ALASKA WORKERS' COMPENSATION BOARD

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

AMANDA K. LYNN, Employee, Claimant, v. FRED MEYER STORES, INC., Employer, and THE KROGER CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201806813 AWCB Decision No. 22-0037 Filed with AWCB Anchorage, Alaska on May 27, 2022

Fred Meyer Stores, Inc.'s (Employer) March 22, 2022 petition to dismiss was heard in Anchorage, Alaska, on May 24, 2022, a date selected on April 12, 2022. An April 12, 2022 request for a hearing gave rise to this hearing. Amanda K. Lynn (Employee) represented herself and testified. Attorney Vicki Paddock represented Employer. All participants appeared telephonically. The record closed at the hearing's conclusion on May 24, 2022.

ISSUES

Employer contends Employee willfully impeded discovery by refusing to sign and return discovery releases and documents as previously ordered. It contends the long delay in providing the releases and discovery documents makes it is clear Employee does not intend to comply with the orders. 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 Employee's claims.

Employee contended she did not previously understand the legal basis for the various releases and discovery requests or her obligations to provide discovery under the law. After considerable explanation from the designated chair at hearing, Employee contended she would immediately sign and deliver all releases and provide the requested discovery.

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

FINDINGS OF FACT

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

1) 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).

2) On May 14, 2018, Employee reported cervical, thoracic and lumbar 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 pain when she felt a popping sensation and the pain moved to her cervical and lumbar spine. Employee was diagnosed with back pain and restricted to light duty work. (David Barnes, DO., progress note, May 14, 2018).

3) On May 23, 2018, Employee sought temporary partial disability (TPD) benefits, a finding of unfair or frivolous controversion and a penalty for late-paid compensation. (Claim for Workers' Compensation Benefits, May 23, 2018).

4) 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 it had light duty available, which she declined. (Controversion Notice, June 1, 2018; Answer, June 1, 2018).

5) On February 28, 2019, Employee sought TTD and permanent partial impairment (PPI) benefits, a 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).

6) On March 9, 2019, orthopedic surgeon Todd Fellars, MD, examined Employee for an Employer's medical evaluation (EME) and diagnosed C5-6 cervical spondylosis unrelated to work, cervicalgia 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 was due to degenerative disc disease and was not caused by work. He concluded her cervical spine pain and intermittent upper extremity pain was also 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, based on pre-injury medical records. (Fellars EME report, March 9, 2019).

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

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

9) On July 9, 2019, Employee claimed PPI benefits, a compensation rate adjustment, an unfair or frivolous controversion, medical costs, a 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).

10) On July 22, 2019, Employer denied TTD and PPI benefits, medical benefits, a compensation rate adjustment, penalty, interest and an unfair or frivolous controversion, based on Dr. Fellars' EME report. (Controversion Notice, July 22, 2019; Answer, July 22, 2019).

11) On April 6, 2020, Employee claimed permanent total disability (PTD) and, PPI benefits, medical costs, an unfair or frivolous controversion, a penalty for late-paid compensation and interest for headaches and a limp. (Claim for Workers' Compensation Benefits, April 3, 2020).

12) On April 16, 2020, Employer denied PTD and PPI benefits, medical benefits, penalty, interest and an unfair or frivolous controversion. (Answer, April 16, 2020).

13) On April 24, 2020, Employer served Employee by certified mail, return receipt requested with a letter enclosing discovery releases, including three medical records releases, three pharmacy releases, an employment records release, Social Security Records Release, Social Security Earnings Information Release, insurance records release, State of Alaska Medicaid Authorization for Release of Information and a Division of Workers' Compensation Request for Release of Information. (Letter, April 24, 2020).

14) On July 10, 2020, Employer denied all benefits for Employee's failure to sign and return releases sent to her on April 24, 2020. (Controversion Notice, July 10, 2020).

