

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

AMANDA K. LYNN,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201806813
FRED MEYER STORES, INC.,)
) AWCB Decision No. 21-0037
Employer,)
and) Filed with AWCB Anchorage, Alaska
) on April 28, 2021
THE KROGER CO.,)
)
Insurer,)
Defendants.)
)

Fred Meyer Stores, Inc. and The Kroger Co.'s (Employer) January 14, 2021 petition to dismiss was heard on the written record in Anchorage, Alaska, on April 6, 2021, a date selected on March 3, 2021. A February 5, 2021 affidavit of readiness for hearing gave rise to this hearing. Amanda K. Lynn (Employee) represented herself. Attorney Vicki Paddock represented Employer. The record closed at the hearing's conclusion on April 7, 2021.

ISSUE

Employer contends Employee willfully impeded discovery by refusing to sign and return discovery releases as order by the designee. It contends the months long delay in providing the signed releases makes it clear Employee does not intend to comply with the order. Employer contends it has incurred unnecessary fees and costs in its efforts to secure current releases and its ability to investigate and make informed decisions on issues surrounding the claim are hindered

by Employee's refusal. It requests an order dismissing her claims with prejudice. Alternatively, Employer requests lesser sanctions and an order directing her to sign and return the releases.

Employee contends Employer does not have the right to the information it seeks to obtain with the releases. She contends Employer already obtained the information. Employee opposes dismissal of her claims.

Should Employee's claims be dismissed for failing to sign and return releases as ordered?

FINDINGS OF FACT

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

- 1) On July 12, 2012, a neck computerized tomography (CT) showed C5-6 degenerative disc disease with narrowing disc space and anterior endplate marginal spurring and left-sided facet osteoarthritis at C5-6 and C6-7. (CT report, July 12, 2012).
- 2) On July 17, 2012, Employee complained of musculoskeletal pain in her right shoulder and radiating down her right arm after right shoulder surgery which began over two months earlier after a physical altercation. (Donna Newkirk, chart note, July 17, 2012).
- 3) On May 14, 2018, Employer reported Employee injured her lower back on May 7, 2018, when she stretched in the parking lot and felt a pop. (Employer First Report of Injury or Illness, May 14, 2018).
- 4) On May 14, 2018, Employee reported cervical thoracic and lumbar back pain with left radiculopathy after she injured her back at work on May 7, 2018 after lifting heavy furniture. She said she initially had thoracic back pain when she felt a popping sensation and the pain moved to her neck and lumbar spine. Employee was diagnosed with back pain and restricted to light duty work. (David Barnes, D.O., progress note, May 14, 2018).
- 5) On May 23, 2018, Employee sought temporary partial disability (TPD) benefits, a finding of unfair or frivolous controversion and penalty for late paid compensation. (Claim for Workers' Compensation Benefits, May 23, 2018).
- 6) On June 1, 2018, Employer denied temporary total disability (TTD) and TPD benefits contending Employee was released to light duty on May 14, 2019 and Employer had light duty

available within her restrictions which she declined. (Controversion Notice, June 1, 2018; Answer, June 1, 2018).

7) On February 28, 2019, Employee sought TTD and permanent partial impairment (PPI) benefits, penalty for late-paid compensation and interest for injuring her neck, lower back and right hand after repeatedly lifting heavy furniture. (Claim for Workers' Compensation Benefits, February 28, 2019).

8) On March 9, 2019, Todd Fellars, M.D., an orthopedic surgeon, examined Employee for an Employer's medical evaluation (EME). He diagnosed C5-6 cervical spondylosis unrelated to work, cervicgia with headaches unrelated to work, thoracic spine pain, L5 lumbar spondylosis and secondary left-sided L5 radiculopathy and right wrist pain. Dr. Fellars stated Employee's radiculopathy is due to degenerative disc disease and was not caused by work. He concluded her cervical spine pain and intermittent upper extremity pain was due to degenerative disc disease and her need for treatment was not work-related. Dr. Fellars opined the substantial cause of Employee's need for treatment and disability is her preexisting degenerative disc disease. (Fellars EME report, March 9, 2019).

