

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MARIE MATEO APONTE,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201717033
COPPER RIVER SEAFOODS INC.,)
) AWCB Decision No. 24-0035
Employer,)
and) Filed with AWCB Anchorage, Alaska
) on June 18, 2024
LIBERTY NORTHWEST INSURANCE)
CORP.,)
)
Insurer,)
Defendants.)

Copper River Seafoods Inc.'s and Liberty Northwest Insurance Corp.'s (Employer) February 7, 2024 petition to dismiss was heard in Anchorage, Alaska on June 5, 2024, a date selected on May 21, 2024. A May 21, 2024 hearing gave rise to this hearing. Marie Mateo Aponte (Employee) represented herself but did not appear. Attorney Adam Sadoski appeared and represented Employer. An oral order issued to proceed with the hearing in Employee's absence. This decision examines the oral order. The record closed at the hearing's conclusion on June 5, 2024.

ISSUES

Employer contended the hearing should go on without Employee's participation. An oral order to proceed with the hearing in Employee's absence was issued.

- 1) Was the oral order to proceed with the hearing in Employee's absence correct?

Employer contends Employee willfully failed to comply with discovery orders to sign and return releases and to attend a properly scheduled employer's medical evaluation (EME). It contends Employee refused to attend any prehearing conferences to address the discovery matters and her own pleadings. Employer contended Employee failed to submit any evidence or argument providing a valid reason for her refusal to cooperate. It contends Employee's ongoing noncompliance is intended to impede Employer's discovery efforts and deprives it of its constitutional right and statutory duty to investigate and defend against her claims. Employer contends it has incurred significant costs as it arranged for hotel, ground transportation and air travel from Alaska to Washington twice for Employee to attend an EME and it continues to incur litigation costs to obtain her compliance with discovery orders. It contends dismissal is the only appropriate sanction and requests her claims be dismissed.

Employee's position is unknown; it is presumed she is opposed to Employer's petition to dismiss.

2) Should Employee's claims be dismissed for failure to comply with discovery orders?

FINDINGS OF FACT

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

- 1) On December 14, 2017, Employer reported Employee injured her back on June 23, 2016 lifting a heavy metal sheet filled with frozen salmon and throwing fish into a processing machine. (First Report of Occupational Injury, December 14, 2017).
- 2) On January 25, 2018, Employer denied chiropractic treatment "beyond" January 25, 2018 based upon James Schwartz, MD's, EME report. (Controversion Notice, January 25, 2018).
- 3) On March 12, 2018, medical provider Core Kinetics sought medical costs, interest and a penalty for services rendered on December 30, 2017. (Claim for Workers' Compensation Benefits, March 12, 2018).
- 4) On March 27, 2018, Core Kinetics sought medical costs, interest and penalty for services rendered on January 12, 2017 and January 22, 24 and 25, 2018. (Claim for Workers' Compensation Benefits, March 27, 2018).

- 5) On April 3, 2018, Employer answered Core Kinetics claims, denying medical costs which were not performed in accordance with a treatment plan, those which exceeded the frequency standards and did not comply with the fee schedule. (Answer, April 3, 2018).
- 6) On June 26, 2018, Employee filed an “amended” claim for interest and attorney fees and costs. (Claim for Workers’ Compensation, June 26, 2018).
- 7) On July 24, 2018, Core Kinetics sought medical costs, interest and penalty for services rendered on April 26 and 30, May 18, 23 and 30, June 1, 2, 7, 8, 13, and 14, 2018. (Claim for Workers’ Compensation Benefits, July 24, 2018).
- 8) On August 17, 2018, Employer answered and controverted Core Kinetics July 25, 2018 claim, denying all benefits sought, contending all medical benefits for which required documentation was received were timely paid pursuant to the fee schedule or controverted. (Answer and Controversion Notice, August 17, 2018).
- 9) On September 25, 2018, Theresa McFarland, MD, evaluated Employee for an EME. (McFarland EME report, September 25, 2018).
- 10) On October 10, 2018, Employer filed a medical summary with an August 30, 2018 medical record for an appointment with Hyon Joo, DO. (Medical Summary, October 10, 2018).
- 11) On October 25, 2018, Employee orally amended her claim to add temporary total disability benefits. (Prehearing Conference Summary, October 25, 2018).
- 12) On November 14, 2018, Employee orally amended her claim to add penalty. (Claim for Workers’ Compensation Benefits Amended, November 14, 2018).
- 13) On December 5, 2018, Employer answered Employee’s November 14, 2018, claim, admitting temporary total disability (TTD) benefits were owed during periods of disability “for which the [work] injury is the substantial cause and for which uncontradicted supporting medical documentation exists.” Employer also admitted medical costs were owed for reasonable and necessary work injury related treatment related that did not exceed the frequency standards and for which timely proper and complete medical records and bills were provided pursuant to the fee schedule. It denied attorney fees and costs, penalty, interest, TTD benefits not admitted, and medical treatment costs not admitted. (Answer, December 5, 2018).
- 14) On December 19, 2018, Employee orally amended her claim to add TTD benefits. (Prehearing Conference Summary, December 19, 2018).

