ALASKA WORKERS' COMPENSATION BOARD

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

JOSEPH BUTCHER,	)	
	)	
Employee,	)	INTERLOCUTORY
Claimant,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 200400422
	)	
FEDERAL EXPRESS CORPORATION,	)	AWCB Decision No. 19-0048
	)	
Self-insured Employer,	)	Filed with AWCB Anchorage, Alaska
Defendant.	)	on April 12, 2019
	)	

Federal Express Corporation's (Employer) January 24, 2019 petition to dismiss was heard on April 10, 2019, in Anchorage, Alaska, a date selected on February 28, 2019. A February 19, 2019 hearing request gave rise to this hearing. Joseph Butcher (Employee) did not participate at hearing. Attorney Rebecca Holdiman-Miller appeared and represented Employer. There were no witnesses. As a preliminary matter, Employer asked the designated chair to recuse himself, a request he refused. The remaining panel members deliberated and denied the recusal request. After further panel deliberation, and by oral order, the hearing proceeded in Employee's absence. The record closed at the hearing's conclusion on April 10, 2019.

ISSUES

Employer contended the designated chair had an unspecified conflict of interest and requested his recusal. He declined, and an oral order from remaining panel members denied the recusal request.

1) Was the oral order denying Employer's recusal request correct?

When Employee did not appear at hearing, Employer contended the hearing should proceed without him. It contended he routinely fails to participate in or appear for normal litigation events.

Employee recently filed an affidavit stating, among other things, that he was "not ready" and does not "wish to have meetings or proceedings with" Employer. He also said he "will and must secure private legal help" to sue someone for "gross negligence."

2) Was the oral order proceeding with the hearing in Employee's absence correct?

Employer contends Employee routinely ignores its discovery requests. Specifically, it contends he ignored an order to present himself for deposition, and failed twice to appear. Employer seeks an order dismissing Employee's claim filed on October 6, 2016 and his April 4, 2018 petition requesting a second independent medical evaluation (SIME).

3) Should Employee's claim and petition be dismissed at this time?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:
1) On July 18, 2005, the board approved a Compromise & Release (C&R) agreement affecting seven separate injuries Employee had while working for Employer. Employee waived all benefits including medical care in six of the seven listed cases. However, in the instant case, AWCB Case No. 200400422, the only future medical care Employee waived was chiropractic treatment effective six months from the date the board approved the C&R. The parties agreed Employee's right to claim non-chiropractic medical expenses in case 200400422 was not waived. However, the parties further agreed in case 200400422, "Future entitlement to medical benefits under the 2004 date of injury remains subject to all rights and defenses of the Alaska Workers' Compensation Act." In other words, while Employee did not waive his right to claim future, non-chiropractic medical care in case 200400422, Employer similarly did not waive its right to defend against any future claims for medical care he might make. The C&R in this case did not expressly or implicitly guarantee to *pay* Employee's "medical benefits for life." It simply left open his right to make medical claims in case 200400422 for life, subject to Employer's defenses. (C&R, July 18, 2005; experience, judgment and inferences drawn from the above).

2) No attorney has entered an appearance for Employee in this case currently. (Agency file).

3) On October 6, 2016, Employee requested permanent partial impairment and medical benefits. He stated only, "+7 All filed med -- for life!" (Workers' Compensation Claim, April 4, 1967 [sic]).

4) On October 6, 2016, Employee also filed a medical summary with no medical records attached, stating on its face, "+7 All filed med -- for life!" (Medical Summary, undated).

5) Between October 6, 2016 and April 4, 2018, Employee filed no documents with the board. (ICERS database, October 6, 2016 through April 4, 2018).

6) On April 4, 2018, Employee requested an SIME. (Petition, April 4, 2018).

7) On June 29, 2018, Employer served on Employee written questions for him to answer and return. (First Set of Interrogatories to Employee, June 29, 2018).