9) On March 18, 2019, Employer denied TTD and PPI benefits, penalties and interest. (Controversion Notice, March 18, 2019; Answer, March 18, 2019).

10) On April 19, 2019, Employer denied all benefits after March 27, 2019, relying on Dr. Fellars' EME report. (Controversion Notice, April 19, 2019).

11) On July 9, 2019, Employee sought PPI benefits, a compensation rate adjustment, a finding of unfair or frivolous controversion, medical costs, penalty for late paid compensation and interest for injuries to her neck, lower back, and right hand and constant headaches and blurry vision. (Claim for Workers' Compensation Benefits, July 9, 2019).

12) On July 22, 2019, Employer denied TTD and PPI benefits, medical benefits, a compensation rate adjustment, penalties, interest and a finding of unfair or frivolous controversion based upon Dr. Fellars' EME report. (Controversion Notice, July 22, 2019; Answer, July 22, 2019).

13) On April 3, 2020, Employee sought permanent total disability (PTD) and PPI benefits, medical costs, a finding of unfair for frivolous controversion, penalty for late paid compensation and interest for permanent headaches and a limp. (Claim for Workers' Compensation Benefits, April 3, 2020).

14) On April 15, 2019, Curtis Mina, M.D., indicated he agreed with Dr. Fellars' opinions in the March 9, 2019 EME report. (Mina response, April 15, 2019).

15) On April 16, 2020, Employer denied PTD and PPI benefits, medical benefits, penalties, interest and a finding of unfair or frivolous controversion. (Answer, April 16, 2020).

16) On April 24, 2020, Employer served Employee by certified mail, return receipt requested with a letter enclosing discovery releases, including (1) three medical records releases for records from January 1, 2010 for Employee's back and upper right extremity, (2) three pharmacy releases for records from January 1, 2010 to the present, (3) an employment records release for employment records from May 7, 2008 to the present and for medical records from January 1, 2020 through the expiration of the release, (4) a Social Security Records Release seeking benefit amount and medical records from January 1, 2010 to the present, (5) Social Security Earnings Information Release for statement of earnings from 2008 to 2020, (6) insurance records release for records from January 1, 2010 to the present for Employee's back and upper right extremity, (7) State of Alaska Medicaid Authorization for Release of Information for a claims detail report and billing documents to satisfy a lien and (8) a Division of Workers' Compensation Request for Release of Information. (Letter, April 24, 2020).

17) On July 10, 2020, Employer denied all benefits for failing to sign and return releases sent to Employee on April 24, 2020. (Controversion Notice, July 10, 2020).

18) On November 12, 2020, Employer served Employee by certified mail, return receipt requested with a letter enclosing discovery releases, including (1) three medical records releases for records from January 1, 2010 for Employee's back and upper right extremity; (2) three pharmacy releases for records from January 1, 2010; (3) an employment records release employment records from May 7, 2008 to the present and medical records from January 1, 2020 through the expiration of the release; (4) a Social Security Records Release seeking benefit amount and medical records from January 1, 2010 to the present; (5) Social Security Earnings Information Release for statement of earnings from 2008 to 2020; (6) insurance records release for records from January 1, 2020 to the present for Employee's back and upper right extremity; (7) State of Alaska Medicaid Authorization for Release of Information for a claims detail report and billing documents to satisfy a lien; and (8) a Division of Workers' Compensation Request for Release of Information. (Letter, November 12, 2020).

19) Employee failed to sign and return the releases or petition for a protective order. (Record).

20) On December 3, 2020, Employer requested an order compelling Employee to sign discovery releases. (Petition, December 3, 2020).

21) On December 9, 2020, Employee sought PPI benefits, a finding of unfair or frivolous controversion and penalty for late paid compensation for injuries to her neck and lower spine and headaches. (Claim for Workers' Compensation Benefits, December 9, 2020).