15) On December 21, 2018, Employer controverted all benefits for Employee's lumbar spine from September 25, 2018 forward and all benefits related to the cervical spine based upon Dr. McFarland's September 25, 2018 EME report. (Controversion Notice, December 21, 2018).

16) On January 10, 2019, the parties agreed to a second independent medical evaluation (SIME). (Prehearing Conference Summary, January 10, 2019).

17) On February 1, 2019, Employee's first attorney withdrew. (Notice of Withdrawal, February 1, 2019).

18) On April 17, 2019, Employer and Core Kinetics and Excellence in Health Chiropractic Care stipulated Employer would pay Core Kinetics an additional \$551.03 and Excellence in Health Chiropractic Care an additional \$72.74 and in exchange the providers accepted the amounts in full and final discharge of the providers' claims for medical treatment, penalty and interest. The parties agreed the provider's claims were dismissed with prejudice. (Stipulation Regarding Resolution of Provider Claims, April 17, 2019).

19) On February 28, 2020, Employee's second attorney withdrew. (Notice of Withdrawal of Attorney, February 28, 2020).

20) On March 20, 2020, William Curran, MD, examined Employee for an SIME. (Curran SIME report, March 20, 2020).

21) On June 14, 2022, Employee did not agree with Dr. Curran's SIME opinion and said she would either request a hearing on her November 14, 2018 amended claim and address the SIME opinion in her merits argument or file a petition to strike Dr. Curran's SIME report with an affidavit of readiness for hearing (ARH). (Prehearing Conference Summary, June 14, 2022).

22) On March 23, 2023, Employee filed a petition checking the "Petition Type" box for "Compel Discovery" and wrote the following in the "Reason for Petition," "I do not agree with his conclusion, due to him using dark MRI and xray images that don't even show my injury site completely and nerve damage." She included a new address of record on the petition. (Petition, March 23, 2023). Employee filed an ARH requesting an oral hearing but did not indicate which claim or petition she wanted to be heard. (ARH, March 23, 2023).

23) On April 25, 2023, the Board designee tried to call Employee at her telephone number of record for a prehearing conference. Employee did not answer, and a voicemail message could not be left. Employer's attorney's office stated it did not receive copies of Employee's March 24, 2023 petition and ARH and requested copies. The Board designee noted Employee's March 24, 2023

petition confirmed her disagreement with the SIME physician and a specific MRI, but did not “make a request of the Board” and her ARH did identify which pleading she wanted to be heard. (Prehearing Conference Summary, April 25, 2023).

24) On July 7, 2023, Employer sent Employee a letter by first-class mail:

This is to inform you that the employer and carrier have scheduled an employer's medical examination ("EIME") for you, pursuant to the authority granted them in AS 23.30.095(e). Under this statute, you are required to attend this evaluation. Failure to attend may affect your right to future benefits under the Alaska Workers' Compensation Act.

The examination will be conducted by Dr. Theresa McFarland on 7/19/23, at 9:00 a.m. **Please arrive at 8:30 a.m.** Dr. McFarland's office is located at 411 Strander Boulevard, Suite 301, Tukwila, Washington 98188.

If for any reason, you are unable to attend the EIME, please contact me immediately.

Travel arrangements, including air, ground, and lodging will be made by the claims examiner at no cost to you. The travel information will be provided prior to your departure. You will receive an expense check to cover meals and ground transportation, if necessary. Please keep all receipts and provide them to the claims examiner, along with any unused funds, on your return home. Also note that ancillary expenses such as alcoholic beverages, in-room movies, and the like, are not covered or reimbursable. (Letter, July 7, 2023).

