ALASKA WORKERS' COMPENSATION BOARD

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

JOSEPH BUTCHER,	)	
	)	
Employee,	)	FINAL
Respondent,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 200400422
	)	
FEDERAL EXPRESS CORPORATION,	)	AWCB Decision No. 19-0083
	)	
Self-insured Employer,	)	Filed with AWCB Anchorage, Alaska
Petitioner.	)	on August 7, 2019
	)	

Federal Express Corporation's (Employer) May 22, 2019 petition to dismiss was heard on the written record on July 30, 2019, in Anchorage, Alaska, a date selected on July 10, 2019. A July 10, 2019 prehearing conference order gave rise to this hearing. Joseph Butcher (Employee) represents himself. Attorney Rebecca Holdiman-Miller represents Employer. There were no witnesses. The record closed at the hearing's conclusion on July 30, 2019.

ISSUES

Employer contends Employee ignored an order from *Butcher v. Federal Express Corporation*, AWCB Decision No. 19-0048 (April 12, 2019) (*Butcher I*) to present himself for a deposition, and failed 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).

Employee did not file a brief for the written record hearing. Though he said he will not give a deposition, Employee's position on Employer's petition is unknown but is presumed in opposition.

Should Employee's claim and SIME petition be dismissed?

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 injuries Employee had while working for Employer. He waived all benefits including medical care in six cases. However, in 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. (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) Between October 6, 2016 and April 4, 2018, Employee filed no documents with the board. (ICERS database, October 6, 2016 through April 4, 2018).

5) On March 30, 2018, Employer requested an order compelling Employee to sign releases because he had refused a request to sign them. (Petition, May 30, 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) On August 9, 2018, Employer asked for an order compelling Employee to answer its June 29, 2018 interrogatories. (Petition, August 9, 2018).

9) On September 20, 2018, a designee scheduled an October 9, 2018 hearing on Employer's request for orders compelling Employee to sign releases and answer interrogatories. (Prehearing Conference Summary, September 20, 2018).

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 staff sent the releases and signed interrogatories to Employer. (ICERS Event Walk In, September 21, 2018).

11) On September 24, 2018, the division at Employee's request returned the 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 gave Employee notice to appear for 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) On October 12, 2018, Employee did not appear at his deposition. This was his first failure to appear for his deposition. (Employer's April 10, 2019 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 December 17, 2018, Employer gave Employee notice to appear for his deposition on January 21, 2019. (Notice of Taking Videotaped Deposition, December 17, 2018).

19) On January 21, 2019, Employer's counsel appeared for Employee's deposition but Employee did not. The court reporter certified the deposition was to begin at 9:00 AM, but by 9:20 AM Employee still had not appeared. This was his second failure to appear at his deposition. (Certificate of Non-Appearance, January 21, 2019; observations).

20) 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).

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 March 8, 2018 hearing notice to the division along with his sworn statement, which states:

> I, Joseph Butcher, do hereby 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 at 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 and 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 [sic] 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. (Affidavit, March 21, 2019).

23) The division has mailed numerous documents to Employee's address of record and has received no returned mail from the United States Postal Service except for one certified mail document, which returned because Employee refused to claim it. His address is not included in this decision to protect his privacy. (Agency file; judgment).

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. The hearing proceeded in his absence. (Observations; record).

26) On April 12, 2019, *Butcher I* issued the following 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 in 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 in 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** (emphasis added).

27) *Butcher I* was the division's first explicit notice to Employee that his October 6, 2016 claim and April 4, 2018 petition would be dismissed if he failed or refused to participate in his deposition as ordered. (Observations and inferences drawn from the above).

28) On April 16, 2019, in response to *Butcher I*, Employer asked Employee to provide dates he was available to be deposed within the next 30 days. (Letter, April 16, 2019).

29) On May 8, 2019, Employer properly noticed Employee's deposition for May 20, 2019, at 2:00 PM. (Re-Notice of Taking Deposition, May 8, 2019).

30) On May 20, 2019, court reporter Angela Peronto signed a statement attesting Employee had not appeared for his deposition 30 minutes past the time it was scheduled to begin. This was his third failure to appear. (Certificate of Non-Appearance, May 22, 2019; observations).

31) On May 22, 2019, Employer asked the board to enforce *Butcher I* and dismiss Employee's claim. It contended he failed to comply with *Butcher I* by failing again to attend his properly noticed deposition. (Petition, May 22, 2019).

