ALASKA WORKERS' COMPENSATION BOARD

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

DOUGLAS M. LAMBERT, Employee, Claimant, v. TRIDENT SEAFOODS CORPORATION, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201006597 AWCB Decision No. 20-0084 Filed with AWCB Anchorage, Alaska on September 24, 2020

Trident Seafoods Corporation's (Employer) June 25, 2020 petition to dismiss Douglas Lambert's (Employee) workers' compensation claim was heard on the written record on July 23, 2020, in Anchorage, Alaska, a date selected on August 18, 2020. An August 18, 2020 hearing request gave rise to this hearing. Attorney Jeffrey Holloway represents Employer and its insurer; Employee represents himself. As this was a written-record hearing, there were no witnesses. The record closed at the hearing's conclusion on July 23, 2020.

ISSUE

Employer contends Employee has repeatedly and willfully refused to sign and return appropriate releases addressing issues raised in his claim. It contends Employee's claim should be dismissed or in the alternative, presently suspended benefits should be forfeited.

Employee failed to file a brief setting forth his position on Employer's petition to dismiss his claim. While his contentions on this issue are unknown, this decision presumes he opposes dismissal.

Is benefit forfeiture an appropriate sanction for Employee's failure to comply with an order requiring him to sign and return releases?

FINDINGS OF FACT

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

1) On May 21, 2010, Employee was working for Employer when a hose on an engine broke, spraying hot antifreeze into his right eye. (Report of Occupational Injury or Illness Injury, May 21, 2010).

2) On May 21, 2010, a clinic treated him for toxic exposure and a thermal burn, prescribed rest, ice, and ibuprofen and no work until improved. (Chart note, Sand Point Medical Clinic, May 21, 2010).

3) On September 3, 2011, Employee's optometrist diagnosed macular degeneration in his right eye and referred him to a retinal specialist. (Chart notes, Karl Stoler, O.D., September 3, 2011).

4) On February 28, 2012, Nicholas Zakov, M.D., at the Cleveland Clinic saw Employee and diagnosed atrophy and scarring in the right macular region, which could be due to the work injury. (Zakov report, February 28, 2012).

5) On March 20, 2012, William Baer, M.D., ophthalmologist, saw Employee for an employer's medical evaluation (EME). Dr. Baer noted that prior to the work injury Employee had very early signs of macular degeneration in both eyes. In addition, he diagnosed pigmentary changes in the right eye, consistent with an impact injury. Dr. Baer concluded the work injury was the substantial cause of Employee's diminished vision, and caused a three percent permanent impairment, but also said he was medically stable, needed no further treatment and probably would not get any better or worse. (EME Baer report, March 20, 2012).

6) On April 30, 2012, and October 30, 2012, Employee sought medical benefits, including glasses, medications and permanent partial impairment (PPI) benefits. (Workers' Compensation Claims, May 31, 2012; October 30, 2012).

7) On May 18, 2012, Employer sent Employee releases for medical records, employment records, workers' compensation records, and Social Security records. Except for one medical release,

Employee signed the releases on May 23, 2012; he altered the Social Security, medical, and employment records releases. (Petition, June 4, 2012).

8) On June 5, 2012, Employer sought an order compelling Employee to sign and return unaltered releases. (Petition, June 4, 2012).

9) Employee did not appear for the July 11, 2012 prehearing conference. In the prehearing conference summary, Employee was "instructed" to sign and return unaltered medical, employment, and social security releases to Employer. The board designee confirmed benefits could be "suspended" if Employee did not cooperate with the discovery process. (Prehearing Conference Summary, July 11, 2012).

10) On August 9, 2012, Employer sent more releases to Employee for signature in accordance with the July 11, 2012 prehearing conference summary. (Letter, August 9, 2012).

11) At the September 19, 2012 prehearing conference, Employer stated it had not received the releases Employee had been directed to sign at the July 11 prehearing conference. Employee said he had signed and returned the releases to Employer but had not kept copies. The board designee advised the parties to attempt to work through the discovery process. (Prehearing Conference Summary, September 19, 2012).

12) On October 29, 2012, and November 6, 2012, Employer petitioned to dismiss Employee's prior claims because he had not returned signed releases. (Petition, October 26, 2012; Notice of Amendment to Petition to Dismiss, November 5, 2012).

