

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JAMES MARKEL, )  
)  
Employee, )  
Claimant, )  
)  
v. ) INTERLOCUTORY  
) DECISION AND ORDER  
PETER PAN SEAFOOD COMPANY, )  
LLC, ) AWCB Case No. 202215725  
)  
Employer, ) AWCB Decision No. 24-0022  
and )  
) Filed with AWCB Anchorage, Alaska  
TOKIO MARINE AMERICA ) on April 4, 2024  
INSURANCE COMPANY, )  
)  
Insurer, )  
Defendants. )  
)

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Peter Pan Seafood Company, LLC's, and Tokio Marine America Insurance Company's (Employer) August 29, 2023 petition to dismiss was heard on the written record in Anchorage, Alaska on March 20, 2024, a date selected on March 7, 2024. A March 6, 2024 affidavit of counsel gave rise to this hearing. James Markel (Employee) represents himself but did not file a hearing brief. Attorney Jeffrey Holloway represents Employer. The record closed at the hearing's conclusion on March 20, 2024.

## ISSUE

Employer contends Employee failed to respond to its request for production and special interrogatories after he was ordered to do so in *Markel v. Peter Pan Seafood Company, LLC*,

AWCB Dec. No. 24-0005 (February 2, 2024) (*Markel I*). It contends Employee volitionally and repeatedly refused to cooperate with a discovery order resulting in considerable prejudice to Employer and delay in case progression. Employer contends Employee's deliberate delay resulted in unnecessary costs and hindered its investigation of his claim. It contends dismissal is the only remedy available, as a suspension or forfeiture would have no impact. Employer requests dismissal of Employee's claim.

Employee did not file a hearing brief. It is presumed he opposes Employer's dismissal request.

**Should Employee's claim be dismissed for failing to comply with a discovery order?**

FINDINGS OF FACT

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

- 1) On October 19, 2023, Employer reported Employee was injured on October 1, 2022, when a metal tray hit his neck causing a contusion while working in a box line department. (*Markel I*).
- 2) On January 9, 2023, Employee sought temporary partial disability (TPD) and permanent partial impairment (PPI) benefits, medical and transportation costs, a penalty for late-paid compensation and interest for injuries he sustained to his neck and back when a metal tray weighing eight pounds hit his neck, which also caused right arm numbness and bad migraines. (*Id.*).
- 3) On February 6, 2023, Employer denied temporary total disability (TTD) benefits from January 17, 2024 forward, and TPD and PPI benefits, contending Employee's physician released him to full-time work on January 17, 2023, and he failed to produce any medical evidence demonstrating the work injury caused a PPI rating. It also denied transportation costs as Employee failed to provide a log under 8 AAC 45.084, and denied a penalty and interest because all benefits were paid or timely controverted. (*Id.*).
- 4) On February 9, 2023, Employer served Employee with a letter and discovery releases by certified mail, return receipt requested. (*Id.*).
- 5) On February 10, 2023, Employer served Employee with requests for production of documents, and special interrogatories, by first-class mail. One of the requests for production

included a request for Employee to provide a colored photocopy of his “driver’s license, passport, state ID or military ID.” (*Id.*).

6) On February 15, 2023, Employee sought permanent total disability (PTD) and PPI benefits, medical and transportation costs, a penalty for late-paid compensation and interest. He wrote, “I’m not same body C3-C4 disc still pain. cant lift 10-15 pounds. walk not normal. my physical is limited.” (*Id.*).

7) On April 3, 2023, Employer petitioned for an order compelling Employee’s response to special interrogatories and requests for production of documents from February 10, 2023, and to sign and return releases served on February 9, 2023. (*Id.*).

8) On April 3, 2023, Employer controverted all benefits based upon Employee’s failure to provide written authority to release medical and rehabilitation information related to the work injury and failure to request a protective order within 14 days. (*Id.*).

9) On June 6, 2023, Employee stated he never received the releases or interrogatories attached to Employer’s April 3, 2023 petition to compel. Employer agreed to email Employee another copy and agreed to call Employee the next day to “go over them and explain why/what is needed from Employee to begin the discovery process.” The Board designee reviewed the releases and found, “All the Releases reviewed appeared standard, relevant, and likely to lead to discoverable information. Also, the Releases were appropriately limited by body part (Head, Cervical Spine, Thoracic Spine, Low Back, and Right Arm) and date (10/10/2020 – forward).” He ordered Employee to sign, date and return unaltered releases to Employer “as soon as possible.” The designee reviewed the interrogatories and requests for production and “found all to be standard, relevant, and likely to lead to discoverable information.” He ordered Employee to answer the interrogatories and requests for production to the best of his ability and to state he does not have the answer or document requested if he does not have them, but the designee did not provide a deadline. Employee was informed of his right to request reconsideration and to appeal the discovery orders and told that sanctions may be imposed, including forfeiture of benefits and dismissal of his claims if he refused to comply with the discovery orders. (*Id.*).