32) On May 29, 2019, Employee filed medical billing statements with hand-written notes without evidence he served these on Employer's attorney. (Letter, postmarked May 28, 2019).

33) On June 5, 2019, Employee stated under oath before a notary public, without evidence he served his statement on Employer:

> The undersigned, JOSEPH BUTCHER, being duly sworn, hereby deposes and says:

> (1) I am over the age of 18 and am a resident of the State of Alaska. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.
> (2) ~~I suffer no legal disabilities and have personal knowledge of the facts set forth below~~. *JB*.
> (3) I, Joseph Butcher, have been sent, regularly, documents that do not line up with the truth of events and do not in any way represent the truth of this matter. There will be no other deposition than the first that was already given and in record and the agreements were to pay for life for the pain I may endure for the rest of my life for the entire back and anything relating or stemming from or to it by cause. I will not be attending any meetings made by the board or the requesting party as the board has found great favor in not helping me in any of this matter other than to have convoluted it through mitigation[]s that are both and only favorable to itself and it[]s favored findings against me regularly and can be seen in all the drafts and documents submitted within this case form [sic] it[]s beginning to the present date two [sic] items that are very evident witch [sic] are the private and closed meeting for deposition that is already in submission taken during a recorded meeting arranged by the board at the time of promise to pay. [A]s well as the EME[]s are and can be seen convoluted by the independent evaluation as they have waffled and when I requested an EMI [sic] I was denied permission to have my own done in response to the waffling of both the board and the employer on this point[.] I will not submit myself to this wrongful and negligent care by either. It has been presented to both the board and the Employer that I would seek out of state defense and to no longer make contact with the defendant as the legal bulling [sic] is very evident in any light. [T]his is the second letter notarizing the fact of this case and the continued bulling [sic] for depositions and meetings. At the time of my choosing if I so chose [sic] I will serve both the board and the Employer[.] [T]here is no lack of evidence in this matter and injury and pain I must endure for the rest of my life. The apathy by witch [sic] the board and employer make there [sic] dissensions is unresolved and can be addressed at the time of appropriate representation.
>
> I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete. (Affidavit of Joseph Butcher, June 4, 2019).

34) It is not clear what Employee means in his affidavit by, "There will be no other deposition than the first that was already given and in record." The hallmark of a party's deposition is an opposing party's right to cross-examine the other party while that party is under oath. A party cannot cross-examine a written statement. There is no deposition from Employee in his agency file, including the old digitized file, and no indication he ever appeared under oath before a court reporter or the board for examination and cross-examination. He may be referring incorrectly to his March 21, 2019 affidavit, his C&R or a recorded statement an adjuster may have taken in the past, as a "deposition." (Agency file; experience, judgment and inferences drawn from the above).

35) On July 15, 2019, the division properly served Employee with the July 30, 2019 written record hearing notice at his correct address. The hearing notice provided Employee an opportunity to be heard on the issue set for hearing and stated:

> **This case has been set for hearing on the written record. It will be decided based on documents in the board's case file and the parties' written arguments. If filed, written arguments must be filed at the address below and served on all parties no later than five business days prior to the hearing.** (Hearing Notice, July 15, 2019) (Emphasis in original).

36) Other than filing itemized medical billing statements and his June 4, 2019 affidavit, Employee did not provide any briefing for the July 30, 2009 written record hearing. (Agency file).

37) There have been 11 prehearing conferences in this case since Employee's October 6, 2016 claim. They are summarized as follows:

- On April 25, 2017, the first prehearing conference convened because Employee had filed a claim. At the prehearing conference, Employee contended Employer had agreed to pay medical benefits for life for his entire body and he demanded payment. According to Employee, his feet had become an issue and his back problems had caused a rotator cuff tear in his right shoulder. The designee asked Employee if he wanted to set a hearing on his claim. Employee responded "he was not going to do anything [and] that this meeting was unnecessary."
- On June 21, 2017, at the second prehearing conference, 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, probably because he complied and signed the releases immediately after the conference ended.
- On July 19, 2017, 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.
- On May 3, 2018, at the fourth prehearing conference the designee explained the SIME process to Employee and sent him "another" list with names and addresses for attorneys who represent injured workers before the board.
- On June 26, 2018, at the fifth prehearing conference, which Employee did not attend, Employer discussed its May 30, 2018 petition to compel Employee to sign releases. 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.