25) On July 12, 2023, Employee called the Division several times:

EE Called back and I scheduled her for an appointment at 2pm on 7/13/23. EE called upset and was forwarded to someone but got VM. She called right back even more upset and yelled at the person who answered. She came and got me. I took the call. The EE went on for a while about how unfair the process is, made several accusations about doctors on the SIME list, and stated how unfair it is that we won't do anything (such as schedule an appointment) without the adjuster's ok. Eventually I cut off the EE and told her I would get her to my supervisor, Shannon. Transferred her. (Phone Call, July 12, 2023).

26) On July 13, 2023, Employee visited the Division's Anchorage office in person:

EE came in extremely upset that the ER ATT is able to make her go out of state for an EIME appointment at the “drop of a dime” I let EE know that they have to let her have 10 days notice and they did, but we can call to see what they will do to help accommodate her if. I called the ADJ office with EE on speaker phone and

ADJ asked us to contact the Attorney on file, so I called the ATT office, when Adam Sadoski got on the phone I tried to talk to him but the EE got extremely emotional and started yelling at him when he tried to explain to her that they gave the notice that they are required to and she told him she is not going cause they are not paying for her daughter and she is not leaving her then she reached over grabbed the phone and hung up on the attorney. I talked to EE about what she is wanting to do EE said she is just wanting to get new images on her back so she can get treatment. I let her know she can file a claim requesting that, and that will trigger a prehearing and they can talk about everything in the prehearing, I did recommend that EE try to keep her composure and let the other party speak and they will give her the same respect. EE was very upset just want all of this done and just wanting new imaging of her spine. I typed up most of the claim form so EE had the correct info, and then she finished filling it out, I also notarized the releases that she signed for the ER ATT office. (Communications, Walk-In, July 13, 2024).

27) On July 13, 2024, Employee filed the 10 releases she signed. Division staff entered the 10 releases Employee signed as "Evidence." There was no proof of service indicating the releases had been served upon Employer. (Releases, July 13, 2024; Observations).

28) On July 13, 2024, Employee filed medical documents for an August 30, 2018 visit with Dr. Joo, and June 28, 2018 results from blood and urinalysis, a June 2, 2020 letter from Employer's attorney's office requesting Employee's medical records from Alaska Spine Institute, a medical release signed by Employee on September 18, 2019, a Statement of Custodian of Records signed by Tamara R. at Alaska Spine Institute on July 26, 2020, and a copy of a \$75 check from Employer's attorney's office to Alaska Spine Institute with a Medical Record Request receipt dated June 29, 2020 charging \$75 for Employee's medical records. There was no medical summary attached and no proof of service indicating any of the documents had been served upon Employer. Division staff entered the medical records as "Evidence." (Medical documents, July 13, 2024; Observations).

29) On July 14, 2024, Employee visited the Division's Anchorage office in person:

EE came in cause she wanted to call the ADJ to tell them she is not going to be able to make the EIME travel they set up for her as she is a single parent and cannot leave her 16 year old daughter by herself. I called the ADJ office and spoke with Yvette Delaquitto which asked us to call ER ATT which I did, when Adam Sadoski was on the phone I introduced myself and started to let him know what the EE was wanting to do, EE was still upset from the ADJ not wanting to talk with her so EE was telling ER ATT she doesn't have any money to be able to travel and cant travel at the drop of the dime and said she is not going to be traveling to the EIME appointment, and then hung up the phone. EE is wanting to get new imaging of her

lumbar spine with contrast, I let EE know she is going to want to file a claim, and a claim will then trigger a PHC, EE was ok with that. (Communications, Walk-In, July 13, 2024).

30) On July 14, 2023, Employee filed the following letter:

I have meet with Amanda with the workers comp board, to call liberty mutual Yvette Delaquito regarding planning flight and hotel without including my child nor fundings money to travel through to airports, I gave notice to her, and Adam Sadoski that I will not be attending as no one bother to call me to arrange with me this nor ask, if I could afford travel to two airports this month being homeless with my minor child and pay on my own tickets for my daughter. As I have not received any money from liberty mutual and have 8 years waiting to get care. (Letter, July 14, 2023).

There was no proof of service indicating the letter had been served on Employer. Division staff entered the letter as “Evidence.” (Agency record; Observations).

31) On July 14, 2023, Employee sought “other” and under the “Reason for filing claim” wrote, “Lumbar spine MRI with contrast to view all of the nerves on my spine including my sciatic nerve for L4 and L5.” (Claim for Workers’ Compensation Benefits, July 14, 2023).