15) On November 12, 2020, Employer served Employee by certified mail, return receipt requested with a letter enclosing discovery releases, including three medical records releases, three pharmacy releases, an employment records release, Social Security Records Release, Social Security Earnings Information Release, insurance records release, State of Alaska Medicaid Authorization for Release of Information and a Division of Workers' Compensation Request for Release of Information. (Letter, November 12, 2020).

16) Employee failed to sign and return the releases or petition for a protective order. (Agency file).

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

18) On December 9, 2020, Employee claimed PPI benefits, an unfair or frivolous controversion, a penalty and a second independent medical evaluation (SIME). (Claim for Workers' Compensation Benefits, December 9, 2020).

19) On December 21, 2020, Employee claimed PTD benefits, an unfair or frivolous controversion, a penalty for late-paid compensation, medical costs exceeding $6,000 and interest. (Claim for Workers' Compensation Benefits, December 21, 2020).

20) On December 23, 2020, Employer denied all claimed benefits and remedies 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).

21) On December 31, 2020, Employer denied PPI and PTD benefits, an unfair or frivolous controversion, a penalty for late-paid compensation, interest and medical costs, relying on Dr. Fellars' EME report and Employee's physician's April 23, 2019 form stating Employee did not have any restrictions. (Controversion Notice, December 31, 2020; Answer, December 31, 2020).

22) On December 24, 2020, Employee at a prehearing conference 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. The designee ordered Employee to sign and return the releases within 10 days of service of the

summary and informed of her right to appeal the order or seek reconsideration. (Prehearing Conference Summary, December 24, 2020).

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

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

25) On January 4, 2021, Paddock sent Employee a letter requesting discovery based on Employee's deposition testimony. It requested (1) all personal bank statements beginning May 7, 2018 to the then-present; (2) all pay records, 1099s, and W-2s, since May 7, 2018 including but not limited to those printed or electronic payments employee had received from DoorDash; Postmates; Uber; UberEats; Lyft; Field Agent; Gig Walk; Easy Shift; Vital Choice Seafood; Stack Social; and Safeway; (3) all formal or informal job applications, and confirmations of employment from the above-referenced employers, excluding Safeway which was added to the list at the hearing; (4) a list including the names, addresses and phone numbers of all employers for whom employee worked for May 7, 2018 through the then-present including her job title, job duties, dates employed and reasons she left employment; (5) and an answer to the question if she had applied for or received unemployment insurance benefits since May 7, 2018, including the dates for which she received it in the amount received each week. (Paddock letter, January 4, 2021).

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

27) On March 11, 2021, Employee filed handwritten documents, which stated:

> 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 <u>ANY</u> treatment at all because this low life company has refused to pay a bill that is owed. (Employee hearing filings, March 11, 2021).

28) On April 28, 2021, *Lynn v. Fred Meyer Stores, Inc*., AWCB Dec. No. 21-0037 (April 28, 2021) (*Lynn I*), denied Employer's January 14, 2021 petition to dismiss Employee's claims and ordered her to sign and return releases to Employer within 10 days. *Lynn I* noted Employee's

benefits continued to be suspended "by operation of the law" until the releases are signed and returned. (*Lynn I*).

29) On May 4, 2021, Employee claimed PPI benefits, an unfair or frivolous controversion, a penalty for late-paid compensation and a compensation rate adjustment. (Claim for Workers' Compensation Benefits, May 4, 2021).

30) On May 4, 2021, Employee petitioned for a protective order and a continuance:

> I see no reason for the opposing party to have any more information on me than they already have! Information covers every pharmacy including ones that I do not use. My SSI information has absolutely nothing to do with my injury & it should not be made public.
>
> Sedgwick claims, Fred Myers thinks that they can intimidate me -- sorry not going to happen.
>
> I'm asking for these authorizations to be denied & let my medical records speak before themselves – I have not sought treatment for over a year, because Sedgwick refused to pay for it any longer -- long before they asked for any release of information. . . .
>
> I asked that you dismiss the releases of information & judge the case on the medical facts. (Petition, May 4, 2021, and attachment).

