

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

FRANK C. BONNER, )  
)  
Employee, )  
Claimant, ) INTERLOCUTORY  
) DECISION AND ORDER  
v. )  
) AWCB Case No. 201710264  
ALASKA GLACIER SEAFOODS, INC., )  
) AWCB Decision No. 22-0062  
Employer, )  
and ) Filed with AWCB Juneau,  
) Alaska on September 14, 2022  
LIBERTY NORTHWEST INSURANCE )  
CORP., )  
)  
Insurer, )  
Defendants. )

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Alaska Glacier Seafoods, Inc. and Liberty Northwest Insurance Corporation's (Employer) June 7, 2022 petition to dismiss was heard in Juneau, Alaska on August 30, 2022, a date selected on July 5, 2022. A June 29, 2022 affidavit of readiness for hearing gave rise to this hearing. Frank C. Bonner (Employee) appeared telephonically and testified on his own behalf. Attorney Adam Sadoski appeared telephonically and represented Employer. The record closed on August 30, 2022.

## ISSUE

Employer contends Employee willfully refused to sign releases and complete interrogatories and return them as ordered. It contends it has been severely prejudiced by Employee's refusal since having an open case ties up money in reserves and it cannot put the money towards other claims or business necessities. Employer contends Employee already indicated he would cooperate with discovery at a December 2021 prehearing conference but failed to do so. It contends only dismissal of Employee's claim would adequately protect its rights.

Employee contends he did not receive the releases, interrogatories or the March 16, 2022 prehearing conference summary ordering him to sign releases and complete interrogatories and return them to Employer. He contends he is willing to sign and return the releases and complete and return the interrogatories. Employee opposes dismissal and forfeiture of benefits.

**Should Employee's claim be dismissed?**

FINDINGS OF FACT

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

- 1) On July 22, 2017, Employer reported Employee slipped and fell on slippery substance on June 1, 2017 and injured his lower back. (Employer First Report of Occupational Injury or Illness, July 22, 2017).
- 2) On November 15, 2021, Employee filed a claim dated October 16, 2021, without checking any box to claim benefits but stated, "unpaid bills, I'm still in pain and [it's] getting more painful, in need of some medical [opinion]. May need more medical surgery on hip in future." He provided his mailing address, email address and telephone number of record. (Claim for Workers' Compensation Benefits, October 16, 2021).
- 3) On December 8, 2021, Employer denied medical benefits, relying on Robert Holladay's, M.D., October 24, 2019 employer's medical evaluation (EME) report. (Answer and Controversion Notice, December 8, 2021).
- 4) On December 15, 2021, Employer mailed Employee a letter by certified mail to his address of record requesting he sign and return three authorizations to release medical records, two pharmacy records releases, an employment records release, a Social Security Administration Consent for Release of Information, a Request for Social Security Earnings Information, an insurance records release, and a Division of Workers' Compensation Request for Release of Information and interrogatories. The letter stated:

Under Alaska Statute 23.30.107(a) of the Alaska Workers' Compensation Act, you may request a protective order from the Alaska Workers' Compensation Board (Board) if you have an objection to one or more of the releases by filing a petition with the Board. If you choose to seek a protective order from the Board, you must do so within 14 days of the date of this letter. Failure to sign and return the release(s) or file a request for a protective order within the 14-day period may result in a suspension of benefits until the release(s) is/are signed. AS. 23.30.108(a). If

the employer seeks and obtains a Board order, a failure to comply with that order may result in sanctions imposed by the Board, including the dismissal of your claim or petition. AS 23.30.108(c). (Letter, December 15, 2021).