13) On December 13, 2012, Employer had still not received signed releases from Employee. Employee said he had signed and returned all the releases Employer sent to him, but had not retained copies. Employer was unwilling to send the releases again and requested a hearing on its petition to dismiss. (Prehearing Conference Summary, December 13, 2012).

14) At hearing on April 24, 2013, Employee testified he signed and returned the releases Employer sent him in May and August. He stated if Employer sent the releases again, he would not sign and return them as he no longer trusted Employer would admit receiving them. Employee agreed to sign releases if he could return them to the board to verify they had been sent. (Record, April 24, 2013).

15) At hearing, the designated chair orally ordered him to fax the signed releases and mail originals to the board within five days. Immediately following the hearing, the designated chair faxed the releases to Employee along with a cover letter that stated in part, "In accordance with the

oral order at today's hearing, sign the releases without alteration and fax them back to the Board's office at **(907) 269-4975** within five days. Also mail the releases with your original signature to the Board's office at **3301 Eagle Street, Suite 304, Anchorage, AK 99510**." The letter also stated "PLEASE NOTE: As ordered at the hearing, failure to fax and mail the releases as instructed will result in the dismissal of your claims." (Record; letter, April 24, 2013; emphasis in original).

16) On April 25, 2013, Employee faxed the signed releases to the division, and the division sent the releases to Employer. (Agency file).

17) On June 26, 2013, *Lambert v. Trident Seafoods Corporation*, AWCB Decision No. 13-0073 (June 26, 2013) (*Lambert I*), declined to dismiss Employee's claims. However, *Lambert I* suspended his benefits until he complied with the oral order regarding releases. (*Lambert I* at 8).

18) Employee's current mailing address in Ohio has not changed since July 2013. (Agency file).

19) On November 14, 2013, the parties conferenced with the board's designee by telephone; he set a hearing on Employee's claims for February 12, 2014. The designee confirmed Employer had received all releases in conformance with *Lambert I*, and sent Employee a pamphlet "How to Present Your Case -- Be Prepared for Hearing." (Prehearing Conference Summary, November 14, 2013).

20) At hearing on February 12, 2014, a panel addressed Employee's claim and held, "So long as the work injury remains the substantial cause of Employee's loss of visual acuity, prescription glasses to remedy the loss are compensable." The panel denied past medical expenses including vitamins and other relief not relevant to the instant matter. (*Lambert v. Trident Seafoods Corporation*, AWCB Decision No. 14-0025 (February 28, 2014) (*Lambert II*).

21) On March 9, 2020, Employee claimed PPI benefits, a compensation rate adjustment and medical costs arising from his work injury with Employer. (Claim for Workers' Compensation Benefits, March 9, 2020).

22) On April 6, 2020, Employer sent Employee by certified mail, return receipt requested, a release so Employer could obtain his file from the division, an employment record release from May 21, 2000 forward, and a Social Security Administration release from May 21, 2008 to the present. (Letter, April 6, 2020; Notice of Intent to Rely, September 3, 2020).

23) Employee did not file a petition for a protective order within 14 days of service of Employer's April 6, 2020 letter requesting him to sign and return releases. (Agency file).

24) On April 22, 2020, the parties met with a board designee telephonically and Employer said medical releases were sent to Employee on April 6, 2020, but had not been received back; Employee said he mailed them. Employer agreed to send the releases to him again. The designee explained the claim process and sent Employee the pamphlet "Workers 'Compensation and You." (Prehearing Conference Summary, April 22, 2020).

25) On April 22, 2020, Employer sent Employee by certified mail, return receipt requested, a release so Employer could obtain his file from the division, an employment record release from May 21, 2000 forward, and a Social Security Administration release from May 21, 2008 to the present. (Letter, April 22, 2020; Notice of Intent to Rely, September 3, 2020).

26) On April 22, 2020, the division scheduled another prehearing conference for May 27, 2020, to follow-up on the claim's progression, and served notice on Employee at his record address. (Prehearing Conference Notice, April 22, 2020)

27) On April 28, 2020, Employee called the division and spoke with a workers' compensation technician:

> EE said he felt the employment releases the ER attorney sent him are extreme and does not feel he should sign those. EE was also asking about a medical report from 2010 EME. Explained that he could retain a copy of anything that is in his file through an FCR. Also explained about the Petition for protective order. EE will file the petition and send a copy to the ER attorney with the signed medical releases and the employment releases that he will not sign. EE also plans to file an FCR to see if the medical report is in his case as he said he never received a copy. (Agency file, April 28, 2020).

