

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MAHMOUD SOUD,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201910291
NORTH PACIFIC SEAFOODS, INC.,)
) AWCB Decision No. 20-0090
Employer,)
and) Filed with AWCB Anchorage, Alaska
) on September 30, 2020.
ALASKA NATIONAL INSURANCE,)
)
Insurer,)
Defendants.)
_____)

Northwest Pacific Seafoods' April 16, 2020 petition to dismiss was heard in Anchorage, Alaska on July 21, 2020, a date selected on June 18, 2020. A May 14, 2020 hearing request gave rise to this hearing. Mahmoud Soud (Employee) did not appear for the hearing. Attorney Martha Tansik appeared and represented Northwest Pacific Seafoods and Alaska National Insurance (Employer). There were no witnesses. The record closed at the hearing's conclusion on July 21, 2020.

ISSUES

As a preliminary matter, the panel addressed Employee's July 6, 2020 and July 10, 2020 petitions seeking a continuance. Employee contended he is incarcerated and he cannot "fight this case" and "do the hearing behind bars." Employer opposed a continuance. It contended Employee's stated reason is not recognized as "good cause" for a continuance under the applicable regulation, and it is not unusual for hearings to be held while claimants are incarcerated, or for hearings to proceed

on petitions when incarcerated claimants do not appear. Employer also contended not proceeding with the hearing on its petition would be contrary to the Act's purposes of being quick, fair and efficient. Following deliberations, the panel denied Employee's petitions seeking a continuance and proceeded with the hearing on Employer's petition to dismiss in Employee's absence.

1) Was it proper to deny Employee's petitions seeking a continuance and proceed with the hearing in his absence?

Employer contends Employee was involved in two physical altercations with the same coworker in a single day, and during the second one, the coworker head-butted Employee, which caused injuries to Employee's teeth. It contends police were called, who determined Employee had instigated the fight, and Employee was immediately terminated for violating Employer's policy on fighting, escorted off the premises and flown back to Anchorage.

Employer explains, because Employee contends he was the person assaulted, and because Employee contends witnesses will support his position in this regard, it requested a list of these witnesses from Employee, which was not provided, so it filed a petition to compel. It contends its petition to compel was granted, but Employee contended he needed more time to comply, so an extension was granted. Employer contends Employee has not complied with the discovery order even though producing a simple list of names is not a complex task and is concerned with witnesses' memories fading with the passage of time.

Employer contends the only sanction as an alternative to dismissal is not allowing Employee's witnesses to testify at hearing, but this sanction would not adequately protect its rights because it will continue to incur unnecessary litigation costs and neither would it be quick, fair and efficient. Employer requests Employee's claim be dismissed, but in the alternative, it requests a "hard deadline" be set for Employee to furnish Employer with a simple list of names, and contends his claim should be dismissed if he fails to provide the list.

Employee's positions are unknown, but he is presumed to oppose dismissal of his claim.

2) Should Employee's claim be dismissed for his willful refusal to cooperate in discovery?

FINDINGS OF FACT

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

- 1) On July 14, 2019, while employed as a seasonal seafood worker, Employee suffered an injury to his teeth during an altercation with another Employee. (First Report of Injury (FROI), August 2, 2019).
- 2) Following the altercation, the cannery manager called the police, who interviewed Employee, Employee's coworker who was involved in the altercation, as well as three potential witnesses. Employee stated his coworker approached him in an "aggressive manner" and head-butted him. Employee's coworker stated Employee tried to strike him in the face, but he "dodged" and head-butted Employee in self-defense. Two witnesses stated they did not see the fighting, and a third witness stated Employee was "in [the other employee's] face and she observed Employee strike his coworker. At the cannery manager's request, Employee was "trespassed" from the cannery and escorted from the premises. (Police report, July 14, 2020).
- 3) When Employee sought treatment for his injuries, he told medical providers his coworker "accidentally head butted his face," and "accidentally hit him in the face." (Triage Notes, July 14, 2020; Provider Notes, July 14, 2020).
- 4) On August 2, 2019, Employee claimed medical and transportation costs. He contended his coworker "approached him in an "aggressive and combative way," and while he tried to "calm the situation down," his coworker head-butted him, which broke his front teeth and caused him to bleed. (Workers' Compensation Claim, August 2, 2019).
- 5) On August 5, 2019, Employer controverted all benefits on the grounds Employee willfully injured himself with premeditated or impulsive conduct such that the injury did not arise in the course and scope of his employment. (Controversion Notice, August 5, 2019). Employer also contended Employee's injury was proximately caused by his willful intent to injure another person by instigating a fight that resulted in his own injury, and further contended Employee had voluntarily remove himself from the workforce when he was fired for violating Employer's policies on fighting. (Employer's Answer, August 26, 2019).
- 6) At a December 31, 2019 prehearing conference, Employer agreed to provide Employee with a copy of his personnel file and its adjuster's notes. It also requested a list of witnesses to the altercation from Employee. (Prehearing Conference Summary, December 31, 2019).