22) On December 21, 2020, Employee sought PTD benefits, a finding of unfair or frivolous controversion, medical costs, penalty for late paid compensation and interest for injuries to her neck, left hip and leg and right hand. (Claim for Workers' Compensation Benefits, December 21, 2020).

23) On December 23, 2020, Employer denied all benefits for Employee's failure to sign and return releases sent to her on April 24, 2020 and November 12, 2020. (Controversion Notice, December 23, 2020).

24) On December 24, 2020, Employee contended, "the releases are overbroad, burdensome and Employer already has all the available discovery documentation." The designee reviewed the releases and "found all to be standard, relevant, and likely to lead to discoverable information" and granted Employer's December 3, 2020 petition to compel. Employee was ordered to sign and return the releases within 10 days of service of the summary and informed of her right to appeal the order and seek reconsideration. (Prehearing Conference Summary, December 24, 2020).

25) On December 28, 2020, the division served the parties with the December 24, 2020 prehearing conference summary. (Prehearing Conference Summary Served, December 28, 2020).

26) Employee did not request reconsideration or appeal the discovery order. (Record).

27) On December 31, 2020, Employer denied PPI and PTD benefits, a finding of unfair or frivolous controversion, penalty for late paid compensation, interest and medical costs, relying on Dr. Fellars' EME report and Dr. Mina's April 15, 2019 form indicating Employee did not have any restrictions. (Controversion Notice, December 31, 2020; Answer, December 31, 2020).

28) On January 14, 2021, Employer requested dismissal of Employee's claims for failing to sign and return the releases as ordered by the designee. (Petition, January 14, 2021). Alternately, Employer sought a sanction denying Employee benefits during the period of noncompliance. (Memorandum in Support of Petition to Dismiss/Sanctions, January 14, 2021).

29) On March 11, 2021, Employee filed handwritten documents, along with medical records, which stated:

I don't care what [Employer] says – they are [responsible] for my current condition – for the pain that I have on regular basis.

I truly do not understand how [Employer] thinks that the job they had me doing – a job that their store manager would not let me out of – lifting heavy furniture [every day] is not [responsible] for my condition. I was 50 [at] the time – I weigh 120 lbs.

Also what gives [Employer] the right to ask about my earnings? – or any info on my SSI – OR the right to deny treatment. Or not pay for treatment? I have not received ANY treatment at all because this low life company has refused to pay a bill that is owed. (Employee hearing filings, March 11, 2021).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. 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;
- (3) this chapter may not be construed by the courts in favor of a party;
- (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.

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).

The Alaska Supreme Court has held the board owes a duty to every claimant to fully advise him of "all the real facts" bearing upon his right to compensation and instruct him on how to pursue that right under law. *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963). In

Bohlmann v. Alaska Construction & Engineering, 205 P.2d 316 (Alaska 2009), the Court held the board's failure to correct an employer's erroneous assertion to a self-represented claimant that his claim was already time-barred rendered the claimant's ARH timely. Applying *Richard, Bohlmann* stated the board has a specific duty to inform a self-represented claimant how to preserve his claim.

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 medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.

The Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987); citing *United Services Automobile Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974). Under AS 23.30.107(a), it is mandatory that employees release all evidence "relative" to the employee's injury. This aids in meeting the directive that the Alaska Workers' Compensation Act be interpreted to ensure the "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers" AS 23.30.001(1). *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), provided guidance in discovery matters by defining the term "relative" as set forth in AS 23.30.107(a) as follows:

Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

. . . Information which would be inadmissible at trial, may nonetheless be discoverable if it is reasonably calculated to lead to admissible evidence. Under our relaxed rules of evidence, discovery should be at least as liberal as in a civil action and the relevancy standards should be at least as broad.

To be admissible at hearing, evidence must be ‘relevant.’ However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing. (Citation omitted).

Employers must be able to thoroughly investigate workers’ compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. Medical and other releases are important means of doing so. *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Employers have a constitutional right to defend against claims. *Rambo v. VECO, Inc.*, AWCB Decision No. 14-0107 (August 5, 2014), at 8 (citing *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), at 6, which cited Alaska Const., Art. I Sec. 7). Employers also have a statutory duty to adjust workers’ compensation claims promptly, fairly and equitably. *Granus* at 5.