28) On April 29, 2020, Employee requested a protective order against Employer preventing it only from contacting his employers from "2000" about "retirement." (Petition, April 29, 2020).

29) On May 27, 2020, Employer's attorney conferenced with a board designee telephonically; Employee did not attend. The designee called Employee at his record telephone number and left a message to call and participate, but he did not, so the prehearing proceeded without him. The designee reviewed Employee's claim that included a compensation rate adjustment, and addressed the releases Employer sent for wages and Social Security benefits, which she found could apply to a compensation rate claim. The designee denied Employee's petition for a protective order and ordered him to sign and return releases to Employer by June 10, 2020. While giving Employee other instructions pertinent to his case, the designee did not expressly

tell him that sanctions could apply, including claim dismissal, if he failed to sign and deliver the releases as ordered. (Prehearing Conference Summary, May 27, 2020).

30) Employee did not appeal the designee's May 27, 2020 decision or ask for reconsideration. (Agency file).

31) On June 25, 2020, Employer sought an order dismissing Employee's claim for failure to comply with the designee's May 27, 2020 discovery order. Employer contends Employee has not provided signed releases and was willfully obstructing discovery. (Petition, June 25, 2020).

32) On June 26, 2020, the division sent Employee a notice at his record address for a prehearing conference for July 17, 2020. (Prehearing Notice, June 26, 2020).

33) On July 17, 2020, the parties met before the board designee who verified his record address was correct. Employee said he never received the May 27, 2020 Prehearing Conference Summary including the order to sign and return releases. After some discussion, Employee said he would sign and return the releases but he no longer had them; Employer agreed to send a new set. Its petition to dismiss was held in abeyance and Employee stipulated to return the signed releases by August 7, 2020, and the designee so ordered, but did not expressly tell him sanctions including dismissal could apply if he failed to do so. (Prehearing Conference Summary, July 17, 2020).

34) Employee's contentions that he previously signed and returned releases to Employer on two occasions, which Employer never received, and that he never received the May 27, 2020 prehearing conference summary ordering him to sign and return releases is not credible. (Experience, judgment and inferences drawn from all the above).

35) On July 17, 2020, the division noticed Employee at his record address for an August 18, 2020 prehearing conference. (Prehearing Conference Notice, July 17, 2020).

36) On July 21, 2020, Employer sent Employee, by certified mail return receipt requested, a release so it could obtain his file from the division, an employment record release from May 21, 2000 forward, a Social Security Administration release from May 21, 2008 to the present and a medical record release for his work-injury from May 21, 2008 forward. The medical record release was not included in the two prior letters Employer sent him. (Letter, July 21, 2020; Notice of Intent to Rely, September 3, 2020).

37) On August 18, 2020, Employer conferenced telephonically with a board designee but Employee did not attend. The designee called him at his record number and left a message for

him to participate but he did not. Employer contends Employee was sent additional releases but failed to comply with the designee's July 17, 2020 order that he sign and return them by August 7, 2020. Therefore, the designee set a hearing on the written record for September 23, 2020, on Employer's petition to dismiss his claim. The designee set a deadline for evidence no later than September 3, 2020, and legal briefing no later than September 16, 2020. (Prehearing Conference Summary, August 18, 2020).

38) On September 15, 2020, Employer filed and served its hearing brief. (Hearing Brief of Trident Seafoods Corp., September 15, 2020).

39) To date, Employee has not filed a hearing brief. At no time since Employee filed his March 9, 2020 claim has the division received any returned mail it sent to him. (Agency file).