8) There have been nine prehearing conferences in this case since Employee's October 6, 2016 claim. Employee appeared for the first four prehearing conferences. At the second prehearing conference, the designee ordered him to sign and return releases to Employer; the designee did not advise Employee there could be sanctions for his failure to comply, possibly because he complied immediately after the conference ended. At the third prehearing conference, the designee reconsidered his prior order and required Employee to sign additional releases, but again did not tell him he could be sanctioned if he failed to comply. When Employee again refused to sign releases, at the fifth prehearing conference, which Employee did not attend, the designee ordered Employee to sign and return releases to Employer; the designee did not advise Employee there could be sanctions for his failure to comply. At the sixth prehearing conference, which Employee also did not attend, the designee scheduled a hearing for October 9, 2018, on Employer's request for an order compelling Employee to sign releases. At the seventh prehearing conference summary, which Employee attended, the designee added Employer's petition to compel interrogatory answers as an issue for hearing. At the eighth prehearing conference, which Employee did not attend, the designee ordered him to attend his deposition; the designee did not advise Employee there could be sanctions for his failure to attend. At the ninth and last prehearing conference, which Employee also failed to attend, the designee scheduled an April 10, 2019 hearing on Employer's petition to dismiss his claim. (ICER's database, Prehearing Conference Summary tab, Prehearing Conference Summary, April 25, 2017; June 21, 2017; July 19, 2017; May 3, 2018; June 26, 2018; August 7, 2018; September 20, 2018; November 21, 2018; and February 28, 2019).

9) The division properly and timely noticed Employee at his record address for each prehearing conference summarized above. (ICER's database, Prehearing Conference Notice Served tab, Prehearing Notice, April 4, 2017; May 31, 2017; July 7, 2017; April 11, 2018; May 3, 2018; July 9, 2018; August 17, 2018; October 24, 2018; and January 31, 2019).

10) On September 21, 2018, Employee visited the Anchorage division office and staff notarized various releases he signed. Employee told staff "that he will not answer any of the interrogatories unless he has an attorney and at this time he was not planning on getting one." Division staff told Employee he needed to mail the notarized documents to Employer. He declined and asked staff if she, "didn't mind doing myself." Staff sent the releases and signed interrogatories to Employer. (ICERS Walk In tab, September 21, 2018).

11) On September 24, 2018, the division returned the June 29, 2018 interrogatories to Employer, unanswered, but including, "Added Dr.'s should be updated from releases" hand-written on the first page. (*Id.*; First Set of Interrogatories to Employee, September 21, 2018).

12) On September 28, 2018, Employer noticed Employee of his obligation to attend his deposition scheduled for October 12, 2018. (Notice of Taking Videotaped Deposition, September 28, 2018).

13) On October 2, 2018, the designee canceled the October 9, 2018 hearing at Employer's request because the matter set for hearing had been resolved. (Petition, September 28, 2018).

14) Employee did not appear at the October 12, 2018 deposition. (Employer's hearing arguments).

15) On October 22, 2018, Employer requested an order compelling Employee to attend his deposition, stating he failed to appear at his last noticed deposition. (Petition, October 22, 2018).

16) On November 1, 2018, Employer sent Employee its second set of questions for his response. (Second Set of Interrogatories to Employee, November 1, 2018).

17) On November 21, 2018, the designee ordered Employee to attend his deposition. (Prehearing Conference Summary, November 21, 2018).

18) On January 21, 2019, Employer's counsel appeared for Employee's deposition. On that date, the court reporter certified the deposition was to begin at 9:00 AM, but by 9:20 AM Employee still had not appeared. (Certificate of Non-Appearance, January 21, 2019).

19) On January 24, 2019, Employer asked for an order dismissing Employee's claim for his failure to attend his two, properly noticed depositions. (Petition, January 24, 2019).

20) Employer has unnecessarily incurred attorney fees and costs filing discovery pleadings, attending prehearing conferences to obtain discovery orders, appearing at two depositions at which Employee failed to appear and preparing for and attending a hearing to dismiss Employee's claim and petition. (Experience, judgment and inferences drawn from the above).

21) On March 8, 2019, the division served a hearing notice for the April 10, 2019 hearing on all parties, including Employee at his correct address. (Hearing Notice, March 8, 2019).