32) On July 19, 2023, Employer petitioned for reimbursement of EME fees for Employee’s unreasonable failure to attend a July 19, 2023 EME which was properly noticed and scheduled and for an order compelling Employee to attend an EME. (Petition, July 19, 2023). It controverted all benefits for her failure to attend the July 19, 2023 EME. (Controversion Notice, July 19, 2023).

33) On July 20, 2023, the Division served Employee’s July 14, 2023 claim. (Claim Served, July 20, 2023).

34) On July 24, 2023, Employer filed an invoice for no-show costs for the July 19, 2023 EME totaling \$597.50. (Affidavit of Service, July 24, 2023).

35) On July 26, 2023, Employer petitioned for an order compelling Employee to return signed releases sent to her by certified mail, return receipt requested on July 5, 2023. (Petition, July 26, 2023). It controverted all benefits for Employee’s failure to return signed releases or to file a petition for a protective order. (Controversion Notice, July 26, 2023).

36) On August 8, 2023, Employer controverted and answered Employee’s July 14, 2023 claim contending it had “not received any medical bills and supporting documents indicating that the requested medical treatment is reasonable and necessary or that [the] work injury is the substantial cause of the need for the requested medical treatment.” (Answer to Employee’s Workers’

Compensation Claim and Controversion Notice, August 8, 2023). It also controverted all benefits for Employee's failure to return signed releases or to file a petition for a protective order. (Controversion Notice, August 8, 2023).

37) On August 9, 2023, Employer again controverted all benefits for Employee's failure to return signed releases or to file a petition for a protective order. (Controversion Notice, August 9, 2023).

38) On August 17, 2023, the Board designee tried to call Employee at her telephone number of record for a prehearing conference and left a voicemail message. The designee granted Employer's July 19, 2023 petition to compel Employee's attendance at an EME and July 26, 2023 petition to compel Employee to sign discovery releases. Employee was ordered to attend a properly noticed EME "as soon as possible" and to sign, date and return all ten unaltered discovery releases to Employer's representative "as soon as possible." The designee informed Employee, "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 forfeiture of benefits, including dismissal of the party's claim, petition, or defense." (Prehearing Conference Summary, August 17, 2023).

39) On August 18, 2023, the Division served Employee with the August 17, 2024 prehearing conference summary by first class mail to her address of record. It was not returned to the Division as "undeliverable." (Prehearing Conference Summary Served, August 18, 2023; Observation).

40) On November 13, 2023, Employer's attorney sent Employee a letter by first-class mail stating:

. . . . This letter is to inform you that the employer and carrier have rescheduled an employer's medical examination (EIME) for you. Pursuant to the authority granted them in AS 23.30.905(e). Under this statute, you are required to attend this evaluation. Failure to attend may affect your right to future benefits under the Alaska Workers' Compensation Act.

This examination will be conducted by Dr. Theresa McFarland on 1/4/24, at 9:00 a.m. **Please arrive at 8:30 a.m.** Dr. McFarland's office is located at 2849 NW Kitsap Place, Silverdale, Washington 98383.

You have been ordered to attend this examination by the Board's designee. A copy of the 8/17/23 Prehearing Conference Summary, which includes the order, is attached for your review.

Travel arrangements, including air, ground, lodging, and advance amounts for food, will be made by the claims examiner at no cost to you. We have made multiple attempts to contact you to make the arrangements but have been unsuccessful.

Please reach out to us so we can make the arrangements. If you do not, you will be expected to make your own arrangements—including air travel, ground transportation, lodging, and food—in a reasonable and most cost-effective manner, for which you will be reimbursed by Liberty Mutual. If you elect to make your own arrangements, please retain all receipts and provide them to the claims examiner on your return home. Also note that ancillary expenses such as alcoholic beverages, in-room movies, and the like, are not covered or reimbursable. (Letter, November 13, 2023).