40) Employer's brief cites numerous cases where the board has dismissed claims for an employee's failure to sign and return appropriate releases. It also noted Employee has a history of failing to return executed releases despite being ordered to do so. Employer contends Employee is deliberately evading discovery and interfering with Employer's duty to thoroughly investigate his claim. It contends more than five months have passed since Employer sent releases to Employee and it remains unable to conduct discovery. It claims that this has "heavily prejudiced" Employer. Since Employee seeks additional medical care and a compensation rate adjustment, Employer contends it cannot defend against either claim without releases enabling it to conduct discovery. Employer also cites unnecessary and significant litigation costs related to this issue from which it has been "severely prejudiced." It contends Employee's claim should be dismissed in its entirety or his benefits should be forfeited during the period of non-cooperative behavior. Employer contends there is simply no other remedy available. (Hearing Brief of Trident Seafoods Corp., September 15, 2020).

41) Employee has not provided good cause for his failure to sign and deliver proffered releases and releases the designee ordered him to sign. While the United States Postal Service is not infallible, mail delivery is the rule and lost or misdirected mail is the exception. Given the above findings, Employee's last three failures to sign and deliver unaltered releases have been willful. (Experience, judgment, 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
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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.** (a) If an employee objects to a request for written authority . . . the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required . . . within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
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> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing 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 commission said, "[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, which she had repeatedly refused to attend, 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*. 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 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 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **8 AAC 45.060. Service**. . . .
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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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> **Rule 37. Failure to Make Disclosures or Cooperate in Discovery: Sanctions.** . .
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> **(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:
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> (C) An order . . . dismissing the action or proceeding or any part thereof. . . .
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> (3) *Standard for Imposition of Sanctions*. Prior to making an order under section . . . (C) of subparagraph (b)(2) the court shall consider
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> (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
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> (B) the prejudice to the opposing party;
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> (C) the relationship between the information the party failed to disclose and the proposed sanction;
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> (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
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> (E) other factors deemed appropriate by the court or required by law.
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> The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

ANALYSIS

Is benefit forfeiture an appropriate sanction for Employee's failure to comply with an order requiring him to sign and return releases?

Employee has a long history of failing to cooperate with discovery. In May 2012, he altered various releases Employer had requested before returning them and refused to sign one release. When Employer at that time petitioned for an order compelling him to sign and return unaltered releases, Employee failed to appear for a July 2012 prehearing conference to discuss the matter. At that prehearing conference, the designee ordered him to sign and return unaltered releases. The designee warned him his benefits could be suspended if he did not cooperate. Employer sent him additional releases in accordance with the July 2012 prehearing conference order. By

September 2012, Employer had still not received the releases Employee was directed to sign at the July 2012 prehearing conference. He contended he had signed and returned the releases to Employer.

Accordingly, Employer sent new releases and in October and November 2012, petitioned to dismiss Employee's previous claim because he had still not returned the signed releases. By December 2012, Employer had still not received the releases though Employee again said he had signed and returned them. Employer refused to provide additional releases and requested a hearing on its petition to dismiss Employee's previous claim for failure to sign and return releases.

At the April 24, 2013 procedural hearing on his previous claim, Employee testified he had signed and returned the releases in May and August. He did not trust Employer to say it had actually received them. Consequently, the designated chair faxed the subject releases to Employee with a letter telling him to sign the releases without alteration and send them to the division by facsimile and by mail and the division would send them to Employer. The next day, Employee sent the releases to the division, which sent them to Employer. Accordingly, *Lambert I* declined to dismiss his claims. However, *Lambert I* told Employee his benefits were suspended until he complied with the oral order regarding the releases, which he had done the day before.

At a subsequent merits hearing on Employee's prior claim, *Lambert II* held that so long as the work injury remained the substantial cause of Employee's loss of visual acuity, prescription glasses to remedy the loss were compensable. *Lambert II* denied his request for vitamins and other relief not relevant to this decision.

Employee's case was quiet until March 9, 2020, when he filed his current claim for PPI benefits, a compensation rate adjustment and unspecified medical costs. On three separate occasions thereafter, April 6, 2020, April 22, 2020 and July 21, 2020, Employer sent Employee by certified mail return receipt requested, a letter with releases for him to sign and return; as discussed below, he filed a timely petition for a protective order on only one set of releases. On April 22, 2020, the parties met at a prehearing conference to discuss releases Employer had sent Employee

on April 6, 2020, but had not received back. As he had done twice before, Employee said he had mailed them; Employer sent him a new set. The designee explained the claim process and sent Employee an informational pamphlet generally describing discovery requirements and sanctions.