31) On May 10, 2021, Employer opposed Employee's petition seeking a hearing continuance. It noted decision 21-0037 found Employer's releases were reasonable and likely to lead to relevant information. Decision 21-0037 instructed Employee to comply with the discovery request and explained why. Employer also noted decision 21-0037 said her past benefits were suspended until releases were signed and returned and her continued refusal to comply with discovery orders could result in claim dismissal. Employer contended Employee did not return the releases within 10 days as the Board had ordered but instead filed a late petition for a protective order and a request for a hearing continuance. It asked the Board to deny her requests. (Employer's Answer to Employee's Petition, May 10, 2021).

32) On May 14, 2021, Employer denied Employee's May 4, 2021 claimed PPI benefits, compensation rate adjustment, an unfair or frivolous controversion, a penalty and interest. It again relied on Dr. Fellar's EME report and its other defenses, including its incomplete discovery. (Answer to Employee's Workers' Compensation Claim, May 14, 2021).

33) On May 25, 2021, *Lynn v. Fred Meyer Stores, Inc*., AWCB Dec. No. 21-0044 (May 25, 2021) (*Lynn II*), denied Employer's June 7, 2021 petition for claim dismissal, which had treated it as a petition for reconsideration of *Lynn I*. (*Lynn v. Fred Meyer Stores, Inc*., AWCB Dec. No. 21-0044 (May 25, 2021) (*Lynn II*)

34) On September 16, 2021, *Lynn v. Fred Meyer Stores, Inc*., AWCB Dec. No. 21-0086 (September 16, 2021) (*Lynn III*), refused to address Employer's June 7, 2021 petition for claim dismissal and found there was insufficient evidence to determine Employee's noncompliance, if any, with orders requiring her to sign and return releases. *Lynn III* determined a written record hearing was an inappropriate way to resolve a petition for claim dismissal and directed the parties to appear at a prehearing conference to arrange for an in-person hearing. (*Lynn III*).

35) On December 7, 2021, *Lynn v. Fred Meyer Stores, Inc*., AWCB Dec. No. 21-0115 (December 7, 2021) (*Lynn IV*), again denied Employer's June 7 and its July 29, 2021 petitions to dismiss Employee's claims. *Lynn IV* determined Employee never sought review from *Lynn I* and it remained in full force and effect. Employer contended it did not receive the new releases from Employee ordered in *Lynn I*; Employee insisted she signed and returned them to Employer. *Lynn IV* noted the magnitude of claim dismissal and provided Employee with another opportunity to comply with discovery orders. It ordered Employer to mail and email releases to Employee who was ordered to sign and return those releases to Employer by mail and email within 14 calendar days from the date she received them. *Lynn IV* also directed Employee to either request a hearing or seek an extension to request one within 90 calendar days from December 7, 2021. (*Lynn IV*).

36) On January 21, 2022, Employer petitioned the appeals commission for review of *Lynn III*. (*Fred Meyer Stores, Inc. v. Lynn*., AWCAC Dec. No. 22-001 (March 18, 2022) (*Lynn V*). The commission denied Employer's petition for review but commented on the Board's procedures and on its *Lynn IV* decision. *Lynn V* took issue with the Board's failure to comment on certain evidence in the file not mentioned in *Lynn IV*. It noted *Lynn IV* implicitly found Employee's statement that she had signed and returned the appropriate releases to Employer credible even though *Lynn IV* did not make explicit credibility findings, and the panel failed to discuss evidence in the file diminishing Employee's credibility and strengthening Employer's position on the factual issues connected to the petitions to dismiss. Nevertheless, *Lynn V* stated:

> Nonetheless, the burden on Fred Meyer to wait once again for Ms. Lynn to comply with a Board order to sign correct releases with a correct date is not so great as to warrant reversal of the Board decision. . . . If Ms. Lynn does not sign and return correct releases in the time frame ordered by the Board, her claim should be dismissed. She has had ample opportunity to sign requested and ordered releases and no further delays should be granted to her. She has a pattern of disregarding direct orders from the Board and the Board is within its rights to dismiss her claim if she does not properly sign the ordered releases. (*Lynn V*, at 18-19).