22) On March 22, 2019, Employee returned the hearing notice to the division along with his attached affidavit, which states:

> I, Joseph Butcher, do here by without representation make the claim that both the Board and the Defendant are both using the legal system created by both the Employers and the Board to legally bully the true defendant of this case. . . . "Joseph Butcher." I have provided under oath for the Board and the Employer a true deposition already at witch [sic] time the Employer had promised to "Pay for Life" the need to maintain the agreed upon pain that I was unduly and unfortunately met with during my employment and on record and maintained by the board. I have been both at the office regularly to state that I am not ready nor do I wish to have meetings or proceedings with the employer or its Defendants. The medical records are both clear and while the ER is requested the Employer and the board both know that my objective is clearly to stay away from such a need all cost. If the bills are not paid because of the Independent medical examiner's decision to be prudent and objective toward the original contravention found in my favor waffling back and forth as the Dr. [sic] in my favor is now dead and as well the original office of holdings in findings of real facts already in record has closed the offices, leaving only the unethical and unreasonable denial of requested and appealed for of a follow up IME by a different other office in which this state is lacking or not made available to me. The legal bulling is true to the most gross negligence by both the board and the employer. I will and must secure private legal help at a private cost to bring this forward and may testify in any other case needing a witness to the same issue brought on by negligence both at unprecedented legal manipulation by offices within the umbrella of public helps and policies under the State of Alaska in the city of Anchorage and my need to find legal help from outside of the local state level of helps.
>
> Thank you for your attention and please refrain from making appointments for the true defendant Joseph Butcher. (Butcher affidavit, March 21, 2019).

23) The division has mailed numerous documents to Employee and has received no returned mail from the United States Postal Service sent to Employee's record address. His address is not included in this decision to protect his privacy. (Agency file).

24) The division properly served Employee with the April 10, 2019 hearing notice. (Inferences drawn from the above).

25) Employee did not call the division to ascertain the time his hearing was to begin, nor did he appear in person or telephonically at the April 10, 2019 hearing. (Observations; record).

26) At hearing on April 10, 2019, as a preliminary matter Employer asked the designated chair to recuse himself from hearing the case. When asked to describe its grounds for recusal, Employer stated it could not go into detail, citing the attorney-client privilege. Employer said the reasons for recusal had something to do with a former client of the law firm representing Employer in this case. It said the recusal request had nothing to do with Employee or Employer. (Employer's hearing arguments).

27) The designated chair stated he had no knowledge of any conflict of interest and, based on the inadequate details Employer provided, the chair refused to recuse himself. The remaining panel members deliberated in private and denied the recusal request based on Employer's inability to provide any basis for it. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> > 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

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.**
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> . . . .
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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 the party's claim, petition, or defense. . . .

Employers have a constitutional right to defend against claims. *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. *Granus* at 5. 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. 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 relevant facts. *Granus* at 14.

In *McKenzie v. Assets, Inc.*, AWCAC Decision No. 109 (May 14, 2009), the commission said, "The parties' contentions require the commission to decide whether the board abused its discretion when it dismissed McKenzie's workers' compensation claims because she refused to attend a deposition after the board ordered her to do so." (*Id.* at 1). McKenzie had a non-attorney representative and relied on her advice. The board noted the representative's advice could lead to claim dismissal because McKenzie was not complying with board discovery orders. (*Id.* at 2-3). Given the employee's refusal to appear for her deposition, the board after hearing ordered her to attend her deposition no later than a date certain. (*Id.* at 4).

McKenzie continued to resist being deposed. The board advised her on numerous occasions that continued resistance to discovery would result in claim dismissal. McKenzie's employer noticed her deposition again but she refused to attend and her representative cited McKenzie's mental incompetence without providing any documentation to support this assertion. Consequently, the employer petitioned the board to dismiss McKenzie's claims. At hearing, the employee's non-attorney representative disrupted the hearing, verbally attacked the designated chair and was generally obstructive. Relying on Civil Procedure Rule 37(b) as guidance, the board decided "outright dismissal" was the only effective sanction because the employee had ignored or staunchly resisted four prior designee or board orders; her representative disrespected the board

panel and designees in hearings and prehearing conferences; and most importantly, there were no benefits at issue that could be suspended or forfeited as a lesser sanction. (*Id.* at 6).