On April 22, 2020, the division scheduled another prehearing conference for May 27, 2020, and served notice of it on Employee at his record address, which has not changed since 2013. *Rogers & Babler*. The record shows Employee received the releases Employer sent after the prehearing conference on April 22, 2020, because he called the division on April 28, 2020, and objected to one releases. Based on information he received from a division staff member, on April 29, 2020, Employee filed a petition for a protective order on only one of the April 22, 2020 releases, seeking to restrict Employer from contacting his employers about his earnings from 2000 forward.

Employee did not attend the May 27, 2020 prehearing conference and did not return a call from the designee made to him during the conference. The designee reviewed Employee's claim and decided the proffered releases were relevant to the issues raised; she denied Employee's petition for a protective order and ordered him to sign and return the April 22, 2020 releases to Employer by June 10, 2020. By this time, Employee had been advised about sanctions numerous times in the past and had successfully defended against Employer's prior petition to dismiss his previous claim for the same reason. He did not appeal the designee's May 27, 2020 order. *Rogers & Babler*.

On June 25, 2020, Employer petitioned to dismiss Employee's current claim for failure to comply with the designee's May 27, 2020 discovery order; Employer still had no signed releases. On June 26, 2020, the division sent Employee a notice at his record address for a prehearing conference on July 17, 2020. On July 17, 2020, Employee participated in a prehearing conference and said he never received the May 27, 2020 prehearing conference summary including the order for him to sign and return releases. Nevertheless, Employee said he would sign and return releases but he no longer had them; Employer agreed to send him a new set and did so on July 21, 2020; unlike the first two requests in April 2020, this request included a medical record release. The designee did not set a hearing on Employer's petition to dismiss

because Employee had stipulated to sign and return the new releases Employer was sending him, by August 7, 2020, and the designee so ordered. Again, while the prehearing conference summary did not expressly tell him sanctions including dismissal could apply if he failed to sign and return the releases, by this point Employee knew or should have known that this could occur since he had been subject to two petitions to dismiss his claim. Employee did not appeal the designee's order. He did not seek protection from the July 21, 2020 releases. *Rogers & Babler*.

On July 17, 2020, the division noticed Employee at his record address for an August 18, 2020 prehearing conference; Employee did not attend the August 18, 2020 conference; the designee called him at his record number during the conference and left a message for him to participate but he did not. Employer contended it had sent him additional releases but he failed to comply with the designee's July 17, 2020 order that he sign and return them by August 7, 2020. Therefore, the designee set a hearing on the written record for September 23, 2020, on Employer's June 25, 2020 petition to dismiss Employee's claims; he did not appeal the designee's July 17, 2020 order.

On August 18, 2020, the division served a written record hearing notice on Employee at his record address advising him to provide any written arguments to the division no later than five business days prior to the written record hearing. AS 23.30.110(c); 8 AAC 45.060(e). Employee filed nothing addressing the issues set for the September 23, 2020 written record hearing. At no time since Employee filed his March 9, 2020 claim has the division received any returned mail it sent to Employee's record mailing address. *Rogers & Babler*.

Employer contends Employee is deliberately evading discovery and interfering with its ability to thoroughly investigate his claim. It correctly notes over five months have passed since Employer sent releases to Employee and it remains unable to conduct discovery. Employer contends it has been prejudiced primarily by having to pay an attorney to force Employee to produce evidence so Employer can defend against his claims. Employer contends his claim should either be dismissed in its entirety or his suspended benefits should be forfeited during the period he has been non-cooperative with discovery.

Employee's contention that he does not receive certain mail from the division and that he has signed and returned releases to Employer, which it never received, is not credible. AS 23.30.122; *Smith*. Mail service, though not perfect, is generally reliable and is not selectively unreliable. *Rogers & Babler*. Employee failed to explain why he can receive most mail but not mail expressly ordering him to sign and return releases. He failed to explain how he keeps mailing releases to Employer but they are not received. By contrast, he has made clear his disdain for most releases Employer has sent him in the past. Historically, Employee has resisted signing and returning unaltered releases. As for the releases giving rise to Employer's June 25, 2020 petition to dismiss, and subsequent releases, Employee has made no effort to comply with the designee's discovery order or sign and deliver subsequent releases; since he made no effort to comply, he is not entitled to special allowances simply because he is representing himself. *DeNardo*. Employee filed a claim and Employer has a right to defend against it. *Granus*. Discovery is an important part of an Employer's defense. Releases are an important part of discovery. *Id*. Without any "good cause" explanation from Employee, and given his history, the facts support a finding that Employee's refusal to sign and return Employer's releases is willful. AS 23.30.108(b); *McKenzie*.