- 41) On January 4, 2024, claims adjuster Yvette Delaquito was informed by Coordinator Jill Davis that Employee failed to show up for the January 4, 2024 EME appointment and a no-show charge would be billed. (Email, January 4, 2024).
- 42) On February 7, 2024, Employer petitioned to dismiss Employee's claims for failing to "attend multiple properly noticed employer's medical examinations, despite being ordered to do so." (Petition, February 7, 2024).
- 43) On February 28, 2024, Employer requested a hearing on its February 7, 2024 petition to dismiss. (ARH, February 28, 2024).
- 44) On April 4, 2024, the Board designee called Employee's telephone number of record but there was no answer, and she was unable to leave a voicemail message. The designee scheduled an oral hearing for May 21, 2024 on Employer's February 7, 2024 petition to dismiss. The designee ordered the parties to serve and file witness lists and legal memoranda by May 15, 2024 and evidence by May 1, 2024. (Prehearing Conference Summary, April 4, 2024).
- 45) On April 4, 2024, the Division served Employee with the May 21, 2024 hearing notice by first-class mail at her address of record. It was not returned as "undeliverable." (Hearing Notice Served, April 4, 2024; Observation).
- 46) On April 5, 2024, the Division served Employee with the April 4, 2024 prehearing conference summary by first-class mail to her address of record. It was not returned as "undeliverable." (Prehearing Conference Summary Served, April 5, 2024; Observation).
- 47) Employee did not appear in person for the hearing; she also did not answer two calls made to her telephone number of record and there was no option to leave a voicemail. (Record).
- 48) On May 21, 2024, the Division served Employee by certified mail, return receipt requested with the June 5, 2024 hearing notice. The envelope was properly addressed to Employee's address of record, the green card attached to the back of the envelope was addressed to Employee's previous address. (Hearing Notice Served; Envelope, May 21, 2024).

49) On May 24, 2024, Employee's June 5, 2024 hearing notice was returned by the United States Postal Service (USPS) as "RETURN TO SENDER, ATTEMPTED - NOT KNOWN, UNABLE TO FORWARD." (Returned Mail Envelope, May 24, 2024).

50) On May 29, 2024, the Division served Employee by certified mail, return receipt requested with *Mateo Aponte v. Copper River Seafoods, Inc.*, AWCB 24-0030 (May 29, 2024) (*Mateo Aponte I*). It found the oral order continuing the hearing due to the Division's failure to properly serve Employee with the hearing notice when she did not appear was correct. *Mateo Aponte I* directed the Division to serve Employee with the June 5, 2024 hearing notice by certified mail, return receipt requested. (*Mateo Aponte I*). The Division served Employee by certified mail, return receipt requested with a copy of *Mateo Aponte I*. The envelope and the green card attached to the back of the envelope were properly addressed to Employee's address of record. (D&O Issued and Served, May 29, 2024).

51) On June 3, 2024, Employee's copy of *Mateo Aponte I* was returned by the USPS as "RETURN TO SENDER, ATTEMPTED - NOT KNOWN, UNABLE TO FORWARD." (Returned Mail Envelope, June 3, 2024).

52) On June 4, 2024, Division staff called Employee's telephone number of record about the June 5, 2024 hearing but did not reach her and could not leave a voicemail. (Phone Call, June 4, 2024).

53) On June 5, 2024, the designated chair called Employee's telephone number of record so she could participate in the June 5, 2024 hearing but did not reach her and could not leave a voicemail. (Record).

54) At hearing, the designated chair reviewed the returned envelope and noted it was returned and properly addressed to Employee's address. (Record).

55) The designated chair located and read Employee's July 14, 2023 letter to Employer at hearing and stated Division staff would be directed to serve Employer with a copy of the letter. (Record).

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;

.....

(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 23.30.110. Procedure on claims. . . . (c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

AS 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

8 AAC 45.060. Service. . . . (a) . . . 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. . . .
. . . .

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties.

(f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.
. . . .

Dandino, Inc. v. U.S. Dept. of Trans., 729 F.3d 917, 921 (9th Cir. 2013) held, "under the common law Mailbox Rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee."

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

....

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

- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the claim or petition;
- (2) dismiss the claim or petition without prejudice; or
- (3) adjourn, postpone, or continue the hearing.

The Alaska Supreme Court in *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 320 (Alaska 2009) considered the Board's duty to advise unrepresented claimants in workers' compensation cases how to preserve their claims:

The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants.

ANALYSIS

1) Was the oral order to proceed with the hearing in Employee's absence, correct?