- 7) On February 11, 2020, Employer petitioned to compel Employee to provide the names and contact information for his witnesses so that Employer could either interview or depose them. (Employer's Petition, February 11, 2020).
- 8) At a March 11, 2020 prehearing conference, Employee contended he intended to produce Employer's requested witness list but had not yet obtained the permission from all the witnesses for him to disclose their names. However, he did agree to provide the names of those witnesses who had agreed to participate on his behalf thus far. Employer confirmed it had provided Employee with the discovery he had requested at the December 31, 2019 prehearing conference and requested a ruling on its petition to compel. The designee found Employer's requested witness list to be relevant and ordered Employee to produce the list by April 10, 2020. (Prehearing Conference Summary, March 11, 2020). That same day, Employee petitioned to compel Employer to disclose information it had redacted in response to his discovery request. (Employee's Petition, March 11, 2020).
- 9) On March 18, 2020, Employee petitioned for additional time to provide his witness list based on the Covid-19 pandemic. (Employee's Petition, March 18, 2020).
- 10) On March 19, 2020, Employer contended the redacted information Employee seeks from its adjuster's notes was protected by attorney client privilege and also contended Employee's failure to produce the ordered witness list prejudiced its ability to conduct interviews and prepare for a hearing in an efficient and timely manner. (Employer's Answer, March 19, 2020).
- 11) On April 16, 2020, Employer petitioned to dismiss Employee's claim based on his failure to cooperate in the discovery process. (Employer's Petition, April 16, 2020).
- 12) At an April 21 2020, prehearing conference, a designee denied Employee's March 11, 2020 petition to compel but granted his March 18, 2020 petition seeking additional time to provide his witness list. Employee was ordered to provide his witness list by May 10, 2020. (Prehearing Conference Summary, April 21, 2020).
- 13) On May 11, 2020, a person who represented she was Employee's mother telephoned to report Employee was incarcerated. (Incident Claims Expense and Reporting System (ICERS) event entry, May 11, 2020). She contended Employee wished for her to express his desire that his case not be "close[d]." She was advised, if Employee wanted her to speak on his behalf, he would need to file an entry of appearance for her to act as his non-attorney representative. (ICERS event

entry, May 12, 2020). Workers' Compensation staff mailed Employee an entry of appearance form to the address where he was incarcerated. (ICERS event entry, May 13, 2020).

14) On May 14, 2020, Employer requested a hearing on its April 16, 2020 petition to dismiss. (Affidavit of Readiness for Hearing, May 14, 2020).

15) At a June 18, 2020 prehearing conference, Employer contended Employee was incarcerated at the Cook Inlet Pretrial facility and requested a hearing date for its April 16, 2020 petition to dismiss. A July 21, 2020 hearing date was chosen. (Prehearing Conference Summary, June 18, 2020).

16) On June 29, 2020, first class and certified mail containing Employee's copy of the hearing notice and the June 18, 2020 prehearing conference summary were returned to the sender. (ICERS event entry, June 29, 2020).

17) On July 1, 2020, a person who represented she was Employee's mother telephoned and left a voice mail recording stating Employee was still incarcerated and requesting the hearing date be moved. (ICERS event entry, July 1, 2020).

18) On July 6, 2020, Employee authored a letter requesting the July 21, 2020 hearing be continued until December 2020 on the grounds he could not "fight this case" while he was incarcerated. (Employee's letter, July 6, 2020).

19) On July 10, 2020, Employee petitioned for a continuance on the grounds he could not "do the hearing behind bars." (Employee's Petition, July 10, 2020).

20) On July 15, 2020, Employer opposed a continuance and contended workers' compensation hearings have been held with incarcerated claimants in the past and also contended hearings have proceeded when incarcerated claimants failed to appear. It cited *Waite v. Holland America*, AWCAC Decision 234 (March 15, 2017) in support of its petition.