- 5) On December 21, 2021, Employer's December 15, 2021 letter with releases and interrogatories was signed for by an unknown individual as the signature and the printed name were illegible. (United States Postal Service Certified Mail Return Receipt, December 21, 2021).
- 6) On December 28, 2021, Employee confirmed his address of record and stated his phone was not working and he would be getting a new phone with a new number. He confirmed his claim sought medical benefits. The Board designee advised Employee to inform all parties if his contact information changes. Employer stated it mailed Employee interrogatory discovery requests on December 15, 2021, Employee said he had not received them but intended to cooperate with discovery. The designee directed Employee to notify Employer's attorney if he does not receive the discovery request within one week so Employer could resend them and informed him that Employer could seek an order compelling him to respond if he does not respond. (Prehearing Conference Summary, December 28, 2021).
- 7) On February 17, 2022, Employer requested an order compelling Employee to return signed releases and completed interrogatories which were mailed to him on December 15, 2021. (Petition, February 17, 2022). It denied all benefits for Employee's failure to return signed releases or petition for a protective order. (Controversion Notice, February 17, 2022).
- 8) On February 18, 2022, the Workers' Compensation Division ("Division") served Employee with notice of a prehearing conference occurring on March 16, 2022 to his address of record. (Prehearing Conference Summary, February 18, 2022).
- 9) On March 16, 2022, the Workers' Compensation Board's designee called Employee's telephone number of record but there was no answer and no option to leave a voicemail. Employee failed to attend the prehearing conference. Employer stated it had not received a response to the interrogatories or signed releases from Employee. The Board designee ordered Employee to sign and return all of the releases to Employer's attorney by April 8, 2022 and to complete and return the interrogatories to Employer's attorney by April 22, 2022. The designee provided notice to Employee of the following:

If a party unreasonably or willfully refuses to cooperate in the discovery process, AS 23.30.135 and AS 23.30.108 vest broad discretionary authority for orders to

assure parties obtain the relevant evidence necessary to litigate or resolve their claims including the specific authority to order sanctions for refusal to comply with discovery orders. . . . These may include suspension and forfeiture of benefits and, in extreme cases, where an employee willfully obstructs discovery, an employee's claim may be dismissed. . . .

Employee was informed of his right to appeal the discovery order. (Prehearing Conference Summary, March 16, 2022).

10) On March 17, 2022, the Division served Employee with the March 16, 2022 prehearing conference summary to his address of record along with a petition form and an affidavit of readiness for hearing (ARH) form. (Prehearing Conference Summary Served, March 17, 2022).

11) On June 7, 2022, Employer requested Employee's claim be dismissed for failing to return signed releases and completed interrogatories as ordered in the March 16, 2022 prehearing conference. It mailed the petition to Employee's address of record. (Employer's Petition, June 7, 2022).

12) On June 8, 2022, the Division served Employee with notice of a prehearing conference occurring on July 5, 2022 to his address of record. (Prehearing Conference Summary Served, June 8, 2022).

13) On June 29, 2022, Employer requested an oral hearing be scheduled on its June 7, 2022 petition. (Employer's ARH, June 29, 2022).

14) On July 5, 2022, Employee did not call in to attend the prehearing conference; the Board designee called his telephone number of record but there was no answer. Employee failed to attend the prehearing conference. The Board's designee scheduled an oral hearing on August 30, 2022, on Employer's June 7, 2022 petition, and directed the parties to serve and file evidence for hearing by the close of business on August 10, 2022, and to serve and file witness lists and hearing briefs by the close of business on August 23, 2022. The designee provided notice to Employee of the following:

If a party unreasonably or willfully refuses to cooperate in the discovery process, AS 23.30.135 and AS 23.30.108 vest broad discretionary authority for orders to assure parties obtain the relevant evidence necessary to litigate or resolve their claims including the specific authority to order sanctions for refusal to comply with discovery orders. . . . These may include suspension and forfeiture of benefits and, in extreme cases, where an employee willfully obstructs discovery, an employee's claim may be dismissed. . . .

Claim dismissal is provided for under AS 23.30.108(c) and AS 23.30.135(a) 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). . . .

The designee also scheduled another prehearing conference for August 3, 2022 to discuss the status of the case. (Prehearing Conference Summary, July 5, 2022).

15) On July 11, 2022, the Division served Employee with a copy of the July 5, 2022 prehearing conference summary, the notice of a prehearing conference occurring on August 3, 2022 and the August 30, 2022 hearing notice to his address of record. (Prehearing Conference Summary Served, July 5, 2022; Prehearing Conference Notice Served, July 5, 2022; Hearing Notice Served, July 11, 2022).

