the release and wrote "not collecting" at the bottom of the release. (Releases, March 19, 2015).

18) On March 19, 2015, Employee again updated her address of record with the Fairbanks Workers' Compensation Division office. (Employee's Notice of Change of Contact Information, March 19, 2015).

19) On April 3, 2015, Employer sent a social security records release via regular and certified mail to Employee at the address she provided on March 19, 2015. (Employer letter, April 3, 2015).

20) On April 17, 2015, Employee was served via regular and certified mail with hearing notices sent to the address she provided on March 19, 2015. Neither notice was returned undelivered. (Hearing Notice, April 17, 2015; record; observations).

21) On April 27, 2015, Employer mailed Employee a notice her deposition would be taken on June 22, 2015. The notice was sent to Employee at the address she provided on March 19, 2015. (Notice of Taking of Deposition, April 27, 2015; record; observations).

22) On April 30, 2015, the hearing on Employer's January 8, 2015 petition to dismiss was held. Employee did not appear for the hearing, and she could not be reached at her telephone number of record. The hearing proceeded in her absence. (*Avalos I*).

23) On April 30, 2015 after the conclusion of the hearing, Employee telephoned the Division's Fairbanks office and left a voice mail message stating "Today was [her] day off," "I really just forgot about the appointment," and "I have pressing matters going on right now." (ICERS event entry, April 30, 2015).

24) Employer's social security release called for the release of the following information: monthly social security benefit amount, monthly supplemental security income payment amount, medical records for Employee's left hand from October 22, 2011 forward, applications for benefits, notices of award or denial, and appeals and reconsiderations. (Employer's social security release, undated).

25) *Avalos I* was issued on May 12, 2015. It explained why the information sought in the social security release was relevant and ordered Employee to sign the release. *Avalos I* also notified Employee that continued failure to cooperate in discovery could result in the dismissal of her case. (*Avalos I*). A copy of the decision was sent to Employee at the address she had provided on March 19, 2015. (ICERS event entry, May 12, 2015, copy of certified mail envelope).

26) On June 12, 2015 the hearing notice sent to Employee on April 17, 2015 was returned marked "unclaimed, unable to forward." (ICERS event entry, returned mail, June 12, 2015). Also on June 12, 2015, the copy of *Avalos I* sent to Employee on May 12, 2015 was returned marked "unclaimed." (ICERS event entry, returned mail, June 12, 2015).

27) On June 22, 2015, Employee did not appear for the scheduled deposition. (Petition, June 25, 2015). Employer incurred $2,645.50 in attorney fees for preparation and travel to and from the deposition, $678.26 in transportation costs, and $150.00 for the court reporter. Of the $2,645.50 in fees, $740.00 was for preparation for and attendance at the deposition; the balance, $1,905.50, was for time spent travelling. (Employer attorney bills).

28) On June 22, 2015, Employer filed three petitions. One petition sought the dismissal of Employee's case for failure to comply with discovery based on her failure to return the release as ordered in *Avalos I* and her failure to attend the deposition. The second petition sought an order compelling Employee to attend a deposition if her claim was not dismissed. The third petition sought reimbursement of the costs Employer incurred in connection with the June 22, 2015 deposition that Employee did not attend. (Petitions, June 22, 2015).

29) On October 23, 2015, Notice of the November 5, 2015 hearing was sent to Employee at the address she provided on March 19, 2015. (Hearing Notice, October 23, 3015). The hearing notice was not returned to the board. (Record; observations).

30) At the inception of the November 5, 2015 hearing, Employee requested a continuance. She explained that she had put her case on the back burner because of family concerns and she

could not find all of her paperwork. Employer opposed a continuance. After deliberation, Employee's request for a continuance was orally denied. (Record).

31) At the November 5, 2015 hearing, Employee testified she had not willfully failed to attend the deposition. She explained she had experienced recent turmoil in her life, including several changes in address. As a result, she had not received many items that had been mailed to her, including the social security release and the notice of deposition. She also testified that even if her claim was denied, the surgery "is going to happen" as she has other medical coverage. (Employee).

32) The designated chair at the hearing reminded Employee of her obligation to keep the board informed of her current mailing address. (Record).

33) At the conclusion of the hearing, Employee requested board staff telephone her when this decision and order issued so she could be assured of receiving it, and so she could come in person to the board's Fairbanks office to sign releases in the event she was ordered to do so. (*Id.*).

34) Employer's attorney's office is in Anchorage, Alaska. (Observation).

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;
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> (3) this chapter may not be construed by the courts in favor of a party;
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> (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).

The Alaska Rules of Civil Procedure do not apply in workers' compensation cases (AS 23.30.135), but have been looked to for guidance. In particular, Civil Rule 26(b)(1), which governs the general scope of discovery in civil actions, provides guidance on releases. *See e.g., Granus.*

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
> . . . .
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> (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 a limited time to comply with a 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 by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.
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> **AS 23.30.155. Payment of compensation.**
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> (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.
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> **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

. . . .

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

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

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

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(b) Failure to Comply with Order.

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> (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:
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> . . . .
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> (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 . . . .

. . . .