- On August 7, 2018, at the sixth prehearing conference, which Employee did not attend, the designee scheduled a hearing for October 9, 2018, on Employer's request for an order compelling Employee to sign releases.
- On September 20, 2018, at the seventh prehearing conference, which Employee attended, the designee added Employer's August 9, 2018 petition to compel interrogatory answers as an issue for hearing.
- On November 21, 2018, at the eighth prehearing conference, which Employee did not attend, Employer discussed its October 27, 2018 petition to compel Employee to attend his deposition. The designee granted the petition and ordered him to attend his deposition. The designee did not advise Employee there could be sanctions for his failure to attend.
- On February 28, 2019, at the ninth prehearing conference, which Employee failed to attend, the designee scheduled an April 10, 2019 hearing on Employer's petition to dismiss his claim. The designee invited Employee to file a document "setting out in his own words why his claim should not be dismissed for failure to participate in the discovery process." The designee did not expressly advise him there could be sanctions for his failure to comply.
- On April 29, 2019, both parties attended the 10th prehearing conference held since Employee filed his October 6, 2016 claim. The designee explained in detail what affect the approved C&R had on Employee's right to benefits. She noted he initially failed to attend two Employer medical evaluations. The designee "quoted" from *Butcher I* and again advised Employee:

> (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 in 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 in 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** (emphasis added).

The designee gave Employee three dates in May 2019 to select from to attend his deposition and allowed him to select the time so the deposition would not interfere with his work schedule. In addition to citing from *Butcher I* (above in bold), the designee said:

> **Mr. Butcher is advised if he fails to select a deposition date and communicate it to Ms. Holdiman-Miller no later than May 12, 2019, his claim and petition will be dismissed.**

In her "Order" section in the conference summary, the designee further advised Employee:

> . . . .
>
> (3) Mr. Butcher must notify Ms. Holdiman-Miller the date and time on May 17, 20, or 21, 2019 that he is available to attend his deposition.
> (4) **If Mr. Butcher does not attend his deposition, his claim shall be dismissed pursuant to the order in *Butcher v. Federal Express Corp.*, AWCB Decision No. 19-0048 (April 12, 2019)** (emphasis added). . . .

This was the division's second explicit notice to Employee that his October 6, 2016 claim and April 4, 2018 petition would be dismissed if he failed to appear for his deposition. At this prehearing conference, the designee also addressed other issues and provided Employee with another list of workers' compensation attorneys.

- On July 10, 2019, at the 11th and last prehearing conference to date, which Employee did not attend, the designee set Employer's May 22, 2019 petition to dismiss on for a written record hearing on July 30, 2019. The designee reviewed the prior event timeline in his summary and again cited the above-referenced order from *Butcher I* which stated in pertinent part:

> . . . .
>
> (4) **If Employee fails or refuses to participate fully at his deposition in conformance with this decision and order, his claim filed 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** (emphasis added).

This was the division's third explicit notice to Employee that his October 6, 2016 claim and April 4, 2018 petition would be dismissed if he failed to appear for his deposition. (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; February 28, 2019; April 30, 2019; and July 10, 2019; observations).

38) The division properly and timely noticed Employee at his record address for each prehearing conference summarized above. (ICER's, 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; January 31, 2019; April 15, 2019; and May 29, 2019).

39) On May 22, 2019, Employer asked the board to "enforce" *Butcher I* and dismiss his claim "with prejudice," because Employee failed to attend his deposition. (Petition, May 22, 2019).

40) On July 30, 2019, the *Butcher I* panel held a written record hearing on Employer's petition. Employee did not submit any relevant evidence or written arguments or briefing after his June 6, 2019 affidavit. (Agency file).

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

42) Employee's failure to appear thrice at his properly noticed depositions was willful and intentional. (Experience, judgment, observations and inferences drawn from the above).

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 . . . 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.**
> . . . .
>
> (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. . . .

A party who made no effort to comply with discovery orders is not entitled to special allowances based on *pro se* status. *DeNardo v. ABC, Inc. RV Motorhomes*, 51 P.3d 919 (Alaska 2002). Employers have a constitutional right to defend against claims. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). Employers have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Id*. 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. *Id*. The scope of admissible evidence in board hearings is broader than in civil courts because most civil rules are 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. *Id*.

In *McKenzie v. Assets, Inc*., AWCAC Decision No. 109 (May 14, 2009), the appeals 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*. 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*. 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*.

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*.