McKenzie appealed. On appeal, the commission decided, "[T]he board considered relevant factors that the courts use" under Rule 37(b)(3) in similar circumstances, including the nature of the employee's discovery violation, prejudice to the employer, and whether a lesser sanction would protect the employer and deter other discovery violations. The commission also defined "willfulness" in disobeying discovery orders, as described in the Alaska Supreme Court precedent, as the "conscious intent to impede discovery, and not mere delay, inability or good faith resistance." (*Id.* at 6). The commission further found the board had rendered adequate factual findings and did a "reasonable exploration of possible and meaningful alternatives to dismissal." (*Id.* at 7). By contrast, a "conclusory rejection" of other sanctions less than dismissal "does not suffice as a reasonable exploration of meaningful alternatives." (*Id.*). Although the commission found the board did not explicitly consider other sanctions, such as not allowing McKenzie to testify at hearing unless she attend a deposition, it held the board "need not . . . examine every alternative remedy." (*Id.*). The commission held the board could properly rely on McKenzie's obstructionist history in deciding on the appropriate sanction, even though only one violation, a failure to attend her deposition, remained from many previous violations. (*Id.*). The commission majority ultimately concluded the board did not abuse its discretion because McKenzie willfully and repeatedly failed to comply with its orders and her conduct was so egregious that no lesser sanction would be effective. (*Id.* at 8).

The commission chair disagreed with the majority and would not have allowed the board to apply the "death knell" and impose litigation ending sanctions for her refusal to attend her deposition. The chair reasoned the board could have fashioned "tailored, but appropriately serious" sanctions in increments directed toward correcting the sanctioned conduct. (*Id.* at 13). The chair further noted the board had punished McKenzie mainly based on her non-attorney representative's actions. The board did not directly inquire to see if McKenzie understood that what her non-attorney representative did leading to claim dismissal was something she understood and she nonetheless consented to it. Given the above, the chair would not have affirmed the board's dismissal and would have reversed and remanded for imposition of lesser sanctions. (*Id.* at 14).

The Alaska Supreme Court in *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009) considered the board's duty to advise unrepresented claimants in workers' compensation cases:

> The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants.

Bohlmann concluded, "Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . ." (*Id.* at 320).

> **AS 23.30.110. Procedure on claims.** . . .
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> (c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. . . .
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> **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. . . .
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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. . . .
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> **8 AAC 45.060. Service.** . . .
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> (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.
> . . . .
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> (e) . . . the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing. . . .
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> (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.

(g) If after due diligence, service cannot be done personally, electronically, by facsimile, or by mail, the board will, in its discretion, find a party has been served if service was done by a method or procedure allowed by the Alaska Rules of Civil Procedure.

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.

8 AAC 45.105. Code of conduct. . . .

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(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a conflict of interest that is substantial and material; or
(2) shows actual bias or prejudgment.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a personal or financial interest that is substantial and material; or
(2) shows actual bias or prejudgment.

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. . . .

. . . .

(d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board

panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

AS 44.62.330. Application of AS 44.62.330 – 44.62.630. (a) The procedure of the state boards . . . listed in this subsection . . . shall be conducted under AS 44.62.330 – 44.62.630. This procedure, including . . . conduct of hearing . . . and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards . . . listed.

. . . .

(12) Alaska Workers' Compensation board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act. . . .

AS 44.62.450. Hearings.

. . . .

(c) A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. . . .

Alaska Civil Rule 30. Depositions upon oral examination. . . .

. . . .

(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. . . .

ANALYSIS

1) Was the oral order denying Employer's recusal request correct?

At hearing, Employer asked the designated chair to recuse himself. 8 AAC 45.106(d). The Employer did not file an affidavit "stating with particularity the grounds upon which" it claimed the designated chair could not accord a fair and impartial hearing, nor did Employer disclose details supporting its request. AS 44.62.330(a)(12); AS 44.62.450(c); 8 AAC 45.105(c), (d). Employer cited the attorney-client privilege as the reason it provided no details. Absent more information,

the chair had no basis for recusal and refused the request. The remaining two panel members deliberated in private and, based on Employer's failure to provide any basis for its recusal request, denied the request. 8 AAC 45.106(d). A party seeking recusal of a panel member has the burden to show by "clear and convincing evidence," the panel member has a "substantial and material" conflict of interest or shows actual bias or prejudgment. 8 AAC 45.105(c). To recuse a panel member to avoid "impropriety or appearance of impropriety," the moving party must show by "clear and convincing evidence" the panel member has a "substantial and material" personal or financial interest or shows actual bias or prejudgment. 8 AAC 45.105(d). Since Employer provided no evidence to support its request, the panel properly applied the appropriate regulations and the oral order denying the recusal request was correct. AS 44.62.450(c).