10) On June 8, 2023, the Division served Employee with the June 7, 2023 prehearing conference notice. (*Id.*).

11) On July 12, 2023, Employee attended an employer's medical evaluation (EME) by Scott Kitchel, MD; a sign language interpreter was used. A color photocopy of Employee's California Identification Card was included with the EME report. (*Id.*).

12) On July 20, 2023, Employer denied TTD benefits from January 17, 2024, forward, TPD and reemployment benefits based upon Dr. Kitchel's EME report. It also denied transportation costs, as Employee failed to provide a transportation log, and a penalty and interest, as all benefits had been paid or timely controverted. (*Id.*).

13) On August 29, 2023, Employer petitioned for an order dismissing Employee's claim for failing to comply with the June 7, 2023 prehearing conference order to return discovery to Employer, despite warnings of the consequences of noncooperation. (*Id.*).

14) On November 1, 2023, Employer noted Employee failed to provide signed releases and responses to the interrogatories and requests for production and it would likely file an affidavit of readiness for hearing (ARH) on its August 29, 2023 petition to dismiss. Employee declined to discuss his case, stating he was sick, and disconnected the call. (*Id.*).

15) On November 11, 2023, Employer filed an ARH seeking a hearing on the written record on its August 29, 2023 petition to dismiss. (*Id.*).

16) On January 17, 2024, Employer withdrew its April 3, 2023 controversion notice because Employee had provided signed releases on June 12, 2023. It contended Employee's benefits "remain denied" from February 24, 2023 through June 11, 2023, due to his failure to return signed releases. (*Id.*).

17) On January 24, 2024, Employee spoke with Division staff:

EE called in expecting to be transferred for his hearing. I let EE know that his hearing was scheduled as a written record as the ER requested on the ARH that was filed on 11/8/23, if didn't want a written record then EE had 10 days to file an opposition on the ARH, and at the PHC on 12/19/23 he could object to the ARH. And since he didn't do either the written record was scheduled. EE said that is not what he received in the mail the letter states that he has a hearing on 1/24/24 and to call in. I tried to explain to EE that the hearing notice was issued incorrectly, as a oral hearing instead of a written record. I tried to explain to EE about what written record means and how it works, but EE didn't understand and EE states he is trying to [cooperate] with the hearing process. I asked EE to hold and see if I can get ahold of the other party and see what they think about this. I called ER ATT office spoke with Jeffrey Holloway and asked ER ATT if they would be willing to postpone the written record since hearing notice stated it was an oral hearing, ER ATT stated he prefers to continue with the hearing as it was a

board mistake and feels they shouldn't be penalized for a board mistake. I let EE know that unfortunately the ER prefers that the written record proceeds today. I let EE know that if he doesn't agree with the decision that will come from the written record from today, then he would need to file a petition for reconsideration within 10 days of the decision. EE can call and talk with a tech and we can walk thru the process with him of what the next steps are for him to take in his case and what his rights and responsibilities are, EE states that he is deaf and English is not his first language and he doesn't understand what all the paperwork is and he prefers to have an interpreter on the line with him then reading emails as he doesn't understand the words. (ICERS, Phone Call Entry, January 24, 2024).

18) Employee did not file a brief or similar document to support his position, which is unknown, but was presumed to be in opposition to having his claims dismissed. (*Id.*).

19) On February 2, 2024, *Markel I* issued, ordering (1) Employer to file with the Division and serve Employee by email with a copy of its interrogatories and a list of informal production requests, except for a colored photocopy of his "driver's license, passport, state ID or military ID," within five days of receiving the decision and order; and (2) Employee to provide his answers to the interrogatories within 30 days from the date Employer emails them and to provide the documents sought in Employer's informal production requests within 30 days from the date Employer emails them and advise Employer in writing if he does not possess the documents. Jurisdiction over the issue was retained in the event Employee willfully refused or failed to comply with the decision and order. *Markel I*. Employee and Employer were served by email and certified mail, return receipt requested. (ICERS, D&O Issued and Served Entry, February 2, 2024).