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*. The commission further found the board had rendered adequate factual findings and did a "reasonable exploration of possible and meaningful alternatives to dismissal." *Id*. 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 orders and her conduct was so bad that no lesser sanction would be effective. *Id*.

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*. 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*.

An employee's "claim" for benefits, *i.e.*, his pleading, is differentiated from his right to benefits. A "claim" for AS 23.30.110(c) purposes is a "written claim for compensation." *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1123-24 (Alaska 1995). A petition is a request for board action. 8 AAC 45.050(b)(2). *Res judicata*, also known as claim preclusion, applies to workers' compensation cases. *Robertson v. American Mechanical, Inc.*, 54 P.3d 777 (Alaska 2002). However, *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005), held dismissal of an earlier claim does not necessarily preclude an employee from filing a later claim for medical costs incurred subsequent to dismissal of the prior claim.

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**. . . .
> . . . .
>
> (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. . . .

8 AAC 45.050. Pleadings. (a) A person may start a proceeding before the board by filing a written claim or petition.

(b) Claims and petitions.
. . . .

(2) A request for action by the board . . . must be by a petition. . . .

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. . . .

8 AAC 45.060. Service. . . .
. . . .

(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. . . .

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. . . .

Rule 37. Failure to Make Disclosures or Cooperate in Discovery: Sanctions. . .
. . . .

(b) Failure to Comply With Order.
. . . .

(2) *Sanctions by Court in Which Action is Pending*. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(C) An order . . . dismissing the action or proceeding or any part thereof. . . .
. . . .

(3) *Standard for Imposition of Sanctions*. Prior to making an order under section[] . . . (C) of subparagraph (b)(2) the court shall consider

> (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
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> (B) the prejudice to the opposing party;
>
> (C) the relationship between the information the party failed to disclose and the proposed sanction;
>
> (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
>
> (E) other factors deemed appropriate by the court or required by law.
>
> The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

ANALYSIS

Should Employee's claim and SIME petition be dismissed?

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). "Party" depositions are an important part of the claim process because they allow an opposing party to obtain evidence with which to prosecute a claim or defend against one. *Granus.* Employer has a statutory and regulatory right to depose Employee. AS 23.30.115(a); 8 AAC 45.054(a); *Granus*. A party's deposition is recorded verbatim, under oath before a court reporter. The hallmark of a deposition is the opposing party's right and opportunity to cross-examine the person giving the testimony. An unsworn, recorded statement given to an adjuster, a C&R and even a sworn affidavit is not a deposition because one or both key components -- verbatim recording while under oath or the right to cross-examine -- are missing. Contrary to his misunderstanding, Employee has never been subject to a deposition in this case. *Rogers & Babler*.

As Employer is entitled to depose Employee so long as he has a claim or petition pending, the designees at November 21, 2018, April 29, 2019 and July 10, 2019 prehearing conferences and *Butcher I* on April 12, 2019, all 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 when it

repeatedly schedules and cancels Employee's deposition. Employee's refusal to appear at his deposition on three occasions and his continuing refusal to appear have caused Employer's discovery costs to become unreasonable. AS 23.30.001(1); AS 23.30.108(c); *Rogers & Babler*. The prehearing conference order for him to appear at a deposition did not include advice or warnings about what might happen to his claim should he not attend. Employee has no attorney. As the Alaska Supreme Court said in *Bohlmann*, ". . . the board at a minimum should have informed Bohlmann how to preserve his claim." For those reasons, *Butcher I* and the designees at the April 29, 2019 and July 10, 2019 prehearing conferences gave Employee one more chance to see if he would relent and appear for and participate in his deposition. He did not.

Employee implies in his affidavits that he may choose to obtain legal counsel, or he may not. He may be suggesting he does not want to give a deposition without legal representation. But Employer does not have to wait indefinitely to depose an unrepresented claimant. AS 23.30.115(a). Employee has had adequate time to obtain a lawyer, if that was his goal. When a party ignores discovery orders he is not entitled to special allowances simply because he does not have an attorney. *DeNardo*.

On May 8, 2019, in accordance with *Butcher I*, Employer properly noticed his deposition again, and again Employee failed to appear. Alaska Civil Rule 30(b)(1). On June 5, 2019, Employee said "there will be no other deposition than the first that was already given and in record. . . ." He has yet to sit for one as ordered and his refusal has continually stymied Employer's discovery in this case. *Rogers & Babler*. In short, Employee was repeatedly told what he had to do to preserve his claim and petition -- appear at and participate in his deposition. *Bohlmann*. He expressly continues to refuse to do it.