16) On August 3, 2022, Employee did not call in to attend the prehearing conference; the Board designee called his telephone number of record but there was no answer. Employee failed to attend the prehearing conference. He was again informed of the August 30, 2022 hearing on Employer’s June 7, 2022 petition to dismiss his claim and that his failure to sign and return the releases and respond to the interrogatories as ordered on March 16, 2022 may result in his benefits being withheld, suspended or forfeited or his claim being dismissed entirely. (Prehearing Conference Summary, August 3, 2022).

17) On August 4, 2022, the Division served Employee with the August 3, 2022 prehearing conference summary and another August 30, 2022 hearing notice to his address of record. (Prehearing Conference Summary Served, August 4, 2022; Hearing Notice Served, August 4, 2022).

18) On August 29, 2022, a workers' compensation technician emailed Employee at his email address of record to confirm his participation in the hearing and requesting a contact number. Employee provided a different telephone number than the number he provided on his claim. (Emails, August 29, 2022).

19) On August 30, 2022, Employee testified he never received the December 15, 2021 letter with releases and interrogatories or the March 16, 2022 prehearing conference summary. He did not know he needed to sign the releases and complete the interrogatories and return them to Employer because he never received them. Employee did not sign for the releases and interrogatories on December 21, 2022 and does not know who did. He confirmed his mailing address remains the same. Employee tried to attend the March 16, 2022 prehearing conference but kept getting a busy signal and called in too late. He did not receive the March 26, 2022 prehearing conference summary, nor did he receive notice of the July and August prehearing conferences and the hearing notice. Employee learned about the hearing when he received the email yesterday. He wants to pursue his claim and strongly feels he is entitled to benefits. Employee opposes claim dismissal and forfeiture of benefits. (Employee).

#### 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; . . . .

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.

**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 45.060. Service.** . . . (b) . . . . Service must be done personally, by facsimile, by electronic mail, or by mail, in accordance with due process. Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. . . .

In *Richard v. Fireman’s Fund*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court wrote:

We hold to the view that a workmen’s compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real



facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

In a footnote, *Richard* cited cases from other states with approval which declared: “The Workmen’s Compensation Act was enacted for the benefit of the employee. The Industrial Accident Board is a state board created by legislative act to administer this remedial legislation, and under the act the Board’s first duty is to administer the act so as to give the employee the greatest possible protection within the purposes of the act.” *Id.* at 450.

In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 319-21 (Alaska 2009), the Alaska Supreme Court addressed this same issue and said:

A central issue inherent to Bohlmann’s appeal is the extent to which the board must inform a pro se claimant of the steps he must follow to preserve his claim. . . .

In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation (footnote omitted). We have not considered the extent of the board’s duty to advise claimants. . . .

*Bohlmann* further stated, “Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion (footnote omitted). . . .”

**8 AAC 45.065. Prehearings.** (a) . . . At the prehearing, the board or designee will exercise discretion in making determinations on  
. . . .

(10) discovery requests; . . . .

**8 AAC 45.095. Release of information.** . . . (c) If after a prehearing an order to release information is issued and an 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 requested release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release.

ANALYSIS

**Should Employee's claim be dismissed?**

Employer seeks an order dismissing Employee's claim because he refused to obey discovery orders. AS 23.30.108(c). Employee contends he never received the releases and interrogatories or the March 16, 2022 prehearing conference summary containing the discovery order. He also contends he was unaware of the July and August prehearing conferences and was made aware of the August 30, 2022 hearing when Division staff emailed him regarding his participation the day before the hearing. Employee contends he still wants to pursue his claim and is willing to sign all of the releases and complete the interrogatories and return them to Employer.