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) *Standards for imposition of Sanctions*. Prior to making an order under sections (A), (B), or (C) of subparagraph (b)(2) the court shall consider
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> (A) the nature of the violation, including the willfulness of the conduct and the materiality of the Information that the party failed to disclose;
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> (B) the prejudice to the opposing party;
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> (C) the relationship between the information the party failed to disclose and the proposed sanction;
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> (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
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> (E) other factors deemed appropriate by the court or required by law.
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> 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 decision denying the requested continuance correct?

Continuances and cancellations are not favored by the board and are granted only for good cause. 8 AAC 45.074. A continuance may be appropriate under 8 AAC 45.074(b)(1) (K) or (L) when a party seeks additional time to present evidence. In this case, however, Employee did not contend there was additional evidence to present. She asked for the continuance because she was unprepared: "she had put her case on the back burner because of family concerns and she could not find all of her paperwork." Under 8 AAC 45.074(b)(1)(N) a continuance may be appropriate if the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance. The inability to prepare for a hearing might justify a continuance under 8 AAC 45.074(b)(1)(N), but vague assertions of "family concerns" and an inability to find paperwork, are not enough to show due diligence. The oral decision denying the continuance was correct.

2. Should Employee's claims be dismissed for failing comply 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 return the social security release as ordered in *Avalos I* and failed to attend a properly noticed deposition even though *Avalos I* had warned her that continued failure to cooperate in discovery could result in the dismissal of her claim. However, Employee did not receive the copy of *Avalos I* warning her of the potential consequences of continued failure to comply. Her failure to keep Employer and the board informed of a current mailing address demonstrates a lack of diligence, but does not arise to willful conduct. At hearing, although Employee stated she may have other means to obtain the medical care she seeks, she also demonstrated a desire to continue to pursue her claim. Here, sanctions short of dismissal will be

an appropriate remedy for Employee's noncompliance. Employee's claims will not be dismissed.

At the November 5, 2015 hearing, Employee was informed of the necessity of keeping Employer and the board informed of her current mailing address. Further failure to do may well rise to willful conduct that would justify dismissal of her claims.

3. Should Employee be ordered to attend a properly noticed deposition?

Employers have a constitutional right to investigate and defend against liability claims. Employees are required to provide written authority for employers to obtain information relevant to their claims. AS 23.30.107(a). Additionally, the regulations specifically provide for depositions as a method for investigation. 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. 8 AAC 45.054(a). Employee will be ordered to sign Employer's social security release within 10 days of this decision and order, and to attend a properly noticed deposition to be held within 30 days of the date of this decision and order. Employee may, within 10 days, contact, Mr. Sadoski to discuss a mutually agreeable date for the deposition. Should Employee fail to contact Mr. Sadoski, or if the parties are unable to agree on a date, Employer may schedule the deposition at its convenience. Employee is notified that failure to attend the deposition may result in the dismissal of her claims.

4. Should Employee be ordered to reimburse Employer the cost of the missed deposition?

Depositions in workers' compensation cases are pursuant to the Alaska Rules of Civil Procedure. Rule 37(b)(2), provides that a party shall be ordered to pay reasonable expenses, including attorney fees if they unjustifiably failed to attend a deposition. On April 27, 2015, Employer sent notice of the June 22, 2015 deposition to the most recent address Employee had provided. Employee asserts that she did receive the notice of deposition because of turmoil in her life. However, the fact that certified mail sent to Employee at the same address was returned as unclaimed, is evidence that Employee did not regularly check her mail. Her failure to attend the deposition, or to timely notify Employer that she could not attend, was due to an unjustifiable

lack of diligence. Employee will be ordered to reimburse Employer the reasonable costs for the deposition. However, a significant portion of Employer's costs were due to travel. While an Employer may hire any attorney of its choosing, Employee should not have to bear the additional cost if Employer chooses an out-of-venue attorney. Reasonable costs in this instance are the attorney fees incurred in preparation and attendance at the deposition of $740.00 plus the court reporter's fee of $150.00, for a total of $890.00. Employer may withhold $890.00 from future benefits payable to Employee in accordance with AS 23.30.155(j).

CONCLUSIONS OF LAW

1. The oral decision denying the requested continuance was correct.

2. Employee's claims should not be dismissed for failing comply with discovery.

3. Employee will be ordered to sign Employer's social security release and to attend a properly noticed deposition.

4. Employee will be ordered to reimburse Employer the cost of the missed deposition.

ORDER

1. Employer's June 25, 2015 petition to dismiss Employee's claims for failure to comply with discovery is denied.

2. Employee is ordered to sign and return Employer's social security release and to attend a properly noticed deposition as set forth above. If the parties are unable to agree on a mutually convenient date, Employer may schedule the deposition at its convenience.

3. Employer may recoup $890.00 from future benefits payable to Employee in accordance with AS 23.30.155(j) to recover the reasonable costs of the deposition which Employee failed to attend.

4. The Workers' Compensation Officer in Fairbanks, Melody Kokrine, is ordered to telephone Employee and inform her of issuance of this decision and order.

Dated in Fairbanks, Alaska on February 29, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____
Robert Vollmer, Designated Chair

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Sarah Lefebvre, Member

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Jacob Howdeshell, 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 ESMERALDA T. AVALOS, employee / claimant; v. GREAT ALASKA BOWL COMPANY, employer; BERKSHIRE HATHAWAY HOMESTATE INSURANCE CO., insurer / defendants; Case No. 201325464; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 29, 2016.

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Jennifer Derosiers, Office Assistant