In an attempt to balance the goals of liberal discovery and reasonable protection of injured workers’ privacy, discovery is generally limited to two years before the earliest evidence of related symptoms. See, e.g., *Smith v. Cal Worthington Ford, Inc.*, AWCB Decision No. 94-0091 (April 15, 1994). Discovery of employment records is generally limited to the period beginning ten years before the work injury. *Id.*

Pharmacy records are often problematic. A wholesale identification of all prescription medications could reveal highly personal information not relevant to the work injury. Some drugs may be so closely associated with particular conditions that the mere fact they have been prescribed would, for all intents and purposes, reveal the underlying diagnosis, which may be irrelevant to the work injury. Also, because doctors may prescribe drugs for unusual or “off label” purposes, a pharmacist may not be able to relate a prescription to a specific injury. *Adkins v. Alaska Job Corps Center*, AWCB Decision. No. 07-0128 (May 16, 2007) addressed those concerns by limiting pharmacy releases to the names of prescribing physicians during the appropriate period, without identifying the prescription medications. Employers could then contact the prescribing physicians to determine if medications relate to the 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 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 by AS 23.30.107 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.

(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.

(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. . . .

Where a party unreasonably refuses to provide information, AS 23.30.108(c) and 8 AAC 45.054(b) grant the board "broad discretionary authority" to make orders assuring parties obtain relevant evidence necessary to litigate or resolve their claims. *Bathony v. State of Alaska DEC*, AWCB Decision No. 98-0053 at 5 (March 18, 1998). Claim dismissal is provided for under AS 23.30.108(c) and AS 23.30.135 where an employee willfully obstructs discovery, although this sanction "is disfavored in all but the most egregious circumstances." *McKenzie v. Assets, Inc.*, AWCB Decision No. 08-0109 at 11-12 (June 11, 2008). 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) (further citations omitted). Repeated noncompliance with board orders is willful. *Brown v. Gakona Volunteer Fire Dep't*, AWCB Decision No. 15-0143, (October 24, 2015), citing *Rogers & Babler*; *McKenzie*; *Erpelding v. R&M Consultants, Inc.*, Case No. 3AN-05-12979CI (Alaska Superior Ct., April 26, 2007)(further citations omitted). An employee was found to have willfully failed to comply with discovery where she “failed or refused to provide the releases [she was previously ordered to sign], without any legal justification or compelling excuse” *Vildosola v. Sitka Sound Seafoods*, AWCB Decision No. 11-0005 at 11 (January 20, 2011).

The sanction of dismissal of an employee’s claim cannot be upheld absent a reasonable exploration of “possible and meaningful alternatives to dismissal.” *Hughes v. Bobich*, 875 P.2d at 753. A conclusory rejection of sanctions other than dismissal of the case does not suffice. *DeNardo v. ABC Inc. RV Motorhomes*, 51 P.3d 919, 926 (Alaska 2002). Since a workers’ compensation claim dismissal is “analogous to a dismissal of a civil action under Civil Rule 37(b)(3), the factors set forth in that subsection when deciding petitions to dismiss have occasionally been applied.” *Mahon v. Newman*, AWCB Decision No 13-0160 at 5 (December 5, 2013) (further citations omitted).

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. . . .

8 AAC 45.054. Discovery. . . .

(b) Upon the petition of a party, the board will, in its discretion, order other means of discovery.

. . . .

(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. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a

party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

....

(h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition in accordance with 8 AAC 45.050 that sets out the grounds for the appeal. Unless a petition is filed under this subsection no later than 10 days after service of a board designee's discovery order, a board designee's discovery order is final.

....

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

....

(10) discovery requests;

....

8 AAC 45.095. Release of Information. (a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 14 days after service of the request, petition for a prehearing under 8 AAC 45.065.