Employee filed a claim against Employer, and he has a duty to release relevant information. AS 23.30.107(a). Designees at prehearing conferences may direct parties to produce documents or other discovery. 8 AAC 45.065(a)(10). If a party refuses to comply with a designee's order concerning discovery, sanctions may be imposed in addition to "forfeiture of benefits, including dismissing the party's claim, petition or defense." AS 23.30.108(c). Parties who refuse to provide discovery may not present related evidence at a hearing. 8 AAC 45.054(d). Further, a hearing panel may refuse to order or award compensation while Employee's refusal to provide discovery continues. AS 23.30.108(c); 8 AAC 45.095(c); *Bohlmann*. This panel must interpret the law and conduct its investigations, inquiries and hearings quickly, fairly, predictably, and impartially and provide due process so all parties' rights may be best ascertained, at a reasonable cost to Employer. AS 23.30.001(1). Employee's failure to provide discovery has delayed the quick, fair, predictable and impartial resolution of his claim. His claim cannot be heard and decided until discovery is completed.

Employer provided a certified mail return receipt indicating an individual received and signed for the December 15, 2021 letter with the releases and interrogatories at Employee's address of record. The March 16, 2022 prehearing conference summary was mailed to Employee's address of record, as were the July 5 and August 3 prehearing conference notices and summaries and the hearing notice. "Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address." 8 AAC 45.060(b). Thus, Employee was properly served with the releases and interrogatories, discovery order and

prehearing conference notices and summaries, which included notice of possible sanctions, including case dismissal, in the event he refused to comply with discovery requests and orders. *Bohlmann*. It is Employee's responsibility to ensure actual receipt of documents properly served and to inform Employer and the Board should his mailing address, email address or telephone number change. *Bohlmann; Richard*.

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. *Sandstrom & Sons*. Employee failed to comply with the March 16, 2022 discovery order. Employee has the burden of proving his failure to comply was not willful. *Hughes*. "Willfulness" is defined as the "conscious intent to impede discovery, and not mere delay, inability or good faith resistance." *Id.* While Employee has been warned of the potential dismissal of his claim, he has not violated multiple discovery orders. *Erpelding*. He testified he did not receive the December 15, 2021 letter with releases and interrogatories and he attempted to attend the March 16, 2022 prehearing conference and was not aware of the July and August prehearing conferences, nor of the discovery orders. Although Employee testified he did not receive notice of the hearing until the day before, he appeared and provided arguments and testimony. Therefore, he has not refused to participate in proceedings and discovery multiple times. *Sullivan*. Employee has proven his failure to comply was not willful. *Hughes; Rogers & Babler*.

Employee's right to benefits are suspended from 10 days after the March 16, 2022 prehearing conference summary was served until he signs the releases and completes the interrogatories and returns them to Employer. AS 23.30.108(b). Employer controverted benefits so benefits are not being paid at this time; thus, suspension is not likely to persuade Employee into complying. Employer is seeking evidence with the releases and interrogatories so barring Employee from introducing at a hearing the evidence which is the subject of the discovery requests would also be unlikely to convince him to comply. Employee testified he wants to pursue his claim and will comply with the order. Based upon the above analysis, dismissal is an improper sanction at this

time and another order will be issued. *Hughes; Erpelding; Sullivan; Rogers & Babler*. Therefore, Employer’s petition to dismiss will not be granted at this time.

Employer will be directed to serve Employee by mail and email with the releases and interrogatories within 10 days from the date this decision and order is issued. Employee will be ordered to sign the releases and return them within 14 days after Employer serves them and to complete the interrogatories and return them within 30 days after Employer serves them. His failure to comply with these orders may be considered willful and can result in claim dismissal.

CONCLUSION OF LAW

Employee’s claim should not be dismissed.

ORDERS

- 1) Employer’s June 7, 2022 petition to dismiss Employee’s claim is denied at this time.
- 2) Employer is directed to serve Employee by mail and email with the releases and interrogatories within 10 days from the date this decision and order is issued.
- 3) Employee is ordered to sign the releases and return them to Employer within 14 days after Employer serves them.
- 4) Employee is ordered to complete the interrogatories and return them to Employer within 30 days after Employer serves them.
- 5) Jurisdiction over this issue is retained in the event Employee refuses or fails to comply with this decision and order.

Dated in Juneau, Alaska on September 14, 2022.

ALASKA WORKERS’ COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Kathryn Setzer, Designated Chair

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/s/  
Bradley Austin, Member