37) On April 15, 2022, Employee claimed PPI benefits, an unfair or frivolous controversion, a penalty for late-paid compensation and interest. She also said she had constant hip and neck pain, was not able to work or lift much weight and potential employers would not accommodate her. Employee contended Employer's petition to dismiss was "harassment at this point" and said she had given Employer's attorney all requested paperwork and her original injury report included her maiden name. She asked, "how far back is she trying to go?" Employee demanded a hearing. (Claim for Workers' Compensation Benefits, undated but filed on April 15, 2022).

38) On April 28, 2022, Employer denied Employee's claimed PPI benefits, unfair or frivolous controversion, penalty for late-paid compensation and interest. It again stated discovery had not been completed and raised statutory bars in law and equity. Employer again relied on Dr. Fellar's EME report and renewed its other previous defenses. (Answer to Employee's Workers Compensation Claim, April 28, 2022).

39) At hearing on May 24, 2022, Employee testified Employer had received all the records she had. She stated it was her understanding she gets to determine what records Employer gets to see because the records belong to her and emphasized her understanding that her medical and other records would be "public records" in "court," subject to review by anyone. Employee also stated her understanding that Employer could only receive records going back to August 2008 and did not need to know her prior name because she legally changed her name through marriage before that 10-year period began. She stated five family members had died during COVID-19 including her brother and this precluded her from obtaining doctor visits in any event. Employee admitted she did not read the five Board and Commission decisions sent to her and did not read the various prehearing conference summaries the Division served on her because she was taking care of her mother, did not have enough time to pursue her claims and had put them "on hold." She admitted she probably received Employer's January 4, 2021 letter requesting discovery, but

it would be sitting "in a pile of mail" at her residence. Employee stated if she pre-dated releases she returned to Employer, it was done by accident and not intentionally. She also testified regarding Employer's January 4, 2021 letter, read to her at hearing and stated she had only worked post-injury for Safeway, Lyft, Uber and DoorDash. (Employee).

40) At hearing, the designated chair took considerable time explaining to Employee the law regarding releases and other discovery and her obligation to provide discovery and the ultimate sanctions that can be applied in the event she did not, including claim dismissal. Employee testified she understood this clearly. Thereafter, Employee expressed her new understanding, admitted her prior notions were not correct and testified she would immediately come to the Division offices in Anchorage to obtain the subject releases, provide discovery she could obtain that day, sign, date and provide her maiden name on all releases Employer wanted, and hand-deliver that discovery and those releases to Paddock's office before it locked its doors to the public at 4:00 PM, on May 24, 2022 She also said she would obtain and provide remaining discovery to Paddock or advise her that she had no responsive production to the January 4, 2021 requests, no later than Thursday, May 26, 2022, at 4:00 PM. (Record; Employee).

41) All the above decisions were served on Employee at her address of record in her agency file. She recently updated her address to a PO Box. Whether Employee reads documents the Division and the Commission sent to her is totally under her control. (Agency file; experience).

42) Employee's agency file, including medical records and her deposition testimony, and some of her hearing testimony raise questions about her credibility, but her hearing statements that she would comply with the Board's May 24, 2022 oral order were credible. (Observations; judgment).

43) Though Employer is incurring attorney fees trying to obtain discovery from Employee, there is no evidence Employer has paid or is paying Employee ongoing benefits. (Agency file, Payments, Annual Report tabs, accessed May 27, 2022).

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

> **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.
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> (b) Medical or rehabilitation records, and the employee's name, address, social security number, electronic mail address, and telephone number contained on any record, and in employee's file maintained by the division or held by the board or the commission are not public records subject to public inspection and copying under AS 40.25.100 – 40.25.295. This subsection does not prohibit
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> (1) the reemployment benefits administrator, the division, the board, the commission, or the department from releasing medical or rehabilitation records in an employee's file, without the employee's consent, to a physician providing medical services under AS 23.30.095(k) or 23.30.110(g), a party to a claim filed by the employee, or a governmental agency; or
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> (2) the quoting or discussing of medical or rehabilitation records contained in an employee's file during a hearing on a claim for compensation or in a decision or order of the board or commission.

The Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab v. Hooper Electric*, AWCB Dec. No. 87-0322 (December 11, 1987). *Granus v. Fell*, AWCB Dec. 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.
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> . . . 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.
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> 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 Dec. No. 87-0108 (May 4, 1987). Employers have a constitutional right to defend against claims. *Rambo v. VECO, Inc.*, AWCB Dec. No. 14-0107 (August 5, 2014). Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Granus*.

> **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.
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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.
> (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) 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 Dec. No. 98-0053 (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 Dec. No. 08-0109 (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). Repeated noncompliance with Board orders is willful. *Brown v. Gakona Volunteer Fire Dep't,* AWCB Dec. No. 15-0143, (October 24, 2015). An employee 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 Dec. No. 11-0005 (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*, 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 Dec. No 13-0160 (December 5, 2013).

> **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 Board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **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 of 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. . . .
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> **Alaska Rules of Civil Procedure. Rule 37. Failure to Make Disclosures or Cooperate in Discovery: Sanctions.**
> . . .
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> (b) Failure to Comply With Order. . . .
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> (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:
> . . . .
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> (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
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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;

> (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 . . . .

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 Dec. No. 15-0125 (September 28, 2015). "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).

ANALYSIS

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

Employer seeks an order dismissing Employee's claims for her refusal to comply with orders requiring her to sign and return releases and provide discovery. AS 23.30.107(a); AS 23.30.108(c); *Bathony*; *Schwab*; *Cooper.* At hearing, Employee initially renewed her prior contentions including that the records in question are hers, she gets to decide what Employer gets to see, the discovery was irrelevant, Employer does not have the right to seek the evidence ordered to be disclosed by the releases, she already signed and returned the prior releases and Employer already discovered all necessary evidence with previous releases. However, at hearing Employee acknowledged she had either improperly dated the releases or otherwise modified them, which she understood after some explanation from the designated chair, made them useless. The designated chair also successfully clarified several critical misunderstandings Employee expressed about the legal requirements the Act places on a person who files a claim. *Richard*.

A petition to dismiss requires balancing the strong preference for an injured worker'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. *Richard*; *Hughes*; *DeNardo*; *McKenna*.

Employer has been trying to obtain discovery releases from Employee since April 24, 2020. There is no doubt Employee's failure to sign and return releases has hindered Employer's constitutional right to defend against her claims. *Rambo*; *Granus*; Alaska R. Civ. P. 37(b)(3). While the Division could have perhaps done a better job at prehearing conferences explaining to Employee her duty to provide Employer written authority to obtain evidence relative to her claims, Employer's right to obtain evidence relative to her claims and the consequences for failing to comply with a discovery order, the Division did expressly advise her of these facts in many prehearing conference summaries and in all relevant decisions and orders. *Richard*. At hearing, Employee candidly admitted she had read none of them. Whether Employee reads material the Division sends her regarding her case is totally within her control; it is her duty to read prehearing conference summaries and decisions and orders to learn about her rights and responsibilities set forth therein and the consequences of failing to follow associated orders. *Richard*; *Rogers & Babler*.

The Commission in *Lynn V* implied Employee should have another chance to comply with the previous orders for her to sign releases. On pages 18-19, *Lynn V* stated Employee had ample opportunity to sign the ordered releases and "no further delays should be granted to her." In the same paragraph *Lynn V* suggested "if she does not properly sign the ordered releases," implying a future event, then "her claim should be dismissed." While a little inconsistent, the Commission's comments suggest Employee be given another opportunity to sign releases, and using the Commission's same reasoning, produce the discovery. AS 23.30.135(a).