2) Was the oral order proceeding with the hearing in Employee's absence correct?

Hearings are held at the time and place noticed. 8 AAC 45.070(a). When, as here, a party has been served with a hearing notice and does not appear, the law provides the hearing panel with prioritized choices: (1) proceed with the hearing in the party's absence and after taking evidence, decide the issue; (2) dismiss the case without prejudice, or (3) adjourn, postpone or continue the hearing. 8 AAC 45.070(f). On March 8, 2019, the division properly served Employee with notice for the April 10, 2019 hearing, at his correct address. 8 AAC 45.060(b), (f). It is known Employee received the hearing notice because he returned a copy to the division with his affidavit concerning his case attached. The division exercised due diligence by serving Employee with a formal hearing notice at his correct address, by certified mail. AS 23.30.110(c). The division provided more than 10 days' hearing notice. 8 AAC 45.060(e). The division properly served Employee with the hearing notice for the April 10, 2019 hearing. 8 AAC 45.060(g).

Employee did not appear at or call in for the hearing. After discussion and deliberation, the panel issued an oral order to proceed with the hearing on Employer's petition to dismiss in Employee's absence. 8 AAC 45.070(f)(1). As this is not the first time Employee failed to participate in a properly noticed proceeding in this case, the oral order to hold the hearing on Employer's petition in Employee's absence was, therefore, correct. *Rogers & Babler.*

3)Should Employee's claim and petition be dismissed at this time?

Employee has a pending claim he filed on October 6, 2016, seeking medical care and permanent impairment benefits and a pending April 6, 2018 petition requesting an SIME. Claims and petitions are to be decided quickly, efficiently, fairly and predictably, at a reasonable cost to employers. AS 23.30.001(1). Discovery depositions, particularly party depositions, are an important part of the claim process because they allow a party to obtain evidence with which to prosecute a claim or defend themselves against one. *Granus*. Furthermore, Employer has a statutory and regulatory right to depose Employee to obtain discovery. AS 23.30.115; 8 AAC 45.054(a); *Granus*. Simply put, Employer has a legal right to depose Employee, who filed a claim and petition against Employer.

As Employer is entitled to depose Employee so long as he has a claim pending, the designee at prehearing conference properly ordered him to attend his deposition. AS 23.30.115(a); AS 23.30.108(c); 8 AAC 45.054(a); *Granus*. It costs Employer attorney fees and costs every time it must compel Employee to comply with his basic discovery duties and when it repeatedly schedules and cancels Employee's deposition; Employer's discovery costs in this case have become unreasonable. AS 23.30.001(1); AS 23.30.108(c); *Rogers & Babler*. However, the four prehearing conferences at which a designee ordered Employee to provide discovery did not include any advice or warnings to him about potential sanctions or repercussions should he fail to comply. Employee has no attorney representing him in this case. As the Alaska Supreme Court said in *Bohlmann*, ". . . the board at a minimum should have informed Bohlmann how to preserve his claim." This decision addresses both preserving Employee's claim and petition, and dismissing them. On at least one previous occasion, when faced with a hearing to force his compliance with a discovery order, Employee relented and signed discovery releases. Perhaps if given one more chance, Employee will again relent and appear for and participate in his deposition.

Employer contends no lesser sanction than dismissal will protect it against Employee's pending claim and petition. It contends his history evidences a willful desire to ignore discovery orders. A lesser sanction could include disallowing Employee's testimony at hearing altogether and prohibiting his submission of any medical records, because he has failed to submit to his deposition and provide information Employer could use to defend itself. *McKenzie*. Such sanction, however, would still increase Employer's costs unreasonably and require an additional hearing at which Employee could

not raise the statutory presumption of compensability on his claim, for lack of his right to present any evidence, thus making the necessity for a hearing a nullity. In essence, under these circumstances such a sanction would be tantamount to a dismissal. *Rogers & Babler.*