There is always a possibility that for some unexplained reason Employee has not been able to sign and return the subject releases and could not file even an informal hearing brief explaining his position or situation. That possibility cuts against forever dismissing his claims with prejudice. On the other hand, Employer is prejudiced by having to pay its attorney to repeatedly try to obtain information to which it is entitled. Employee has not demonstrated any cause much less good cause for failing or refusing to sign and return Employer's releases. AS 23.30.108(b). To date, Employee's claim processing has not been quick, fair, efficient or predictable or a reasonable cost to Employer because Employee has refused to cooperate with discovery. AS 23.30.001(1). Given these balancing interests, an appropriate sanction must be devised.

This decision determined Employee's refusal to provide signed, unaltered releases is willful. *McKenzie*. The information requested is clearly material to the claims because releases will allow Employer to discover earnings information that may be relevant to his compensation rate adjustment claim, and other information involving medical and PPI benefits he seeks. An order

dismissing Employee's past and current claims for benefits, while a lesser but still serious sanction, will protect Employer from having to pay for those benefits and might deter Employee from discovery violations in the future. Therefore, the past medical benefits, compensation rate adjustment and PPI benefits sought in Employee's March 9, 2020 claim will be dismissed with prejudice, which means he cannot file a future claim seeking those same benefits. *Bohlmann*.

To clarify: any compensable past work-related medical benefits, under *Lambert II*, from his injury date to today's date, are denied. Similarly, if in the future Employee becomes disabled because of his work injury, any compensation rate increase to which he might be entitled will not apply to any disability he may claim from his injury date through today's date. This remedy will protect Employer from having to pay benefits affected by Employee's willful refusal to cooperate with discovery; it will also protect Employee who may need medical care for his work injury in the future or may become disabled and entitled to a compensation rate adjustment. AS 23.30.108(a), (b), (c); Civil Rule 37(b)(2)(C), (3)(A)-(E).

It is important for Employee to understand that if in the future he seeks any additional reasonably necessary medical treatment for the loss of visual acuity in his right eye resulting from his work injury, he should obtain and provide to Employer immediately after treatment, a copy of a medical record and the associated medical billing, since *Lambert II* remains in effect and requires Employer to pay for such medical benefits so long as the work injury remains the substantial cause of his need to correct his right eye's visual acuity. *Bohlmann*. He should also understand that if he needs additional work-related medical care for his right eye not addressed in *Lambert II*, Employee retains his right to file a claim for those benefits. *Lambert II* already denied his claim for PPI benefits above three percent; it is unclear how Employee could be entitled to a higher PPI rating in the future for his right eye. In the event Employee files a claim in the future for future work-related medical benefits or a compensation rate adjustment, Employer will undoubtedly provide him with additional releases to obtain discovery. Employee is required to either sign and return the unaltered releases or file and serve a petition for a protective order within 14 days of the date Employer serves the releases on him. AS 23.30.108(a). Failure to do one or the other timely will result in Employee's future requested

benefits being suspended as a matter of law, and subject to forfeiture and possible claim dismissal. AS 23.30.108(b), (c); *Bohlmann*.

CONCLUSION OF LAW

Benefit forfeiture is an appropriate sanction for Employee's failure to comply with an order requiring him to sign and return releases.

ORDER

1) Employer's June 25, 2020 petition is granted in part.
2) Employee's rights to benefits under the Act that were suspended by operation of law are hereby forfeited in accordance with this decision for his refusal to provide written authority as ordered.
3) Employee retains his right to file a future claim for new benefits, not forfeited through this decision, in accordance with this decision.

Dated in Anchorage, Alaska on September 24, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Nancy Shaw, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. 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 due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the 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 ground upon which the cross-appeal is taken. AS 23.30.128.

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 Douglas M. Lambert employee / claimant v. Trident Seafoods Corporation, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201006597; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on September 24, 2020.

/s/
Nenita Farmer, Office Assistant