

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION)
FOR A FINDING OF THE FAILURE TO) INTERLOCUTORY
INSURE WORKERS' COMPENSATION) DECISION AND ORDER
LIABILITY, AND ASSESSMENT)
OF A CIVIL PENALTY AGAINST,) AWCB Case No. 700006817
)
MICHAEL ZABORWSKI D/B/A) AWCB Decision No. 20-0035
R & M ROOFING & PENINSULA MOSS)
REMOVAL,) Filed with AWCB Anchorage, Alaska
) on May 22, 2020.

Respondent.)

The Division of Workers' Compensation's (division) February 10, 2020 petition for a finding of Michael Zaborwski's (Employer) failure to comply with the August 28, 2019 and January 16, 2020 discovery orders and an order to compel discovery was heard on the written record in Anchorage, Alaska on April 30, 2020, a date selected on March 10, 2020. The division's March 10, 2020 hearing request gave rise to this hearing. Investigator Douglas Love represents the division. Employer represents himself. The record closed on April 30, 2020.

ISSUE

The division contends Employer failed to comply with the August 28, 2019 and January 16, 2020 discovery orders. It asks for an order requiring Employer to provide discovery.

Employer did not answer or offer any defenses to the division's petition. This decision assumes Employer opposes it.

Should Employer be ordered to provide discovery?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On June 5, 2019, the division sought a civil penalty against Employer in AWCB Case Number 700006817 and served the petition and discovery demand at Employer's address of record; on July 22, 2019, these documents returned "unclaimed." (Petition, June 5, 2019; Petitioner's Notice of Evidence, March 25, 2020, Exhibit 1 & 2).

2) On July 16, 2019, the division filed and served a petition to compel discovery. (Petition, July 16, 2019).

3) On August 28, 2019, Employer and Love discussed discovery issues. Love indicated he did not receive discovery from Employer. The designee granted the division's July 16, 2019 petition to compel discovery and ordered Employer to provide discovery by September 13, 2019. (Prehearing Conference Summary, September 6, 2019).

4) On September 13, 2019, Employer emailed Love: "I am currently out of town and am not able to get documents to your office today. I will have them to you Monday the 16th." (Petitioner's Notice of Evidence, March 25, 2020, Exhibit 3).

5) On October 22, 2019, the division amended the June 5, 2019 petition and discovery demand and served them at 8050 Nadine Street, Anchorage, Alaska 99507; it received a return receipt signed by "Deborah Kersh---." (Amended Petition, October 22, 2019; Petitioner's Notice of Evidence, March 25, 2020, Exhibit 5).

6) On December 4, 2019, Employer agreed to provide all requested discovery by December 13, 2019. (Prehearing Conference Summary, December 17, 2019).

7) On December 16, 2019, the division filed and served a second petition to compel discovery. (Petition, December 16, 2019).

8) As of January 16, 2020, the division did not receive discovery from Employer. On the same date, the designee granted the division's December 16, 2019 petition to compel discovery and ordered Employer for the second time to provide discovery by February 6, 2020. (Prehearing Conference Summary, January 23, 2020).

9) On February, 10, 2020, the division filed and served a petition for a board order requiring Employer to provide discovery. (Petition, February 10, 2020).

10) On March 10, 2020, Employer did not appear at prehearing, but after its conclusion, he contacted the designee via telephone. The March 10, 2020 prehearing conference summary states:

“About an hour after this prehearing Mr. Zaborwski did call in to the Board. The designee informed him the prehearing had concluded and a prehearing summary will be sent to all parties. The designee also offered to reach out to Investigator Love but Mr. Zaborwski declined. Nothing further was discussed.”

(Prehearing Conference Summary, March 10, 2020).

11) Employer did not comply with the August 28, 2019 and January 16, 2020 discovery orders.

(Agency file; judgment and inferences from the above).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board’s “experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

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. . . .

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. If a discovery dispute comes before the board for review of a determination by the board’s designee, the board may not consider any evidence or argument that was not presented to the board’s designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee’s decision except when the board’s designee’s determination is an abuse of discretion. . . .

8 AAC 45.054. Discovery. . . .

. . . .

(e) If an employer petitioned for failure to insure for workers' compensation liability fails to comply with the division's discovery demand not later than 30 days after service, the division may petition the board for an order compelling the employer to provide the discovery. If the employer fails to comply with an order by the board or the board's designee concerning discovery matters, the board may impose appropriate sanctions, including dismissing the employer's defenses and accepting the division's proffered evidence regarding estimated uninsured employee workdays and workers' compensation insurance premiums the employer would have paid had it been insured.

8 AAC 45.060. Service. . . .

. . . .

(b) . . . 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. . . .

8 AAC 45.065. Prehearings. . . .

. . . .

(c) After a prehearing the board or designee will issue a summary of the action taken at the prehearing. . . . Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. . . .

ANALYSIS

Should Employer be ordered to provide discovery?

It is undisputed Employer was properly served with the division's June 5 and October 22, 2019 discovery demands and had notice of them. 8 AAC 45.060; *Rogers & Babler*. Due to lack of Employer's response, the August 28, 2019 and January 16, 2020 orders were issued to compel discovery. 8 AAC 45.065(c), (d). Yet, Employer did not comply with those orders. Therefore, Employer is ordered to produce records requested by the division no later than June 19, 2020. AS 23.30.135. If Employer fails to produce those records by June 19, 2020, sanctions will be imposed,

including but not limited to dismissing Employer's defenses and accepting the division's proffered evidence regarding estimated uninsured employee workdays and workers' compensation insurance premiums Employer would have paid had it been insured. AS 23.30.108(c); 8 AAC 45.054(e).

CONCLUSION OF LAW

Employer is ordered to provide discovery.

ORDER

- 1) The division's February 10, 2020 petition is granted.
- 2) Employer is ordered to produce records requested in the division's June 5 and October 22, 2019 discovery demands by June 19, 2020.
- 3) If Employer fails to produce records by June 19, 2020, sanctions will be imposed including but not limited to dismissing Employer's defenses and accepting the division's proffered evidence regarding estimated uninsured employee workdays and workers' compensation insurance premiums Employer would have paid had it been insured.

Dated in Anchorage, Alaska on May 22, 2020, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Justin Mack, Member

/s/
Kimberly Ziegler, 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 accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Michael Zaborwski; Employer / respondent; Case No. 700006817; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties by First-Class U.S. Mail, postage prepaid, on May 22, 2020.

/s/

Charlotte Corriveau Office Assistant