21) On July 20, 2020, the hearing chair telephoned the Cook Inlet Pretrial facility to ascertain whether their policies had changed as a result of the Covid-19 pandemic such as would preclude Employee's telephonic participation in the hearing. He was informed incarcerated persons can still participate in hearings, but Employee could not. The Cook Inlet Pretrial facility declined to explain Employee's inability to participate in the hearing, citing HIPPA considerations. (Experience; record).

22) On July 21, 2020, prior to commencing the hearing, a workers' compensation administrative assistant unsuccessfully attempted to reach Employee by telephone but his phone number was not accepting calls. (*Id.*).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

AS 23.30.005. Alaska Workers' Compensation Board.

....

(h) Process and procedure under this chapter shall be as summary and simple as possible....

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

AS 23.30.107. Release of information. (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain . . . information relative to the employee's injury. . . .

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 under AS 23.30.107, the employee must file a

petition . . . seeking a protective order within 14 days after service of the request
. . . .

(b) 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.

(c) If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense.

The board has long recognized a thorough investigation of workers' compensation claims allows employers to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect fraud. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). The law has also long favored giving a party his "day in court," e.g. *Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645 at 647 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits, AS 23.30.001(2). Dismissal should only be imposed in "extreme circumstances," and even then, only if a party's failure to comply with discovery has been willful and when lesser sanctions are insufficient to protect the adverse party's rights. *Id.* at 647. The extreme sanction of dismissal requires a reasonable exploration of alternative sanctions. *Id.* at 648-49.

However, AS 23.30.108(c) does provide a statutory basis for dismissal as a sanction for noncompliance with discovery, and the Board has long exercised its authority to dismiss claims when it found the employee's noncompliance to have been willful. *O'Quinn v. Alaska Mechanical, Inc.*, AWCB Decision No. 06-0121 (May 15, 2006); *Erpelding v. R & M Consultants, Inc.*, AWCB Decision No. 05-0252 (October 3, 2005), reversed by 3AN-05-12979 CI (Alaska Superior Ct., April 26, 2007) for failing to explore sanctions lesser than dismissal); *Sullivan v. Casa Valdez Restaurant*, AWCB Decision No. 98-0296 (November 30, 1998); *Maine v. Hoffman/Vranckaert, J.V.*, AWCB Decision No. 97-0241 (November 28, 1997); *McCarroll v.*

Catholic Community Services, AWCB Decision No. 97-0001 (January 6, 1997). “Willfulness” is defined as the “conscious intent to impede discovery, and not mere delay, inability or good faith resistance.” *Hughes v. Bobich*, 875 P.2d 749; 752 (Alaska 1994). Once noncompliance has been demonstrated, the noncomplying party bears the burden of proving that the failure to comply was not willful. *Id.* at 753.

Willfulness has been established when a party has been warned of the potential dismissal of his claim and has violated multiple discovery orders. *Erpelding*. It has also been established when a party has been warned of the potential dismissal of her claim and has refused to participate in proceedings and discovery multiple times. *Sullivan*. Offering unsatisfactory excuses to “substantial and continuing violations” of a discovery order demonstrates willfulness. *Bobich* at 753. Dismissal was appropriate when a party violated two orders to compel and lesser sanctions had been tried. *DeNardo v. ABC Inc. RV Motorhomes*, 51 P.3d 919, 921-22 (Alaska 2002). However, dismissal was improper when a party had not violated a prior discovery order and no previous sanctions had been imposed. *Hughes* at 754. A party who has made no effort to comply with discovery orders is not entitled to any special allowances based on *pro se* status. *DeNardo* at 924. Since dismissal of a workers’ compensation claim under AS 23.30.108(c) is analogous to dismissal of a civil action under Civil Rule 37(b)(3), the Board has occasionally consulted the factors set forth in that subsection of the Rule when deciding petitions to dismiss. *Erpelding*; *Sullivan*; *McCarroll*.

AS 23.30.235. Cases in which no compensation is payable. Compensation under this chapter may not be allowed for an injury

(a) Proximately caused by the employee’s willful intent to injure or kill any person;
.....

8 AAC 45.054. Discovery.

.....

(d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.

.....

8 AAC 45. 070. Hearings.

....

(f) If the board finds that a party was served with notice of a hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing.

....

In *Waite v. Holland America*, AWCAC Decision No. 234 (March 15, 2017), the Alaska Workers' Compensation Appeals Commission addressed a situation where an incarcerated employee had not provided notice of an address change or made any attempt to telephonically attend a properly noticed hearing on the dismissal of his claim for failure to comply with discovery. At hearing, the workers' compensation panel proceeded with employer's petition in employee's absence and dismissed employee's claim. The Commission held it was not an abuse of discretion for the panel to have done so.