20) On February 5, 2024, Employee contacted the Division and spoke with an officer,

EE called with questions with what the D&O was meaning, I explained to EE what the order was on page 13, and that EE needs to make sure that he is responding to the interrogatories within 30 days of receiving them, EE asked how he is going to get them. I told him I was not sure and asked him to hold on a minute and I called Mr. Holloway's office and spoke with Becca she advised me to give EE her email to have him email her to set up a time to call and they will be able to talk about best way to get them to EE. I gave EE Becca's email BSheldon@bhcsllaw.com, I reiterated to EE to make sure that he complies with the D&O and gets the paperwork back to the ER ATT as order, and to let us know if he has any question. (ICERS, Phone Call entry, February 5, 2024).

21) On March 6, 2024, Employer filed an affidavit stating, “Pursuant to the Decision and Order No. 24-0005 (February 2, 2024), the employer submits this affidavit and can confirm that the employee has not answered the [employer’s] interrogatories and requests for production. (Affidavit of Counsel, March 6, 2024).

22) On March 11, 2024, an unknown “agent” signed the certified mail, return receipt mailed to Employee; the signature is illegible. (Certified Return Receipt, March 11, 2024).

23) There is no evidence Employer served Employee by email, or by any other means, or filed with the Division a copy of its interrogatories and list of informal production requests, except for a colored photocopy of his “driver’s license, passport, state ID or military ID,” within five days of receiving *Markel I*. (Agency file).

#### PRINCIPLES OF LAW

**AS 23.30.001. Legislative intent.** It is the intent of the legislature that

(1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

(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).

**AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.** . . . (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.

Employers have a constitutional right to defend against claims. *Granus v. Fell*, AWCB Dec. No. 99-0016 (January 20, 1999). A thorough investigation allows employers to verify information provided by the opposing party, effectively litigate disputed issues and detect fraud. *Id.* Information inadmissible at a civil trial may be discoverable in a workers' compensation case if it is reasonably calculated to lead to relevant facts. *Id.* The law has also long favored giving a party his "day in court." *Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645 at 647 (Alaska 1992). 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) provides 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 Dec. No. 06-0121 (May 15, 2006); *Erpelding v. R & M Consultants, Inc.*, AWCB Dec. No. 05-0252 (October 3, 2005), reversed by 3AN-05-12979CI (Alaska Superior Ct., April 26, 2007) (for failing to explore sanctions lesser than dismissal); *Sullivan v. Casa Valdez Restaurant*, AWCB Dec. No. 98-0296 (November 30, 1998); *Maine v. Hoffman/Vranckaert, J.V.*, AWCB Dec. No. 97-0241 (November 28, 1997); *McCarroll v. Catholic Community Services*, AWCB Dec. 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 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.

*Hughes* 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 made no effort to comply with discovery orders is not entitled to special allowances based on *pro se* status. *DeNardo* at 924.

*McKenzie v. Assets, Inc.*, AWCAC Dec. No. 109 (May 14, 2009), said the Board must consider “relevant factors that the courts use” in similar circumstances, including the nature of the employee’s discovery violation, prejudice to the employer, and whether a lesser sanction would protect the employer and deter other discovery violations. *McKenzie* defined “willfulness” in disobeying discovery orders as the “conscious intent to impede discovery, and not mere delay, inability or good faith resistance.” *Id.* *McKenzie* further found the Board had rendered adequate factual findings and did a “reasonable exploration of possible and meaningful alternatives to dismissal.” *Id.* By contrast, a “conclusory rejection” of other sanctions less than dismissal “does not suffice as a reasonable exploration of meaningful alternatives.” *Id.*

**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. . . .

*Richard v. Fireman’s Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska, 1963) held the Board owes a duty to fully advise a claimant of “all the real facts” that bear upon his right to compensation, and to instruct him on how to pursue that right. *Bohlmann v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska, 2009), held the Board had a duty to inform a self-represented claimant how to preserve his claim under AS 23.30.110(c), and to correct the employer’s lawyer’s incorrect prehearing conference statement that AS 23.30.110(c) had already run on his claim. *Bohlmann* said *Richards* may be applied to excuse noncompliance with AS



23.30.110(c) when the Board failed to adequately inform a claimant of the two-year time limitation.

ANALYSIS

**Should Employee's claim be dismissed for failing to comply with a discovery order?**

*Markel I* ordered Employer to file with the Division and serve Employee by email with its interrogatories and a list of informal production requests, except for a colored photocopy of his “driver’s license, passport, state ID or military ID,” within five days of receiving the decision and order. It ordered Employee to respond to them within 30 days from the date Employer emailed them to him. Division staff served Employer and Employee with *Markel I* by email and certified mail, return receipt requested on February 2, 2024. On March 6, 2024, Employer filed an affidavit stating Employee had not answered Employer’s interrogatories and requests for production. It did not file evidence showing it served Employee with its interrogatories and a list of informal production requests, except for a colored photocopy of his “driver’s license, passport, state ID or military ID,” within five days of receiving *Markel I* as ordered. Nonetheless, Employer seeks an order dismissing Employee’s claim due to his failure to provide responses to interrogatories and to provide documents. AS 23.30.108(c).