Employer seeks an order enforcing *Butcher I* and contends Employee's history evidences a willful desire to ignore discovery orders. While Employee's first few interactions with division staff did not result in adequate warnings about what would happen if he did not give a deposition, that excuse has long since gone away. Since April 12, 2019, the division has provided him no less than three explicit warnings that his claim and petition would be dismissed if he failed to appear for his deposition.

Dismissing a party's claim or petition is generally a last-resort sanction. *McKenzie*. But Employee has intentionally prevented Employer from deposing him. His conduct is costing Employer money

unreasonably. AS 23.30.001(1). Employer is prejudiced through Employee's actions because it is no further along in defending against his claim and petition than it was on September 28, 2018, when it first noticed his deposition. Civil Rule 37(b)(3)(B). The one year anniversary of its first deposition notice is fast approaching. Employee filed a claim and petition against Employer, not vice-versa. *Granus*. It is difficult to understand how it could take a year to depose an injured worker in a pending claim. Employee's two affidavits state he does not want to participate in any legal proceedings relating to his claim or petition and seeks no contact from anyone having to do with his case. That necessarily includes not participating in his deposition.

Butcher I and two prehearing conference designees explicitly warned Employee he would 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 would be dismissed. Employer spent more attorney fees and costs on its third deposition attempt and still Employee did not appear. He had notice and an opportunity to participate in the July 30, 2019 written record hearing and explain his behavior but chose not to. AS 23.30.110(c); 8 AAC 45.060(e). Dismissing his claim and petition is closely related to his refusal to give a deposition because without it Employer cannot discern the bases for Employee's claim and the reasons he thinks he is entitled to an SIME. Civil Rule 37(b)(C).

This decision and order has considered lesser sanctions. *McKenzie*. But Employee has now stated twice, most recently on June 5, 2019, that he does not intend to participate in his deposition. A reasonable inference from Employee's behavior is that his failure and refusal to appear for a deposition as ordered has been and remains willful. *Rogers & Babler*. Employee already waived his rights to all benefits in this case except for certain medical care. Thus, there is nothing else to dismiss as a lesser sanction since to date Employee has filed only a handful of medical bills, presumably related to his work injury. As Employer can go no further in defending against Employee's pending claim and petition without his deposition, dismissal is the only way to adequately protect Employer against the currently pending pleadings. Therefore, in accordance with *Butcher I* and Employee's twice-expressed intention to not participate in a deposition notwithstanding numerous orders requiring him to do so, Employee's claim and SIME petition will be dismissed. AS 23.30.108(c); *Rogers & Babler*; Civil Rule 37(b)(2)(C), (3)(D); *McKenzie*.

Employer wants Employee's claim and petition dismissed "with prejudice." There is a distinction between Employee's claim and petition versus his right to benefits. A claim is a written request for benefits and a petition is a request for action. *Jonathan*; 8 AAC 45.050(a), (b)(2);. This decision will dismiss Employee's claim he filed on October 6, 2016, and his April 4, 2018 petition. Consequently, all benefits identifiable in Employee's claim and the SIME requested in his April 4, 2018 petition are dismissed and he cannot bring them again -- they are precluded. *Robertson*. In the future, if Employee seeks new benefits not claimed in his claim filed on October 6, 2016, and not waived in his C&R, or seeks relief not sought in his April 4, 2008 petition, he may file a new claim for those benefits or a new petition seeking action other than an SIME. *Bailey*. Though *Bailey* addressed claim dismissal under a different statute, the dismissal in this case under AS 23.30.108(c) is analogous. Employee is advised that if he files a future claim or petition and again fails or refuses to provide discovery or a deposition, he may be subject to sanctions including claim and petition dismissal. AS 23.30.108(c).

CONCLUSION OF LAW

Employee's claim and SIME petition will be dismissed.

ORDER

1) Employer's May 22, 2019 petition to enforce *Butcher I* and dismiss Employee's claim filed on October 6, 2016 and his April 4, 2018 petition is granted.
2) Employee's claim filed on October 6, 2016 and his April 4, 2018 petition are dismissed.

Dated in Anchorage, Alaska on August 7, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Bob Doyle, Member

/s/
Nancy Shaw, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

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 Final 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 August 7, 2019.

/s/
Nenita Farmer, Office Assistant