Dismissing a party's claim is generally a last-resort sanction. *McKenzie.* However, Employee has a pending claim and petition and has effectively stymied Employer's ability to depose him and develop information relevant to its obligations under the Act. Employee's conduct is costing Employer money unnecessarily. AS 23.30.001(1). Employee filed a claim and petition against Employer, not vice versa. *Granus.* Employee's March 21, 2019 affidavit can be understood in several ways. Employee says he does not have an attorney and states he needs to hire one. This could mean he wants to delay any proceedings until he finds legal counsel. However, in September 2018, he told a division staff member he has no plans to hire an attorney to represent him in his workers' compensation claim. Rather, he considers obtaining a lawyer to sue someone for "gross negligence." His affidavit could also mean he is simply "not ready" for a hearing and needs more time to prepare. By contrast, Employee's affidavit also makes it fairly clear he does not want to participate in any legal proceedings relating to his claim or petition and asks all concerned to "please refrain from making appointments" for him, presumably including depositions. Employer agrees a deposition would obviate the need for his interrogatory answers. Employee's unreasonable failure to appear for his deposition is the discovery issue stopping this case from proceeding, and is the issue costing Employer money.

On balance, given the prehearing conference designees' failures to advise Employee about potential sanctions should he not comply with discovery orders, and given the fact he has no attorney, Employee will have one more opportunity to appear for, and participate in, his deposition or his claim filed on October 6, 2016, and his April 4, 2018 petition will be dismissed. Employee will be ordered to appear at a properly noticed deposition not later than 30 days from the date this decision and order is issued. Employer must contact him to schedule an appropriate date and time for his deposition and "shall give reasonable notice in writing" to him. Civil Rule 30(b)(1). If Employee fails or refuses to appear upon reasonable notice at a deposition noticed within the next 30 days, his claim filed on October 6, 2016, and his April 4, 2018 petition will be dismissed in a subsequent, Final Decision and Order upon Employer filing a deposition notice showing proof of service on Employee, and notice from a court reporter showing Employee's non-appearance at the

deposition. Simply appearing at a deposition but not actually answering questions will not save his claim and petition from being dismissed. He must appear at the deposition and answer all questions to the best of his ability. Employee should be prepared at his deposition to provide, for example, details about employment he has held since his 2005 C&R, medical providers he has seen since then, other accidents or injuries he may have had in the interim, details about medical treatment he requests in his claim and answers to other questions typically asked in a deposition. If Employee needs assistance in understanding why Employer wants to depose him, or wants to know more about what to expect at his deposition, he can contact a workers' compensation technician at 269-4965 for additional information. This tailored sanction protects Employee by giving proper advice concerning his duties to provide discovery and protects Employer by giving Employee a deadline to comply with the designee's order to attend his deposition. *McKenzie*.

CONCLUSIONS OF LAW

1) The oral order denying Employer's recusal request was correct.
2) The oral order proceeding with the hearing in Employee's absence was correct.
3) Employee's claim will not be dismissed at this time.

ORDER

1) Employee is ordered to appear at a properly scheduled and noticed deposition not later than 30 days from the date this decision and order is issued. He is ordered to participate fully at his deposition and answer all questions to the best of his ability.
2) Employer is ordered to make a good faith effort to arrange a mutually agreeable time and date with Employee for his deposition. Employer is ordered to provide employee with "reasonable notice" in conformance with Civil Rule 30.
3) If Employee's current employment interferes in any way with his ability to attend his deposition within 30 days from the date this decision and order is issued, he must appear for his deposition after normal working hours if necessary.
4) If Employee fails or refuses to participate fully at his deposition in conformance with this decision and order, his claim filed on October 6, 2016 and his April 4, 2018 petition will be dismissed in a subsequent Final Decision and Order, issued after Employer files a deposition notice and a court reporter's certificate of Employee's nonappearance at the scheduled deposition.

Dated in Anchorage, Alaska on April 12, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Bob Doyle, Member

/s/
Nancy Shaw, 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 Joseph Butcher, employee / claimant v. Federal Express Corporation, employer; self-insured / defendant; Case No. 200400422; 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 April 12, 2019.

/s/
Nenita Farmer, Office Assistant