8 AAC 45.074. Continuances and cancellations.

(a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

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

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be

offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

.....

ANALYSIS

1) Was it proper to deny Employee's petitions seeking a continuance and proceed with the hearing in his absence?

The criteria for continuing a hearing are set forth in regulation, which instructs continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). It also imposes a "good cause" requirement on granting a continuance and specifies 14 different circumstances that constitute good cause. 8 AAC 45.074(b)(1).

Employee sought a continuance on the basis he cannot “fight this case” and “do the hearing behind bars.” Circumstances constituting good cause under the regulation are both specific and comprehensive. They do not provide for a continuance because a party is incarcerated. 8 AAC 45.074(b)(1)(A-N). Moreover, Employee’s stated basis is not persuasive because defending Employer’s petition would merely involve providing an explanation why he has not provided the ordered discovery. *Rogers & Babler*. Employee’s petitions seeking a continuance were properly denied.

The regulation governing hearings sets forth how a panel should proceed when a party, who was served with notice of a hearing, does not appear for it. 8 AAC 45.070(f). The preferred course of action is for the panel to proceed with the hearing in the party’s absence and to decide the issues presented. 8 AAC 45.070(f)(1). Although case notes show first class and certified mail containing Employee’s copy of the hearing notice and the June 18, 2020 prehearing conference summary were returned to the sender, Employee’s petitions seeking a continuance, as well as the voice mail message from a person who represented herself to be Employee’s mother requesting the hearing date be moved, demonstrate Employee had actual knowledge of the hearing. The panel properly proceeded with the hearing in Employee’s absence. *Waite*.

2) Should Employee’s claim be dismissed for his willful refusal to cooperate in discovery?

A petition to dismiss requires balancing the strong preference for an employee having his “day in court” against an employer’s need to investigate and defend against claims. *Sandstrom; Granus*. Dismissal should only be imposed in extreme circumstances and even then, only if (1) a party’s failure to comply with discovery has been willful; and (2) lesser sanctions are insufficient to protect the rights of the adverse party. *Sandstrom; Hughes; Denardo; Erpelding*.

On March 11, 2020, Employee was ordered to provide his witness list by April 10, 2020. An extension was later granted, affording Employee until May 10, 2020 to produce the list. Nevertheless, as of the hearing’s date, he had not done so. Given his noncompliance with the order, Employee now has the burden of proving his failure to comply was not willful, a burden he

has not met since he failed to appear or otherwise offer any kind of an explanation why he could not have complied with the order. *Bobich*.

Employer is correct in its contention that making a simple list is not a complex task. Additionally, the ordered discovery goes to the heart of the pivotal issue in this case – the compensability of Employee’s claim. AS 23.30.235(a). Another concern at this point is witnesses’ memories fading over time, as Employer contends. *Rogers & Babler*. Nevertheless, it cannot be concluded a lesser sanction is insufficient to protect Employer’s rights because a lesser sanction has yet to be tried, so Employee’s claim will not be dismissed at this time. *Sandstrom*.

As Employer points out, the sanction provided in regulation of excluding Employee’s witnesses from testifying at hearing is insufficient to protect Employer’s rights because it would require Employer to incur additional and unnecessary litigation costs, and would also be contrary to the Act’s intent. 8 AAC 45.054(d); AS 23.30.001(1). Therefore, under the circumstances presented, Employer’s suggested alternative sanction of again ordering Employee to provide his witness list by a date certain, and dismissing his claim should he not, will be adopted. AS 23.30.005(h).

CONCLUSIONS OF LAW

- 1) It was proper to deny Employee’s petitions seeking a continuance and proceed in his absence.
- 2) Employee’s claim should not be dismissed at this time for his willful refusal to cooperate in discovery. A lesser sanction should be tried, instead.

ORDERS

- 1) Employee is ordered to produce his witness list within 30 days of this decision and order. Jurisdiction is reserved to dismiss Employee’s claim should he not produce the list as ordered.
- 2) Employer’s April 16, 2020 petition to dismiss is held in abeyance pending the outcome of the above order.
- 3) Employee is cautioned, his failure to produce the witness list as ordered may result in the dismissal of his claim.

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of MAHMOUD SOUD, employee / claimant v. NORTH PACIFIC SEAFOODS, INC., employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201910291; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 30, 2020.

_____/s/
Kimberly Weaver, Office Assistant II