(b) If after prehearing the board or his designee determines that information sought from the employee is not relevant to the injury that is the subject of the claim, a protective order will be issued.

(c) If after prehearing an order to release information is issued and employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the request to release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release

8 AAC 45.110. Record of proceedings. (a) A person may see or get a copy of the written record in accordance with this subsection and after completing and giving the division a written request, providing identification, and paying the fee, if required under 8 AAC 45.030. Under this section,

(1) a party to a claim or a petition or a party's representative who has filed an entry of appearance in a case may see or get a copy of the written record, including medical and rehabilitation reports, for all of the employee's case files; for purposes of this paragraph, "a party to a claim or a petition" is the employee, the employer, the insurer, a person sought to be joined or consolidated to a claim or petition, or the rehabilitation specialist appointed or selected in accordance with AS 23.30.041

....

Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure. . . .

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

Alaska Rules of Civil Procedure. 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 regarding to the failure as are just, and among others the following:

...

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

(3) Standard for Imposition of Sanctions. Prior to making an order . . . 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;

- (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

Dismissal as a sanction may be reversed for abuse of discretion where the board fails to consider or explain why a sanction other than the end of litigation would not be adequate to protect the parties' interests. *McKenna v. Wintergreen, LLC*, AWCB Decision No. 15-0125 at 7 (September 28, 2015), *citing to Erpelding*. "While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless 'the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal.'" *Hughes* at 753.

Giving a party his day in court has long been favored. *Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645, 647 (Alaska 1992). Unless otherwise provided for by statute, workers' compensation cases are to be decided on their merits. AS 23.30.001(2).

ANALYSIS

Should Employee's claims be dismissed for failing to sign and return releases as ordered?

Employer seeks an order dismissing Employee's claims for her refusal to comply with a designee's order. Employee contends Employer does not have the right to seek the evidence authorized to be disclosed by the releases and it already discovered evidence with previous releases. Employer served Employee with releases on April 24, 2020 and November 12, 2020, and she failed to sign and return the releases or file for a petition for a protective order. Her right to benefits are suspended until the signed releases are delivered. AS 23.30.108(a). The designee exercised discretion granted under AS 23.30.108, 8 AAC 45.054(b) and 8 AAC 45.065(a)(10) when he ordered Employee to sign and return the releases on December 28, 2020, and informed her of the right to appeal the order. Neither Employee nor Employer appealed the order and it

became final. 8 AAC 45.054(h). However, Employee failed to sign and return the releases. Employee's right to benefits continues to be suspended until the signed releases are delivered. AS 23.30.108(b).

A petition to dismiss requires balancing the strong preference for an employee's "day in court" against an employer's need to investigate and defend against claims. AS 23.30.108(c); *Sandstrom*. Dismissal should only be imposed in extreme circumstances and even then, only if an employee's failure to comply with discovery has been willful and lesser sanctions are insufficient to protect the employer's rights. *Id.*; *Hughes*; *DeNardo*; *Erpelding*.

Employer has been trying to obtain releases for medical, employment, insurance, Social Security and workers' compensation records from Employee since April 24, 2020. Employee's failure to sign and return releases for almost a year has hindered Employer's constitutional right to defend against claims. Alaska R. Civ. P. 37. However, the December 28, 2020 prehearing conference summary does not inform Employee of her duty to provide Employer written authority to obtain evidence relative to her claims, Employer's right to obtain such evidence and consequences for failing to comply with a discovery order. *Id.* Therefore, the designee failed to adequately inform Employee how to preserve her claims. *Richard*; *Bohlmann*.