The Act states, "The board shall give each party at least 10 days' notice of the hearing, either personal or by certified mail." AS 23.30.110(c). Due process and fairness require parties to have adequate hearing notice. AS 23.30.001(1), (4). Employee is a party to her claims. 8 AAC 45.060(e) interprets AS 23.30.110(c) to require written hearing notice, unless waived. The Division served a written copy of the May 21, 2024 hearing on Employee by certified mail, return receipt requested. However, the return receipt attached to the properly addressed envelope was improperly addressed to Employee's previous address of record while the envelope was properly addressed to her current address of record. Thus, the certified mail service on Employee used inconsistent addresses. The envelope was returned as "Attempted - not known, Unable to Forward." Due to the Division's use of inconsistent addresses for Employee on the envelope and certified mail green card, it failed to

properly serve a hearing notice on Employee. Service by certified mail was not properly accomplished. AS 23.30.110(c).

Employee did not appear at hearing. When a party unexpectedly fails to appear at a hearing, the hearing panel must determine the appropriate action. If it can be determined the party was served with hearing notice and is not present, the panel may in its discretion and in priority order either (1) proceed to hearing, take evidence and decide the case; (2) dismiss the case without prejudice; or (3) adjourn, postpone or continue the hearing. 8 AAC 45.070(f). However, the panel must first find the missing party was served with the hearing notice. The Division attempted to serve Employee with written hearing notice by certified mail but did not serve her properly. The attempted service by certified mail was returned as “Attempted - not known, Unable to Forward.” AS 23.30.110(c). Unfortunately, the panel did not discover the issue with the certified return receipt until after the hearing. Because the certified mail was not properly served, the mailbox rule, which creates a presumption it was received if properly addressed, cannot be applied. It cannot be presumed that Employee simply failed to pick up her mail. *Dandino*. Therefore, Employee was not properly served with the hearing notice. It would violate Employee’s due process rights to proceed to hearing, take evidence, and decide the case when she was not properly served with the hearing notice, and she did not appear. AS 23.30.001(1), (4); AS 23.30.135(a); *Rogers & Babler*.

It is not proper to address Employer’s February 7, 2024, petition to dismiss Employee’s claims until the Division properly serves Employee with the hearing notice. The only option left to the panel is to “adjourn, postpone or continue the hearing.” Thus, the oral order to proceed with the hearing in Employee’s absence was incorrect. It should have been continued again due to the Division’s failure to properly address the certified mail. A prehearing conference will be scheduled to set another hearing on Employer’s February 7, 2024, petition to dismiss

2) Should Employee’s claims be dismissed for failure to comply with discovery orders?

Because it was an error to proceed with the hearing in Employee’s absence, Employer’s February 7, 2024 petition to dismiss will not be addressed.

The panel notes that Employee was not properly instructed to serve Employer with a copy of her July 14, 2023, letter and the signed releases and medical documents she filed on July 13, 2023. *Bohlmann*. Therefore, Employer will be provided a copy of Employee's July 14, 2023, letter and the signed releases and the medical documents filed on July 13, 2023. Employee is also advised she is responsible for notifying the board and parties of any changes in address or other contact information and she will be considered served by mail when mailed with sufficient postage and properly addressed to her last known address. 8 AAC 45.060(a), (f).

CONCLUSIONS OF LAW

- 1) The oral order to proceed with the hearing in Employee's absence was incorrect.
- 2) Employee's claims should not be dismissed for failure to comply with discovery orders.

ORDER

- 1) The Division shall provide Employer a copy of Employee's July 14, 2023, letter.
- 2) The Division shall provide Employer a copy of the ten signed discovery releases and medical documents Employee filed on July 13, 2023, with this decision and order.
- 3) The June 5, 2024, hearing is continued until one of the hearing dates described below in item (5) of the ORDER, after the Employee receives proper hearing notice.
- 4) The hearing shall be an oral hearing.
- 5) A hearing date for Employer's February 7, 2024, petition to dismiss will be selected that is convenient for the parties. At this time, the following hearing dates are available:

<u>Month</u>	<u>Date</u>
July 2024	9, 10, 11, 17, 23, 24, 25

Please discuss the available hearing dates and advise the Workers' Compensation Technician no later than June 21, 2024, of the date the parties agreed upon. Hearing notice will be served by certified mail.

MARIE MATEO APONTE v. COPPER RIVER SEAFOODS INC.

If the parties have not chosen a date by June 24, 2024, the next available hearing date will be selected, and hearing notice served. Once hearing notice is served, a scheduled hearing may be continued or cancelled only for good cause under 8 AAC 45.074. Parties may contact a Technician with questions at 907-269-4980.

Dated in Anchorage, Alaska on June 18, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bronson Frye, 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 Marie Mateo Aponte, employee / claimant v. Copper River Seafoods Inc.,