Dismissal should only be imposed if a party’s failure to comply with discovery has been willful. *Sandstrom*. “Willfulness” is the “conscious intent to impede discovery, and not mere delay, inability or good faith resistance.” *Hughes McKenzie*. Employer must first demonstrate Employee’s noncompliance with a discovery order before Employee must prove his failure to comply was not willful. *Id.* On February 5, 2024, Employee contacted the Division to ask what *Markel I* meant. Division staff informed him he must respond to the “interrogatories” within 30 days of receiving them from Employer. It is unclear whether Division staff properly informed Employee *Markel I* also ordered him to respond to informal requests for production within 30 days of receiving them from Employer. *Richard; Bohlmann*. When Employee asked how he was going to receive “them,” Division staff stated she “was not sure” and contacted Employer’s attorney’s office that advised it would set up a phone call to discuss the best way to get “them” to him. Division staff did not advise Employee that *Markel I* had expressly ordered Employer to serve Employee with the interrogatories and informal requests for production by email. *Id.*

There is no evidence showing Employer emailed Employee the interrogatories and list of informal production requests as ordered in *Markel I* or served Employee with them by any other means.

The discovery order in *Markel I* directed Employee to respond in 30 days but was predicated upon Employer's service on Employee with the interrogatories and informal requests for production. Because Employer failed to provide any evidence it served Employee with the interrogatories and informal requests for production as ordered in *Markel I*, it failed to demonstrate Employee's noncompliance with *Markel I*'s discovery order. Sanctioning Employee after Employer failed to follow *Markel I*'s order directing it to serve Employee with the interrogatories and requests for production by email within five days of issuance, and after Division staff failed to properly advise Employee *Markel I* ordered Employer to serve him by email within five days, is inconsistent with the law's requirement to interpret the Act fairly, predictably and impartially and to provide due process for both parties. AS 23.30.001(1), (2), (4); AS 23.30.135(a). Therefore, Employee's claim should not be dismissed for failing to comply with a discovery order.

Employer will be ordered once more to file with the Division and serve Employee by email with the interrogatories and list of informal production requests, except for a colored photocopy of his "driver's license, passport, state ID or military ID" within five days of this decision and order. Employer is informed it may be sanctioned if it refuses to comply with the discovery order and sanctions may include dismissal of a defense. AS 23.30.108(c). Employee will be ordered once more to respond to them within 30 days after receiving them. He is advised that he may be sanctioned if he refuses to comply with this discovery order and sanctions may include forfeiture of benefits during the time he refuses to comply with the order, or dismissal of his claim. *Bohlmann*; AS 23.30.108(c). Employee is also informed he may call the Division's office at 907-269-4980 to speak with a Workers' Compensation Technician for assistance with reading the special interrogatories and informal requests for production, and this decision and order.

#### CONCLUSION OF LAW

Employee's claim should not be dismissed for failing to comply with a discovery order.

ORDER

- 1) Employer’s August 29, 2023 petition is denied.
- 2) Employer is ordered to file with the Division and serve Employee by email its interrogatories and a list of informal production requests, except for a colored photocopy of his “driver’s license, passport, state ID or military ID,” within five days of receiving this decision and order.
- 3) Employee is ordered to provide his answers to the interrogatories within 30 days from the date Employer emails them.
- 4) Employee is ordered to provide the documents sought in Employer’s informal production requests within 30 days from the date Employer emails them and advise Employer in writing if he does not possess the documents.
- 5) Jurisdiction over this issue is retained in the event Employee willfully refuses or fails to comply with this decision and order.
- 6) Office staff is directed to mail and email this decision to Employee and Holloway.

Dated in Anchorage, Alaska on April 4, 2024.

ALASKA WORKERS’ COMPENSATION BOARD

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

\_\_\_\_\_  
/s/  
Mark Sayampanathan, 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 James Markel, employee / claimant v. Peter Pan Seafood Company LLC, employer; Tokio Marine America Insurance Company, insurer / defendants; Case No. 202215725; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by email and certified U.S. Mail, postage prepaid, on April 4, 2024.

/s/  
Lorvin Uddipa, Workers' Compensation Technician