Employee was ordered to sign the releases because Employer has the right to thoroughly investigate and gather evidence concerning claims and the releases seek discoverable information. Employee claimed TPD, TTD, PTD and PPI benefits and medical benefits for a May 7, 2018 work injury involving headaches and her neck, back, and right hand and Employer disputes her entitlement to those benefits based upon the EME report. The medical releases, insurance records release and employment record release seek records from January 1, 2010 to the present for Employee's back and right upper extremity, a Social Security Records Release seeks medical records from January 1, 2010 to the present, and the pharmacy releases seek records from January 1, 2010 to the present. Whether the work injury is the substantial cause of Employee's need for medical treatment and disability is a question at issue. *Granus*; *Rogers & Babler*. A release seeking medical records two years before the earliest evidence of related symptoms is reasonably calculated to lead to facts that will have any tendency to make a

question at issue more or less likely. *Granus; Smith*. The date of the earliest evidence of related symptoms is May 2012. The medical, Social Security Records and pharmacy release time period is reasonable. *Rogers & Babler; Granus; Smith*. Medical records regarding Employee's back and upper right extremity from January 1, 2010 are discoverable; Social Security medical records and pharmacy records from January 1, 2010 are discoverable. *Id.* The Medicaid release seeks a "claims detail report and billing documents" regarding a lien for medical treatment Employee sought for the work injury, which Employer contends is not work-related; the Medicaid claims detail report and billing documents are discoverable. *Id.*

The employment records release seeks employment records from May 7, 2008, a Social Security Records Release seeks the benefit amounts from January 1, 2010 and the Social Security Earnings release seeks earnings from 2008 to 2020. Whether Employee is entitled to PTD benefits is at issue. *Granus; Rogers & Babler*. A release seeking employment records, the Social Security benefit amount and earnings records ten years before the work injury is reasonably calculated to lead to facts that will have any tendency to make a question at issue more or less likely. *Granus; Smith*. The employment records, Social Security Records and Social Security Earnings release time period is reasonable. *Rogers & Babler; Granus; Smith*. Employment records from May 7, 2008, Social Security Records for benefit amounts from January 1, 2010 and Social Security Earnings records from 2008 to 2020 are discoverable. *Id.*

8 AAC 45.110 states a party to a claim or a party's representative may see or obtain a copy of the written record, including medical and rehabilitation reports, for all of the employee's case files. Employee's case files with the Division of Workers' Compensation are discoverable.

Pursuant to *Richard* and *Bohlmann*, Employee is informed Employer is entitled to the information it seeks in the releases because:

- 1) Employee has a continuing duty to provide Employer written authority to obtain relevant evidence regarding medical and rehabilitation information during the pendency of the dispute. AS 23.30.107(a).

- 2) Employer has a constitutional right to defend against claims, including the right to thoroughly investigate and gather evidence concerning claims for benefits under the Act for which they ultimately may be responsible. *Granus; Schwab; Cooper; Rambo*; AS 23.30.001.
- 3) Employer has the right to obtain relevant records concerning medical history, previous employment, and other types of benefits sought or collected by an injured worker which may be relevant to a claim or to affirmative defenses. *Id.*; AS 23.30.107; AS 23.30.108; Alaska R. Civ. P. 26.

Employee is also advised if she fails to comply with an order directing her to sign and return releases, appropriate sanctions may be imposed in addition to any forfeiture of benefits during the period of suspension, including dismissal of her claims. AS 23.30.108(b); *Richard; Bohlmann*.

The circumstances in this case are not egregious because Employee has not failed to comply with multiple orders and she has demonstrated a desire to continue to pursue benefits by participating in prehearing conferences and the April 6, 2021 hearing and by filing several claims. *McKenzie; Hughes; Brown*. Given the designee's failure to inform Employee how to preserve her claims and Employee's mistaken assertion Employer is not entitled to the evidence it seeks with the releases, it is unclear her failure to sign and return the releases was unreasonable and willful. AS 23.30.108(b); 8 AAC 45.095; *Vildosola; Rogers & Babler*. Therefore, Employee's claims will not be dismissed at this time. Employer's petition to dismiss will be denied.

However, Employee will be ordered to sign and return the releases within 10 days from issuance of this decision. AS 23.30.135. Any benefits to which Employee may be entitled that are currently suspended may be forfeited and her claims may be dismissed if she fails to sign and return the releases.

CONCLUSION OF LAW

Employee's claim should not be dismissed for failing to sign and return releases as ordered.

ORDER