Notwithstanding her previous misconceived notions about her rights vis-à-vis Employer's rights, at hearing Employee credibly stated she would complete, sign and appropriately date all the

ordered releases and would provide all discovery requested in Employer's January 4, 2021 letter. AS 23.30.122; *Smith*. She was given until 4:00 PM on May 24, 2022 to present the completed releases to Paddock's office and was given until 4:00 PM on May 26, 2022 to present to Paddock the requested discovery. Employee was also advised if she failed to comply with the oral orders directing her to sign and return releases and discovery as directed, all claims she filed as of May 24, 2022 will be dismissed. AS 23.30.108(b); *Richard*. Employee understood her prior beliefs were incorrect and accepted the designated chair's explanation of her rights and obligations under the Act to provide discovery. Her biggest concern was her incorrect belief that all her records were "open to the public." As the designated chair explained in detail at hearing, that is incorrect. AS 23.30.107(b)(1), (2). With her newly found knowledge, Employee was sincere in her statement that she was now going to comply. AS 23.30.122; *Smith*.

Given these circumstances, including her obvious, prior and critical misconceptions about her rights and obligations under the law, dismissing all her claims without giving her another opportunity to comply with the previous and current orders to sign releases and give discovery would be a harsh remedy. AS 23.30.001(1), (2), (4). Though it is occurring attorney fees in fighting the continuing battle for discovery, Employer controverted all benefits in April 2019, is not paying her benefits and, as the commission in *Lynn V* stated, "the burden on [Employer] to wait once again for [Employee] to comply with a Board order to sign correct releases with the correct date is not so great as to warrant reversal of [*Lynn IV*]" and dismiss her claims. Moreover, Employee's past benefits remain suspended and subject to forfeiture. AS 23.30.108(a).

Whether her failure to sign and return releases and discovery was unreasonable and willful remains to be determined at a future hearing, as will the statute of limitations issue, which was not raised as an issue to be decided at this hearing. *McKenzie*; *Brown*; *Vildosola*; *Mahon*. At such future hearing, the parties are advised to file and serve any evidence addressing the willfulness issue and be prepared to discuss that evidence to support their respective positions. Such evidence could include returned or unclaimed certified mail or signed return receipt "green cards."

In the event Employee fails to comply with the May 24, 2022 oral orders as set forth in this decision, her prior claims will be dismissed, which has the same effect as a past benefit forfeiture. AS 23.30.108(b); *Vildosola*; *Rogers & Babler*. If Employee complies, the forfeiture of past benefits question including whether her past failures to sign and return releases and discovery was unreasonable and willful will be determined later. Given this result, issues about her receipt or nonreceipt of past releases, and questions about her mailing address are immaterial at this time. She will either comply with these orders or she will not. If she complies, Employee's case will move forward subject to Employer's defenses; if she does not, her claims will be dismissed. Therefore, Employee's claims will not be dismissed at this time. Employer's petition to dismiss will be denied with jurisdiction retained.

CONCLUSION OF LAW

Employee's claims should not be dismissed for failing to sign and return releases and for failing to provide discovery, as ordered.

ORDER

1) Employer's March 22, 2022 petition to dismiss is denied with jurisdiction retained.
2) Employee is ordered to complete, sign, correctly date and return all releases identified at the May 24, 2022 hearing to Paddock's office by no later than 4:00 PM on May 24, 2022.
3) Employee is ordered to present all discovery requested in Employer's January 4, 2021 letter to Paddock's office by no later than 4:00 PM on May 26, 2022. If Employee determines there is no physical documentation available in response to the discovery requests, she is to so advise Paddock in writing with an appropriate explanation.

Dated in Anchorage, Alaska on May 27, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/
Nancy Shaw, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 Amanda K. Lynn, employee / claimant v. Fred Meyer Stores, Inc., employer; The Kroger Co., insurer / defendants; Case No. 201806813; 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 May 27, 2022.

/s/
Kimberly Weaver, Office Assistant II